No. 22-55332

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUDREY HEREDIA, as successor-in-interest to the Estate of Carlos Heredia; AMY FEARN, as successor-in-interest to the Estate of Edith Zack; and HELEN GANZ, by and through her Guardian ad Litem, Elise Ganz, on behalf of themselves and all others similarly situated,

***Plaintiffs-Appellees*,**

v.

SUNRISE SENIOR LIVING, LLC; and SUNRISE SENIOR LIVING MANAGEMENT, INC.,

***Defendants-Appellants*.**

On Appeal from the United States District Court for the Central District of California Case No. 8:18-CV-1974 | Hon. Josephine L. Staton

---

BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION AND CALIFORNIA LONG TERM CARE OMBUDSMEN ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES

WILLIAM ALVARADO RIVERA*
MERYL D. GRENADIER
STEFAN SHAIBANI
AARP FOUNDATION
601 E Street, NW
Washington, DC 20049
(202) 434-3392
warivera@aarp.org
Counsel for Amici Curiae
* Counsel of Record

CORPORATE DISCLOSURE STATEMENT

AARP and AARP Foundation

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

California Long Term Care Ombudsmen Association

The California Long-Term Care Ombudsman Association ("CLTCOA") does not have a parent corporation, and no publicly traded corporation owns 10% or more of its stock. CLTCOA is organized as a 501(c)(3) tax exempt nonprofit corporation.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. Private Enforcement Is the Primary Means of Protecting Residents of Assisted Living Facilities Because Assisted Living is Inadequately Regulated 4

II. The Market for Assisted Living is Growing 12

III. The District Court Did Not Abuse Its Discretion In Certifying The Class Because Staffing Is A Material Component Of Assisted Living 15

A. Prospective Residents And Their Families Carefully Consider Their Selection Of Assisted Living Facility 15

B. Assisted Living Facility Residents Pay A Lot Of Money to Move Into a Facility 17

C. Staffing Is a Critical Factor In Selecting an Assisted Living Facility 18

D. Insufficient Staffing Negatively Impacts the Health and Wellbeing of Residents 21

CONCLUSION 23

CERTIFICATE OF COMPLIANCE 24

CERTIFICATE OF SERVICE AND FILING 25

TABLE OF AUTHORITIES

Cases

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997).....9

Becerra v. General Motors, LLC,
241 F. Supp. 3d 1094 (S.D. Cal. 2017) 11

Bright v. Brookdale,
No. 19-CV-374 (M.D. Tenn.)..... 1

Doe #1, et al. v. Alden Group Ltd., et al.,
No. 2022-CH-09754 (Ill. Cir. Ct.)..... 1

Eisen v. Carlisle and Jacqueline,
417 U.S. 156 (1974).....9

Heredia v. Sunrise Senior Living LLC,
No. 8:18-cv-01974, 2021 WL 6104188 (C.D. Cal. Nov. 16, 2021)..... 10-11, 15

Hinojos v. Kohl's Corp.,
718 F.3d 1098 (9th Cir. 2013).....11

Keegan v. Honda Motor Co., Inc.,
838 F. Supp. 2d 929 (C.D. Cal. 2012).....11

Six (6) Mexican Workers v. Arizona Citrus Growers,
904 F.2d 1301 (9th Cir. 1990).....9

Vasquez v. Superior Ct.,
4 Cal. 3d 800 (1971).....10

Statutes

42 U.S.C. § 1395i–3 *et seq*. 5

State Statutes

California Health & Safety Code § 1569.33(b) 7

Consumer Legal Remedies Act, California Civil Code §§ 1750, et seq. 11

Unfair Competition Law, California Business and Professions Code §§ 17200, et seq 11

Rules

Fed. R. App. P. 29(a)(4)(E)..... 1

Fed. R. App. Proc. 29(a)(4)(E). 1

Fed. R. Civ. P., Rule 23 9

Other Authorities

AARP, *2018 Staying Home And Community Preference Survey*, bit.ly/3RfvxNN 13-14

AARP, *Assisted Living Facilities: Weighing the Options* (Dec. 3, 2021), bit.ly/3HIVZfF 14

AARP Pub. Pol'y Inst., *Disrupting the Marketplace* (2018), bit.ly/3Y5NC2X.....17

Admin. for Cmty. Living, *2021 Profile of Older Americans* (2022), bit.ly/3HGObe4 12

Admin. for Cmty. Living, *How Much Care Will You Need?*, LongTermCare.gov (February 18, 2020), bit.ly/3HJtqic 13

Advisory Board, *What Drives Consumer Choice in Senior Living?* (2016), bit.ly/408vY0t.....18

Assistant Sec'y for Plan. and Evaluation, *Most Older Adults are Likely to Need Long-Term Services and Supports* (2021), bit.ly/3Du4j03 13

Kimberly Bonvissuto, McKnights Senior Living, *Senior Living, Led by Assisted Living, Sees Strong Occupancy Rate Gains in Third Quarter*, (Oct. 7, 2022).....12

Janet Buelow & Frank Fee, *Perceptions of Care and Satisfaction in Assisted Living Facilities*, 17 Health Mktg. Q. 13, (2000), bit.ly/3XPAG1g 20

Cal. Advoc. for Nursing Home Reform, *Residential Care in California: Unsafe, Unregulated & Unaccountable* (2013), bit.ly/3Hcgoba.....8

Cal. CA Dep't of Fin., *P-1B Total Population by Individual Year of Age* Projections (July 19, 2021), bit.ly/3WPetiD 13

Cal. Dep't of Aging, *California Master Plan for Aging* (2021), bit.ly/3HmuCql. 13

Cal. Dep't Soc. Serv., *Evaluator Manual, Facility Evaluation/ Visits* (2022), bit.ly/3WWvSWY 6

Cal. Dep't Soc. Serv., PIN 21-25-ASC, *Annual Inspections Utilizing the Infection Control Domain* (2021), bit.ly/3WN4pa6 7

Cal. Dep't Soc. Serv., PIN 21-35-ASC, *Update Regarding the Resumption of Annual Inspections Using the Compliance and Regulatory Enforcement (CARE) Tools* (2021), bit.ly/3Ju43lx 7

Cal. Dep't Soc. Serv., PIN 20-07-CCLD, *Suspension of All Annual Inspections to Allow Technical Assistance for Licensees Regarding the Coronavirus 2019 Disease* (2020), bit.ly/3DpvHwa.....7

Cal. Dep't Soc. Serv., *Residential Care Facilities for the Elderly, Most Common Deficiencies for All Visit Types in 2019* (2020), bit.ly/3kHPRuP 8

Suja Chaulagain et al. *What Matters, and What Matters Most? Exploring Resident Satisfaction in Continuing Care Retirement Communities*, 34 Int'l J. of Contemp. Hosp. Mgmt. (2022), bit.ly/3kOek1D 19

Shu-li Chen et al., *Elders' Decisions to Enter Assisted Living Facilities*, 22 J. Hous. for the Elderly (2008), bit.ly/3DqmDaw 14, 16

Sara Clemens et al., *The Relationship between Quality and Staffing in Long-Term Care*, 122 Int'l J. of Nursing Studies (2021), bit.ly/3jecUND 21

Myriam Gilles, Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer *Class Actions*, 59 DePaul L. Rev. 3052010) 9

Grand View Rsch., *U.S. Assisted Living Facility Market Size, Share & Trend Analysis Report By Age (More than 85, 75–84, 65–74, Less than 65) Region (West, South, Midwest), and Segment Forecasts, 2022–2030* Report Overview (2022), bit.ly/3XRYAtk. 12

Angela Greene et al. *How do Family Members Define Quality in Assisted Living Facilities?*, 21 J. of the Am. Soc'y on Aging (1997), bit.ly/3XQ9ZcT 20

J.D. Power, *Senior Living Community Selection Driven by Convenient Location; Satisfaction Driven by Quality Staff, J.D. Power Finds* (2018), bit.ly/3HmOB86 19

Eric Jutkowitz et al., *Effects of Nurse Staffing on Resident Outcomes in Nursing Homes*, J. of Am. Med. Dir. Ass'n (forthcoming 2023), bit.ly/3jjNb6w 21

Kaiser Comm'n on Medicaid and the Uninsured, *Medicaid and Long-Term Services and Supports* Figure (2015), bit.ly/3wE9iay 17

Terry Koenig et al., *Older Adult and Family Member Perspectives of the Decision-Making Process Involved in Moving to Assisted Living*, 13 Qualitative Soc. Work (2013), bit.ly/3XPiULQ 16, 19

Diana T.F. Lee et al., *A Review of Older People's Experiences with Residential Care Placement*, 37 J. of Advanced Nursing (2002), bit.ly/3kSNsO9 15

Thomas Lehnert et al., *Stated Preferences for Long-Term Care*, 39 Ageing and Soc'y (2019), bit.ly/3kPWrzA 18

Nat'l Health Pol'y F., *National Spending for Long-Term Services and Supports* (2012), bit.ly/3XZCx3s 17

Nat'l Ctr. for Health Stat., *Residential Care Communities and Their Residents in 2010* (2016), bit.ly/3kVw2Aw. 18

Nat'l Ctr. for Health Stat., *Residential Care Facilities: A Key Sector in the Spectrum of Long-Term Care Providers in the United States* (2011), bit.ly/3HHLEjV 17

Nat'l Ctr. for Health Stat., *Residential Living in Care Facilities: United States 2010* (2012), bit.ly/3HgMiU1 17

Nat'l Ctr. For Health Stat., *Variation in Residential Care Community Resident Characteristics, by Size of Community* 1 (2022), bit.ly/3Ybx4GX 12, 14

Nat'l Long-Term Care Ombudsmen, *2019 All A Tables* Tab A-4A, Row 14, bit.ly/3WJn0nb 8

NIC MAP Vision, *4Q22 Market Fundamentals* 1 (October 6, 2022), bit.ly/3YqAEx5. 12

Caroline Pearson et al., *The Forgotten Middle*, 38 Health Affairs (2019), bit.ly/3RfOCiS. 18

Lexi Pitz, *The Critical Need for State Regulation of Assisted Living Facilities: Defining "Critical Incidents," Implementing Staff Training, and Requiring Disclosure of Facility Data*, 105 Minn. L. Rev. 1009 (2020). 6

Andrew W. Roberts, et al., U.S. Census Bureau, *The Population 65 Years and Older in the United States: 2016*, bit.ly/3Jnnnkv 13

Kali Thomas et al., *The Relationship between States' Staffing Regulations and Hospitalizations of Assisted Living Residents,* 40 Health Affairs (2021), bit.ly/3HEd8WD. 22

U.S. Gov't Accountability Off., GAO-18-179, *Medicaid Assisted Living Services: Improved Oversight of Beneficiary Health and Welfare is Needed* (2018), bit.ly/3RgUdoY 5, 6, 9

Sheryl Zimmerman et al., *Recommendations for Medical and Mental Health Care Based on an Expert Delphi Consensus Panel*, J. of Am. Med. Ass'n Consensus Statement 4–5 and Table 2 (2022), bit.ly/3YqKSNZ. 22

STATEMENT OF INTEREST[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial resilience, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity. Among other things, AARP and AARP Foundation fight to ensure that older adults have the power to make informed choices about where they live, including through participation as counsel or amici curiae in state and federal courts. *See, e.g., Bright v. Brookdale*, No. 19-CV-374 (M.D. Tenn.) (class action challenging assisted living chain systematic understaffing in Florida and North Carolina assisted living facilities)*;* and Complaint, *Doe #1, et al. v. Alden Group Ltd., et al.*, No. 2022-CH-09754 (Ill. Cir. Ct.) (class action challenging staffing levels in skilled nursing facility chain).

---

[1] No party's counsel authored this brief in whole or in part. Likewise, no party nor party's counsel contributed money for preparing or submitting this brief. No person or entity other than Amici Curiae themselves contributed money for preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E). Counsel of record for all parties received timely notice of Amici's intent to file this brief and consented to same. Fed. R. App. P. 29(a)(2).

The California Long-Term Care Ombudsman Association is a membership organization comprised of local Long-Term Care Ombudsmen, their staff, and volunteers. The state and federally mandated purpose of the Long-Term Care (LTC) Ombudsman Program is to ensure the highest possible quality of life and care for older adults and adults with disabilities living in long term care, including skilled nursing facilities (SNFs), residential care facilities for the elderly (RCFEs), and assisted living facilities (ALFs). The program, which is overseen by the Office of State Long Term Care Ombudsman within the California Department of Aging, provides regular, unannounced in-person facility monitoring visits and resident-centered advocacy conducted by state-certified Ombudsman representatives. These advocates identify and resolve complaints and ensure that facilities are free from health and safety issues.

Amici submit this brief urging affirmance of the District Court decision below granting class certification. The Court correctly found that class members suffered economic injury when they paid Sunrise for assisted living services without being told that Sunrise fails to ensure facility staffing is sufficient to provide those promised services.

SUMMARY OF THE ARGUMENT

Amici are organizations dedicated to the well-being of older adults. Many of the people we serve reside in assisted living facilities or will consider doing so. Because assisted living facilities are largely unregulated, when a facility fails to disclose that it cannot provide the staffing required to meet the aggregate needs of the residents, the dangers to the people in their custodial care are profound. These concerns will only grow as the elderly population in the United States continues to rise.

In the absence of meaningful regulation, private litigation, such as this case, is the primary mechanism for older adults to enforce their rights. This appeal thus presents an issue extraordinarily important to *amici*—when a chain of assisted living facilities has systemically failed to disclose that it lacked the capacity to provide the level of care that it promised, can the victims effectively hold it accountable? The District Court did not abuse its discretion in answering in the affirmative.

Due to the importance and cost of the decision, prospective residents carefully evaluate their selection of an assisted living facility. A facility's promise to adequately staff is one of, if not the most, material consideration because understaffing is the root of a multitude of negative health outcomes. If a facility fails to deploy enough staff, residents will suffer falls and bedsores, their call lights

will go unanswered, nobody will help them to use the bathroom, and they will suffer many other forms of neglect. Although these health concerns are separate and distinct from the economic injury suffered by the class, they are front of mind when prospective residents and their families choose a facility. *See* Appellee Br. 24-27.

The District Court correctly found that Appellants' misrepresentations and omissions about their staffing can be litigated on a class-wide basis. Appellants mislead residents and their loved ones into paying for care based on the belief that their care needs would be met. Appellants failed to disclose that they lacked adequate staff capacity to actually meet those needs, harming class members financially. This is a prototypical economic loss.

For these reasons, the District Court's decision granting class certification should be affirmed.

ARGUMENT

I. PRIVATE ENFORCEMENT IS THE PRIMARY MEANS OF PROTECTING RESIDENTS OF ASSISTED LIVING FACILITIES BECAUSE ASSISTED LIVING IS INADEQUATELY REGULATED

Oversight of assisted living facilities in the United States is lacking, at both the federal and state level. In the absence of robust regulation, class actions—like this one—are one of the only ways for older adults to assert and enforce their rights

as consumers. This is especially important when, as alleged here, the undisclosed defect can impact a resident's health and safety. *See* Appellee Br. 13-15.

At the federal level, there is extremely limited supervision of assisted living facilities and virtually no enforcement action. "In contrast to long-term care services provided in nursing facilities, less is known at the federal level about the oversight and quality of care in assisted living facilities." U.S. Gov't Accountability Off., GAO-18-179, *Medicaid Assisted Living Services: Improved Oversight of Beneficiary Health and Welfare is Needed* 9, 28 (2018), bit.ly/3RgUdoY (oversight limited to state-reported deficiencies, and many states fail to report).[2] Because nursing facilities are funded in large part by Medicaid, and, to a lesser extent, Medicare, they are subject to the conditions of participation detailed in the federal Nursing Home Reform Act and corresponding regulations. *See generally* 42 U.S.C. § 1395i–3 *et seq*. This statutory and regulatory scheme is intended to ensure there is at least a foundational level of requirements for nursing facilities related to licensure, administration, quality, and resident rights.

In contrast, no equivalent regulatory structure exists for assisted living facilities at the federal level. States that choose to cover certain assisted living services (excluding room and board) through Medicaid-funded home and

[2] Unless otherwise indicated, citations omit internal quotation marks, alterations, citations, and footnotes in text quoted.

community-based services ("HCBS") waivers are subject to some limited requirements, but the federal government only exercises minimal indirect oversight over assisted living facilities by monitoring states with these types of waivers rather than the facilities themselves. *See* Lexi Pitz, *The Critical Need for State Regulation of Assisted Living Facilities: Defining "Critical Incidents," Implementing Staff Training, and Requiring Disclosure of Facility Data*, 105 Minn. L. Rev. 1009, 1017–19, 1028 (2020). In 2018, the Government Accountability Office (GAO) found significant shortcomings with this system as a result of broad language in the HCBS waiver application requirements, extensive discretion afforded states in how to collect and report information, and inconsistent enforcement by the Center for Medicare and Medicaid Services ("CMS") of the requirement that states submit annual reports for HCBS waivers. U.S. Gov't Accountability Off., GAO-18-179, *Medicaid Assisted Living Services* at 27–32.

At the state level, regulation of assisted living facilities varies considerably. *See* Pitz, *Critical Need* at 1021–28. Notably, in California, the California Department of Social Services ("CDSS") has no policies or guidelines for inspecting assisted living facilities for compliance with the requirement to provide sufficient staffing other than assessing whether "clients require a level of care that cannot be met by facility staff." *See* Cal. Dep't Soc. Serv., *Evaluator Manual, Facility Evaluation/Visits* 18 (2022), bit.ly/3WWvSWY. Moreover, although

annual inspection of assisted living facilities is required by California Health & Safety Code § 1569.33(b) under certain circumstances, there have been no such inspections for nearly three years due to the COVID-19 pandemic. *See* Cal. Dep't Soc. Serv., PIN 20-07-CCLD, *Suspension of All Annual Inspections to Allow Technical Assistance for Licensees Regarding the Coronavirus 2019 Disease* 1 (2020), bit.ly/3DpvHwa. In May 2021, CDSS announced that all inspections would be focused on infection control, meaning it would cite noncompliance for violations of regulations other than infection control only if those violations were observed during an infection control inspection. *See* Cal. Dep't Soc. Serv., PIN 21-25-ASC, *Annual Inspections Utilizing the Infection Control Domain* 2 (2021), bit.ly/3WN4pa6. CDSS continues today to limit its annual inspections to infection control reviews only. *See* Cal. Dep't Soc. Serv., PIN 21-35-ASC, *Update Regarding the Resumption of Annual Inspections Using the Compliance and Regulatory Enforcement (CARE) Tools* 3 (2021), bit.ly/3Ju43lx ("CDSS will *temporarily delay* the pivot to conducting annual inspections using the Compliance and Regulatory Enforcement (CARE) tool, and instead maintain our priority focus on infection control") (emphasis added).

For these reasons, the citations received by Sunrise facilities in the relevant period are a microcosm of the industry's widespread violations of regulatory requirements affecting the health and safety of elderly residents and those with

disabilities. Appellee's Br. 14-15. By way of example, in 2019, the Quality Assurance Unit of CDSS identified 14,907 deficiencies cited at assisted living facilities in California, and the California Long-Term Care Ombudsman received 11,829 complaints relating to resident care, resident rights, and quality of life, among other things, at assisted living facilities. Cal. Dep't Soc. Serv., *Residential Care Facilities for the Elderly, Most Common Deficiencies for All Visit Types in 2019* 1 (2020), bit.ly/3kHPRuP; Nat'l Long-Term Care Ombudsmen, *2019 All A Tables* Tab A-4A, Row 14, bit.ly/3WJn0nb. Given the limitations of CDSS's ability to conduct inspections, the actual deficiencies are likely far higher, amounting to a system that is both unsafe for residents and facilities that are "essentially unregulated and unaccountable for their actions." Cal. Advoc. for Nursing Home Reform, *Residential Care in California: Unsafe, Unregulated & Unaccountable* 3–10 (2013), bit.ly/3Hcgoba, (noting a "failed inspection system; a broken complaint system; limited and ineffective penalties for violations; outdated and inadequate staffing and staff training requirements; the failure to provide consumers with any comparative information about the quality of care . . . all contribute to a system that is unsafe for consumers."). "Effective state and federal oversight is necessary to ensure that the health and welfare of Medicaid beneficiaries receiving assisted living services are protected, especially given the particular vulnerability of many of these beneficiaries to abuse, neglect, or

exploitation." U.S. Gov't Accountability Off., GAO-18-179, *Medicaid Assisted Living Services* at 33.

In the absence of robust regulation and enforcement by CMS and state licensing authorities, class actions—such as the instant case—are the principal means for vulnerable older adults and people with disabilities to assert and enforce their rights as consumers. *See Amchem Products, Inc. v. Windsor* 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."); *Eisen v. Carlisle and Jacqueline*, 417 U.S. 156, 161 (1974) ("Economic reality dictates that petitioner's suit proceed as a class action or not at all."); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990) ("where the statutory objectives include enforcement, deterrence or disgorgement, the class action may be the superior and only viable method to achieve those objectives."); Fed. R. Civ. P., Rule 23, 1966 Amend. Adv. Comm. Notes ("the class may have a high degree of cohesion … [so] that separate suits would be impracticable.").

Indeed, consumer protection statutes providing a private right of action were enacted to effectuate these purposes. *See* Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions,* 59 DePaul L. Rev. 305, 306–07 (2010) ("Nearly every state also has laws on its books

to protect . . . consumers, and many of these statutes expressly anticipate consumer class actions as a principal means of enforcement"). As the California Supreme Court explained in *Vasquez v. Superior Ct.*, 4 Cal. 3d 800 (1971):

> Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.

Id. at 808. The need for class actions is especially clear when, as alleged here, the uniform failure to disclose the defects in the staffing formula adopted by Sunrise to maximize profits impacts a residents' health and safety.

Amici American Seniors Housing Association, Argentum, and California Assisted Living Association contend class action litigation diverts resources and impedes providing quality care by forcing assisted living facilities to incur legal expenses to defend unmeritorious claims. Amicus Br. 21–29. However, the District Court correctly concluded Appellees' claims are meritorious and ample evidence suggests Sunrise misrepresented its capacity to staff its facilities to consumers. *See Heredia v. Sunrise Senior Living LLC*, No. 8:18-cv-01974, 2021 WL 6104188, at

*11-12 (C.D. Cal. Nov. 16, 2021) ("the underlying evidence illustrates that Plaintiffs can point to Sunrise's use of 'round down' target staffing formula and alleged corporate knowledge that 'its staffing formula placed care managers in an impossible position' to show intent to defraud."). Amici's argument disregards the purpose of consumer protection statutes: to redress deceptive corporate practices that harm real people.

The consumer statutes alleged to have been violated here, the Unfair Competition Law, California Business and Professions Code §§ 17200, *et seq.*, and the Consumer Legal Remedies Act, California Civil Code §§ 1750, *et seq.*, were enacted to enable consumers to enforce their rights when they fall victim to false promises. *See Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1107–08 (9th Cir. 2013); *Becerra v. General Motors, LLC*, 241 F. Supp. 3d 1094, 1111 (S.D. Cal. 2017) ("The purpose of the UCL is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services."); *Keegan v. Honda Motor Co., Inc.*, 838 F. Supp. 2d 929, 938 (C.D. Cal. 2012) (the "underlying purposes [of the CLRA] are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection."). That is precisely what Plaintiffs-Appellees seek to do here.

II. THE MARKET FOR ASSISTED LIVING IS GROWING

In 2021, the U.S. assisted living facility market size was estimated at $87.4 billion. Grand View Rsch., *U.S. Assisted Living Facility Market Size, Share & Trend Analysis Report By Age (More than 85, 75–84, 65–74, Less than 65), Region (West, South, Midwest), and Segment Forecasts, 2022–2030* Report Overview (2022), bit.ly/3XRYAtk. This number is expected to grow rapidly, reaching $140.8 billion by 2030. *Id.* In 2020, an estimated 818,800 residents lived in assisted living communities across the country. Nat'l Ctr. For Health Stat., *Variation in Residential Care Community Resident Characteristics, by Size of Community* 1 (2022), bit.ly/3Ybx4GX. And although the pandemic caused a dip in occupancy rates, as of October 2022 those rates were on the rise, with assisted living experiencing the highest number of occupied living units ever. Kimberly Bonvissuto, McKnights Senior Living, *Senior Living, Led by Assisted Living, Sees Strong Occupancy Rate Gains in Third Quarter*, (Oct. 7, 2022) (citing NIC MAP Vision, *4Q22 Market Fundamentals* 1 (October 6, 2022)), bit.ly/3YqAEx5.

The major driver of this market growth is the increasing older population. In the United States, the number of adults aged 65 and older is expected to almost double, rising to 95 million in 2060 from 54 million in 2019. Admin. for Cmty. Living, *2021 Profile of Older Americans* 5 (2022), bit.ly/3HGObe4. In California, the population aged 60 and older is expected to increase 166 percent during that

time frame, reaching over 14 million. Cal. CA Dep't of Fin., *P-1B Total Population by Individual Year of Age* Projections (July 19, 2021), bit.ly/3WPetiD. The California Master Plan for Aging describes this population increase as a "seismic demographic shift that will change every aspect of our life" that will also require millions of new housing options and access to caregivers. Cal. Dep't of Aging, *California Master Plan for Aging* 2, 11 (2021), bit.ly/3HmuCql.

As people age, the likelihood that they will live with a disability also rises, resulting in difficulty walking, seeing, hearing, concentrating, remembering, making decisions, dressing, bathing, or living independently. Andrew W. Roberts, et al., U.S. Census Bureau, *The Population 65 Years and Older in the United States: 2016* 15, bit.ly/3Jnnnkv. As a result, more than one half of older adults will rely upon paid long-term services and supports at some point after reaching age 65. Assistant Sec'y for Plan. and Evaluation, *Most Older Adults are Likely to Need Long-Term Services and Supports* 3 (2021), bit.ly/3Du4j03; *see also* Admin. for Cmty. Living, *How Much Care Will You Need?*, LongTermCare.gov (February 18, 2020), bit.ly/3HJtqic (someone turning age 65 today has almost a 70% chance of needing some type of long-term care services). Although nearly 80 percent of adults aged 50 and older desire to stay in their homes and communities as they age, many of those homes would require major modifications in order to make that wish a reality. AARP, *2018 Staying Home And Community Preference Survey* 4,

bit.ly/3RfvxNN. Many older adults therefore turn to assisted living so they can continue to age in the community and maintain independence while also receiving key long-term services and support they need.

Assisted living facilities offer a range of services, available to residents to meet both their scheduled and unscheduled needs. Shu-li Chen et al., *Elders' Decisions to Enter Assisted Living Facilities*, 22 J. Hous. for the Elderly 86, 87 (2008), bit.ly/3DqmDaw. Residents of assisted living facilities typically have their own room. AARP, *Assisted Living Facilities: Weighing the Options* (Dec. 3, 2021), bit.ly/3HIVZfF. Services offered include meals, housekeeping, laundry, and around-the-clock supervision. *Id.* According to the National Center for Assisted Living, a majority of facilities also offer access to some or all of the following basic healthcare services: a pharmacy, dietary and nutritional guidance, physical, occupational, and/or speech therapy, hospice care, nursing care, mental health services or counseling, or social worker services. *Id.* Residents of assisted living facilities often require help with essential daily tasks including dressing, bathing, walking, shopping, managing medications, paying bills, going to the doctor, running errands, and eating. Nat'l Ctr. for Health Stat., *Variation in Residential Care Community Resident Characteristics, by Size of Community* Figure 4 (2022), bit.ly/3Ybx4GX.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING THE CLASS BECAUSE STAFFING IS A MATERIAL COMPONENT OF ASSISTED LIVING

Moving to assisted living is not a decision that older adults take lightly. Not only is selecting a particular assisted living facility a major life decision, but it is also a decision that involves considerable expense. For these reasons, it is paramount that the information provided to prospective residents—especially information related to clinical staffing at facilities—is accurate. Sunrise failed to disclose its deficient staffing protocol to residents and their families, thus harming all members of the class because they paid for something they did not receive. The District Court correctly held that staffing considerations were material to class members' decision to contract with Sunrise and that residents may pursue their damages against Sunrise on a class-wide basis. *Heredia v. Sunrise Senior Living LLC*, No. 8:18-cv-01974, 2021 WL 6104188, at *11-12 (C.D. Cal. Nov. 16, 2021).

A. PROSPECTIVE RESIDENTS AND THEIR FAMILIES CAREFULLY CONSIDER THEIR SELECTION OF ASSISTED LIVING FACILITY

Deciding to move to an assisted living facility is a significant source of fear and stress among older adults. They face the physical change to their primary living space as well as the attendant changes to daily life patterns, social networks, and support. Diana T.F. Lee et al., *A Review of Older People's Experiences with Residential Care Placement*, 37 J. of Advanced Nursing 19–20 (2002), bit.ly/3kSNsO9. Some older adults describe declines in physical and/or cognitive

functioning as the impetus for the move to an assisted living facility; while others cite a single event, like a fall, major illness, or death of a spouse that impacted their ability to continue to live independently. Terry Koenig et al., *Older Adult and Family Member Perspectives of the Decision-Making Process Involved in Moving to Assisted Living*, 13 Qualitative Soc. Work 335, 337 (2013), bit.ly/3XPiULQ; *see also* Shu-li Chen et al., *Elders' Decisions to Enter Assisted Living Facilities*, 22 J. Hous. for the Elderly 86, 88 (2008), bit.ly/3DqmDaw.

For example, an older adult who participated in a qualitative study of the decision-making process recounted going to the desk at the grocery store and asking for help picking out soup from the shelves because they were nearly blind, saying, "And you know I can't live like that. I made up my mind that day to move [to assisted living]." Shu-li Chen, et al., *Elders' Decisions* at 94. Another described living in a nursing facility for months after a hip replacement, and not being able to return home or move in with family: "there was no place back home that I could stay. So I could not stay there, so I moved here [to assisted living]." *Id.* at 98. Underscoring the difficulty of this decision, another study participant said "I would tell you it's not easy to move. But when you need some help you've got to go where the help is." *Id.* at 101.

B. ASSISTED LIVING FACILITY RESIDENTS PAY A LOT OF MONEY TO MOVE INTO A FACILITY

It is not surprising that older adults expect to get everything they are promised at assisted living facilities since they pay a lot per year. The median rate of a private one-bedroom unit in an assisted living facility was $45,000 per year in 2017, more than the entire income (107 percent) of the typical older family. AARP Pub. Pol'y Inst., *Disrupting the Marketplace* 1 (2018), bit.ly/3Y5NC2X. "Medicare plays no role in financing" long-term care, like assisted living. Nat'l Health Pol'y F., *National Spending for Long-Term Services and Supports* 3 (2012), bit.ly/3XZCx3s. Medicaid does fund some assisted living, but it is limited: 57% of facilities have no residents who receive funding through Medicaid, and 81% of assisted living residents receive no Medicaid funding whatsoever. Nat'l Ctr. for Health Stat., *Residential Care Facilities: A Key Sector in the Spectrum of Long-Term Care Providers in the United States* 3 (2011), bit.ly/3HHLEjV; Nat'l Ctr. for Health Stat., *Residential Living in Care Facilities: United States 2010* 2 (2012), bit.ly/3HgMiU1. Private long-term care insurance funds only about 8% of long-term care expenditures. Kaiser Comm'n on Medicaid and the Uninsured, *Medicaid and Long-Term Services and Supports* Figure 3 (2015), bit.ly/3wE9iay. Older adults pay for the remaining costs themselves.

In the absence of insurance or government funding, the expenses quickly add up. In 2010, assisted living residents were charged a combined $28 billion for

room, board, and services. Nat'l Ctr. for Health Stat., *Residential Care Communities and Their Residents in 2010* 19 (2016), bit.ly/3kVw2Aw. The numbers paint a concerning picture, in that "most of tomorrow's middle-income seniors will lack the financial resources required to pay for private seniors housing, regardless of their preferences." Caroline Pearson et al., *The Forgotten Middle*, 38 Health Affairs 851, 857 (2019), bit.ly/3RfOCiS.

C. STAFFING IS A CRITICAL FACTOR IN SELECTING AN ASSISTED LIVING FACILITY

Given that older adults enter assisted living because they need assistance with activities of daily living, the availability of adequate staff is a critical factor guiding which facility an older adult selects. When surveyed about facility quality, residents and their families consistently pointed to the importance of staff in their answers. Respondents to a survey cited "regular/constant, flexible, reliable and punctual care-givers" as important to their preferences in long-term care. Thomas Lehnert et al., *Stated Preferences for Long-Term Care*, 39 Ageing and Soc'y 1873, 1893, 1898 (2019), bit.ly/3kPWrzA. Another study found that, "staff at the community will check on me" and "there are emergency call buttons if I need help" were tied for second most important considerations, with cost being the first factor considered. Advisory Board, *What Drives Consumer Choice in Senior Living?* 4 (2016), bit.ly/408vY0t. In another study, all of the older adults and family members assessed the types of assisted living services provided to meet the

older adults' needs as a major factor in their assisted living decision, saying "Absolutely yes… All the services that are offered are exactly what we were looking for." Terry Koenig et al., *Older Adult and Family Member Perspectives* at 342. Necessarily underlying the importance of these services are *people* sufficient to actually provide them.

Staffing continues to drive satisfaction even after residents have entered a facility, since leaving means facing the financial costs of moving and the psychological burden of starting the search for a home again. A recent study concluded that "community staff is most important to overall satisfaction: When looking at all the factors that make up the senior living experience, caregiver and staff significantly stands out from the others." J.D. Power, *Senior Living Community Selection Driven by Convenient Location; Satisfaction Driven by Quality Staff, J.D. Power Finds* 3 (2018), bit.ly/3HmOB86. Staffing was twice as important as cost to continued resident satisfaction. *Id.* When understaffing leads to inconsistent provision of services, resident satisfaction drops precipitously. *Id.*

The importance of staffing to satisfaction is echoed throughout the scientific literature. "Staff play a crucial role in affecting resident satisfaction." Suja Chaulagain et al. *What Matters, and What Matters Most? Exploring Resident Satisfaction in Continuing Care Retirement Communities*, 34 Int'l J. of Contemp. Hosp. Mgmt. 2472, 2475, 2486 (2022), bit.ly/3kOek1D. Family members who

responded to another survey discussed the "key role played by staff," including both staffing type and level. Angela Greene et al. *How do Family Members Define Quality in Assisted Living Facilities?*, 21 J. of the Am. Soc'y on Aging 34, 35 (1997), bit.ly/3XQ9ZcT. "Family members spoke of staff-to-resident ratios at each focus group, with high ratios being of greater importance as their relative's condition declined." *Id.*

Conversely, inadequate staffing is a consistent source of dissatisfaction. In one study, the most common complaints concerned the imbalanced ratio between residents and staff. Janet Buelow & Frank Fee, *Perceptions of Care and Satisfaction in Assisted Living Facilities*, 17 Health Mktg. Q. 13, 20–21 (2000), bit.ly/3XPAG1g. For example, residents complained about the slow response time to emergency call lights, to the point that they described it as effectively "no emergency response system." *Id.* Many were left waiting for half an hour or more. *Id.* They worry that someday they will fall and help will not come. *Id.* This fear is especially acute on weekends when "even less help is available." *Id.* Inadequate staffing, coupled with high turnover, means that staff are not able to build relationships with residents. This was another common source of complaints, as both residents and their family value staff's genuine concern, kindness, respect, and consistent attentiveness. *Id.*

D. INSUFFICIENT STAFFING NEGATIVELY IMPACTS THE HEALTH AND WELLBEING OF RESIDENTS

Older adults have good reason to care about staffing in assisted living facilities. They need to be able to rely on the representations made by assisted living facilities when choosing where to live because their lives depend on making the right decision. Thus, although separate and distinct from the *legal* injury alleged by Appellees, the relationship between staffing and health outcomes helps to underscore why sufficient staffing is a material component of assisted living.

Understaffing has been consistently tied to negative health outcomes for residents in long-term care.[3] Sara Clemens et al., *The Relationship between Quality and Staffing in Long-Term Care*, 122 Int'l J. of Nursing Studies 1, 7, 10 (2021), bit.ly/3jecUND. Inadequate staffing leads to more pressure ulcers, more infections, more cases of and deaths from COVID-19, more frequent and intensive hospitalization, and more moderate-severe pain and depression. *Id.;* Eric Jutkowitz et al., *Effects of Nurse Staffing on Resident Outcomes in Nursing Homes*, J. of Am. Med. Dir. Ass'n 3 (forthcoming 2023), bit.ly/3jjNb6w.

[3] Because of the greater medical and regulatory attention to nursing homes, discussed further *infra*, much of the existent scientific literature concerns the relationship between staffing and health outcomes in those facilities. Given the similarities between the types of hands-on assistance with activities of daily living provided at the two types of facilities, it is logical to conclude that these findings hold true in the assisted living context.

Without sufficient clinical staff, residents suffer deterioration in functional status. Kali Thomas et al., *The Relationship between States' Staffing Regulations and Hospitalizations of Assisted Living Residents,* 40 Health Affairs 1377, 1383 (2021), bit.ly/3HEd8WD. They are rendered more dependent on facilities and their staff to manage their health and live their lives. In this way, insufficient staffing creates a vicious cycle of negative health outcomes. Residents of poorly staffed facilities need more care simply to maintain their well-being. This care is not provided by understaffed facilities, and so their health continues to decline.

For these reasons, expert geriatric physicians decided, by 100% consensus, that an adequately trained and staffed clinical team is the single most important recommendation they could offer to operators of assisted living facilities. Sheryl Zimmerman et al., *Recommendations for Medical and Mental Health Care Based on an Expert Delphi Consensus Panel*, J. of Am. Med. Ass'n Consensus Statement 4–5 and Table 2 (2022), bit.ly/3YqKSNZ.

Older adults in understaffed facilities put their health in the hands of people who cannot fulfill that responsibility. Deciding who to trust with your life requires accurate information about what you are buying. An empty promise that misrepresents staffing levels exposes older adults to risks they did not bargain for, and—ultimately—may die for.

CONCLUSION

For the above reasons, amici respectfully request that the District Court's decision granting class certification be affirmed.

Dated: February 3, 2023

Respectfully submitted,

/s/ William Alvarado Rivera
WILLIAM ALVARADO RIVERA*
MERYL GRENADIER
STEFAN SHAIBANI
AARP FOUNDATION
601 E Street, NW
Washington, DC 20049
(202) 434-3392
warivera@aarp.org
mgrenadier@aarp.org
sshaibani@aarp.org

Counsel for Amici Curiae
*Counsel of Record

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because the brief contains 5,041 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Dated: February 3, 2023

/s/ William Alvarado Rivera
WILLIAM ALVARADO RIVERA*

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on February 3, 2023, the foregoing Brief Of Amici Curiae AARP, AARP Foundation And California Long Term Care Ombudsmen Association In Support Of Plaintiffs-Appellees was electronically filed with the Clerk of the Court for the United States Court of Appeals of the Ninth Circuit using the appellate CM/ECF system which will send notice of such filing to all registered CM/ECF users.

Dated: February 3, 2023

/s/ William Alvarado Rivera
WILLIAM ALVARADO RIVERA*