

STATE OF NEW YORK

SUPREME COURT

COUNTY OF ALBANY

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*In the Matter of the Application of*

LEADINGAGE NEW YORK, INC., ANDRUS ON HUDSON; THE BAPTIST HOME AT BROOKMEADE; BEECHWOOD HOMES; BETHEL NURSING & REHABILITATION CENTER; BETHEL NURSING HOME COMPANY, INC.; BROTHERS OF MERCY NURSING & REHABILITATION CENTER; CHEMUNG COUNTY HEALTH CENTER-NURSING FACILITY; CHENANGO MEMORIAL HOSPITAL INC. SNF; CLINTON COUNTY NURSING HOME; THE COMMONS ON ST. ANTHONY, A SKILLED NURSING & SHORT TERM REHABILITATION COMMUNITY; CROUSE COMMUNITY CENTER INC.; DAUGHTERS OF SARAH NURSING CENTER; DEGRAFF MEMORIAL HOSPITAL-SKILLED NURSING FACILITY; EDDY HERITAGE HOUSE NURSING & REHABILITATION CENTER; EDDY MEMORIAL GERIATRIC CENTER; EDDY VILLAGE GREEN AT BEVERWYCK; EDDY VILLAGE GREEN; ELIZABETH CHURCH MANOR NURSING HOME; FAIRPORT BAPTIST HOMES; FORT HUDSON NURSING CENTER, INC.; FINGER LAKES HEALTH LIVING CENTER AT GENEVA – SOUTH; FINGER LAKES HEALTH LIVING CENTER AT GENEVA – NORTH; THE FRIENDLY HOME; GLENDALE HOME-SCHDY CNTY DEPT SOCIAL SERVICES; GOOD SAMARITAN NURSING AND REHABILITATION CARE CENTER; GURWIN JEWISH NURSING AND REHABILITATION CENTER; HEBREW HOME FOR THE AGED AT RIVERDALE; HERITAGE GREEN REHAB & SKILLED NURSING; HERITAGE PARK REHAB & SKILLED NURSING; HERITAGE VILLAGE REHAB & SKILLED NURSING, INC.; HIGHPOINTE ON MICHIGAN HEALTH CARE FACILITY; HUNTINGTON LIVING CENTER; IDEAL SENIOR LIVING CENTER; ISABELLA GERIATRIC CENTER INC.; ISLAND NURSING AND REHAB CENTER; JAMES G. JOHNSTON MEMORIAL NURSING HOME; KENDAL AT ITHACA; KENDAL ON HUDSON; NATHAN LITTAUER HOSPITAL

**VERIFIED**  
**PETITION AND**  
**COMPLAINT**

Index No.

NURSING HOME; LORETTO HEALTH AND REHABILITATION CENTER; LUTHERAN RETIREMENT HOME; MASONIC CARE COMMUNITY OF NEW YORK; MENORAH HOME & HOSPITAL FOR AGED & INFIRM; METHODIST HOME FOR NURSING AND REHABILITATION; NOTTINGHAM RHCF; ONEIDA HEALTH REHABILITATION AND EXTENDED CARE; OUR LADY OF CONSOLATION NURSING AND REHABILITATIVE CARE CENTER; OUR LADY OF MERCY LIFE CENTER; OUR LADY OF PEACE NURSING CARE RESIDENCE; PARKER JEWISH INSTITUTE FOR HEALTH CARE AND REHAB; PECONIC LANDING AT SOUTHOLD; PENN YAN MANOR NURSING HOME INC.; THE PINES HEALTHCARE & REHABILITATION CENTERS MACHIAS CAMPUS; REBEKAH REHAB & EXTENDED CARE CENTER; ST. ANN'S COMMUNITY d/b/a ST. ANN'S HOME; ST. ANN'S COMMUNITY d/b/a ST. ANN'S NURSING HOME COMPANY, INC.; ST. CABRINI NURSING HOME; ST. CAMILLUS RESIDENTIAL HEALTH CARE FACILITY; ST. JOHN LAND NURSING CENTER, INC.; ST. JOSEPH'S HOME; ST. LUKE RESIDENTIAL HEALTH CARE FACILITY, INC.; ST. MARY'S CENTER, INC.; ST. PETER'S NURSING AND REHABILITATION CENTER; SAN SIMEON BY THE SOUND CENTER FOR NURSING & REHABILITATION; SENECA HILL MANOR INC.; SETON HEALTH AT SCHUYLER RIDGE RESIDENTIAL HEALTHCARE; SHAKER PLACE REHABILITATION AND NURSING CENTER; CHARLES T. SITRIN HEALTH CARE CENTER, INC.; SOLDIERS AND SAILORS MEMORIAL HOSPITAL EXTENDED CARE UNIT; UNITED HEBREW GERIATRIC CENTER; UNITED HELPERS CANTON NURSING HOME; WELLS NURSING HOME, INC.; WESLEY HEALTH CARE CENTER INC.; WOODLAND POND AT NEW PALTZ; and WYOMING COUNTY COMMUNITY HOSPITAL SKILLED NURSING FACILITY

Petitioners-Plaintiffs,

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*For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules, and for Declaratory and Injunctive Relief,*

-against-

KATHY HOCHUL, in her official capacity as GOVERNOR OF THE STATE OF NEW YORK; MARY T. BASSETT, M.D., M.P.H., in her official capacity as Commissioner of Health of the State of New York; ROBERT F. MUJICA, JR., in his official capacity as Director of the Budget for New York State; NEW YORK STATE DEPARTMENT OF HEALTH; NEW YORK STATE DIVISION OF THE BUDGET; and the STATE OF NEW YORK,

Respondents-Defendants.

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Petitioners-Plaintiffs LeadingAge New York, Inc., et al. (collectively "Petitioners"), through their attorneys, Hinman Straub P.C., petitioning and complaining of the Respondents-Defendants Kathy Hochul, as Governor of the State of New York, et al. (collectively, "Defendants"), allege as follows:

### INTRODUCTION

1. Petitioners are not-for-profit and public (i.e., local government-owned) operators of residential health care facilities (commonly known as "nursing homes") and the major trade association representing non-profit and public, mission-driven facilities in New York.
2. As non-profit and public, mission-driven organizations, Petitioners strive to help older persons and persons with disabilities thrive and age safely in the place they call home with dignity and the highest quality of care and services.

3. Petitioners seek to enjoin and/or obtain declaratory and other relief against an illegal and unconstitutional scheme by the Defendants that imposes upon non-profit and public nursing homes an unfunded arbitrary and infeasible mandate, which could cost approximately \$1.8 billion statewide.

4. In 2021, the New York State Legislature enacted two “nursing home reform” bills that, ostensibly, sought to improve “the level of care being provided to residents in nursing homes” in response to “[t]he recent COVID-19 outbreak” (Assembly Memorandum in Support, New York Laws of 2021, ch 156). As discussed below, they do nothing of the sort.

5. The laws are broadly applicable, even though there is wide variation among homes in the resident acuity and needs, staffing levels and patterns, and investment in direct resident care.

6. The first, Section 2895-b of the New York Public Health Law (the “Staffing Levels Law”), instructs Respondent-Defendant Commissioner of Health (the “Commissioner”) to “by regulation, establish nursing home minimum staffing levels for nursing services to meet applicable standards of service and care and to provide services to attain or maintain the highest practicable physical, mental, and psycho-social well-being of each resident of the facility . . . [b]eginning January first, two thousand twenty-two”.

7. Before these laws were enacted, the Commissioner’s agency, Respondent-Defendant New York State Department of Health (“DOH”), had extensively studied the issue and determined that statutory staffing mandates were not consistent with the flexible, team-based approach to modern medicine that is required to treat the needs of nursing home residents such as during the pandemic caused by the novel coronavirus SARS-CoV-2 (“COVID-19”).

8. The inflexible staffing ratios imposed by the Staffing Levels Law undermine the professional discretion of clinical care leadership to deploy nurses, aides, and other direct care staff in ways that enhance quality of clinical care. The arbitrary allocation of nurse and aide hours does not account for the need for enhanced nurse hours for clinically complex residents, more activities staff time and less nursing time for residents with cognitive impairments, the lower level of need for aide services for residents with clinical conditions that do not interfere with all activities of daily living, etc.

9. Ordering non-profit and public, mission-driven nursing homes to bring more people to work in nursing homes during a declared statewide healthcare staffing emergency, when candidates for existing openings cannot be found, is a futile exercise. Based on an analysis of payroll data submitted by nursing homes to the federal government, an estimated 12,000 additional nurses and aides would have to be hired to satisfy all three requirements of the Staffing Levels Law.<sup>1</sup> There is no army of surplus workers available to fill these positions because there is a nationwide health care workforce shortage that has disproportionately affected nursing homes.

10. The Staffing Levels Law instructs DOH and its Commissioner to penalize nursing homes up to \$2,000 per day for failure to meet these arbitrary and irrational targets. There simply are not enough nurses and nurse aides to satisfy the requirements of the Staffing Levels Law, and the Law will merely serve to financially penalize Petitioners and other non-profit nursing homes, regardless of resident need or the quality of care delivered, depleting

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<sup>1</sup> LeadingAge New York analysis of Centers for Medicare & Medicaid Services, Payroll-Based Journal data, Q4 2021, accessed on May 9, 2022.

them of funds needed to recruit and retain staff.

11. The second challenged law, Section 2828 of the New York Public Health Law (the “70/40 Spending Law”), instructs the Commissioner to “promulgate regulations governing the disposition of revenue in excess of expenses for residential health care facilities consistent with this section” effective “on and after January first, two thousand twenty-two”. “Revenue,” for purposes of the 70/40 Spending Law, includes essentially all operating revenues, regardless of source, not just payments made by or on behalf of Respondent-Defendant State of New York (the “State”).

12. The 70/40 Spending Law proclaims that, irrespective of the quality of care delivered by a nursing home or amounts it must invest in facility improvements or other essential items not classified as care-related by the law, a facility must spend at least 70% of its annual operating revenue on “direct resident care,” including at least 40% of revenues on wages and benefits for “resident-facing staffing,” a term comprising some, but not all, of the workers who provide services that benefit nursing home residents. In addition, if a “resident-facing staffing” payment is for an independent contractor, such as a nurse who works for a staffing company and assists there is an insufficient number of regular employees to provide appropriate care for residents, 15% of the dollars the facility spends do not count towards the direct care minimums. If spending does not meet these arbitrary targets, Defendants will “recoup,” i.e., confiscate, some of the nursing home’s funds so that it does.

13. Among LeadingAge members that may not meet these arbitrary targets, a common reason is because they have made capital investments in their facilities to create a more homelike and person-centered environment, to improve energy efficiency, or to support

architectural or engineering improvements that curb the spread of communicable diseases. With some exceptions, the 70/40 Spending Law omits capital costs from direct resident care expenses, but inexplicably includes almost all capital reimbursement for most facilities in the calculation of revenue thereby discouraging, if not outright preventing, facilities from making capital improvements that support infection control efforts during a pandemic involving an airborne, highly contagious virus.

14. The 70/40 Spending Law also instructs Defendants to “recoup,” i.e., confiscate, any annual operating revenue that exceeds 105% of annual operating and non-operating expenses. Although the term “recoup” implies that the State is only taking back funds it has paid, the law actually requires the state to take funds paid by all payers, whether by Medicare, Medicaid, residents and their families, long-term care insurers, or health insurance. Further, if a not-for-profit nursing home happens to have a good year financially, such as through investment income generated by reserves, Defendants will also seize those funds. The facility will not be allowed to save them for a financial crisis or extraordinary expense, or otherwise protect the facility’s fiscal condition.

15. The interaction of the infeasible Staffing Levels Law with 70/40 Spending Law creates a death spiral that that will ultimately prevent facilities from complying with either. Facilities that are unable to meet all three requirements of the Staffing Levels law will face heavy daily fines, which *will not count* toward their direct resident care and resident-facing staffing spending requirements. As a result of the fines, they may fail the 70/40 test and may have to pay the same amount again as a “recoupment” for failing to meet the 70/40 Spending Law’s requirements. This will leave them with even less money to hire new staff and retain

those they have.

16. Consequently, the Staffing Levels Law and 70/40 Spending Law function arbitrarily to penalize and, potentially force closure of, nursing homes that do not meet a blunt, one-size-fits-all model, irrespective of resident acuity, necessary investments in physical plant, and health and quality of life outcomes.

17. Accordingly, the Staffing Levels Law and 70/40 Spending Law should be declared invalid for the reasons stated herein, and the Court should enjoin enforcement or implementation of the statutes by Defendants.

#### **PARTIES, JURISDICTION, AND VENUE**

18. Petitioner-plaintiff LeadingAge New York, Inc. ("LeadingAge") is a statewide not-for-profit trade association which has operated in New York for over 50 years and currently represents the interests of approximately 186 not-for-profit, mission-drive "residential health care facilities" under Public Health Law § 2801 (3) (commonly referred to as "nursing homes") serving approximately 25,000 residents throughout New York State. The principal office of LeadingAge is located at 13 British American Blvd., Latham, Albany County, New York 12110.

19. LeadingAge has a history of litigating on behalf of its members regarding issues of significance to its membership, and it has the capacity to assume an adversary position on the issues involved herein. LeadingAge fairly represents nursing homes and their residents in this State, and the Defendants' unlawful conduct at issue directly affects LeadingAge's members and their residents. Accordingly, LeadingAge has standing to maintain this action on



its own behalf and on behalf of its members, which would have standing in their own names to pursue this action.

20. Andrus on Hudson ("Andrus") is a 197-bed nursing home located at 185 Old Broadway, Hastings-on-Hudson, Westchester County, New York 10706. Andrus is operated by John E. Andrus Memorial, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Andrus is rated overall three stars (out of five) by the federal Centers for Medicare and Medicaid Services ("CMS"), including five out of five stars for quality measures. During the most recent quarter for which data is available, Andrus provided an average of 2.92 hours of nursing staff time per resident per day. It has been estimated that Andrus would need to hire a total of 15 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Andrus would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

21. The Baptist Home at Brookmeade ("Brookmeade") is a 120-bed nursing home located at 46 Brookmeade Drive, Rhinebeck, Dutchess County, New York 12572. Brookmeade is operated by The Baptist Home of Brooklyn, New York, a domestic not-for-profit corporation. As of April 27, 2022, Brookmeade is rated overall five stars (the highest score) by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Brookmeade provided an average of 2.73 hours of nursing staff time per resident per day. It has been estimated that Brookmeade would need to hire a total of 10 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report,

Brookmeade would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

22. Beechwood Homes ("Beechwood") is a 272-bed nursing home located at 2235 Millersport Highway, Getzville, Erie County, New York 14068. Beechwood is operated by Beechwood Health Care Center, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Beechwood is rated overall four stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Beechwood provided an average of 3.05 hours of nursing staff time per resident per day. It has been estimated that Beechwood would need to hire a total of 13 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Beechwood would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

23. Bethel Nursing & Rehabilitation Center ("Bethel Croton") is a 200-bed nursing home located at 67 Springvale Road, Croton-on-Hudson, Westchester County, New York 10520. Bethel Croton is operated by Bethel Springvale Nursing Home, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Bethel Croton is rated overall two stars by the CMS, including three stars for quality measures. During the most recent quarter for which data is available, Bethel Croton provided an average of 2.89 hours of nursing staff time per resident per day. It has been estimated that Bethel Croton would need to hire a total of 10 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Bethel Croton would not

suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

24. Bethel Nursing Home Company, Inc. ("Bethel Ossining") is a 79-bed nursing home located at 17 Narragansett Avenue, Ossining, Westchester County, New York 10562. Bethel Ossining is operated by The Bethel Nursing Home Company, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Bethel Ossining is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Bethel Ossining provided an average of 3.94 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 18 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Bethel Ossining would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

25. Brothers of Mercy Nursing & Rehabilitation Center ("Brothers of Mercy") is a 240-bed nursing home located at 10570 Bergtold Road, Clarence, Erie County, New York 14031. Brothers of Mercy is operated by Brothers of Mercy Nursing Home Company, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Brothers of Mercy is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Brothers of Mercy provided an average of 3.30 hours of nursing staff time per resident per day. It has been estimated that Brothers of Mercy would need to hire a total of 5 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Brothers of Mercy would suffer a seizure under the 70/40 Spending Law.

26. Chemung County Health Center-Nursing Facility ("Chemung Co. NH") is a 200-bed nursing home located at 103 Washington Street, Elmira, Chemung County, New York 14901. Chemung Co. NH is operated by County of Chemung, a municipal corporation. As of April 27, 2022, Chemung Co. NH is rated overall three stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Chemung Co. NH provided an average of 3.24 hours of nursing staff time per resident per day. It has been estimated that Chemung Co. NH would need to hire a total of 4 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Chemung Co. NH would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

27. Chenango Memorial Hospital Inc. SNF ("Chenango Memorial") is a 200-bed nursing home located at 179 North Broad Street, Norwich, Chenango County, New York 13815. Chenango Memorial is operated by Chenango Memorial Hospital, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Chenango Memorial is rated overall four stars by the CMS. During the most recent quarter for which data is available, Chenango Memorial provided an average of 4.09 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 5 days during that quarter.

28. Clinton County Nursing Home ("Clinton Co. NH") is an 80-bed nursing home located at 16 Flynn Avenue, Plattsburgh, Clinton County, New York 12901. Clinton Co. NH is operated by County of Clinton, a municipal corporation. As of April 27, 2022, Clinton Co. NH is rated overall one star by the CMS. During the most recent quarter for which data is

available, Clinton Co. NH provided an average of 3.14 hours of nursing staff time per resident per day. It has been estimated that Clinton Co. NH would need to hire a total of 3 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Clinton Co. NH would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

29. The Commons on St. Anthony, A Skilled Nursing & Short Term Rehabilitation Community ("The Commons") is a 300-bed nursing home located at 3 St. Anthony Street, Auburn, Cayuga County, New York 13021. The Commons is operated by Auburn Senior Services, Inc., a domestic not-for-profit corporation. As of April 27, 2022, The Commons is rated overall three stars by the CMS, including three stars for quality measures. During the most recent quarter for which data is available, The Commons provided an average of 3.02 hours of nursing staff time per resident per day. It has been estimated that The Commons would need to hire a total of 15 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, The Commons would suffer a seizure under the 70/40 Spending Law.

30. Crouse Community Center Inc. ("Crouse") is a 120-bed nursing home located at 101 South Street, Morrisville, Madison County, New York 13408. Crouse is operated by Crouse Community Center, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Crouse is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Crouse provided an average of 4.38 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of

the Staffing Levels Law on one or more days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Crouse would suffer a seizure under the 70/40 Spending Law.

31. Daughters of Sarah Nursing Center ("Daughters of Sarah") is a 210-bed nursing home located at 180 Washington Avenue Extension, Albany, Albany County, New York 12203. Daughters of Sarah is operated by Daughters of Sarah Nursing Home Co., Inc., a domestic not-for-profit corporation. As of April 27, 2022, Daughters of Sarah is rated overall three stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Daughters of Sarah provided an average of 2.97 hours of nursing staff time per resident per day. It has been estimated that Daughters of Sarah would need to hire a total of 12 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Daughters of Sarah would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

32. Degraff Memorial Hospital-Skilled Nursing Facility ("Degraff") is an 80-bed nursing home located at 445 Tremont Street, North Tonawanda, Niagara County, New York 14120. Degraff is operated by Kaleida Health, a domestic not-for-profit corporation. As of April 27, 2022, Degraff is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Degraff provided an average of 2.60 hours of nursing staff time per resident per day. It has been estimated that Degraff would need to hire a total of 9 nurses and aides in order to meet the artificial targets in the Staffing Levels Law.

33. Eddy Heritage House Nursing & Rehabilitation Center (“Eddy Heritage House”) is a 120-bed nursing home located at 2920 Tibbits Avenue, Troy, Rensselaer County, New York 12180. Eddy Heritage House is operated by Heritage House Nursing Center, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Eddy Heritage House is rated overall three stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Eddy Heritage House provided an average of 3.17 hours of nursing staff time per resident per day. It has been estimated that Eddy Heritage House would need to hire a total of 4 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Eddy Heritage House would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

34. Eddy Memorial Geriatric Center (“Eddy Memorial”) is an 80-bed nursing home located at 2256 Burdett Avenue, Troy, Rensselaer County, New York 12180. Eddy Memorial is operated by James A. Eddy Memorial Geriatric Center, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Eddy Memorial is rated overall two stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Eddy Memorial provided an average of 3.33 hours of nursing staff time per resident per day. It has been estimated that Eddy Memorial would need to hire a total of 2 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Eddy Memorial would suffer a seizure under the 70/40 Spending Law.

35. Eddy Village Green at Beverwyck (“Eddy Beverwyck”) is a 24-bed nursing home located at 40 Autumn Drive, Slingerlands, Albany County, New York 12159. Eddy Beverwyck is operated by Beverwyck, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Eddy Beverwyck is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Eddy Beverwyck provided an average of 4.22 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 4 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Eddy Beverwyck would suffer a seizure under the 70/40 Spending Law.

36. Eddy Village Green (“Eddy Village”) is a 192-bed nursing home located at 421 West Columbia Street, Cohoes, Albany County, New York 12047. Eddy Village is operated by Capital Region Geriatric Center, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Eddy Village is rated overall four stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Eddy Village provided an average of 4.05 hours of nursing staff time per resident per day, and may not have been in compliance with all requirements of the Staffing Levels Law during all days of that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Eddy Village would suffer a seizure under the 70/40 Spending Law.

37. Elizabeth Church Manor Nursing Home (“ECM”) is a 120-bed nursing home located at 863 Front Street, Binghamton, Broome County, New York 10520. ECM is operated by UMH ECM Corp., a domestic not-for-profit corporation. As of April 27, 2022, ECM is rated overall two stars by the CMS, including four stars for quality measures. During the most



recent quarter for which data is available, ECM provided an average of 3.02 hours of nursing staff time per resident per day. It has been estimated that ECM would need to hire a total of 6 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, ECM would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

38. Fairport Baptist Homes ("Fairport Baptist") is a 142-bed nursing home located at 4646 Nine Mile Point Road, Fairport, Erie County, New York 14450. Fairport Baptist is operated by Fairport Baptist Homes, a domestic not-for-profit corporation. As of April 27, 2022, Fairport Baptist is rated overall three stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Fairport Baptist provided an average of 4.14 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 3 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Fairport Baptist would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

39. Finger Lakes Health Living Center at Geneva – South ("Geneva South") is a 103-bed nursing home located at 196-198 North Street, Geneva, Ontario County, New York 14456. Geneva South is operated by Geneva Nursing Home, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Geneva South is rated overall three stars by the CMS, including four stars for quality measures. Based upon its revenue and expenses in fiscal year

2020 reported on its RHCF Cost Report, Geneva South would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

40. Finger Lakes Health Living Center at Geneva – North (“Geneva North”) is a 160-bed nursing home located at 196-198 North Street, Geneva, Ontario County, New York 14456. Geneva North is operated by Geneva Nursing Home II, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Geneva North is rated overall three stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Geneva South and Geneva North together reported an average of 3.10 hours of nursing staff time per resident per day. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Geneva North would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

41. Fort Hudson Nursing Center, Inc. (“Fort Hudson”) is a 196-bed nursing home located at 319 Upper Broadway, Fort Edward, Washington County, New York 12828. St. Peter’s is operated by Fort Hudson Nursing Center, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Fort Hudson is rated overall three stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Fort Hudson provided an average of 3.14 hours of nursing staff time per resident per day. It has been estimated that Fort Hudson would need to hire a total of 9 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Fort Hudson would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future. DOH has granted Fort Hudson a temporary “Vital Access Provider” adjustment to the non-capital component of

Fort Hudson's Medicaid rate or temporary lump sum payment pursuant to Public Health Law § 2826 (see New York State Medicaid Plan Amendment SPA#22-0013, *available at* [https://health.ny.gov/regulations/state\\_plans/status/lcicare/original/docs/os\\_2021-12-30\\_spa\\_22-13.pdf](https://health.ny.gov/regulations/state_plans/status/lcicare/original/docs/os_2021-12-30_spa_22-13.pdf) [accessed May 23, 2022]). This payment, and Fort Hudson's financial stability, could be impacted by the 70/40 Spending Law.

42. The Friendly Home ("Friendly Home") is a 200-bed nursing home located at 3156 East Avenue, Rochester, Monroe County, New York 14618. Friendly Home is operated by Rochester Friendly Home, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Friendly Home is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Friendly Home provided an average of 3.51 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 48 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Friendly Home would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

43. Glendale Home-Schdy Cnty Dept Social Services ("Glendale") is a 200-bed nursing home located at 59 Hetcheltown Road, Scotia, Schenectady County, New York 12302. Glendale is operated by the County of Schenectady, a municipal corporation. As of April 27, 2022, Glendale is rated overall two stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Glendale provided an average of 2.99 hours of nursing staff time per resident per day. It has been estimated that Glendale would need to hire a total of 13 nurses and aides in order to meet the artificial targets in the Staffing

Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Glendale would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

44. Good Samaritan Nursing and Rehabilitation Care Center ("Good Samaritan") is a 100-bed nursing home located at 101 Elm Street, Sayville, Suffolk County, New York 11782. Good Samaritan is operated by Good Samaritan Hospital Medical Center, a domestic not-for-profit corporation. As of April 27, 2022, Good Samaritan is rated overall three stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Good Samaritan provided an average of 2.44 hours of nursing staff time per resident per day. It has been estimated that Good Samaritan would need to hire a total of 10 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Good Samaritan would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

45. Gurwin Jewish Nursing and Rehabilitation Center ("Gurwin") is a 460-bed nursing home located at 68 Hauppauge Road, Commack, Suffolk County, New York 11725. Gurwin is operated by The Rosalind and Joseph Gurwin Jewish Geriatric Center of Long Island, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Gurwin is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Gurwin provided an average of 3.59 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 34 days during that quarter. Based upon its revenue and

expenses in fiscal year 2020 reported on its RHCF Cost Report, Gurwin would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

46. Hebrew Home for the Aged at Riverdale ("Hebrew Home") is a 751-bed nursing home located at 5901 Palisade Avenue, Bronx, Bronx County, New York 10471. Hebrew Home is operated by The Hebrew Home for the Aged at Riverdale, a domestic not-for-profit corporation. As of April 27, 2022, Hebrew Home is rated overall three stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Hebrew Home provided an average of 2.62 hours of nursing staff time per resident per day. It has been estimated that Hebrew Home would need to hire a total of 63 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Hebrew Home would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

47. Heritage Green Rehab & Skilled Nursing ("Heritage Green") is a 134-bed nursing home located at 3023 Route 430, Greenhurst, Chautauqua County, New York 14742. Heritage Green is operated by The Gerry Homes, a domestic not-for-profit corporation. As of April 27, 2022, Heritage Green is rated overall four stars by the CMS, including three stars for quality measures. During the most recent quarter for which data is available, Heritage Green provided an average of 2.62 hours of nursing staff time per resident per day. It has been estimated that Heritage Green would need to hire a total of 12 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal

year 2020 reported on its RHCF Cost Report, Heritage Green would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

48. Heritage Park Rehab & Skilled Nursing (“Heritage Park”) is a 146-bed nursing home located at 150 Prather Avenue, Jamestown, Chautauqua County, New York 14701. Heritage Park is operated by The Gerry Homes, a domestic not-for-profit corporation. As of April 27, 2022, Heritage Park is rated overall one star by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Heritage Park provided an average of 3.14 hours of nursing staff time per resident per day. It has been estimated that Heritage Park would need to hire a total of 6 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Heritage Park would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

49. Heritage Village Rehab and Skilled Nursing, Inc. (“Heritage Village”) is a 120-bed nursing home located at 4570 Route 60, Gerry, Chautauqua County, New York 14740. Heritage Village is operated by The Gerry Homes, a domestic not-for-profit corporation. As of April 27, 2022, Heritage Village is rated overall three stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Heritage Village provided an average of 2.87 hours of nursing staff time per resident per day. It has been estimated that Heritage Village would need to hire a total of 8 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Heritage Village would suffer a seizure under the 70/40 Spending Law.

50. Highpointe on Michigan Health Care Facility ("Highpointe") is a 300-bed nursing home located at 1031 Michigan Avenue, Buffalo, Erie County, New York 14203. Highpointe is operated by Kaleida Health, a domestic not-for-profit corporation. As of April 27, 2022, Highpointe is rated overall three stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Highpointe provided an average of 3.60 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 33 days during that quarter.

51. Huntington Living Center ("Huntington") is a 160-bed nursing home located at 369 East Main Street, Waterloo, Seneca County, New York 13165. Huntington is operated by Huntington Nursing Home, Inc., a domestic not-for-profit corporation. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Huntington would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future

52. Ideal Senior Living Center d/b/a UHS Senior Living at Ideal ("Ideal") is a 150-bed nursing home located at 601 High Avenue, Endicott, Broome County, New York 13760. Ideal is operated by Ideal Senior Living Center, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Ideal is rated overall four stars by the CMS, including three stars for quality measures. During the most recent quarter for which data is available, Ideal provided an average of 3.69 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 29 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report,

Ideal would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

53. Isabella Geriatric Center, Inc. ("Isabella") is a 705-bed nursing home located at 515 Audubon Avenue, New York, New York County, New York 10040. Isabella is operated by Isabella Geriatric Center, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Isabella is rated overall three stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Isabella provided an average of 3.06 hours of nursing staff time per resident per day. It has been estimated that Isabella would need to hire a total of 33 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Isabella would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

54. Island Nursing and Rehab Center ("Island") is a 120-bed nursing home located at 5537 Expressway Drive North, Holtsville, Suffolk County, New York 11742. Island is operated by Island Rehabilitation and Nursing Center Inc., a domestic not-for-profit corporation. As of April 27, 2022, Island is rated overall three stars by the CMS, including three stars for quality measures. During the most recent quarter for which data is available, Island provided an average of 3.05 hours of nursing staff time per resident per day. It has been estimated that Island would need to hire a total of 5 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Island would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.



55. James G. Johnston Memorial Nursing Home ("Johnston") is a 120-bed nursing home located at 286 Deyo Hill Road, Johnson City, Broome County, New York 13790. Johnston is operated by UMH JGJ Corp., a domestic not-for-profit corporation. As of April 27, 2022, Johnston is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Johnston provided an average of 3.31 hours of nursing staff time per resident per day. It has been estimated that Johnston would need to hire a total of 2 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Johnston would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

56. Kendal at Ithaca ("Kendal Ithaca") is a 48-bed nursing home located at 2230 North Triphammer Road, Ithaca, Tompkins County, New York 14850. Kendal Ithaca is operated by Kendal at Ithaca, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Kendal Ithaca is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Kendal Ithaca provided an average of 4.12 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 3 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Kendal Ithaca may suffer a seizure under the 70/40 Spending Law.

57. Kendal on Hudson ("Kendal Hudson") is a 26-bed nursing home located at 1 Kendal Way, Sleepy Hollow, Westchester County, New York 10591. Kendal Hudson is operated by Kendal on Hudson, a domestic not-for-profit corporation. As of April 27, 2022,

Kendal Hudson is rated overall five stars by the CMS, including five stars for quality measures. Kendal Hudson may suffer a seizure under the 70/40 Spending Law.

58. Nathan Littauer Hospital Nursing Home ("Littauer") is an 84-bed nursing home located at 99 East State Street, Gloversville, Fulton County, New York 12078. Littauer is operated by Nathan Littauer Hospital Association, a domestic not-for-profit corporation. As of April 27, 2022, Littauer is rated overall two stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Littauer provided an average of 2.54 hours of nursing staff time per resident per day. It has been estimated that Littauer would need to hire a total of 7 nurses and aides in order to meet the artificial targets in the Staffing Levels Law.

59. Loretto Health and Rehabilitation Center ("Loretto") is a 583-bed nursing home located at 700 East Brighton Avenue, Syracuse, Onondaga County, New York 13205. The Commons is operated by Loretto Health and Rehabilitation Center, a domestic not-for-profit corporation. As of April 27, 2022, Loretto is rated overall one star by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Loretto provided an average of 3.55 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 38 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Loretto would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future. DOH has granted Loretto a temporary "Vital Access Provider" adjustment to the non-capital component of Loretto's Medicaid rate or temporary lump sum payment pursuant to Public Health Law § 2826. (*see* New York State

Medicaid Plan Amendment SPA#22-0013, *available at* [https://health.ny.gov/regulations/state\\_plans/status/ltcare/original/docs/os\\_2021-12-30\\_spa\\_22-13.pdf](https://health.ny.gov/regulations/state_plans/status/ltcare/original/docs/os_2021-12-30_spa_22-13.pdf) [accessed May 23, 2022]]. This payment, and Loretto's financial stability, could be impacted by the 70/40 Spending Law.

60. Lutheran Retirement Home ("Lutheran Jamestown") is a 148-bed nursing home located at 715 Falconer Street, Jamestown, Chautauqua County, New York 14701. Lutheran Jamestown is operated by Lutheran Social Services of Upstate New York, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Lutheran Jamestown is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Lutheran Jamestown provided an average of 2.57 hours of nursing staff time per resident per day. It has been estimated that Lutheran Jamestown would need to hire a total of 12 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Lutheran Jamestown would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

61. Masonic Care Community of New York ("Masonic Care Community") is a 320-bed nursing home located at 2150 Bleeker Street, Utica, Oneida County, New York 13501. Masonic Care Community is operated by Trustees of the Masonic Hall and Asylum Fund, a domestic not-for-profit corporation. As of April 27, 2022, Masonic Care Community is rated overall two stars by the CMS, including three stars for quality measures. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Masonic Care Community would not suffer a seizure under the 70/40 Spending Law; however, it could be

subject to seizure in the future. DOH had granted Masonic Care Community a temporary “Vital Access Provider” adjustment to the non-capital component of Masonic Care Community’s Medicaid rate or temporary lump sum payment pursuant to Public Health Law § 2826. (*see* New York State Medicaid Plan Amendment SPA#22-0013, *available at* [https://health.ny.gov/regulations/state\\_plans/status/lcicare/original/docs/os\\_2021-12-30\\_spa\\_22-13.pdf](https://health.ny.gov/regulations/state_plans/status/lcicare/original/docs/os_2021-12-30_spa_22-13.pdf) [accessed May 23, 2022]). This payment, and Masonic Care Community’s financial stability, could be impacted by the 70/40 Spending Law.

62. Menorah Home & Hospital for Aged & Infirm (“Menorah”) is a 436-bed nursing home located at 1516 Oriental Boulevard, Brooklyn, Kings County, New York 11235. Menorah is operated by Menorah Home and Hospital for the Aged and Infirm, a domestic not-for-profit corporation. As of April 27, 2022, Menorah is rated overall five stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Menorah provided an average of 3.24 hours of nursing staff time per resident per day. It has been estimated that Menorah would need to hire a total of 14 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Menorah would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

63. Methodist Home for Nursing and Rehabilitation (“Methodist Home”) is a 120-bed nursing home located at 4499 Manhattan College Parkway, Bronx, Bronx County, New York 10471. Methodist Home is operated by Methodist Church Home for the Aged in the City of New York, a domestic not-for-profit corporation. As of April 27, 2022, Methodist Home is rated overall five stars by the CMS, including five stars for quality measures. During the most

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recent quarter for which data is available, Methodist Home provided an average of 3.16 hours of nursing staff time per resident per day. It has been estimated that Methodist Home would need to hire a total of 4 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Methodist Home would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

64. Nottingham RHCF ("The Nottingham") is a 40-bed nursing home located at 1305 Nottingham Road, Jamesville, Onondaga County, New York 13078. The Nottingham is operated by The Nottingham Residential Health Care Facility, a domestic not-for-profit corporation. As of April 27, 2022, The Nottingham is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, The Nottingham provided an average of 3.22 hours of nursing staff time per resident per day. It has been estimated that The Nottingham would need to hire at least one nurse or aide in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, The Nottingham would suffer a seizure under the 70/40 Spending Law.

65. Oneida Health Rehabilitation and Extended Care ("Oneida") is a 160-bed nursing home located at 323 Genesee Street, Oneida, Oneida County, New York 13421. Oneida is operated by Oneida Health Systems, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Oneida is rated overall three stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Oneida provided an average of 3.19 hours of nursing staff time per resident per day. It has been estimated that

Oneida would need to hire a total of 4 nurses and aides in order to meet the artificial targets in the Staffing Levels Law.

66. Our Lady of Consolation Nursing and Rehabilitative Care Center (“Our Lady of Consolation”) is a 345-bed nursing home located at 111 Beach Drive, West Islip, Suffolk County, New York 11795. Our Lady of Consolation is operated by Our Lady of Consolation Geriatric Care Center, a domestic not-for-profit corporation. As of April 27, 2022, Our Lady of Consolation is rated overall four stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Our Lady of Consolation provided an average of 3.42 hours of nursing staff time per resident per day. It has been estimated that Our Lady of Consolation would need to hire a total of 3 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Our Lady of Consolation would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

67. Our Lady of Mercy Life Center (“Our Lady of Mercy”) is a 160-bed nursing home located at 2 Mercycare Lane, Guilderland, Albany County, New York 12084. Our Lady of Mercy is operated by Our Lady of Mercy Life Care Center, a domestic not-for-profit corporation. As of April 27, 2022, Our Lady of Mercy is rated overall three stars by the CMS, including two stars for quality measures. During the most recent quarter for which data is available, Our Lady of Mercy provided an average of 3.11 hours of nursing staff time per resident per day. It has been estimated that Our Lady of Mercy would need to hire a total of 7 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Our Lady of

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Mercy would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

68. Our Lady of Peace Nursing Care Residence (“Our Lady of Peace”) is a 250-bed nursing home located at 5285 Lewiston Road, Lewiston, Niagara County, New York 14092. Our Lady of Peace is operated by Our Lady of Peace, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Our Lady of Peace is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Our Lady of Peace provided an average of 3.56 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 30 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Our Lady of Peace would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

69. Parker Jewish Institute for Health Care and Rehab (“Parker Jewish”) is a 527-bed nursing home located at 271-11 76<sup>th</sup> Avenue, New Hyde Park, Nassau County, New York 11040. Parker Jewish is operated by Parker Jewish Institute for Health Care and Rehabilitation, a domestic not-for-profit corporation. As of April 27, 2022, Parker Jewish is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Parker Jewish provided an average of 3.32 hours of nursing staff time per resident per day, and may not have been compliant with one or more requirements of the Staffing Levels Law on approximately 69 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Parker Jewish would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

70. Peconic Landing at Southold ("Peconic") is a 60-bed nursing home located at 1500 Brecknock Road, Greenport, Suffolk County, New York 11944. Peconic is operated by Peconic Landing at Southold, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Peconic is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Peconic provided an average of 4.10 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 10 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Peconic may suffer a seizure under the 70/40 Spending Law.

71. Penn Yan Manor Nursing Home Inc. ("Penn Yan Manor") is a 46-bed nursing home located at 655 North Liberty Street, Penn Yan, Yates County, New York 14527. Penn Yan Manor is operated by Penn Yan Manor Nursing Home, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Penn Yan Manor is rated overall three stars by the CMS, including three stars for quality measures. During the most recent quarter for which data is available, Penn Yan Manor provided an average of 3.30 hours of nursing staff time per resident per day. It has been estimated that Penn Yan Manor would need to hire 1 additional nurses or aide in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Penn Yan Manor would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

72. The Pines Healthcare & Rehabilitation Centers Machias Campus ("The Pines") is a 115-bed nursing home located at 9822 Route 16, Machias, Cattaraugus County, New York



14101. The Pines is operated by the County of Cattaraugus, a municipal corporation. As of April 27, 2022, The Pines is rated overall four stars by the CMS, including three stars for quality measures. During the most recent quarter for which data is available, The Pines provided an average of 4.30 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on one or more days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, The Pines would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

73. Rebekah Rehab & Extended Care Center ("Rebekah Rehab") is a 213-bed nursing home located at 1072 Havemeyer Avenue, Bronx, Bronx County, New York 10462. Rebekah Rehab is operated by United Odd Fellow and Rebekah Home, a domestic not-for-profit corporation. As of April 27, 2022, Rebekah Rehab is rated overall two stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Rebekah Rehab provided an average of 2.63 hours of nursing staff time per resident per day. It has been estimated that Rebekah Rehab would need to hire a total of 23 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Rebekah Rehab would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

74. St. Ann's Community ("St. Ann's Home") is a 470-bed nursing home located at 1500 Portland Avenue, Rochester, Monroe County, New York 14621. St. Ann's Home is operated by the St. Ann's Home for the Aged, a domestic not-for-profit corporation. As of

April 27, 2022, St. Ann's Home is rated overall three stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, St. Ann's Home provided an average of 3.47 hours of nursing staff time per resident per day, and may not be compliant with one or more requirements of the Staffing Levels Law on approximately 27 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCFCost Report, St. Ann's Home would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

75. St. Ann's Community d/b/a St. Ann's Nursing Home Company, Inc. ("St. Ann's Cherry Ridge") is a 72-bed nursing home located at 920 Cherry Ridge Boulevard, Webster, Monroe County, New York 14580. St. Ann's Cherry Ridge is operated by St. Ann's Nursing Company, Inc. (The Heritage), a domestic not-for-profit corporation. As of April 27, 2022, St. Ann's Cherry Ridge is rated overall four stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, St. Ann's Cherry Ridge provided an average of 3.80 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 18 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCFCost Report, St. Ann's Cherry Ridge would suffer a seizure under the 70/40 Spending Law.

76. St. Cabrini Nursing Home ("St. Cabrini") is a 304-bed nursing home located at 115 Broadway, Dobbs Ferry, Westchester County, New York 10522. St. Cabrini is operated by Cabrini of Westchester, a domestic not-for-profit corporation. As of April 27, 2022, St. Cabrini is rated overall three stars by the CMS, including five stars for quality measures. During the

most recent quarter for which data is available, St. Cabrini provided an average of 3.09 hours of nursing staff time per resident per day. It has been estimated that St. Cabrini would need to hire a total of 15 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, St. Cabrini would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

77. St. Camillus Residential Health Care Facility d/b/a The Centers at St. Camillus ("St. Camillus") is a 284-bed nursing home located at 813 Fay Road, Syracuse, Onondaga County, New York 13219. St. Camillus is operated by St. Camillus Residential Health Care Facility, a domestic not-for-profit corporation. As of April 27, 2022, St. Camillus is rated overall three stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, St. Camillus provided an average of 3.19 hours of nursing staff time per resident per day. It has been estimated that St. Camillus would need to hire a total of 8 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, St. Camillus would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

78. St. Catherine of Siena Nursing and Rehabilitation Care Center ("St. Catherine of Siena") is a 240-bed nursing home located at 52 Route 25A, Smithtown, Suffolk County, New York 11787. St. Catherine of Siena is operated by Catholic Health System of Long Island, Inc., a domestic not-for-profit corporation. As of April 27, 2022, St. Catherine of Siena is rated overall five stars by the CMS, including five stars for quality measures. During the most recent

quarter for which data is available, St. Catherine of Siena provided an average of 3.72 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 18 days during that quarter.

79. St. Johnland Nursing Center, Inc. ("St. Johnland") is a 250-bed nursing home located at 395 Sunken Meadow Road, Kings Park, Suffolk County, New York 11754. St. Johnland is operated by St. Johnland Nursing Center, Inc., a domestic not-for-profit corporation. As of April 27, 2022, St. Johnland is rated overall one star by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, St. Johnland provided an average of 3.19 hours of nursing staff time per resident per day. It has been estimated that St. Johnland would need to hire a total of 8 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, St. Johnland would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

80. St. Josephs Home ("St. Josephs") is an 82-bed nursing home located at 950 Linden Street, Ogdensburg, St. Lawrence County, New York 13669. St. Josephs is operated by St. Joseph's Home, Ogdensburg, N.Y., a domestic not-for-profit corporation. As of April 27, 2022, St. Josephs is rated overall five stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, St. Josephs provided an average of 2.70 hours of nursing staff time per resident per day. It has been estimated that St. Josephs would need to hire a total of 9 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on

its RHCF Cost Report, St. Josephs would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

81. St. Luke Residential Health Care Facility, Inc. d/b/a St. Luke Health Services ("St. Luke") is a 200-bed nursing home located at 299 East River Road, Oswego, Oswego County, New York 13126. St. Luke is operated by St. Luke Residential Health Care Facility, Inc., a domestic not-for-profit corporation. As of April 27, 2022, St. Luke is rated overall two stars by the CMS, including three stars for quality measures. During the most recent quarter for which data is available, St. Luke provided an average of 2.84 hours of nursing staff time per resident per day. It has been estimated that St. Luke would need to hire a total of 14 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, St. Luke would suffer a seizure under the 70/40 Spending Law.

82. St. Mary's Center, Inc. ("St. Mary's") is a 40-bed nursing home, primarily focused on the provision of specialty services for persons with AIDS, located at 516 West 126<sup>th</sup> Street, New York, New York County, New York 10027. St. Mary's is operated by St. Mary's Center, Inc., a domestic not-for-profit corporation. As of April 27, 2022, St. Mary's is rated overall four stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, St. Mary's provided an average of 3.00 hours of nursing staff time per resident per day. It has been estimated that St. Mary's would need to hire a total of 2 nurses and aides in order to meet the artificial targets in the Staffing Levels Law.

83. St. Peter's Nursing and Rehabilitation Center ("St. Peter's") is a 160-bed nursing home located at 301 Hackett Boulevard, Albany, Albany County, New York 12208.

St. Peter's is operated by Villa Mary Immaculate, a domestic not-for-profit corporation. As of April 27, 2022, St. Peter's is rated overall two stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, St. Peter's provided an average of 3.15 hours of nursing staff time per resident per day. It has been estimated that St. Peter's would need to hire a total of 5 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, St. Peter's would suffer a seizure under the 70/40 Spending Law.

84. San Simeon by the Sound Center for Nursing & Rehabilitation ("San Simeon") is a 120-bed nursing home located at 61700 Route 48, Greenport, Suffolk County, New York 11944. San Simeon is operated by San Simeon by the Sound Center for Nursing and Rehabilitation, a domestic not-for-profit corporation. As of April 27, 2022, San Simeon is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, San Simeon provided an average of 2.83 hours of nursing staff time per resident per day. It has been estimated that San Simeon would need to hire a total of 8 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, San Simeon would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

85. Seneca Hill Manor Inc. ("Seneca Hill") is a 120-bed nursing home located at 20 Manor Drive, Oswego, Oswego County, New York 13126. Seneca Hill is operated by Seneca Hill Manor, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Seneca Hill is rated overall five stars by the CMS, including five stars for quality measures. During the most

recent quarter for which data is available, Seneca Hill provided an average of 3.16 hours of nursing staff time per resident per day. It has been estimated that Seneca Hill would need to hire a total of 4 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Seneca Hill would suffer a seizure under the 70/40 Spending Law.

86. Seton Health at Schuyler Ridge Residential Healthcare (“Schuyler Ridge”) is a 120-bed nursing home located at 1 Abele Boulevard, Clifton Park, Saratoga County, New York 12065. Schuyler Ridge is operated by Seton Health at Schuyler Ridge Residential Healthcare, a domestic not-for-profit corporation. As of April 27, 2022, Schuyler Ridge is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Schuyler Ridge provided an average of 3.55 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 38 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Schuyler Ridge would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

87. Shaker Place Rehabilitation and Nursing Center (“Shaker Place”) is a 250-bed nursing home located at 780 Albany Shaker Road, Albany, Albany County, New York 12211. Shaker Place is operated by the County of Albany, a municipal corporation. As of April 27, 2022, Shaker Place is rated overall four stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Shaker Place provided an average of 2.87 hours of nursing staff time per resident per day. It has been estimated that

Shaker Place would need to hire a total of 17 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Shaker Place would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

88. Charles T. Sitrin Health Care Center, Inc. ("Sitrin") is a 187-bed nursing home located at 2050 Tilden Avenue, New Hartford, Oneida, New York 13413. Sitrin is operated by Charles T. Sitrin Health Care Center, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Sitrin is rated overall three stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Sitrin provided an average of 3.38 hours of nursing staff time per resident per day, and may not compliant with one or more requirements of the Staffing Levels Law on approximately 61 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Sitrin would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

89. Soldiers and Sailors Memorial Hospital Extended Care Unit d/b/a The Homestead at Soldiers and Sailors ("The Homestead") is a 150-bed nursing home located at 418 North Main Street, Penn Yan, Yates County, New York 14527. The Homestead is operated by Soldiers and Sailors Memorial Hospital of Yates County, Inc., a domestic not-for-profit corporation. As of April 27, 2022, The Homestead is rated overall one star by the CMS. During the most recent quarter for which data is available, The Homestead provided an average of 2.78 hours of nursing staff time per resident per day. It has been estimated that The



Homestead would need to hire a total of 10 nurses and aides in order to meet the artificial targets in the Staffing Levels Law.

90. United Hebrew Geriatric Center ("United Hebrew") is a 294-bed nursing home located at 391 Pelham Road, New Rochelle, Westchester County, New York 10805. United Hebrew is operated by United Home for Aged Hebrews, a domestic not-for-profit corporation. As of April 27, 2022, United Hebrew is rated overall five stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, United Hebrew provided an average of 3.88 hours of nursing staff time per resident per day, but may not have been compliant with one or more requirements of the Staffing Levels Law on one or more days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, United Hebrew would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

91. United Helpers Canton Nursing Home ("United Helpers") is a 200-bed nursing home located at 205 State Street, Canton, St. Lawrence County, New York 13617. United Helpers is operated by United Helpers Canton Nursing Home, Inc., a domestic not-for-profit corporation. As of April 27, 2022, United Helpers is rated overall three stars by the CMS, including three stars for quality measures. During the most recent quarter for which data is available, United Helpers provided an average of 3.53 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 46 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, United Helpers would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

92. Wells Nursing Home, Inc. (“Wells”) is a 100-bed nursing home located at 201 West Madison Avenue, Johnstown, Fulton County, New York 12095. Wells is operated by Wells Nursing Home, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Wells is rated overall three stars by the CMS, including three stars for quality measures. During the most recent quarter for which data is available, Wells provided an average of 4.01 hours of nursing staff time per resident per day, but was not compliant with one or more requirements of the Staffing Levels Law on approximately 20 days during that quarter. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Wells would not suffer a seizure under the 70/40 Spending Law; however, it could be subject to seizure in the future.

93. Wesley Health Care Center Inc. (“Wesley”) is a 342-bed nursing home located at 131 Lawrence Street, Saratoga Springs, Saratoga County, New York 12866. Wesley is operated by Wesley Health Care Center, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Wesley is rated overall three stars by the CMS, including four stars for quality measures. During the most recent quarter for which data is available, Wesley provided an average of 2.49 hours of nursing staff time per resident per day. It has been estimated that Wesley would need to hire a total of 36 nurses and aides in order to meet the artificial targets in the Staffing Levels Law. Based upon its revenue and expenses in fiscal year 2020 reported on its RHCF Cost Report, Wesley would suffer a seizure under the 70/40 Spending Law.

94. Woodland Pond at New Paltz (“Woodland Pond”) is a 40-bed nursing home located at 100 Woodland Pond Circle, New Paltz, Ulster County, New York 12561. Woodland Pond is operated by Woodland Pond, Inc., a domestic not-for-profit corporation. As of April 27, 2022, Woodland Pond is rated overall four stars by the CMS, including five stars for quality

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measures. During the most recent quarter for which data is available, Woodland Pond provided an average of 6.78 hours of nursing staff time per resident per day, but may not have been compliant with one or more requirements of the Staffing Levels Law on one or more days during that quarter.

95. Wyoming County Community Hospital Skilled Nursing Facility (“Wyoming Co. SNF”) is a 138-bed nursing home located at 400 North Main Street, Warsaw, Wyoming County, New York 14569. Wyoming Co. NH is operated by County of Wyoming, a municipal corporation. As of April 27, 2022, Wyoming Co. NH is rated overall two stars by the CMS, including five stars for quality measures. During the most recent quarter for which data is available, Wyoming Co. NH provided an average of 3.26 hours of nursing staff time per resident per day. It has been estimated that Wyoming Co. NH would need to hire a total of 4 nurses and aides in order to meet the artificial targets in the Staffing Levels Law.

96. Collectively, Andrus; Brookmeade; Beechwood; Bethel Croton; Bethel Ossining; Brothers of Mercy; Chemung Co. NH; Chenango Memorial; Clinton Co. NH; The Commons; Crouse; Daughters of Sarah; Degraff; Eddy Heritage House; Eddy Memorial; Eddy Beverwyck; Eddy Village; ECM; Fairport Baptist; Geneva South; Geneva North; Fort Hudson; Friendly Home; Glendale; Good Samaritan; Gurwin; Hebrew Home; Heritage Green; Heritage Park; Heritage Village; Highpointe; Huntington; Ideal; Isabella; Island; Johnston; Kendal Ithaca; Kendal Hudson; Littauer; Loretto; Lutheran Jamestown; Masonic Care Community; Menorah; Methodist Home; The Nottingham; Oneida; Our Lady of Consolation; Our Lady of Mercy; Our Lady of Peace; Parker Jewish; Peconic; Penn Yan Manor; The Pines; Rebekah Rehab; St. Ann’s Home; St. Ann’s Cherry Ridge; St. Cabrini; St. Camillus; St. Catherine of

Siena; St. Johnland; St. Josephs; St. Luke; St. Mary's; St. Peter's; San Simeon; Seneca Hill; Schuyler Ridge; Shaker Place; Sitrin; The Homestead; United Hebrew; United Helpers; Wells; Wesley; Woodland Pond; and Wyoming Co. NH are referred to herein as the "Individual Petitioners".

97. In addition to all of the aforementioned facilities, there are, upon information and belief, other facilities that are members of LeadingAge and that have been adversely affected by the actions taken by the Defendants that are challenged herein. LeadingAge is also bringing this action on behalf of these facilities.

98. Pursuant to Article IV, Section 1 of the New York State Constitution, Respondent-Defendant Governor Kathy Hochul (the "Governor") is "vested" with "[t]he executive power" of the government of the State of New York. Pursuant to Article IV, Section 3 of the New York State Constitution, the Governor "shall take care that the laws [of the State of New York] are faithfully executed". The Governor is sued here in her official capacity.

99. Respondent-Defendant State of New York (the "State") acts through the agencies and officials named in this hybrid action and proceeding. Pursuant to CPLR 307 (1), the State may be served by delivery of the summons and notice of petition to an assistant attorney general at the Office of the New York State Attorney General at The Capitol in Albany.

100. Pursuant to Section 2800 of the New York Public Health Law, Respondent-Defendant DOH is the state agency charged under the Public Health Law with the "central, comprehensive responsibility for the development and administration of the [S]tate's policy with respect to hospital and related services," including nursing home services.

101. Pursuant to Section 200 of the Public Health Law, Respondent-Defendant Commissioner of Health of the State of New York Mary T. Bassett, M.D., M.P.H. (the “Commissioner”) is “the head of the [D]epartment”. The Commissioner is sued here in her official capacity.

102. Pursuant to Section 31 of the New York Executive Law, Respondent-Defendant Division of the Budget is a division within the Executive Department of the State of New York that assists the Governor and New York State agencies with budgetary matters.

103. Pursuant to Section 180 of the Executive Law, Respondent-Defendant Director of the Budget Robert F. Mujica Jr. (the “Director”) is “[t]he head of the division of the budget”. The Director is sued here in his official capacity.

104. The principal offices of all of the Defendants are located in the City of Albany, Albany County, New York.

105. The Hon. Letitia James, Attorney General of the State of New York, is being served with notice of this hybrid action and proceeding pursuant to CPLR 1012 (b).

106. The Court has subject matter jurisdiction to decide this Verified Petition and Complaint pursuant to Judiciary Law § 140-b, including jurisdiction to render a declaratory judgment pursuant to CPLR 3001 and to grant injunctive relief pursuant to CPLR articles 63 and 78.

107. The Court has personal jurisdiction over all of the Defendants pursuant to CPLR 301. Petitioners are not required to bring this action in the Court of Claims because any money damages they seek are incidental to their claims for declaratory and injunctive relief.

108. Venue lies in this County pursuant to CPLR 503 (a) because it is where the Defendants reside and where material events giving rise to the subject matter of this proceeding occurred.

### **FACTUAL BACKGROUND**

#### *The Nursing Home Model of Long-Term Care in New York*

109. Nursing homes serve persons who, whether due to age, disability, or other condition, require both round-the-clock nursing care and assistance with activities of daily living, such as bathing and dressing, that render them unable to live independently. Many also require other skilled services, such as rehabilitation, wound care, ventilator support, and behavioral health care. Nursing homes may serve as short-term rehabilitation facilities for residents recovering from surgery or acute illness or as long-term homes for residents who are no longer able to live independently due to medically-complex chronic conditions, disabilities, or cognitive impairments. In addition to providing skilled nursing, nursing homes offer medical care, rehabilitation therapies, and recreation and social activities, among other services.

110. Approximately 92,000 New Yorkers reside in nursing homes. According to DOH data, services for approximately 72% of the State's nursing home days are paid by medical assistance (commonly known as "Medicaid"). See DOH, *Nursing Home Cost Report (RHCF): 2020*, available at <https://health.data.ny.gov/Health/Nursing-Home-Cost-Report-RHCF-2020/kz27-ecra>.

111. Medicaid is a program jointly funded and regulated by the state and federal government and administered by state agencies. See 42 U.S.C. §§ 1396a, 1396b. DOH administers New York's Medicaid program. See N.Y. Public Health Law § 201 (1) (u).

112. DOH and the Commissioner are required to administer Medicaid consistent with a State Plan approved by the Centers for Medicare and Medicaid Services (“CMS”). Amendments to the State Plan (“SPAs”) must be submitted to and approved by CMS. *See* 42 U.S.C. §§ 1396a, 1396b.

113. DOH and the Commissioner are prohibited from using Federal funds, such as Medicare payments, to fund *New York State’s* share of the costs of its Medicaid program. *See* 42 C.F.R. § 433.51.

114. Pursuant to New York’s approved State Plan, each nursing home’s Medicaid rate is supposed to be calculated based upon a methodology in State law and DOH regulations. *See* N.Y. Public Health Law §§ 2807, 2808; 10 N.Y.C.R.R. §§ 86-2.1 *et. seq.*

115. The Medicaid rate is set by DOH for each facility and is comprised of two components. First is an “operating” component that is primarily calculated based on statewide average Medicaid allowable costs reported by all facilities in 2007, reduced by 9 percent and adjusted for regional wage differences. Other than periodic adjustments for the acuity (medical need and care complexity) of the facility’s Medicaid patients (also called “residents”), the operating component has generally been effectively frozen at 2007 levels, with inflation factors eliminated in each of the last 14 years. *See* 10 N.Y.C.R.R. § 86-2.40. On top of the frozen rates, in 2020-21, the state enacted an additional 1.5 percent reduction in nursing home payments. However, the recently-enacted state fiscal year (SFY) 2022-23 budget, for the first time in 14 years, provides for a 1 percent cost-of-living increase in the nursing home operating rate and restoration of the 1.5 percent cut. The second element of the rate is a “capital” component, which averages approximately \$26 per patient day, based upon the facility’s

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reported depreciation of capital (buildings, fixed equipment, etc.) and costs such as interest on capital indebtedness. *See* 10 N.Y.C.R.R. § 86-2.10. The capital component of nursing home rates was also cut in SFY 2020-21 by 5 percent.

116. In addition, as part of New York's approved State Medicaid Plan, DOH established a "nursing home quality pool" to "facilitat[e] quality improvements in residential health care facilities" (the "Quality Pool"). N.Y. Public Health Law § 2808 (2-c) (d); 10 N.Y.C.R.R. § 86-2.42. The Individual Petitioners, and most other nursing homes in New York, are potentially eligible for payments from the Quality Pool if their performance on selected quality measures is high enough. *See* 10 N.Y.C.R.R. § 86-2.42 (b).

117. In DOH's regulations and the approved State Medicaid Plan, the Quality Pool is funded by "a Medicaid rate reduction" that, at present, is approximately 1 percent of Medicaid payments. 10 N.Y.C.R.R. § 86-2.42 (c). The approved State Medicaid Plan does not permit withholding of non-Medicaid revenues to fund the Quality Pool. *See* New York State Plan Amendment TN 20-0007 (May 12, 2020), *available at* <https://www.medicaid.gov/State-resource-center/Medicaid-State-Plan-Amendments/Downloads/NY/NY-20-0007.pdf>.

118. DOH scores the nursing homes participating in the Quality Pool on various "quality" metrics, including "percent of contract/agency staff used" and "rate of staffing hours per resident per day". *Id.* Facilities in the top three quintiles receive payments from the Quality Pool; others do not.

119. DOH recently applied to CMS for approval to amend certain Quality Pool metrics; however, the proposed amendment does not address recoupment of non-Medicaid revenues to fund the Quality Pool. *See* New York State Plan Amendment SPA #22-0008 (Mar.



31, 2022), *available at* [https://health.ny.gov/regulations/state\\_plans/status/lcicare/original/docs/os\\_2022-03-31\\_spa\\_22-08.pdf](https://health.ny.gov/regulations/state_plans/status/lcicare/original/docs/os_2022-03-31_spa_22-08.pdf)

120. In 2020, the most recent year available, Medicare paid for 17.8% of days of care in New York nursing homes. Medicare is an entirely Federally-funded program, administered by CMS. Medicare “Part A” covers up to 100 days of nursing home care in certain circumstances, generally after a hospital stay. *See* 42 U.S.C. § 1395(d). Traditional Medicare rates are calculated by CMS and paid directly to nursing homes through a Federal system known as the “Prospective Payment System”. *See* 42 C.F.R. §§ 413.330 *et seq.* Nursing home benefits are covered by Medicare Advantage plans at rates negotiated or set by the plan. *See* 42 C.F.R. § 422.101.

121. In order to participate in the Medicare program and receive Medicare payments, a nursing home must execute a provider agreement with CMS. *See* 42 U.S.C. § 1395cc.

122. The remaining residents pay for services either “privately,” i.e., directly, or via commercial or long-term care insurance, pursuant to a contract between the payor and the nursing home fixing a rate of payment for the facility’s services.

123. Residents of LeadingAge’s member nursing homes are demographically similar to the State’s nursing home population as a whole.

124. Inasmuch as the services for the vast majority of nursing home residents are paid by Medicaid or Medicare, an inability to participate in those government programs “would likely be tantamount to shutting down the facility”. *Blossom South, LLC v Sebelius*, 987 F. Supp.2d 289, 297 (W.D.N.Y. 2013).

125. Regulatory standards required to participate in Medicaid or Medicare are, in effect, rules which nursing homes must follow in order to operate.

*The Regulatory Framework for Staffing of Nursing Homes in New York*

126. Since at least 1987, when Congress enacted the Nursing Home Reform Act as part of the Omnibus Budget Reconciliation Act of 1987 (P.L. 100-203), nursing homes have been subject to comprehensive regulation and oversight by CMS in order to participate in the Medicare and Medicaid programs.

127. 42 U.S.C. § 1396r (4) (C) (i) requires nursing home operators, including the Individual Petitioners, to “(I) . . . provide 24-hour licensed nursing services which are sufficient to meet the nursing needs of its residents” and “(II) . . . use the services of a registered professional nurse for at least 8 consecutive hours a day, 7 days a week”.

128. The statute contemplates that “nursing or nursing-related services to residents in a nursing facility” will be provided by registered professional nurses (“RNs”), licensed practical nurses (“LPNs”), and “nurse aides” who complete statutorily required training and education. *See* 42 U.S.C. § 1396r (5).

129. The implementing regulations promulgated by CMS further specify that nursing homes must “have sufficient nursing staff with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility’s resident population”. 42 C.F.R. § 483.35.

130. The regulations further define “[s]ufficient staff” as meaning a “sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans: (i) . . . licensed nurses; and (ii) Other nursing personnel, including but not limited to nurse aides.” 42 C.F.R. § 483.35 (a) (1).

131. The regulations also require that “the facility . . . designate a licensed nurse to serve as a charge nurse on each tour of duty,” i.e., shift of workers. 42 C.F.R. § 483.35 (a) (2). Most nursing homes in New York, including the Individual Petitioners, operate using three 8-hour shifts each day for nursing staff.

132. CMS also requires that the nursing home “designate a registered nurse to serve as the director of nursing on a full time basis” who, except in very small nursing homes, cannot “serve as a charge nurse”. 42 C.F.R. § 483.35 (b). In other words, the director of nursing is a registered nurse whose duties focus upon supervision of the charge nurses and other nursing staff.

133. The three different types of nursing staff are permitted to perform different functions. Only RNs may assess patients. LPNs and RNs may dispense medication and provide treatments to residents. Nurse aides may not do those tasks, but may perform other nursing care tasks, such as feeding, bathing, dressing, turning, and transporting residents.

134. In addition to nursing staff, the regulations require nursing homes to “ensure that . . . the medical care of each resident is supervised by a physician” and that a physician, or a physician assistant, nurse practitioner, or clinical nurse specialist delegated by the physician, must visit the resident at regular intervals and “[r]eview the resident’s total plan of care”. 42 C.F.R. § 483.30.

135. As part of each resident's clinical services, nursing homes must also "[p]rovide" or "obtain" any "specialized rehabilitative services such as but not limited to physical therapy, speech-language pathology, occupational therapy, respiratory therapy, and rehabilitative services for a mental disorder and intellectual disability" that is "required in the resident's comprehensive care plan". 42 C.F.R. § 483.65. In New York, these services must be provided by licensed professionals. *See* N.Y. Education Law §§ 6732; 7902; 8202; 8502.

136. In roughly 70% of New York nursing homes, employees in at least one of the three nursing staff titles are represented by a labor union. *See* Adam Dean, et al., *Mortality Rates from COVID-19 Are Lower in Unionized Nursing Homes*, 39 Health Affairs 1993, 1997 (Nov. 2020).

137. According to the U.S. Bureau of Labor Statistics ("BLS") nationwide data, among the states with the "highest employment level" of RNs, New York State has the second highest hourly median wage, second only to California. *See* U.S. Bureau of Labor Statistics, Occupational Employment and Wages, May 2020 29-1141 Registered Nurses, *available at* <https://www.bls.gov/oes/current/oes291141.htm#st>.

138. According to BLS, among the states with the "highest employment level" of LPNs, New York State has the second highest hourly mean wage, second only to California. *See* U.S. Bureau of Labor Statistics, Occupational Employment and Wages, May 2020 29-2061 Licensed Practical and Licensed Vocational Nurses, *available at* <https://www.bls.gov/oes/current/oes292061.htm#st>.

139. According to BLS, New York State has the highest hourly mean wage for "nursing assistants," the Federal occupational classification that includes nurse aides, among

the states with the “highest employment level” of nursing assistants. *See* U.S. Bureau of Labor Statistics, Occupational Employment and Wages, May 2020 31-1131 Nursing Assistants, available at <https://www.bls.gov/oes/current/oes311131.htm#st>.

*History of Nursing Home Staffing Ratios Before 2021*

140. Federal law requires nursing homes to report their “direct care staffing information . . . based on payroll and other verifiable and auditable data” to CMS, which is referred to in the industry as payroll-based journal or “PBJ”. 42 U.S.C. § 1320a-7j (g).

141. CMS has studied nursing home staffing and, to date, has not recommended “minimum federal nurse-staffing standards” for RNs, LPNs, or nurse aides beyond those in the existing Federal regulations “because staffing needs vary with residents’ care needs and management or nursing practices (such as training or policies affecting the retention of nursing staff) can influence the quality of care.” GAO-11-571, at 14.

142. Contracts between some New York health care facilities and some employee organizations include agreements concerning the specific number of staff working during a particular shift; notably, these requirements were the product of negotiation between employers and employee organizations. *See* New York State Nurses Association, *Summary of Tentative Agreement* (Dec. 5, 2019), available at [https://actionnetwork.org/user\\_files/user\\_files/000/037/183/original/Summary\\_of\\_Tentative\\_Agreement.NYSNA\\_NYCHH\\_Mayoral\\_120519.pdf](https://actionnetwork.org/user_files/user_files/000/037/183/original/Summary_of_Tentative_Agreement.NYSNA_NYCHH_Mayoral_120519.pdf); *see also* 1199SEIU, *Better Staffing* (2015), available at <https://web.archive.org/web/20150223060047/http://www.join1199seiu.org:80/better-staffing-job-protection/>; 1199/LVHH Memorandum of Agreement July 16, 2018, available at [https://www.1199seiu.org/application/files/2415/3988/lvh\\_moa\\_2018.pdf](https://www.1199seiu.org/application/files/2415/3988/lvh_moa_2018.pdf).

143. Separately from facility-specific negotiations between employers and employee organizations, since at least 2009, legislation has been introduced in every session of the New York State Legislature to mandate that all nursing homes, regardless of patient acuity or need, have specific numbers of nursing staff in the facility. *See e.g.* 2009 NY Assembly Bill No. A11015. Much of this proposed legislation also mandated specific nursing staff levels or ratios within general hospitals. Prior to 2021, these bills were not enacted.

*A 2020 DOH Report Evaluated But Did Not Recommend Minimum Staffing Levels, and Emphasized the Need for Workforce Flexibility in Nursing Homes*

144. In 2019, a State statute directed DOH to “engage stakeholders” and conduct a study of hospitals and nursing homes that would “consider minimum staffing levels, other staffing enhancement strategies, and other patient quality improvement initiatives for registered nurses, licensed practical nurses, and certified nurse aides to improve quality of care and patient safety” and the “potential fiscal impacts of staffing levels, other staffing enhancement strategies, and other patient quality improvement initiatives” in both nursing homes and hospitals. New York State Laws of 2019, ch. 57, pt. KK, § 1.

145. Thereafter, on or about March 7, 2020, then-New York Governor Andrew Cuomo declared a State disaster emergency for the State of New York, based upon “travel-related cases and community contact transmission of COVID-19”. Executive Order (Cuomo) 202, 9 N.Y.C.R.R. § 8.202.

146. Upon information and belief, COVID-19 has become one of the most significant pandemics in New York, and national, history, with a nationwide death toll that exceeds the 1918 influenza pandemic. *See* Helen Braswell, *Covid-19 Overtakes 1918 Spanish Flu as*

*Deadliest Disease in American History*, STAT (Sept. 20, 2021), available at

<https://www.statnews.com/2021/09/20/covid-19-set-to-overtake-1918-spanish-flu-as-deadliest-disease-in-american-history/>.

147. In or about August 2020, i.e., during the pandemic, DOH published a report titled “Study of Nurse Caregiver Minimum Staffing Levels and Other Staffing Enhancement Strategies and Patient Quality Improvement Initiatives” (available at [https://health.ny.gov/press/reports/docs/2020-08\\_staffing\\_report.pdf](https://health.ny.gov/press/reports/docs/2020-08_staffing_report.pdf); the “DOH Staffing Report”). A copy of the DOH Staffing Report is annexed hereto as Exhibit “A”.

148. The DOH report stated that, based upon available data, “the Cornell University Schools of Human Ecology and Industrial and Labor Relations estimate that . . . nursing staff wage/salary costs in nursing homes total approximately \$2.7 billion” annually. DOH Report, at 12.

149. DOH projected that, if legislation “set minimum RN, LPN and CNA [nurse aide] daily care hours for residents of nursing homes,” at the ratios discussed in the report, the “lower bound” of “total additional wage costs” for nursing homes would be \$1,898,600,000 annually. DOH Report, at 8, 35.<sup>2</sup>

150. DOH reasoned that, in addition to the costs necessary to increase the number of staff even if wages were stagnant, creating an artificial spike in demand for workers would

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<sup>2</sup> The ratios evaluated in the DOH Report were derived from a 2019 bill introduced in the NYS Legislature, entitled the Safe Staffing for Quality Care Act (A.2954/S.1032), which proposed nurse to patient ratios for various types of hospital units, and in nursing homes 1.3 hours of RN or LPN care and 2.8 hours of certified nurse aide care per resident per day, with at least 0.75 hours per resident day being provided by an RN allocated among all shifts.

drive up wages that are, particularly for nurse aides, already amongst the highest in the United States. *See* DOH Report, at 32.

151. DOH cautioned that “[i]f the increased wage costs of the proposed legislation cannot be borne by providers by either shifting resources or passing it through to customers, it may threaten provider viability.” DOH Report, at 38.

152. DOH concluded its report on staffing as follows:

“Maintaining a nursing workforce that effectively meets the needs of patients requires a comprehensive approach to address today’s multifaceted and complex healthcare delivery challenges. While the Department supports measures to improve quality of care and patient outcomes, the COVID-19 pandemic has only highlighted the need to maintain workforce flexibility. The team-based approach to healthcare that fundamentally requires flexible staffing solutions is essential to a sustainable system that can support an effective pandemic response. The Department will continue to work with stakeholders to ensure staffing is adequate to serve patients.”

DOH Report, at 43.

153. Shortly before the pandemic, a study commissioned by the American Health Care Association of several State Medicaid programs noted that while many state Medicaid programs woefully underfund nursing homes, New York State has the dubious distinction of being among the worst. That study revealed a shortfall between costs and the daily Medicaid reimbursement rate paid for by New York State that, in 2018, the most recent year available, was \$54.77 per resident per day. *See* Hansen Hunter and Company, P.C., “A Report on Shortfalls of Medicaid Funding for Nursing Center Care” [Nov. 2018]. A copy of the relevant portion of that report is annexed hereto as Exhibit “B”.

154. During the COVID-19 pandemic, most states took actions through their Medicaid program to increase financial support to nursing homes. For example, California,



Connecticut, Rhode Island, Washington D.C., and Washington State increased their Medicaid reimbursement rates to nursing homes in 2020, during the height of the pandemic. *See LeadingAge, States Leverage Medicaid to Provide Nursing Homes a Lifeline through COVID-19* (Jun. 12, 2020), available at <https://leadingage.org/regulation/states-leverage-medicaid-provide-nursing-homes-lifeline-through-covid-19>. During 2021, 39 states implemented Medicaid rate increases for their nursing homes to assist with staffing challenges and the COVID-19 pandemic. *See* Kathleen Gifford, et al., *States Respond to COVID-19 Challenges but Also Take Advantage of New Opportunities to Address Long-Standing Issues* (Oct. 2021), at 37-38, available at <https://files.kff.org/attachment/Report-States-Respond-to-COVID-19-Challenges.pdf>.

155. Notably, New York State took the opposite approach, reducing Medicaid payments by 1.5% across the board during 2020, the worst year of the pandemic, with continued rate reduction in the 2021-22 state fiscal year. *See* N.Y. State Plan Amendment TN 20-0017, available at [https://health.ny.gov/regulations/state\\_plans/status/ltcare/approved/docs/app\\_2020-06-01\\_spa\\_20-17.pdf](https://health.ny.gov/regulations/state_plans/status/ltcare/approved/docs/app_2020-06-01_spa_20-17.pdf). In fact, New York rates have remained largely unchanged since 2008.

#### *Enactment of the Challenged Legislation*

156. In February 2021, in the midst of the pandemic, as part of amended 2021-2022 New York State Executive Budget for Health and Mental Hygiene legislation, then-Governor Cuomo announced proposed a new statute, Section 2828 of the New York Public Health Law, that was described as intended to “ensure nursing home facilities are prioritizing patient care over profits”. Governor’s Press Office, *Governor Cuomo Announces Sweeping Nursing Home*

*Reform Legislation as Part of 30-day Amendments* (Feb 19, 2021), available at <https://www.governor.ny.gov/news/governor-cuomo-announces-sweeping-nursing-home-reform-legislation-part-30-day-amendments>.

157. On or about April 19, 2021, Section 2828 of the New York Public Health Law was enacted, with an effective date of January 1, 2022. *See* New York Laws of 2021, ch. 57, pt. GG, § 1.

158. Thereafter, the Staffing Levels Law was enacted and codified as Section 2895-b of the New York Public Health Law (annexed hereto as Exhibit “C”).

159. Notably, unlike prior bills, the Staffing Levels Law did not address hospital staffing. Instead, the Legislature enacted a separate statute that requires only that general hospitals “establish and maintain a clinical staffing committee,” if they do not already do so, that will be responsible for “development and implementation of an annual clinical staffing plan” (Public Health Law § 2805-t). Unlike nursing homes, who face mandatory monetary penalties under the Staffing Levels Law, penalties may be imposed upon general hospitals only if the hospital “fails to submit or submits but fails to implement a corrective action plan in response to a violation or violations found by the Department [of Health]” (Public Health Law § 2805-t).

160. Section 2828 was thereafter amended, effective April 1, 2022. *See* New York Laws of 2022, ch. 57, pt. M, §§ 1, 4. Section 2828, as amended in April 2022, is annexed hereto as Exhibit “D”.

*The Staffing Levels Law Imposes Inflexible Mandates on the Deployment of Nursing Home Staff*

161. The Staffing Levels Law mandates that DOH “by regulation, establish staffing standards for nursing home minimum staffing levels to meet applicable standards of service and care and to provide services to attain or maintain the highest practicable physical, mental, and psycho-social well-being of each resident of the facility” with compliance “determined quarterly” based upon the CMS “payroll based journal and the facility’s average daily census on a daily basis”. N.Y. Public Health Law § 2895-b (2) (a).

162. The statute further instructs DOH to “establish, by regulation, civil penalties for facilities out of compliance with minimum staffing levels. Such regulations shall include a range of penalties to account for mitigating factors which shall include: (i) extraordinary circumstances facing the facility . . . ; (ii) the frequency and nature of non-compliance; and (iii) the existence of an acute labor supply shortage within a particular region” based upon “regional labor supply of available certified nurse aides, licensed practical nurses and registered nurses; regional pay rates for the relevant titles as determined by the federal department of labor, bureau of labor statistics; and evidence that the facility attempted to procure sufficient staffing” (Public Health Law § 2895-b [1] [b]).

163. In addition, the statute provides that “[i]n determining whether a nursing home has violated its obligations under this section, it shall not be a defense that such nursing home was unable to secure sufficient staff if the lack of staffing was foreseeable and could be prudently planned for, or involved routine staffing needs that arose due to typical staffing patterns, typical levels of absenteeism, or time off typically approved by the employer for vacation, holidays, sick leave, and personal leave” (Public Health Law § 2895-b [1] [d]).

164. The Staffing Levels Law articulates the following “[s]tatutory standard” effective January 1, 2022: “3.5 hours of care per resident per day by a certified nursing aide [hereinafter “CNA”], a licensed nurse, or a nurse aide; provided that out of such 3.5 hours, no less than 2.2 hours of care per resident per day shall be provided by a certified nurse aide or nurse aide, and no less than 1.1 hours of care per resident per day shall be provided by a licensed nurse” (Public Health Law § 2895-b [3] [a]). Beginning on January 1, 2023, the law provides that nursing homes may use only CNAs, not other nurse aides, to satisfy the minimum staffing requirements (*see* Public Health Law § 2895-b [3] [b]).

165. To the extent that a facility meets the overall 3.5 hours per resident day staffing standard by exceeding the RN and LPN mandated hours, but fails to meet the aide minimum, it will be in violation of the statute, even if the medical complexity of its residents demands higher nurse hours. Similarly, if a facility serves significant number of residents with dementia who require supervision and social activities but less nursing care, and hires more recreation therapists and activity aides in lieu of nurse aides, it will also be in violation of the statute.

166. These provisions do not improve patient care and create an impediment to patient safety by removing the discretion of professional nursing and medical staff in deploying resources based on the changing needs of patients.

167. Upon information and belief, the unrealistic nature of the artificial targets in the Staffing Levels Law have not been and cannot, under present circumstances, be met by the vast majority of New York nursing homes. According to the most recent publicly-available PBJ data from CMS (fourth quarter 2021), over 80% of nursing homes fell short of at least one of the three targets and would be deemed non-compliant with the statute:

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Staffing Mandate Compliance Based on 2021 Q4 PBJ Data		Count	Percent
<b>A</b>	Meet Requirements (3.5 Total, 1.1 Nurse, 2.2 Aide)	117	19.7%
<b>B</b>	Do Not Meet at Least One Requirement	477	80.3%
<i>1</i>	<i>Do Not Meet 3.5 Requirement</i>	435	73.2%
<i>2</i>	<i>Meet 3.5 Total but not 2.2 Aide requirement</i>	35	5.9%
<i>3</i>	<i>Meet 3.5 Total but not 1.1 Nurse requirement</i>	7	1.2%

**New York Nursing Homes with 2021 Q4 PBJ Data = 594**

See CMS, Staffing Data Submission Payroll Based Journal (PBJ), available at

[https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-](https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/Staffing-Data-Submission-PBJ)

[Instruments/NursingHomeQualityInits/Staffing-Data-Submission-PBJ](https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/Staffing-Data-Submission-PBJ) (accessed May 9, 2022).

168. Although the original staffing ratio bills and the DOH Report required minimum ratios or hours in both hospitals and nursing homes, New York State has not imposed arbitrary ratios on hospitals. Instead, it required hospitals to establish staffing committees to develop staffing plans. Only intensive care units will be subject to minimum hours requirements pursuant to regulations yet to be adopted. *See* L 2021, ch 155.

*The State Fails to Fund the Minimum Staffing Mandate in the Staffing Levels Law*

169. The Department of Health section of New York's 2021-2022 fiscal year Aid to Localities budget (L 2021, ch 50) included the following allocation related to nursing home staffing:

“For services and expenses for nursing homes to increase resident facing staffing services provided by registered nurses, licensed practical nurses and certified nursing assistants sufficient to attain the highest practicable physical, mental and psychological well-being of each resident of such facilities as further specified in a chapter of the laws of 2021. Provided however, that nursing homes which spend less than 70 percent of revenues on direct resident care or less than 40 percent of revenues on resident-facing-staffing shall not be eligible

for monies authorized herein. Provided further however, that no monies shall be available for expenditure from this appropriation unless submitted in a plan by the commissioner of the department of health and approved by the director of the budget...[\$]64,000,000”.

170. DOB’s press release announcing the enacted budget described this allocation as “investing \$32 million annually to implement the reforms” of the State’s “comprehensive nursing home reform legislation” (Division of the Budget Press Release, “Governor Andrew Cuomo Announces Highlights of the FY 2022 State Budget to Reimagine, Rebuild and Renew New York [Apr. 6, 2021], available at <https://www.budget.ny.gov/pubs/press/2021/fy22-enacted-budget-highlights.html>). Inasmuch as New York’s Medicaid program is generally funded 50% by the Federal government, and 50% by State and local authorities, the DOB press release indicates that the \$64 million allocation is intended to be paid by DOH through the Medicaid program.

171. In the “Fiscal Implications” section of the Senate Introductor’s Memorandum in Support of the Staffing Levels Law, the State budget allocation described above is referenced as providing financial support for the mandated “increased nurse staffing in nursing homes.”

172. The 2020 DOH Report analyzing the feasibility of similar proposed minimum staffing levels noted that filling the required workforce need would cost an additional \$1.8 billion to \$2.3 billion for nursing homes. DOH Report, at 4. The budgetary allocation in the 2021-22 fiscal year provided only three percent of the funds for this mandate.

173. The \$64 million appropriated to support the Staffing Levels Law did not even replace one-half of the funds cut from nursing home rates in 2020, much less provide a sufficient supplement to cover the costs of the new mandate. To date, none of these funds have

been allocated to any nursing homes.

174. The 2022-23 fiscal year budget included the unspent \$64 million from the 2022-23 plus an additional \$123 million for each of fiscal years 2022-23 and 2023-24. The appropriation still represents a meager fraction of the amount called for by the DOH Report, and may be dispensed only if DOH submits a plan to the Director which the Director approves. Upon information and belief, the Director has not approved any such plan or expenditures to date.

*The “70/40 Spending Law” Imposes Unprecedented Controls Over Nursing Home Operations*

175. The 70/40 Spending Law directs that “every residential health care facility shall spend a minimum of seventy percent of revenue on direct resident care, and forty percent of revenue shall be spent on resident-facing staffing, provided that amounts spent on resident-facing staffing shall be included as a part of amounts spent on direct resident care”. N.Y. Public Health Law § 2828 (1) (a).

176. The law states that “[f]ifteen percent of costs associated with resident-facing staffing contracted out by a facility for services provided” by an RN, LPN, or CNA “shall be deducted from the amount spent on resident-facing staffing and direct resident care”. Public Health Law § 2828 (1) (b). The statute does not define the phrase “contracted out”.

177. The 70/40 Spending Law requires DOH to “promulgate regulations governing the disposition of revenue in excess of expenses for residential health care facilities” which “include at a minimum that any residential health care facility for which total operating revenue exceeds total operating and non-operating expenses by more than five percent of total operating and non-operating expenses or that fails to spend the minimum amount necessary to comply

with the minimum spending standards for resident-facing staffing or direct resident care, calculated on an annual basis, shall remit such excess revenue, or the difference between the minimum spending requirement and the actual amount of spending on resident-facing staffing or direct care staffing, as the case may be to the [S]tate". N.Y. Public Health Law § 2828 (1) (c).

178. The statute defines "revenue" as "the total operating revenue from or on behalf of residents of the residential health care facility, government payers, or third-party payers, to pay for a resident's occupancy of the residential health care facility, resident care, and the operation of the residential health care facility as reported in the residential health care facility cost reports submitted to the [D]epartment; provided, however, that revenue shall exclude: (i) the average increase in the capital portion of the Medicaid reimbursement rate from the prior three years; (ii) funding received as reimbursement for the assessment under subparagraph (iv) of paragraph (b) of subdivision two of section twenty-eight hundred seven-d of this article, as reconciled pursuant to paragraph (c) of subdivision ten of section twenty-eight hundred seven-d of this article; (iii) the capital per diem portion of the reimbursement rate for nursing homes that have an overall four- or five-star rating assigned pursuant to the inspection rating system of the U.S. Centers for Medicare and Medicaid Services (CMS rating), provided however that such exclusion shall not apply to any amount of the capital per diem portion of the reimbursement rate that is attributable to a capital expenditure made to a corporation, other entity, or individual, with a common or familial ownership to the operator or the facility as reported under subdivision one of section twenty-eight hundred three-x of this chapter; and (iv) any grant funds from the federal government for reimbursement of COVID-19 pandemic-



related expenses, including but not limited to funds received from the federal emergency management agency or health resources and services administration.” N.Y. Public Health Law § 2828 (2) (a).

179. The statute defines “expenses” as “all operating and non-operating expenses, before extraordinary gains, reported in cost reports submitted pursuant to [Public Health Law § 2805-e], except as expressly excluded by regulations and/or this section. Such exclusions shall include, but not be limited to, any related party transaction or compensation to the extent that the value of such transaction is greater than fair market value, and the payment of compensation for employees who are not actively engaged in or providing services at the facility”. N.Y. Public Health Law § 2828 (2) (b).

180. Further, the statute defines “direct resident care” as including specified “cost centers in the residential health care facility cost report” within the “nonrevenue support services”, “ancillary services”, and “program services” categories but “does not include, at a minimum and without limitation, administrative costs (other than nurse administration), capital costs, debt service, taxes (other than sales taxes or payroll taxes), capital depreciation, rent and leases, and fiscal services”. The complete list is as follows:

RHCF Cost Report Cost Centers	Treatment in PHL § 2828
<i>Nonrevenue Support Services</i>	
Depreciation Leases & Rental	Must be Excluded
Depreciation, Major Moveable Equip.	Must be Excluded
Interest on Capital Debt	Must be Excluded
Fiscal Services	Must be Excluded
Administrative Services	Must be Excluded
Plant Operation & Maint.	Included
Grounds	Not Addressed
Security	Not Addressed

Laundry and Linen	Included
Housekeeping	Included
Cafeteria/Patient Food Service	Included
Nursing Administration	Included
Activities Program	Included
Nonphysician Education	Included
Medical Education	Included
Medical Director's Office	Included
Housing	Included
Medical Records	Not Addressed
Utilization Review	Not Addressed
Social Service	Included
Transportation	Included
<i>Ancillary Services</i>	
Laboratory Services	Included
Electrocardiology	Included
Electroencephalography	Included
Radiology	Included
Inhalation Therapy	Included
Podiatry	Included
Dental	Included
Psychiatric	Included
Physical Therapy	Included
Occupational Therapy	Included
Speech/Hearing Therapy	Included
Pharmacy	Included
Central Service Supply	Included
Medical Staff Services	Included for "licensed or certified professionals"
<i>Program Services</i>	
Res. Health Care Fac.	Included
Pediatric	Included
Traumatic Brain Injury (TBI)	Included
Autoimmune Deficiency Syndrome (AIDS)	Included
Long Term Ventilator	Included
Respite	Included
Behavioral Intervention	Included
Neurodegenerative	Included
Adult Care Facility	Included
I.C.F. Mental Retardation	Included
Independent Living	Included

Outpatient Clinics	Included
Adult Day Health Care	Included
Home Health Care	Included
Homemaker-Services	Not Addressed
Meals on Wheels	Included
Research	Not Addressed
Physicians' Office & Other Rentals	Not Addressed
Gift Shop	Not Addressed
Public Restaurant	Not Addressed
Fund Raising	Not Addressed
Barber & Beauty Shops	Included
Sold Services	Not Addressed
Other	Included if "directly address the physical condition of residents"

*DOH Commences the Regulatory Implementation Process*

181. On or about October 7, 2021, DOH presented proposed regulations implementing the Staffing Levels Law and 70/40 Spending Law to the New York Public Health and Health Planning Council ("PHHPC").

182. On or about November 17, 2021, DOH published notices of proposed rulemaking in the New York State Register concerning the 70/40 Spending Law and Staffing Levels Law (collectively, the "Proposed Regulations").

183. The proposed regulation concerning the 70/40 Spending Law, if adopted, is to be codified at Section 415.34 of Title 10 of the New York Code of Rules and Regulations (annexed hereto as Exhibit "E").

184. The proposed regulations concerning the Staffing Levels Law, if adopted, are to be codified at Sections 415.2 and 415.13 of Title 10 of the New York Code of Rules and Regulations (annexed hereto as Exhibit "F").

185. Pursuant to Section 202 (1) of the New York State Administrative Procedure Act, DOH must provide public notice in the State Register “at least sixty days prior to either (i) the addition, amendment or repeal of a rule for which statute does not require that a public hearing be held prior to adoption, or (ii) the first public hearing on a proposed rule for which such hearing is so required.” More than 60 days have passed since the regulations were proposed.

186. In the Regulatory Flexibility Analyses in both Proposed Regulations, DOH stated that, prior to adoption, “the regulation will again go to PHHPC where there will be another opportunity for public comment.” N.Y. Reg., Nov. 17, 2021, at 21, 26.

187. Presently, the next full PHHPC meeting is scheduled for June 2, 2022. However, upon information and belief, PHHPC’s meeting schedule is subject to change with only limited public notice.

188. As of the date of this complaint, DOH has not obtained approval from CMS of any State Plan Amendment concerning the Legislation, Proposed Regulations, or any modification of the approved State Medicaid Plan provisions governing the nursing home Quality Pool.

*The Ongoing Pandemic Has Already Constrained Nursing Home Providers’ Ability to Staff*

189. COVID-19 uniquely impacted the nursing home workforce. While the pandemic has strained all healthcare workers, according to the BLS, “[e]mployment in health care is down by 450,000 since February 2020, with nursing and residential care facilities accounting for nearly all of the loss.” BLS, *Economic Situation News Release USDL-21-2075* (Dec. 3, 2021), available at [https://www.bls.gov/news.release/archives/empst\\_12032021.htm](https://www.bls.gov/news.release/archives/empst_12032021.htm).

During November 2021, the most recent month available, nursing homes “lost 11,000 jobs” even as unemployment nationwide has recovered “considerably from their highs at the end of the February-April 2020 recession” caused by the pandemic. *Id.*

190. In addition to nationwide staffing shortages, New York faces particular nursing home staff challenges created by State regulations not challenged in this action.

191. New York Governor Hochul, who took office after the 70/40 Spending Law and Staffing Levels Law were enacted, has stated that there is “one way to address” the COVID-19 pandemic: “New Yorkers, get vaccinated, get boosted, and get ready” (Governor’s Press Office, Governor Hochul Updates New Yorkers on Omicron Variant; Encourages New Yorkers to Get Vaccinated and Booster Shot, *available at* <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-hochul-updates-new-yorkers-omicron-variant>).

192. In furtherance of the Governor’s position, grounded in scientific determinations by DOH, that vaccination is the key to protecting vulnerable persons in health care settings such as nursing homes, DOH promulgated emergency regulations that require all DOH-licensed health care facilities, including nursing homes, to permit only vaccinated individuals to work in the facility, unless the worker has a documented medical exemption that meets DOH criteria. *See* 10 N.Y.C.R.R. § 2.61.

193. The medical director of DOH’s Bureau of Immunization has testified that one of “key concerns” underlying the vaccine mandate is that “[d]uring the spring 2020, many doctors and nurses came to help New York, as it had become the epicenter for the pandemic. As the entire nation has now, at one point or another, faced high infection rates, New York can no longer rely on the reserve of additional volunteers.” Affidavit of Elizabeth Rausch-Phung,

M.D., M.P.H., ¶ 15 (annexed hereto as Exhibit “G”).

194. Another concern was the determination by the Federal Centers for Disease Control and Prevention “that ‘COVID-19 outbreaks have occurred in LTCFs [nursing homes] in which residents were highly vaccinated, but transmission occurred through unvaccinated staff members” *Id.* ¶ 34.

195. DOH had itself previously studied the factors for transmission of COVID-19 into nursing homes and concluded that a number of significant infections may have been traceable to asymptomatic or pre-symptomatic staff. *See* DOH, *Factors Associated with Nursing Home Infections and Fatalities in New York State During the COVID-19 Global Health Crisis* (Rev. Feb. 11, 2021), available at [https://www.health.ny.gov/press/releases/2020/docs/nh\\_factors\\_report.pdf](https://www.health.ny.gov/press/releases/2020/docs/nh_factors_report.pdf). At the time of the data collected for DOH’s study, vaccines were not yet available.

196. In December 2021, the U.S. Supreme Court declined to intervene and stay enforcement of the vaccine mandate while challenges by unvaccinated health care workers are pending in Federal courts. *See Dr. A, et al. v Hochul*, No. 21A145, 595 U.S. \_\_ (2021).

197. According to testimony by DOH officials, the vaccine mandate has reduced the number of available nursing home staff by approximately 2.1% (Declaration of Valerie A. Deetz, ¶ 3) (Exhibit “H”). This is because those staff had sought exemptions from the mandate for non-medical reasons not permitted by DOH, but temporarily permitted by an injunction of this Court that was later vacated. Because DOH will not allow nursing homes to permit individuals to work under the types of exemptions permitted under the vacated injunction, they cannot presently work within a facility.

198. Upon information and belief, the actual reduction to the nursing home staff pool was greater than 2.1%, because DOH only assessed individuals who worked as of September 30, 2021, after the vaccine mandate took effect. Workers who left the industry after announcement of the vaccine mandate, but before it took effect, because of hesitance to accept the COVID vaccine or opposition to vaccination, were not counted.

199. On or about September 27, 2021, Governor Hochul declared a statewide disaster emergency based upon “current staffing shortages in hospital and other healthcare facilities” and the “immediate and critical need to supplement staffing to assure healthcare facilities can provide care.” Executive Order (Hochul) No. 4, 9 N.Y.C.R.R. § 9.4.

200. On or about December 26, 2021, the disaster declaration was continued because “severe understaffing in . . . healthcare facilities is expected to continue to affect the ability to provide critical care and to adequately serve vulnerable populations”. Executive Order (Hochul) No. 4.3, 9 N.Y.C.R.R. § 9.4.3.

201. On or about December 31, 2021, pursuant to her statutory authority in New York Executive Law § 29-a (2), the Governor of New York temporarily suspended enforcement portions of the 70/40 Spending Law and Staffing Levels Law as follows:

**“IN ADDITION**, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, I hereby temporarily suspend or modify, in light of the staffing shortage caused by the Covid-19 public health emergency, for the period from the date of this Executive Order through January 30, 2022 the following:

- Subdivision 3 of Section 2895-b of the Public Health Law to the extent that failure of a nursing home to meet the daily average staffing hours will not be held to be a violation of the Public Health Law;
- Subdivision 1 of Section 2828 of the Public Health Law to the extent that failure of a residential health care facility to spend a minimum of seventy percent of revenue on direct resident care, and forty percent of revenue on resident-facing staffing, will not be held to be a violation of the Public Health Law.”

Executive Order (Hochul) No. 4.4, 9 N.Y.C.R.R. § 9.4.4.

202. Thereafter, Governor Hochul issued two subsequent, substantially similar temporary suspensions. *See* 9 N.Y.C.R.R. §§ 9.4.5; 9.4.6.

203. After issuing Executive Order 4, the Governor ordered medics and non-clinical personnel in the New York National Guard to deploy to nursing homes across the state. *See* Eric Durr, *NY National Guard sends 120 troops to bolster long-term care*, National Guard (Dec. 8, 2021), available at <https://www.nationalguard.mil/News/Article/2866170/ny-national-guard-sends-120-troops-to-bolster-long-term-care/>.

204. The National Guard were deployed, in part, because nursing homes were unable to admit new residents due to staffing shortages, and hospitals were unable to discharge patients who required post-acute skilled nursing care. An informal poll of LeadingAge members on April 4, 2022 revealed that 41 percent were reducing admissions due to lack of sufficient staff. As a result, hospital beds were occupied for prolonged periods by patients who no longer needed hospital care; those beds were unavailable to those who were acutely ill or injured. The Governor herself has admitted this, stating when she deployed National Guard personnel that “One of the reasons we still have additional individuals in hospitals, non-COVID ready to be discharged is because nursing homes don’t have the staff to take them” (Leanne



Stuck, *Nursing Home Staffing Shortage Is One Factor Behind Hospital Capacity Increase According to Gov. Hochul*, WRGZ.com [Nov. 29, 2021], available at <https://www.wgrz.com/article/news/health/hochul-nursing-home-staffing-shortage-is-one-factor-behind-hospital-capacity-increase-western-new-york/71-c7408305-64cf-49f0-8538-67640829a590>; see Jon Harris, *NY Nursing Home Staffing Mandate Takes Effect. Trade Group Says It's 'Impossible to Comply With'*, The Buffalo News [Apr. 8, 2022], available at [https://buffalonews.com/business/local/ny-nursing-home-staffing-mandate-takes-effect-friday-trade-group-says-its-impossible-to-comply/article\\_d0892a76-b14c-11ec-bce7-8f795515a85c.html](https://buffalonews.com/business/local/ny-nursing-home-staffing-mandate-takes-effect-friday-trade-group-says-its-impossible-to-comply/article_d0892a76-b14c-11ec-bce7-8f795515a85c.html); Eric Tichy, *Heritage CEO: State Prioritizing Sports over Vets, Seniors*, The Post-Journal [Mar. 31, 2022], available at <https://www.post-journal.com/news/page-one/2022/03/heritage-ceo-state-prioritizing-sports-over-vets-seniors/>).

205. As of March 8, 2022, approximately 500 National Guard troops had been deployed to a total of 87 nursing homes. Approximately 25% of these individuals provide direct patient care (see John Harris, *At Niagara Falls Nursing Home, Troops Are 'Doing Things We Never Thought the National Guard Would Do'*, The Buffalo News [Mar. 8, 2022], available at <https://www.stripes.com/branches/army/2022-03-08/national-guard-nursing-homes-new-york-covid-5271202.html>).

206. Executive Order 4.6 expired March 31, 2022. See N.Y. Executive Law § 29-a (4).

207. On March 31, 2022, Governor Hochul issued Executive Order 4.7. *See* 9

N.Y.C.R.R. § 9.4.7. This version states:

“WHEREAS, there are staffing shortages in hospitals and other healthcare facilities and they are expected to continue.

WHEREAS, severe understaffing, in hospitals and other healthcare facilities is expected to continue to affect the ability to provide critical care and to adequately serve vulnerable populations;

WHEREAS, there is an immediate and critical need to supplement staffing to assure healthcare facilities can provide care;

NOW, THEREFORE, I, Kathy Hochul, Governor of the State of New York . . . do hereby extend the state disaster emergency as set forth in Executive Order 4, as continued in Executive Order 4.6, . . . except: The suspensions contained in Executive Order 4.4 of Subdivision 3 of Section 2895-b of the Public Health Law and Subdivision 1 of Section 2828 of the Public Health Law shall no longer be in effect.”

208. On April 30, 2022, the Governor issued Executive Order 4.8, which was substantially similar to Executive Order 4.7 (*see* 9 NYCRR 9.4.8).

209. Upon information and belief, as recognized by the Governor, the staffing shortages underlying Executive Order 4 have not materially improved in recent times. On the contrary, according to the Bureau of Labor Statistics, nursing care facility employment in February 2022 remained below that in February 2021. *See* BLS, Economic News Release, Table B-1. Employees on Nonfarm Payrolls by Industry Sector and Selected Industry Detail (Mar. 4, 2022), available at <https://www.bls.gov/news.release/empsit.t17.htm>. Notwithstanding this continued health care staffing crisis and the extension of the State Disaster Emergency relating to the staffing shortage, the Governor, inexplicably, revised Executive Order 4 to allow the Staffing Levels Law and 70/40 Spending Law to go into effect.

210. Upon information and belief, the non-profit and public homes that are members of LeadingAge would need to hire, collectively, over 4,000 nurses and aides in order to meet the requirements of the Staffing Levels Law. There is no evidence that job applicants for these positions exist. As noted above, there are fewer individuals willing to work in nursing homes today than the same time last year.

211. Upon information and belief, if direct care workers were available for hire, the Governor would not have deployed the National Guard to one out of every seven nursing homes in the State.

212. DOH proposed emergency regulations, in January 2022, amending the healthcare personnel vaccination mandate to require that all covered, non-exempt personnel receive “any booster or supplemental dose as recommended by the CDC. On February 18, 2022, DOH issued a letter to health care executives, advising them that it would not enforce the booster mandate scheduled to take effect on February 21 and that it would reassess the mandate in three months. A DOH press release on the same date quoted the Commissioner as attributing the delay to staffing shortages: “While we are making progress with 75% of staff received or are willing to receive their booster, the reality is that not enough healthcare workers will be boosted by next week's requirement in order to avoid substantial staffing issues in our already overstressed healthcare system.” On March 17, 2022, in an emergency meeting, PHHPC, at the request of DOH, approved an amended regulation that removed the booster dose requirement. The DOH attorney told the Council that this decision was made in light of the “twin disaster emergencies of COVID and also the healthcare worker labor shortage.” The amended regulation took effect on March 22, 2022. The Individual Petitioners and other health

care providers anticipate that booster shot requirements, if adopted, may further deplete their workforce.

213. As a consequence, the Individual Petitioners and other LeadingAge members have been placed in an impossible position effective on or about April 1, 2022: hire thousands of new nurses and aides who do not exist and who cannot be recruited and paid without receiving the over \$1.8 billion cited in the DOH Report, *or* incur substantial, potentially ruinous fines which may effectively double in size by triggering non-compliance with the 70/40 mandates and seizure of both Medicaid and non-Medicaid revenues. The broader health care system may feel the effects of these requirements too, if nursing homes further reduce admissions in order to come closer to the required staffing hours per resident, and hospitals are unable to discharge patients who no longer need acute care.

**AS AND FOR A FIRST CAUSE OF ACTION**  
**EXPRESS PREEMPTION BY NATIONAL LABOR RELATIONS ACT**  
**(CPLR 3001 and CPLR art. 63)**

214. Petitioners incorporate and reallege the allegations of all prior paragraphs as if fully set forth herein.

215. Article VI, clause 22 of the United States Constitution (the “Supremacy Clause”) provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made; or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

216. The National Labor Relations Act (29 U.S.C. §§ 151 et seq., the “NLRA”) regulates “concerted activities” of employers and employees.

217. The Supreme Court has held that “state regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by” the NLRA. *Belknap, Inc. v Hale*, 463 U.S. 491, 498 (1983).

218. A substantial number of LeadingAge members, including certain Individual Petitioners, are parties to collective bargaining agreements with employee organizations representing direct care staff (e.g., certified nurse assistants, licensed practical nurses, and/or registered nurses).

219. Employee wages, hours and working conditions are terms and conditions of employment subject to the NLRA and governed by collective bargaining agreements between the Individual Petitioners and the employee organizations.

220. Implementation and enforcement of the Legislation by Defendants will directly cause LeadingAge members, including Individual Petitioners, to incur additional costs, in the form of wages, overtime, or bonuses, in order to meet artificial and unattainable staff and spending targets in the Legislation.

221. Moreover, certain collective bargaining agreements with employee organizations, including certain of those with Individual Petitioners, include specific nurse staffing level guidelines or mandate processes to develop staffing levels.

222. For such employers, the matter of the number of direct care staff per resident or per unit within a nursing home also constitutes a term and condition of employment governed by the NLRA.

223. By attempting to regulate terms and conditions of employment governed by the NLRA, the Legislation, and implementation or enforcement thereof by Defendants, violates the Supremacy Clause.

224. Accordingly, Petitioners are entitled to a judgment declaring the Legislation preempted by the NLRA.

225. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the Legislation by Defendants.

226. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the Legislation by Defendants.

**AS AND FOR A SECOND CAUSE OF ACTION**  
**IMPLIED PREEMPTION BY NATIONAL LABOR RELATIONS ACT**  
**(CPLR 3001 and CPLR art. 63)**

227. Petitioners incorporate and reallege the allegations of all prior paragraphs as if fully set forth herein.

228. Article VI, clause 22 of the United States Constitution (the “Supremacy Clause”) provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made; or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

229. The National Labor Relations Act (29 U.S.C. §§ 151 et seq., the “NRLA”) regulates “concerted activities” of employers and employees.

230. The Supreme Court has held that the NLRA occupies the field of “regulation of the bargaining process” and states are not permitted to regulate “the free play of economic forces” or the use of “economic weapons” among employers and employee organizations. *Lodge 76, Int’l Ass’n of Machinists and Aerospace Workers, AFL-CIO v Wisc. Employment Relations Comm’n*, 427 U.S. 132, 145-147 (1976).

231. A substantial number of LeadingAge members, including certain Individual Petitioners, are parties to collective bargaining agreements with employee organizations representing direct care staff (e.g., certified nurse assistants, licensed practical nurses, and/or registered nurses).

232. Employee wages, hours, and working conditions are terms and conditions of employment subject to the NLRA and governed by collective bargaining agreements between the Individual Petitioners and the employee organizations.

233. By attempting to regulate terms and conditions of employment governed by the NLRA, the Legislation, and implementation or enforcement thereof by Defendants, violates the Supremacy Clause.

234. Accordingly, Petitioners are entitled to a judgment declaring the Legislation preempted by the NLRA.

235. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the Legislation by Defendants.

236. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the Legislation by Defendants.

**AS AND FOR A THIRD CAUSE OF ACTION**  
**FIELD PREEMPTION BY NURSING HOME REFORM ACT OF 1987 AND 42 C.F.R.**  
**PART 483**  
**(CPLR 3001 and CPLR art. 63)**

237. Petitioners incorporate and reallege the allegations of all prior paragraphs as if fully set forth herein.

238. Article VI, clause 22 of the United States Constitution (the “Supremacy Clause”) provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made; or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

239. The Supreme Court has held that state laws and regulations are preempted if they “intrude[] on the field” subject to “comprehensive” federal regulation, even if state laws are “parallel” or “complementary”. *Arizona v United States*, 567 U.S. 387, 400-401 (2012).

240. The Nursing Home Reform Act of 1987 (42 U.S.C. § 1396r) and Part 483 of Title 42 of the Code of Federal Regulations comprehensively regulate the field of nursing home staffing.

241. 42 C.F.R. 483.1 states that Part 483 “contain[s] the requirements that an institution must meet in order to qualify to participate as a Skilled Nursing Facility in the Medicare program, and as a nursing facility in the Medicaid program.” All nursing homes in New York participate in Medicare and/or Medicaid.



242. 42 CFR 483.35 establishes comprehensive staffing requirements, which are based upon “resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility’s resident population”, rather than inflexible, hours- or spending-based standards.

243. CMS previously studied nursing home staffing and, to date, has not elected to promulgate regulations that impose hours-based staffing requirements upon nursing homes.

244. The Legislation, even if viewed as complementary of Federal requirements, violates the Supremacy Clause because it intrudes upon a field comprehensively regulated by Federal law.

245. Accordingly, Petitioners are entitled to a judgment declaring the Legislation preempted by the Nursing Home Reform Act of 1987 and its implementing regulations.

246. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the Legislation by Defendants.

247. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the Legislation by Defendants.

**AS AND FOR A FOURTH CAUSE OF ACTION**  
**VIOLATIONS OF SUBSTANTIVE DUE PROCESS BY STAFFING LEVELS LAW**  
**(CPLR 3001 and CPLR art. 63)**

248. Petitioners incorporate and reallege the allegations of all prior paragraphs as if fully set forth herein.

249. Section 1 of the Fourteenth Amendment to the United States Constitution provides, as relevant here, that “No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any

person of life, liberty, or property, without due process of law”.

250. Article I, Section 6 of the New York State Constitution provides that “[n]o person shall be deprived of life, liberty or property without due process of law.”

251. Accordingly, New York laws cannot be enforced unless they are, at a minimum rationally related to a legitimate government interest.

252. The Staffing Levels Law is not rationally related to a legitimate government interest.

253. First, the Staffing Levels Law lacks a rational basis because it is impossible for the overwhelming majority of nursing homes to satisfy its requirements. The state is in the midst of a declared statewide health care staffing emergency. The National Guard has been deployed to nursing homes to respond to the emergency. The enforcement of the requirements will only result in onerous daily fines that will further prevent nursing homes from improving staff wages and recruiting new staff.

254. Further, Courts must “interpret a statute so as to avoid an unreasonable or absurd application of the law” (*Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 255 [2019], *rearg denied* 34 NY3d 1149 [2020]). A literal reading of the Staffing Levels Law to impose penalties for failure to comply with an arbitrary standard during a declared statewide health care staffing emergency is unreasonable, absurd, and would produce an unjust result.

255. Furthermore, the Staffing Levels Law is contrary to the research cited and recommendations made by DOH in the August 2020 report commissioned by the Legislature. DOH concluded that “the COVID-19 pandemic has only highlighted the need to maintain workforce flexibility.” DOH Report, at 43. Instead, the statute imposes arbitrary, one-size-fits-

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all standards.

256. Moreover, the Staffing Levels Law ignores the complexity of deploying resources based on patient needs and imposes regressive and inflexible staffing mandates. It forces nursing homes to maintain the same ratios of nurses and aides whether they are serving principally residents with medically-complex conditions or those with cognitive impairments.

257. Accordingly, Petitioners are entitled to a judgment declaring that implementation or enforcement of the Staffing Levels Law violates Petitioners' constitutional right to substantive due process.

258. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the Legislation by Defendants.

259. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the Staffing Levels Law by Defendants.

**AS AND FOR A FIFTH CAUSE OF ACTION**  
**VIOLATIONS OF SUBSTANTIVE DUE PROCESS BY 70/40 SPENDING LAW**  
**(CPLR 3001 and CPLR art. 63)**

260. Petitioners repeat and re-allege each of the foregoing paragraphs as if fully set forth herein.

261. Section 1 of the Fourteenth Amendment to the United States Constitution provides, as relevant here, that "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law".

262. Article I, Section 6 of the New York State Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law."

263. Accordingly, New York laws cannot be enforced unless they are, at a minimum rationally related to a legitimate government interest.

264. The 70/40 Spending Law is not rationally related to a legitimate government interest.

265. Second, although Defendants are not permitted by Federal law to seize expenditures by the Medicare program (*see* 42 U.S.C. § 1396b (q)), and have no authority in Federal law or the State Public Health Law or implementing regulations to seize payments made to a nursing home by a private party for services rendered, the 70/40 Spending Law directs the Commissioner and DOH to seize funds paid to nursing homes by non-Medicaid sources and deposit them into the Quality Pool.

266. The 70/40 Spending Law further includes essentially all of the capital reimbursement portion of the Medicaid rate,” but excludes capital expenditures from the 70% and 40% spending thresholds. Capital reimbursement at most nursing homes ranges from 7-14% of the per diem Medicaid rate.

267. Upon information and belief, the 70/40 Spending Law, ostensibly written to encourage spending in the best interests of nursing home residents, will not have that effect because it will serve to discourage facilities from making capital improvements, such as installing walls and other construction work to convert double occupancy rooms to single occupancy, or reducing shared bathrooms, that have a demonstrable impact on reducing resident exposure to respiratory illnesses such as COVID-19. *See* Kevin Brown, et al., *Association Between Nursing Home Crowding and COVID-19 Infection and Mortality in Ontario, Canada*, 181 JAMA Internal Med. 229, 235 (2021), available at

<https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2772335>. In many, if not most cases, if facilities make capital investments, which are by definition excluded from direct care expenses, their reimbursement for capital will impede their ability to meet the artificial spending targets in the 70/40 Spending Law.

268. Further, the 2022 amendments to the 70/40 Spending Law arbitrarily and irrationally exclude from “revenue” the capital portion of the Medicaid reimbursement rate only if the nursing home is rated four or five stars (out of five) overall by CMS. Effectively, this means that more than half of nursing homes will be penalized by having the portion of the Medicaid rate intended for capital expenditures counted as “revenue” that should be spent on direct care staff. This is because CMS’s star rating methodology is heavily based upon “the relative performance of facilities within a state” on health inspections, with the top 10% receiving 5 stars, the bottom 20% receiving 1 star, and the remaining 70% divided evenly into 2, 3, and 4 stars, with adjustments to the base rating based upon staffing and quality measures. *See CMS, Design for Care Compare Nursing Home Five-Star Quality Rating System: Technical Users’ Guide* (April 2022), available at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/usersguide.pdf> (accessed Apr. 14, 2022). This will have the effect of perpetuating disparities experienced by residents of nursing homes rated three stars (average) or less by CMS, by unfairly exposing these facilities to greater revenue seizure by DOH. Moreover, the star ratings upon which the exception relies can change quarterly, making it virtually impossible for facilities to initiate a capital project, without annual risk of penalty due to capital reimbursement.

269. Further, the 70/40 Spending Law, to the extent that it reduces a facility's direct care spending on so-called contract staff by fifteen (15%) percent, is irrational. New York State Labor Law § 167 (3) (c) requires nursing homes to maintain a contractual relationship with one or more nurse staffing companies in order to make the statutorily required "good faith effort to have overtime covered on a voluntary basis" for nursing employees. Penalizing direct care spending that is made consistent with express statutory instructions applicable to all New York health care facilities lacks a rational basis.

270. The financial penalty in the 70/40 Spending Law is particularly compounded by the requirements of the Staffing Levels Law. In order to meet, or attempt to meet, the artificial targets of the Staffing Levels Law, nursing homes must scour every available source for staffing, including retention of agency or per diem contract staff. Yet, under the 70/40 Spending Law, only 85% of this cost is counted for compliance purposes.

271. Moreover, upon information and belief, the 70/40 Spending Law irrationally distinguishes between categories of workers that deliver what are defined in DOH's regulations as "clinical services", counting some clinical services as "direct resident care" but not others. 10 N.Y.C.R.R. § 415.22. For example, the 70/40 Spending Law does not count medical records expenses towards direct resident care, even though such staff are defined in DOH regulations as providing clinical services, and medical records are maintained in order to facilitate and ensure the provision of resident care. In addition, the 70/40 Spending Law excludes security staff spending from "direct resident care", even though the DOH regulation requiring provision of security states that the purpose of the service is "maintaining the safety and well-being of residential health care facility patients". 10 N.Y.C.R.R. § 455.8.

272. Thus, this nonsensical approach will both: (i) result in nursing homes being able to exclude capital reimbursement based upon four/five star facility status one day -- only to be forced to include capital reimbursement after a single negative survey results in a star rating reduction that will make any financing for a nursing home capital project nearly impossible; and (ii) perversely discourage lower rated facilities from investing in capital projects that will improve resident care and quality of life due to a potential violation of the 70/40 Spending Law.

273. The interaction of the Staffing Levels Law and the 70/40 Spending Law is particularly irrational. Because it will be impossible for most facilities to comply with the Staffing Levels Law, many if not most will face severe penalties, which will not count toward their direct care expenses for purposes of 70/40 compliance. For at least some facilities, this will result in the seizure of amounts equivalent to the Staffing Level penalties (effectively a double fine), which will further deplete resources needed for hiring and retaining staff, resulting in more fines and the seizure of more funds -- a death spiral that will not support improvements in resident care.

274. Further, the provision in the 70/40 Spending Law that annual "revenues" cannot exceed 105% of "expenses", or the excess will be seized by Defendants, bears no rational relationship to any legitimate government interest.

275. Accordingly, Petitioners are entitled to a judgment declaring that implementation or enforcement of the 70/40 Spending Law violates Petitioners' constitutional right to substantive due process.

276. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the Legislation by Defendants.

277. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the 70/40 Spending Law by Defendants.

**AS AND FOR A SIXTH CAUSE OF ACTION**  
**VIOLATION OF CONTRACTS CLAUSE**  
**(CPLR 3001 and CPLR art. 63)**

278. Petitioners repeat and re-allege each of the foregoing paragraphs as if fully set forth herein.

279. Section 10 of Article I of the U.S. Constitution prohibits any State from enacting any "Law impairing the Obligation of Contracts". The clause also applies to State agency rulemaking (*see Krabel v New York City Dept. of Hous. Preserv. & Dev.*, 959 F.2d 395, 403 [2d Cir 1992]). Article I, Section 6 of the New York State Constitution also prohibits the State from impairing contractual obligations (*see Peoples Sav. Bank of Yonkers, N.Y. v County Dollar Corp.*, 43 AD2d 327, 332 [2d Dept 1974], *aff'd* 35 NY2d 836 [1974]).

280. To the extent that the 70/40 Spending Law empowers Defendants to seize from nursing homes amounts paid by the Federal Medicare program or pursuant to a contract with a resident or resident's private insurance company, the statute substantially impairs Petitioners' contractual relationships with CMS and non-governmental payers.

281. Upon information and belief, Defendants have no significant and legitimate public purpose in implementing or enforcing the 70/40 Spending Law.

282. Moreover, even if a legitimate public purpose for the 70/40 Spending Law could be identified by Defendants, the adjustment of rights and responsibilities of the contracting



parties is not based upon reasonable conditions nor of a character appropriate to the public purpose justifying the 70/40 Spending Law.

283. By virtue of the foregoing, the Defendants have violated, and are continuing to violate, the Contracts Clause of the U.S. Constitution and the Due Process Clause of the New York State Constitution.

284. Accordingly, Petitioners are entitled to a judgment declaring that implementation or enforcement of the 70/40 Spending Law violates Petitioners' constitutional right to be free from State impairment of contracts.

285. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the 70/40 Spending Law by Defendants.

286. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the 70/40 Spending Law by Defendants.

**AS AND FOR A SEVENTH CAUSE OF ACTION**  
**TAKING WITHOUT JUST COMPENSATION**  
**(CPLR 3001 and CPLR art. 63)**

287. Petitioners repeat and re-allege each of the foregoing paragraphs as if fully set forth herein.

288. The Takings Clause of the Fifth Amendment to the U.S. Constitution, as applicable to the states through the Fourteenth Amendment, prohibits Defendants from taking any "private property . . . for public use, without just compensation."

289. Article I, Section 7 of the New York State Constitution contains an identical prohibition on takings.

290. In addition, the State may not deprive a municipal corporation of funds in which it has a vested property right or interest, such as payments for services rendered to nursing home residents, without due process of law (*see County of Chemung v Shah*, 28 NY3d 244, 263 [2016]).

291. These constitutional safeguards are intended to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

292. In the context of a state-declared health care workforce shortage emergency, it is impossible for the Individual Petitioners to comply with the staffing mandate. They will not be able to hire approximately 12,000 new nurses and aides in the near term and will not qualify for any relief due to extraordinary circumstances because their staffing shortage is fully foreseeable. And, even if they were to qualify for relief, the regulations proposed by the Department of Health would impose a minimum of \$300 per day in penalties for every day in a quarter in which a facility is non-compliant, even when extraordinary circumstances exist. Thus, virtually all facilities will face penalties under the staffing mandate. Those penalties will further deplete their resources and prevent them from investing in recruiting and retaining staff.

293. The interaction between the two laws creates a situation in which the facilities are doomed to fail, and the state's ability to enrich itself at their expense grows. The Staffing Levels Law is infeasible and will lead to fines that may ultimately render facilities unable to satisfy the direct care spending requirements, which will in turn drive additional seizures of funds, further diminishing the ability of facilities to hire and retain staff.

294. The State has done nothing to assist nursing homes to comply with the laws. It has not distributed the paltry amount of funds it appropriated last year to enable nursing homes to recruit more staff, and it failed to appropriate an adequate amount of funds this year.

295. Nor may a nursing home simply close or cease operations in response, inasmuch as DOH must approve of any closure plan before it takes effect. Further, nursing home closure would be severely disruptive to the facility's residents and staff.

296. The Individual Petitioners have a legitimate property interest in the maintaining fiscally viable operations. To the extent that New York's Medicaid rate fails to cover nursing home operators' actual and reasonable costs of compliance with the Legislation—estimated by DOH at over \$1.8 billion—the State has interfered with the distinct 'investment-backed expectations' of the Individual Petitioners and other LeadingAge members.

297. The character of this governmental action does not merely adjust the benefits and burdens of economic life to promote the common good. Rather, it specifically targets nursing home operators, rather than health care providers more broadly. In fact, legislation addressing hospital staffing enacted at the same time as the nursing home Staffing Levels Law took a much more flexible approach.

298. The Legislation constitutes a regulatory taking of private property for public use without just compensation.

299. By virtue of the foregoing, the Defendants have violated, and are continuing to violate, the Takings Clause of the U.S. and New York State Constitutions and/or the due process clauses of the U.S. and New York State Constitutions.

300. Accordingly, Petitioners are entitled to a judgment declaring that implementation or enforcement of the Legislation violates Petitioners' constitutional right to be free from takings without just compensation.

301. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the Legislation by Defendants.

302. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the Legislation by Defendants.

**AS AND FOR AN EIGHTH CAUSE OF ACTION**  
**UNCONSTITUTIONALLY EXCESSIVE FINES**  
**(CPLR 3001 and CPLR art. 63)**

303. Petitioners repeat and re-allege each of the foregoing paragraphs as if fully set forth herein.

304. The Eighth Amendment to the U.S. Constitution, as applicable to the states through the Fourteenth Amendment, prohibits Defendants from imposing any "excessive fines".

305. Article I, Section 5 of the New York State Constitution prohibits the imposition of "excessive fines".

306. Seizure of a nursing home's operating revenues that exceed 105% of operating and non-operating expenses, seizure of revenues based upon spending that does not meet arbitrary targets fixed by the New York State Legislature, and imposing monetary penalties of \$2,000 per day based upon noncompliance with arbitrary and infeasible staffing hours requirements that are not based upon patient needs, are all fines imposed by the Legislation that are excessive and violative of the Eighth Amendment. Further, the regulations proposed under

the staffing legislation impose minimum fines of \$300 per day even if the facility demonstrates that its non-compliance was due to extraordinary circumstances beyond its control.

307. The interaction between the penalties likely to result from the infeasible Staffing Levels Law and compliance with the 70/40 Spending Law will drive additional seizures of funds, further diminishing the ability of facilities to comply with the Staffing Levels Law and triggering additional penalties.

308. Moreover, the seizures and fines in the Legislation are excessive inasmuch as they are grossly disproportionate with respect to the Individual Petitioners and other facilities that are high-quality providers.

309. Accordingly, Petitioners are entitled to a judgment declaring that implementation or enforcement of the Legislation violates Petitioners' constitutional right to be free from excessive fines.

310. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the Legislation by Defendants.

311. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the Legislation by Defendants.

**AS AND FOR A NINTH CAUSE OF ACTION**  
**VIOLATION OF RATE ADEQUACY REGULATIONS AND STATUTE**  
**(CPLR 3001 and CPLR art. 63)**

312. Petitioners incorporate and reallege the allegations of all prior paragraphs as if fully set forth herein.

313. Article VI, clause 22 of the United States Constitution (the "Supremacy Clause") provides that "[t]his Constitution, and the Laws of the United States which shall be

made in Pursuance thereof; and all Treaties made; or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

314. Federal law requires the State pay all Medicaid providers rates that are “consistent with efficiency, economy, and quality of care and sufficient to enlist enough providers so that services under the plan are available to beneficiaries at least to the extent that those services are available to the general population.” 42 C.F.R. § 447.204 (a).

315. Federal law further requires that, nursing homes be paid Medicaid “rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers to provide services in conformity with applicable State and Federal laws, regulations, and quality and safety standards.” 42 C.F.R. § 447.253 (b) (1) (i).

316. Further, Section 2807 (3) of the New York Public Health Law requires the Commissioner to “determine” that nursing home Medicaid reimbursement rates “are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities”.

317. DOH itself concluded in its August 2020 report analyzing similar proposed minimum staffing legislation that, the “lower bound” of increased costs for nursing home providers statewide was potentially \$1,898,600,000.00. DOH Report, at 35.

318. Upon information and belief, the Medicaid rates to be paid effective on and after January 1, 2022 will not be reasonable and adequate to meet the costs that must be incurred to comply with the Legislation, because the only adjustment to the Medicaid rate targeted at

staffing will be the maximum of \$187 million payments which might be made by DOH if it receives approval by the Director for an expenditure plan that may benefit only providers that already comply with the 70/40 Spending Law. This amount does not cover the amount needed to recruit the additional nurses and aides necessary to comply with this mandate.

319. By virtue of the foregoing, the Defendants have violated, and are continuing to violate, the regulations and statute governing the adequacy of Medicaid payment to nursing homes.

320. Accordingly, Petitioners are entitled to a judgment declaring that implementation or enforcement of the Legislation violates 42 C.F.R. §§ 447.204 and 447.253 and Section 2807 (3) of the New York Public Health Law.

321. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the Legislation by Defendants.

322. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the Legislation by Defendants.

**AS AND FOR A TENTH CAUSE OF ACTION**  
**VIOLATION OF RESTRICTION ON STATE USE OF MEDICARE FUNDS**  
**(CPLR 3001 and CPLR art. 63)**

323. Petitioners incorporate and reallege the allegations of all prior paragraphs as if fully set forth herein.

324. Article VI, clause 22 of the United States Constitution (the “Supremacy Clause”) provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made; or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

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be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

325. Federal regulations prohibit Defendants from using Federal Medicare funds to financially support New York State’s share of the costs of its Medicaid program. *See* 42 C.F.R. § 433.51.

326. By directing the Commissioner and DOH to recoup Medicare funds for deposit into the Quality Pool, a State Medicaid program, the 70/40 Spending Law violates Federal law.

327. Accordingly, Petitioners are entitled to a judgment declaring that implementation or enforcement of the 70/40 Spending Law violates 42 C.F.R. § 433.51.

328. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the 70/40 Spending Law by Defendants.

329. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the 70/40 Spending Law by Defendants.

**AS AND FOR AN ELEVENTH CAUSE OF ACTION**  
**ILLEGAL AMENDMENT OF STATE MEDICAID PLAN WITHOUT PRIOR CMS**  
**APPROVAL**  
**(CPLR 3001 and CPLR art. 63)**

330. Petitioners incorporate and reallege the allegations of all prior paragraphs as if fully set forth herein.

331. Federal law requires the State pay rates to long term care facilities, such as nursing homes, that are “determined in accordance with methods and standards specified in an approved State plan”. 42 C.F.R. § 447.253 (i).



332. Federal law requires “material” alterations to the State’s approved Medicaid plan to be submitted to CMS. *See* 42 C.F.R. § 430.12 (c).

333. CMS has instructed States that “[f]ederal statute and regulations require CMS to review and approve SPAs for consistency with the requirements of § 1902(a) of the Social Security Act (the ‘Act’) *before* a state may implement Medicaid program modifications”. CMS Dear State Medicaid Director Ltr. No. SMD #10-020 (Oct. 1, 2010); *see California Assn. of Rural Health Clinics v Douglas*, 738 F.3d 1007, 1018 (9th Cir 2013).

334. Attachment 4.19-D of New York’s approved Medicaid State Plan contains the rules governing the nursing home quality pool incentive payment program (the “Quality Pool”).

335. The approved Quality Pool program does not contemplate or address revenues seized from nursing homes pursuant to the 70/40 Spending Law. Although DOH proposed an amendment to the Quality Pool portion of the approved Medicaid State Plan on March 31, 2022, the proposed amendment does not address recoupment pursuant to the 70/40 Spending Law.

336. Rather, the approved Quality Pool program was established consistent with Public Health Law § 2808 (2-c) (d), which states that the Quality Pool exists “[f]or purposes of facilitating quality improvements” and is “funded at the discretion of the commissioner by (i) adjustments in medical assistance [i.e., Medicaid] rates, (ii) funds made available through state appropriations, or (iii) a combination thereof,” not payments by the Federal Medicare program or from private payors.

337. The DOH rule concerning the approved Quality Pool program provides that the Quality Pool is funded exclusively via “a Medicaid rate reduction” calculated pursuant to the

rule (10 NYCRR 86-2.42 [c]). The use of Medicare and private payments is not permitted.

338. Seizing funds from nursing homes pursuant to the 70/40 Spending Law for deposit into the Quality Pool would constitute a material, illegal alteration of the approved State Medicaid Plan document governing the Quality Pool.

339. DOH has not applied for, let alone obtained CMS approval for, a SPA that would modify the Quality Pool section of the Medicaid State Plan to permit seizure of so-called excess revenues, including Medicare and private payments, from nursing homes for deposit into and distribution from the Quality Pool.

340. Absent CMS approval of a SPA submitted following public notice and comment as required by CMS regulations, Defendants cannot implement the 70/40 Spending Law without running afoul of federal law, inasmuch as the statute requires funds to be deposited into the Quality Pool.

341. Accordingly, Petitioners are entitled to a judgment declaring that implementation or enforcement of the 70/40 Spending Law violates CMS regulations applicable to the Medicaid State Plan.

342. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the 70/40 Spending Law by Defendants.

343. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the 70/40 Spending Law by Defendants.

**AS AND FOR A TWELFTH CAUSE OF ACTION**  
**ARBITRARY AND CAPRICIOUS EXECUTIVE ACTION**  
**(CPLR 7803 & 7805)**

344. Petitioners incorporate and reallege the allegations of all prior paragraphs as if fully set forth herein.

345. CPLR 7803 (3) proscribes actions by state government bodies and officers that are “affected by an error of law or [are] arbitrary and capricious”.

346. The Governor is an officer of the state who may be a party to an Article 78 proceeding pursuant to CPLR 7802 (a) (*see Betzler v Carey*, 109 Misc 2d 881, 886-887 [Sup Ct, Chemung County 1981], *affd* 91 AD2d 1116 [3d Dept 1983], *lv denied* 59 NY2d 601 [1983]).

347. Courts have held that state agencies and officers act irrationally if they take an action or position that marks an “unsubstantiated departure from the agency’s previous position on a given subject” (*see Matter of Entergy Nuclear Indian Point 2, LLC v New York State Dept. of State*, 130 AD3d 1190, 1192 [3d Dept 2015]; *see also Matter of United Univ. Professions v State of New York*, 36 AD3d 297 [3d Dept 2006]).

348. Agency and official actions that are “unsupported by any evidence” are also arbitrary and capricious under CPLR 7803 (*Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health*, 85 NY2d 326, 332 [1995]).

349. In Executive Order 4.4, the Governor, based upon “staffing shortages in hospitals and other healthcare facilities and they are expected to continue” and a “staffing shortage caused by the Covid-19 public health emergency”, determined that the Staffing Levels Law and 70/40 Spending Law should be suspended or modified. The Governor continued this

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determination in Executive Orders 4.5 and 4.6.

350. In Executive Orders 4.7 and 4.8, the Governor, while acknowledging the continued staffing shortages Statewide, and without any stated reasoning or factual basis to distinguish the present staffing situation facing nursing homes from that in previous months, determined that the Staffing Levels Law and 70/40 Spending Law should take full force and effect on April 1, 2022.

351. This determination is also contrary to DOH's determination in the DOH Report that a "team-based approach to healthcare that fundamentally requires flexible staffing solutions is essential to a sustainable system that can support an effective pandemic response" (DOH Report, at 43). It also disregards the labor pool data discussed in the DOH Report, which concluded that, even before the determination of a healthcare worker staffing shortage in Executive Order 4, there were zero RNs unemployed and looking for nursing home work in half of the regions in the State, and zero LPNs unemployed and looking for nursing home work on Long Island (DOH Report, at 65).

352. This determination in Executive Order 4.7 that the Staffing Levels Law and 70/40 Spending Law should take effect was arbitrary and capricious, irrational, and should be annulled.

353. Accordingly, Petitioners are entitled to an order annulling, vacating, and/or enjoining any implementation and/or enforcement of the Staffing Levels Law and/or 70/40 Spending Law by Defendants until a reasonable time after the staffing shortage acknowledged in Executive Order 4.4 has abated.

**AS AND FOR A THIRTEENTH CAUSE OF ACTION**  
**VIOLATION OF CONSTITUTIONAL RIGHT TO EQUAL PROTECTION**  
**(CPLR 3001 and CPLR art. 63)**

354. Petitioners incorporate and reallege the allegations of all prior paragraphs as if fully set forth herein.

355. Petitioners have a right under the New York State Constitution to “equal protection of the laws of this [S]tate” (NY Const, art I, § 11). The 14<sup>th</sup> Amendment to the United States Constitution provides that Defendants may not “deny” Petitioners “the equal protection of the laws.”

356. Both nursing homes and general hospitals are defined as “hospitals” in article 28 of the Public Health Law and subject to Medicaid rate-setting by DOH that is governed by the same statute (Public Health Law § 2801 [1]; *see* Public Health Law § 2807).

357. Both nursing homes and general hospitals must provide nursing care to patients on a 24-hour basis (*see* 42 CFR 483.35 [nursing homes]; 42 CFR 482.23 [general hospitals]).

358. Further, as is the case with general hospitals in this State, all of LeadingAge’s members are nonprofit or publicly owned (*see* Public Health Law § 2801-a [9]).

359. The Challenged Legislation treats nursing homes differently from general hospitals. There is no equivalent to the 70/40 Spending Law for general hospitals. The Staffing Levels Law applies only to nursing homes, while the statute enacted applicable to general hospitals does not generally mandate specific numbers of nursing hours per patient per day.

360. There is no rational basis for the distinction drawn by the Challenged Legislation between nursing homes and general hospitals.

361. Petitioners are directly and irreparably harmed by the Challenged Legislation inasmuch as they are, unlike general hospitals, subject to seizure under the 70/40 Spending Law and civil monetary penalties under the Staffing Levels Law.

362. Accordingly, Petitioners are entitled to a judgment declaring that implementation or enforcement of the Challenged Legislation violates the Equal Protection Clauses of the New York State and United States Constitutions.

363. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the Challenged Legislation by Defendants.

364. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the Challenged Legislation by Defendants.

**AS AND FOR A FOURTEENTH CAUSE OF ACTION**  
**VIOLATION OF CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS**  
**(CPLR 3001 and CPLR art. 63)**

365. Petitioners incorporate and reallege the allegations of all prior paragraphs as if fully set forth herein.

366. Section 1 of the Fourteenth Amendment to the United States Constitution provides, as relevant here, that “No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law”.

367. Article I, Section 6 of the New York State Constitution provides that “[n]o person shall be deprived of life, liberty or property without due process of law.”

368. Petitioners have a constitutionally protected interest in not being deprived of Medicare, Medicaid, and private payments made to them without due process of law.

369. The 70/40 Spending Law directs Respondents to recoup, i.e., seize funds from Petitioners without prior notice or an opportunity to be heard.

370. Seizure of Petitioners' property without prior notice and an opportunity to be heard violates Petitioners' constitutional rights to due process of law.

371. Accordingly, Petitioners are entitled to a judgment declaring that implementation or enforcement of the 70/40 Spending Law violates the Due Process Clauses of the New York State and United States Constitutions.

372. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the 70/40 Spending Law by Defendants.

373. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the 70/40 Spending Law by Defendants.

**AS AND FOR A FIFTEENTH CAUSE OF ACTION**  
**VIOLATION OF CONSTITUTIONAL LIBERTY INTERESTS**  
**(CPLR 3001 and CPLR art. 63)**

374. Petitioners incorporate and reallege the allegations of all prior paragraphs as if fully set forth herein.

375. Section 1 of the Fourteenth Amendment to the United States Constitution provides, as relevant here, that "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law".

376. Article I, Section 6 of the New York State Constitution provides that “[n]o person shall be deprived of life, liberty or property without due process of law.”

377. Accordingly, Petitioners have a constitutionally protected liberty interest.

378. The Staffing Levels Law violates the constitutionally protected interests of Petitioners, as nursing home facilities, by labelling them with the injurious label of not meeting “staffing standards,” imposing significant burdens upon them by virtue of this label, irrespective of whether the nursing home is assuring residents attain or maintain their highest practicable physical, mental, and psychosocial well-being.

379. Accordingly, Petitioners are entitled to a judgment declaring that implementation or enforcement of the Staffing Levels Law violates the Due Process Clauses of the New York State and United States Constitutions.

380. Moreover, Petitioners have no adequate remedy at law to prevent the violation of their rights by implementation and/or enforcement of the Staffing Levels Law by Defendants.

381. Accordingly, Petitioners are entitled to injunctive relief restraining implementation and/or enforcement of the Staffing Levels Law by Defendants.

**WHEREFORE**, Petitioners respectfully request that the Court:

A. A statewide preliminary and permanent injunction, restraining and enjoining the Defendants, their officers, agents, employees, attorneys and successors in office, and all other persons in active concert therewith, of and from implementation or enforcement of the Legislation, including, but not limited to, any actions to adopt or amend regulations pursuant to the Legislation, to recoup funds from or impose civil monetary penalties upon nursing homes



based upon the Legislation;

B. Enter an order declaring the Legislation unconstitutional and/or illegal for the reasons stated herein;

C. Award Petitioners their reasonable attorneys' fees, costs, and disbursements pursuant to CPLR article 86; and

D. Grant such other and further relief as the Court deems just and proper.

Dated: May 23, 2022  
Albany, New York

HINMAN STRAUB P.C.

By 

David T. Luntz  
David B. Morgen

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VERIFICATION

STATE OF NEW YORK     }  
                                  } ss.:  
COUNTY OF ALBANY     }

JAMES CLYNE, being duly sworn, deposes and says as follows:

I am the President and Chief Executive Officer of LeadingAge New York, Inc., a petitioner-plaintiff in this hybrid proceeding and action and I have read the foregoing Verified Petition and Complaint and know the contents thereof. The same is true to my knowledge, except as to those matters alleged upon information and belief, and as to those matters as I believe them to be true.

Sworn to before me this 23<sup>rd</sup>  
day of May, 2022.

  
JAMES CLYNE

  
Notary Public

**SUSAN V. DIXON**  
**NOTARY PUBLIC, STATE OF NEW YORK**  
**NO. 01DI5021789**  
**Qualified in Saratoga County**  
**My Commission Expires: Dec. 27, 2025**