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FLORIDA NEEDS TO PROTECT GRANDMA & GRANDPA

Jessica A. Alvarez*

I. INTRODUCTION

After enduring a bowel obstruction surgery, 89-year-old, Hussein Younes, was checked into the Autumnwood of Livonia nursing home.¹ During his visits with his father, Younes' son, Salim Younes, noticed cuts and bruises on his father's head and legs, as well as drastic weight loss.² The nursing home attributed these lesions to eleven falls that Younes had over the span of five months.³ Salim voiced his concerns to the staff at Autumnwood, who "assured [him] everything [would] be taken care of."⁴ However, Salim needed to confirm his suspicions and installed a hidden camera in his father's room.⁵ To his dismay, the footage showed

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1. See Dana Afana, *Family Sues Livonia Nursing Home Over Abuse Captured on Hidden Camera*, MICHIGAN LIVE (Mar. 5, 2018), https://www.mlive.com/news/detroit/index.ssf/2018/03/family_sues_livonia_nursing_ho.html (stating that Younes was seeking care at Autumnwood); see also Sarah Cwick, *Video: "Horrible" Nursing Home Abuse Caught on Hidden Camera*, MICH. RADIO (Mar. 5, 2018), <http://www.michiganradio.org/post/video-horrible-nursing-home-abuse-caught-hidden-camera> (explaining that Hussein Younes was staying at Autumnwood for six months after undergoing bowel reconstruction surgery).

2. See Afana, *supra* note 1 (explaining that Salim Younes was suspicious of the lesions on his father's body); see also Cwick, *supra* note 1 (explaining that Salim also noticed his father's significant weight loss while at Autumnwood).

3. See The Associated Press, *Family Sues Michigan Nursing Home Over Abuse Caught on Video*, NAT'L POST (Mar. 6, 2018), <https://nationalpost.com/pmnn/news-pmnn/family-sues-michigan-nursing-home-over-abuse-caught-on-video> (stating that Autumnwood blamed Younes' injuries to eleven falls that happened over five months of Younes' residency); see also Afana, *supra* note 1 (stating that the numerous falls over five months were evidence indicating this was "not an isolated incident").

4. See Afana, *supra* note 1 (explaining that while Autumnwood investigated and reported the allegation to the local police, Autumnwood could not confirm the allegations); see also Cwick, *supra* note 1 (stating that Autumnwood was notified of the abuse in December 2015 but did not offer the family any details).

5. See Afana, *supra* note 1 (explaining that after Salim complained to Autumnwood, Younes' situation continued to worsen, and Salim took matters into his own hands and installed

Autumnwood staff verbally and physically abusing Younes.⁶ Younes was “denied water, had his ‘call button’ taken away from him, [was] violently shaken by his head[,] and had his legs run into the wall and wheelchair while being moved.”⁷ With only two days of footage, the hidden camera captured over one hundred (100) clips documenting neglectful and abusive acts towards Younes.⁸ Without the use of this hidden camera, Hussein Younes would likely have suffered more abuse.⁹

Currently, Section 400.022, Florida Statutes, does not include the right for nursing home residents, or their family members, to install electronic monitoring devices in a resident’s room.¹⁰ Florida should amend Section 400.022, Florida Statutes, to allow nursing home residents and their family member to conduct such monitoring.¹¹ Doing so would ensure that the elderly population living in these nursing homes are protected and their loved ones can keep an eye on them from afar.¹²

the hidden camera); *see also* Cwiek, *supra* note 1 (explaining that Salim put a hidden camera disguised as an alarm clock in his father’s room due to suspicions of abuse).

6. *See* The Associated Press, *supra* note 3 (stating that the caretakers “physically abused and hurled ethnic slurs at Younes”); *see also* Cwiek, *supra* note 1 (stating that the video shows one of the nurse’s aides telling Younes, “I’m sick of your stupid ass. Get your ass up here,” and jerks him roughly from his wheelchair to his bed).

7. Afana, *supra* note 1 (“The complaint also alleges Younes was denied water, had his ‘call button’ taken away from him, [was] violently shaken by his head and had his legs run into the wall and wheelchair while being moved.”); *see also* Cwiek, *supra* note 1 (stating that the employees were very rough with Younes “allowing him to slide from his wheelchair to the floor, jerking his head back and forth and yelling obscenities directly into his face, among other abusive and negligent behaviors.”).

8. *See* Afana, *supra* note 1 (stating that the family procured one hundred nineteen (119) clips over only two days of footage); *see also* Cwiek, *supra* note 1 (expressing that the clips captured inconceivable scenes of the abusive behavior by Mr. Younes’ caretakers).

9. *See* Afana, *supra* note 1 (stating that Autumnwood tried to keep the video from being released and kept it a secret); *see also* Cwiek, *supra* note 1 (stating what one of the employees captured on video “was a time bomb waiting to go off” having been disciplined by the state and fired from two other nursing and rehab facilities.”).

10. *See* FLA. STAT. § 400.022 (2018) (establishing rights of nursing home residents, but lacking mention of electronic monitoring); *see also* Dean Freeman, *Hidden Camera Use Weighed After Florida Nursing Home Abuse Revealed*, FLA. NURSING HOME L. BLOG (Mar. 14, 2018), <https://www.floridanursinghomelawyerblog.com/hidden-camera-use-weighed-florida-nursing-home-abuse-revealed/> (providing that Florida does not have a law regarding electronic monitoring).

11. *See* S.B. 896, 2018 (Fla. 2018) (proposing an amendment to Section 400.022, Florida Statutes, to allow nursing home residents to use electronic monitoring devices their rooms); *see also* Nancy Reynolds, *An Update on Granny Cams*, LONG TERM CARE COUNS. (Nov. 27, 2017), <https://ltccounsel.com/an-update-on-granny-cams/> (commenting that since many families are hiding cameras in their loved one’s room regardless of state laws, states and facilities should implement policies regarding the electronic monitoring to have some control on the monitoring).

12. *See* Selket N. Cottle, “Big Brother” and Grandma: An Argument for Video Surveillance in Nursing Homes, 12 ELDER L. J. 119, 147 (2004) (arguing in favor of “enacting legislation

This Comment discusses how amending Florida Senate Bill 896 (“S.B. 896”) to incorporate more specific language regarding who can consent to electronic monitoring devices in the residents’ rooms will help it pass and become part of Section 400.022, Florida Statutes.¹³ Part II will examine the current law in Florida and the attempts to amend it.¹⁴ Part III will explain that allowing electronic monitoring devices is in the best interest of both the resident and the nursing home, and will touch upon issues regarding expectations of privacy.¹⁵ Lastly, Part IV proposes to change the language of S.B. 896 so that it is more likely to be passed.¹⁶

II. BACKGROUND

A. FLORIDA’S ELDERLY POPULATION

Florida has the densest population of elderly people (sixty years and up) in the nation, and that number is increasing every day.¹⁷ The United States Census Bureau estimates that by 2020, the elderly will represent twenty-eight percent (28%) of Florida’s population.¹⁸ To accommodate the growth, Florida has over six hundred (600) registered nursing homes representing relatively eighty-three thousand (83,000) beds.¹⁹ However, a

making granny cams a mandatory component of nursing home life”); *see also* Matthew Ullrich, *What You Need to Know About Granny Cams*, CAPLAN & EARNST (July 17, 2017), <http://www.celaw.com/blog/health-law/need-know-granny-cams> (listing reasons why family members would want to install cameras in their loved one’s room, including having peace of mind by allowing easy check-in on loved ones).

13. *See infra* Part II–III.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See* Chandni Rathod, *The 13 Cities with the Most Old People in America*, BUS. INSIDER (Nov. 17, 2010) <https://www.businessinsider.com/cities-with-the-most-old-people-2010-10> (explaining that Florida “has the densest concentration of old people in the country” and it’s “warm weather and low cost of living makes it an ideal haven for retirement.”); *see also* 2017 *Profile of Older Floridians*, DEP’T OF ELDER AFF., 1, 1 (2017), http://elderaffairs.state.fl.us/doc/pubs/stats/County_2017_projections/Counties/PSA11.pdf (showing the dramatic increase in elderly population projection over the next twenty years).

18. *See Economic Impact of Florida Seniors*, AGING & DISABILITY RESOURCE CTR. OF BROWARD COUNTY, <http://www.adrcbroward.org/economicimpact.php> (last visited Dec. 28, 2019) (“By 2020, the State is expected to have a population of more [than] 23.5 million, and people over 60 will make up over 28% of that population.”); *see also* 2017 *Profile of Older Floridians*, *supra* note 17 (showing that the growth of the elderly population is not slowing down, but continually increasing).

19. *See Facts About Long Term Care in Florida*, FLA. HEALTH CARE ASS’N, http://www.fhca.org/media_center/long_term_health_care_facts (last visited Dec. 28, 2019) (“There are 683 licensed nursing homes in Florida, representing approximately 83,587 beds.”); *see also* *Faculty/Provider Search Results*, FLA. HEALTH FINDER,

survey of nursing home residents showed that up to forty-four percent (44%) of residents reported they had been abused during their residency, and ninety-five percent (95%) reported having seen another resident neglected.²⁰ With these statistics, it is reasonable to believe that being put in one of these facilities will lead to abuse and neglect generally because there are no eyes on the inside.²¹ With the increasing elderly population, it is imperative that Florida's laws are amended to better protect the elderly.²²

B. FLORIDA STATUTE § 400.022

Only nine states in the United States have enacted laws regarding electronic monitoring devices in the rooms of nursing home residents.²³

<http://www.floridahhealthfinder.gov/facilitylocator/ListFacilities.aspx> (last visited Dec. 28, 2019) (listing all 683 licensed nursing homes in Florida, including their addresses, phone numbers and number of licensed beds).

20. See Kayla Gleason, *Florida Fails Seniors*, CBS FOX (Feb. 18, 2018), https://www.actionnewsjax.com/news/florida/florida-fails-seniors/702727380?utm_source=homestream&utm_medium=site_navigation&utm_campaign=homestream_click ("Already, nearly [ninety-six] percent of elder abuse instances go unreported or unresolved . . ."); see also NURSING HOME ABUSE GUIDE, <HTTP://WWW.NURSINGHOMEABUSEGUIDE.ORG> (last visited Dec. 28, 2019) (showing that regardless of anti-elder abuse laws, elders are still being abused).

21. See Brad Schrade, *Families Turn to Cameras in Nursing Homes*, SEATTLE TIMES (Sept. 21, 2011), <https://www.seattletimes.com/seattle-news/health/families-turn-to-cameras-in-nursing-homes/> (explaining that hidden cameras are helping to protect loved ones that are suspected of being abused or mistreated by caregivers); see also NURSING HOME ABUSE GUIDE, *supra* note 20 ("Though many residents are well-cared for, abuse continues to be more prevalent than most people wish to believe and over three-fourths of the cases of nursing home abuse are perpetrated by caregivers.").

22. See Adam McCann, *States with the Best Elder Abuse Protections*, WALLETHUB (Dec 4, 2018), <https://wallethub.com/edu/states-with-best-elder-abuse-protection/28754/> (finding that Florida, compared to the other forty-nine states and the District of Columbia, ranks below average in terms of elder-abuse protection, and finished last in terms of resources for funding long-term care ombudsman and eldercare organizations and services); see also Gleason, *supra* note 20 (stating that Florida is not doing enough to protect their elderly population).

23. See The AARP Bulletin, *New Law Allows Cameras in Nursing Home Rooms*, AARP LA. (Sept. 1, 2018), <https://states.aarp.org/new-law-allows-cameras-in-nursing-home-rooms/> (adding Louisiana to the small group of states that require nursing homes to allow residents to install monitoring devices in their rooms); see also Ullrich, *supra* note 12 (listing the eight states that allow nursing homes to use electronic monitoring devices: Illinois, Maryland, New Mexico, Oklahoma, Texas, Utah, Virginia, and Washington). But see Victor Lane Rose, *Cameras in Long-Term Care: Monitoring, Surveillance, and Risk Management Concerns*, MANAGED HEALTH CARE CONNECT (Aug. 13, 2018), <https://www.managedhealthcareconnect.com/article/cameras-long-term-care-monitoring-surveillance-and-risk-management-concerns> (explaining that fifteen other states have proposed legislation similar to those states who have passed laws regarding the use of cameras in nursing home residents' rooms).

Florida is not one of those states.²⁴ Section 400.022, Florida Statutes, discusses a nursing home resident's rights such as the "right to civil and religious liberties; to be adequately informed of his or her medical condition and proposed treatment; to have privacy in treatment and in caring for personal needs; and to be free from mental and physical abuse, corporal punishment, extended involuntary seclusion."²⁵ Although, the chapter encompassing nursing home laws is silent regarding this issue of electronic monitoring devices, it is not for lack of legislative attempts.²⁶

C. ATTEMPTS TO AMEND FLORIDA STATUTE § 400.022

In 2001, the Florida Senate proposed Senate Bill 1202 ("S.B. 1202") to amend Section 400.022, Florida Statutes, to include Subsection 400.0223, providing for a nursing home resident's right to have electronic monitoring devices in his or her room.²⁷ This provision of S.B. 1202 was not passed.²⁸ Additionally, in 2002, the Florida Senate proposed Senate

24. See *The Rising Use of Surveillance Cameras in Nursing Homes*, JACKSONVILLE INJURY ATT'Y BLOG (Nov. 16, 2017), <https://www.jacksonvilleinjuryattorneyblog.com/rising-use-surveillance-cameras-nursing-homes/> (highlighting that most states, including Florida, do not have laws addressing the issue of installing a camera in the rooms of nursing home residents); see also Freeman, *supra* note 10 (stating that Florida does not have a law allowing the installation of cameras in the rooms of nursing home residents).

25. FLA. STAT. § 400.022 (2018) (listing a nursing home resident's rights); see also *Resident's Rights*, FLA.'S LONG-TERM CARE OMBUDSMAN PROGRAM, <http://ombudsman.myflorida.com/ResidentsRights.php> (last visited Dec. 28, 2019) (listing the rights of nursing home residents according to Section 400.022, Florida Statutes).

26. See FLA. STAT. §§ 400.011–440.334 (2018) (showing that Florida statutes regarding nursing homes do not mention allowing electronic monitoring devices in nursing home residents rooms); see also S.B. 896, 2018 (Fla. 2018) (offering Florida's legislature a second attempt to amend Section 400.022 to include allowing electronic monitoring devices in nursing home resident's rooms); S.B. 1202, 2001 (Fla. 2001) (offering Florida's legislature a first attempt to amend Section 400.022 to include allowing electronic monitoring devices in nursing home residents' rooms).

27. See FLA. STAT. § 400.022 (2018) (showing that there is nothing regarding allowing electronic monitoring devices in nursing home residents' rooms); see also S.B. 1202, 2001 (Fla. 2001) (showing that Florida legislature is attempting to amend Section 400.022 to include allowing electronic monitoring devices in nursing home residents' rooms).

28. See *Senate 1202: Relating to Long-term-care Facilities*, FLA. SENATE WEBSITE ARCHIVE, http://archive.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&Tab=session&BI_Mode=ViewBillInfo&BillNum=1202&Chamber=Senate&Year=2001&Title=%2D%3EBill%2520Info%3AS%25201202%2D%3ESession%25202001 (last visited Dec. 28, 2019) (showing that Subsection 400.0223 did not pass through the Florida Senate); see also Bradley J.B. Toben & Matthew C. Cordon, *Legislative Stasis: The Failures of Legislation and Legislative Proposals Permitting the Use of Electronic Monitoring Devices in Nursing Homes*, 59 BAYLOR L. REV. 675, 709–12 (2007) ("The final committee substitute of Senate Bill 1202 removed the provision that would have allowed electronic monitoring.").

Bill 1714 (“S.B. 1714”) to implement a pilot program to test the impact that electronic monitoring would have on the amount of resident abuse, neglect and exploitation in nursing homes.²⁹ S.B. 1714 passed in the Senate, but died in the House Committee on Rules, Ethics, and Elections.³⁰ In 2017, the Florida Senate again sought to amend Section 400.022, Florida Statutes, with S.B. 896 which allowed residents’ use of electronic monitoring devices in nursing homes.³¹ However, S.B. 896 died in Health Policy, and while it discussed who could request and monitor the resident’s room via electronic monitoring devices, S.B. 896 likely did not pass due to its lack of specificity regarding consent and expectations of privacy that the residents, visitors, and employees [were to] hold.³²

29. See FLA. STAT. § 400.022 (2018) (showing that there is nothing regarding allowing electronic monitoring devices in nursing home residents’ rooms); see also S.B. 1714, 2002 (Fla. 2002) (proposing the implementation of a pilot program with nursing homes to see the effects that having cameras in the rooms of nursing home residents would have on thwarting elder abuse, neglect, and exploitation).

30. See *Senate 1714: Nursing Homes/Electronic Monitoring*, FLA. SENATE WEBSITE ARCHIVE, http://archive.flscenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&BI_Mode=ViewBillInfo&BillNum=1714&Year=2002&Chamber=Senate#Vote (last visited Dec. 28, 2019) (showing that Subsection 400.0223 did not pass through the Florida Senate); see also John Kasprak, *Video Cameras in Nursing Homes*, CONN. GEN. ASSEMBLY (2002), <https://www.cga.ct.gov/2002/rpt/2002-R-0474.htm> (stating that the Bill died in Committee on Rules, Ethics, and Elections).

31. See S.B. 896, 2018 (Fla. 2018) (proposing an amendment to the Florida Statutes to include allowing electronic monitoring devices in nursing home resident’s rooms); see also Allison Nielsen, *Dem Lawmakers Push ‘Granny Cam’ Bill for Closer Watch on Florida Nursing Homes*, SUNSHINE ST. NEWS (Nov. 14, 2017, 11:45 AM), <http://sunshinestatenews.com/story/dem-lawmakers-push-granny-cam-bill-closer-watch-florida-nursing-homes> (stating that the bill would “establish an ‘undercover’ system to watch for abuses and neglect in nursing homes” with the use of electronic monitoring devices).

32. See *S.B. 896: Nursing Homes and Related Health Care Facilities*, FLA. SENATE, <https://www.flscenate.gov/Session/Bill/2018/00896> (last visited Dec. 28, 2019) (stating that S.B. 896 died in Health Policy); see also Jeff Wcinsier, *Hidden Cameras Show Apparent Abuse Inside South Florida Nursing Homes*, WPLG LOCAL 10 (Nov. 13, 2017, 11:55 PM), <https://www.local10.com/news/local-10-investigates/hidden-cameras-show-apparent-abuse-inside-south-florida-nursing-homes> (explaining that the Florida Health Care Association, which represents five hundred fifty (550) of Florida’s six hundred eighty-three (683) nursing homes is opposed to the use of cameras, stating that “[c]ameras observe, they do not protect. . . . Even if proper consent is obtained by one resident, the issue becomes complicated when there are roommates involved.”).

III. DISCUSSION

A. DANGERS OF NOT ALLOWING ELECTRONIC MONITORING

Approximately one out of every four nursing homes fails to provide their patients with proper care, endangering their patients' health and security.³³ Additionally, only one out of every fourteen elder abuse cases is reported.³⁴ Of every reported abuse case, there is estimated to be another twenty-four cases existing that go unreported.³⁵

A study in 2017 which compared all fifty states and the District of Columbia on their elder abuse protections, ranked Florida among the bottom half of the scale.³⁶ Meanwhile, some states with electronic monitoring laws such as Louisiana and Texas, ranked in the top half.³⁷ In another study which examined states' long-term services and support for elders and persons with disabilities, Florida ranked almost last and fell a

33. See *Electronic Monitoring of Nursing Home Residents – A Coming Trend?*, HARDISON & COCHRAN ATT'YS AT LAW, <https://www.lawyernc.com/blog/2015/06/electronic-monitoring-of-nursing-home-residents-a-coming-trend/> (last visited Dec. 28, 2019) (expressing that nursing homes are failing to meet basic standards to provide their residents with quality care); see also Catherine Hawes, *Elder Abuse in Residential Long-Term Care Settings: What is Known and What Information is Needed?*, NAT'L ACADEMIES PRESS, <https://www.ncbi.nlm.nih.gov/books/NBK98786/> (last visited Dec. 28, 2019) (stating how the U.S. Department of Health and Human Services found an increase in neglect and poor quality of care within nursing homes).

34. See *Elder Abuse Statistics*, NURSING HOME ABUSE CTR., <https://www.nursinghomeabusecenter.com/elder-abuse/statistics/> (last visited Dec. 28, 2019) (expressing that only about seven percent (7%) of elder abuse cases are reported to the authorities); see also *Electronic Monitoring of Nursing Home Residents – A Coming Trend?*, *supra* note 33 (expressing that the majority of the elder abuse happening in nursing homes is unknown).

35. See Jeff Rasansky, *Facts & Statistics Regarding Elder Abuse in U.S. Nursing Homes*, NURSING HOME ABUSE STAT. (May 11, 2017), <https://www.jrlawfirm.com/blog/nursing-home-abuse-statistics/> (stating that a New York study found that for every known case of abuse in the state, there were twenty-four the that they were not aware of); see also *Electronic Monitoring of Nursing Home Residents – A Coming Trend?*, *supra* note 33 (expressing that while few elder abuse cases are reported, there are many more unreported cases).

36. See Tom D'Amore, *How Well Does Your State Rank When It Comes to Elder Abuse Protection?*, THE LEGAL EXAMINER (Dec. 11, 2017), <https://www.legalexaminer.com/home-family/how-well-does-your-state-rank-when-it-comes-to-elder-abuse-protection/> (expressing that the rankings of the states with the best and worst protection of elders had nothing to do with the state's region or affluence); see also McCann, *supra* note 22 (showing that Florida ranked below the midpoint at number twenty-two out of fifty-one).

37. See McCann, *supra* note 22 (showing that Louisiana ranked thirteenth, Texas ranked fifteenth, Oklahoma ranked eighteenth, and Virginia ranked thirty-fourth); see also Gleason, *supra* note 20 (stating that Florida ranked below average in regard to elder abuse and neglect protections, and dead last in regard to resources).

few rankings from the previous years.³⁸ Yet, Washington, a state allowing electronic monitoring in nursing homes, went up in rankings over the years and is now the highest ranked state.³⁹

B. HOW TO GET S.B. 896 PASSED

i. Consent

a. Who May Request Electronic Monitoring?

According to S.B. 896, those who may request electronic monitoring in a resident's room are the "resident; the resident's surrogate; the resident's guardian; or, at the resident's request, the resident's personal representative."⁴⁰ While it is good to list the authorized requesters, S.B. 896's identification of the persons who may be authorized to request the use of electronic monitoring devices in the resident's room should have more specificity in identifying who may request such monitoring and under what circumstances.⁴¹ Without these specific guidelines, the resident's privacy rights may be infringed upon.⁴²

38. See Susan C. Reinhard et al., *Picking Up the Pace of Change, 2017: A State Scorecard on Long-Term Services and Supports for Older Adults, People with Physical Disabilities, and Family Caregivers*, LONG-TERM SERVS. & SUPPORTS STATE SCORECARD (June 14, 2017), <http://www.longtermcorecard.org/2017-scorecard> [hereinafter *2017 State Scorecard*] (showing that now in 2017, Florida has fallen in ranks and is now number forty-six); see also Susan C. Reinhard et al., *Raising Expectations, 2014: A State Scorecard on Long-Term Services and Supports for Older Adults, People with Physical Disabilities, and Family Caregivers*, LONG-TERM SERVS. & SUPPORTS STATE SCORECARD (June 19, 2014), <http://www.longtermcorecard.org/2014-scorecard#U6MgrpRdU9V> [hereinafter *2014 State Scorecard*] (showing that in 2014 Florida was ranked forty-three).

39. See WASH. REV. CODE § 388-97-0400 (2018) (explaining a nursing home resident's right to request electronic monitoring of their room); see also *2017 State Scorecard*, *supra* note 38 (explaining that Washington ranked highest in all but one of the five categories examined resulting in Washington being ranked first in the nation for long-term services and support); *2014 State Scorecard*, *supra* note 38 (showing that in 2014, Washington ranked second in the country).

40. See S.B. 896, 2018 (Fla. 2018) (listing those who can request to monitor the resident's room through the use of electronic monitoring devices).

41. See S.B. 896, 2018 (Fla. 2018) (listing only the resident, resident's surrogate, resident's guardian, or resident's personal representative as those who may consent to the request to conduct electronic monitoring in a resident's room); cf. TEX. HEALTH & SAFETY CODE ANN. § 242.845 (2018) (elaborating on who is able to consent to the request to conduct electronic monitoring in a resident's room).

42. See FLA. STAT. § 400.022 (2018) (outlining the rights of nursing home residents, including rights such as the "right to civil and religious liberties, including knowledge of available choices and the right to independent personal decisions"); see also Tracey Kohl, *Watching Out for Grandma: Video Cameras in Nursing Homes May Help to Eliminate Abuse*, 30

In contrast, Section 242.845 of the Texas Health and Safety Statutes,⁴³ clearly sets out who can request the use of these devices by breaking down the hierarchy determined by the resident's mental capacity.⁴⁴ The mental capacity of the resident is determinative because if the resident has capacity, and has not been judicially deemed incapacitated, then only the resident may request the use of the electronic monitoring device.⁴⁵ However, if the resident does not have capacity, and has been judicially deemed incapacitated, then only the guardian of the resident may request the use of the electronic monitoring device.⁴⁶ Additionally, if the resident does not have capacity, and has not been judicially deemed incapacitated, then only the legal representative may request the use of the electronic monitoring device.⁴⁷

FORDHAM URB. L. J. 2003, 2097 (2003) (expressing that guidelines for standards of who can consent is a vital part of any law that allows using cameras in nursing home resident's rooms).

43. See TEX. HEALTH & SAFETY CODE ANN. § 242.845 (2019).

If a resident has capacity to request electronic monitoring and has not been judicially declared to lack the required capacity, only the resident may request authorized electronic monitoring under this subchapter, notwithstanding the terms of any durable power of attorney or similar instrument. If a resident has been judicially declared to lack the capacity required for taking an action such as requesting electronic monitoring, only the guardian of the resident may request electronic monitoring under this subchapter. If a resident does not have capacity to request electronic monitoring but has not been judicially declared to lack the required capacity, only the legal representative of the resident may request electronic monitoring under this subchapter.

Id.; see also Kohl, *supra* note 42, at 2096 (stating that with regard to incapacitated residents Texas has a much more flexible approach).

44. See TEX. HEALTH & SAFETY CODE ANN. § 242.845(c)(2) (2019) (clarifying who is authorized to give consent to conduct electronic monitoring of a resident's room); see also Toben & Cordon, *supra* note 28, at 706–07 (summarizing the Texas statutes regarding who can consent to the use of electronic monitoring devices).

45. See TEX. HEALTH & SAFETY CODE ANN. § 242.845(a) (2019) (explaining that if the resident has capacity, the resident can consent for themselves); see also Toben & Cordon, *supra* note 28, at 706 (summarizing the Texas statute regarding who can consent to the use of electronic monitoring devices when the resident has capacity).

46. See TEX. HEALTH & SAFETY CODE ANN. § 242.845(b) (2019) (explaining that if the resident has legally been deemed to lack capacity the resident's guardian has the authority to request the monitoring of a resident's room); see also Toben & Cordon, *supra* note 28, at 706 (summarizing the Texas statute regarding who can consent to the use of electronic monitoring devices if the resident has been adjudicated incapacitated).

47. See TEX. HEALTH & SAFETY CODE ANN. § 242.845(c) (2019) (explaining that if the resident lacks capacity but has not legally been deemed to lack capacity, the resident's legal representative has the authority to request the monitoring of a resident's room); see also Toben & Cordon, *supra* note 28, at 706 (summarizing the Texas statutes regarding who can consent to the use of electronic monitoring devices when the resident has not been adjudicated incapacitated, but does not have capacity).

Florida law allows persons declared incapacitated to retain their right to privacy,⁴⁸ but certain rights can be delegated to the guardian, such as the right of choosing the incapacitated person's residence and to make decisions regarding his or her social environment.⁴⁹ Thus, S.B. 896 should mirror the Texas Statute guidelines by better identifying who would be an authorized individual allowed to make these decisions regarding the incapacitated person's social environment and how that determination is made based on capacity.⁵⁰ This would also hinder any violations of the resident's rights because no one would be able to monitor the resident without specific authority.⁵¹

b. Form of Requesting Electronic Monitoring

S.B. 896 states that "the nursing home may require that a request to conduct electronic monitoring be made in writing."⁵² However, this vague requirement leaves the form of requesting the monitoring of a resident via electronic monitoring devices up in the air.⁵³ S.B. 896 should require any form of request for electronic monitoring be made in writing.⁵⁴

48. See FLA. STAT. § 744.3215(1)(o) (2019) (stating that a person who has been determined to be incapacitated retains the right to privacy); see also Kohl, *supra* note 42, at 2096 (explaining that under Florida law, incapacitated persons retain their right to privacy).

49. See FLA. STAT. § 744.3215(3)(e)–(g) (2019) (listing rights that may be removed from a adjudicated incapacitated person and delegated to guardians, such as the right "to determine his or her residence[,] to consent to medical and health treatment[, and] to make decisions about his or her social environment or other aspects of his or her life"); see also Kohl, *supra* note 42, at 2096 (stating that state law governs a guardian's decision-making power, and Florida allows guardians to make choices regarding certain aspects of the incapacitated persons social life and environment).

50. See TEX. HEALTH & SAFETY CODE ANN. § 242.845 (2019) (outlining the individuals authorized to consent to the electronic monitoring in the resident's room); see also Toben & Cordon, *supra* note 28, at 706 (stating that generally only a resident can consent to the electronic monitoring, but if the resident lacks capacity then only the resident's guardian or legal representative may consent to the electronic monitoring on the resident's behalf).

51. See Katherine Anne Meier, *Removing the Menacing Specter of Elder Abuse in Nursing Homes Through Video Surveillance*, 50 GONZ. L. REV. 29, 37 n.63 (2014) (citing Op. S.C. Att'y Gen. at 4 (July 16, 2003) ("Applying some modified form of the Hudson balancing test, a court might well hold that the use of video surveillance without the resident's express consent or the consent of the resident's legal representative is an unreasonable invasion of personal privacy."); see also Kohl, *supra* note 42, at 2097 (expressing that guidelines for standards of who can consent is a vitally important when dealing with conducting electronic monitoring in a nursing home resident's room).

52. See S.B. 896, 120th Lcg., Reg. Sess. (Fla. 2018) (stating that nursing homes may require written requests before conducting electronic monitoring of a resident's room); see also Toben & Cordon, *supra* note 28, at 715 (stating that in order to conduct electronic monitoring in a resident's room, Texas statute requires that the authorized party (resident, personal representative, etc.) must complete the prescribed form and submit it to the nursing home manager).

53. See S.B. 896, 120th Leg., Reg. Sess. (Fla. 2018) (failing to have a specific requirement

Section 242.846 of the Texas Health and Safety Code,⁵⁵ also requires the resident or authorized individual requesting the use of electronic monitoring devices to “make the request to the institution on a form prescribed by the department.”⁵⁶ The form explains that, by requesting the use of electronic monitoring devices, the resident or the authorized person requesting must “release the institution of civil liability for violation of privacy rights in connection with the [camera,]” among other restrictions.⁵⁷

S.B. 896’s proposed requirement for the request of conducting electronic monitoring to be in written form could be vital to the nursing home’s defense against certain issues that could arise such as dealing with issues of violations of privacy rights.⁵⁸ The requirement of a written form

on how a resident, or authorized individual, would consent to electronic monitoring). *But see* TEX. HEALTH & SAFETY CODE ANN. § 242.846(a) (2019) (applying a strict requirement that the authorized person who wants to conduct the electronic monitoring is required to make the request by a written form prescribed by the Texas Department of Aging and Disability Services (“DADS”)).

54. *See* TEX. HEALTH & SAFETY CODE ANN. § 242.846(a) (2019) (requiring that any person making the request to conduct electronic monitoring to make the request in writing); *see also* WASH. REV. CODE § 388-97-0400 (2019) (establishing that there must be written consent from both the resident and roommate to request electronic monitoring).

55. *See* TEX. HEALTH & SAFETY CODE ANN. § 242.846 (a)–(b) (2019).

A resident or the guardian or legal representative of a resident who wishes to conduct authorized electronic monitoring must make the request to the institution on a form prescribed by the department. The form prescribed by the department must require the resident or the resident’s guardian or legal representative to: (1) release the institution from any civil liability for a violation of the resident’s privacy rights in connection with the use of the electronic monitoring device; (2) choose, when the electronic monitoring device is a video surveillance camera, whether the camera will always be unobstructed or whether the camera should be obstructed in specified circumstances to protect the dignity of the resident; and (3) obtain the consent of other residents in the room, using a form prescribed for this purpose by the department, if the resident resides in a multiperson room.

Id.

56. *See* TEX. HEALTH & SAFETY CODE ANN. § 242.846(a) (2019) (stating that the request must be a written request via prescribed form from DADS); *see also* Toben & Cordon, *supra* note 28, at 706 (summarizing that DADS requires a prescribed form must be signed by the resident, or the authorized individual for that resident, when the resident is admitted into to the nursing home).

57. *See* TEX. HEALTH & SAFETY CODE ANN. § 242.846(b)(1) (2018) (stating that the form must release the nursing home from civil liability for violating the resident’s privacy rights with the use of the electronic monitoring device); *see also* Kohl, *supra* note 42, at 2084 (stating that Texas statutes require the request form to release the nursing home from civil liability dealing with an invasion of privacy stemming from the electronic monitoring).

58. *See* S.B. 896, 2018 (Fla. 2018) (expressing that the request to conduct electronic monitoring is not required to be in writing, but can be if the facility so chooses); *see also* *Protecting Resident Privacy and Prohibiting Mental Abuse Related to Photographs and Audio/Video Recordings by Nursing Home Staff*, CENTERS FOR MEDICARE & MEDICAID SERVICES 1, 2 (Aug. 5, 2016), <https://www.cms.gov/Medicare/Provider-Enrollment-and->

can also be used to prove the nursing home's notice of the devices, and a written form will ensure that only those who are authorized to consent to the request for the electronic monitoring device are able to do so.⁵⁹ Additionally, the requirement can be used to prove that all procedures necessary to request the electronic monitoring were properly followed by both the nursing home and those requesting the monitoring.⁶⁰

ii. Expectation of Privacy

a. Residents

While Florida has no caselaw construing the laws regarding the privacy rights of nursing home residents, there is concern for their right of privacy in his or her room.⁶¹ Section 400.022, Florida Statutes, strives to protect these privacy rights.⁶² Nursing homes are considered “quasi-private

Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-16-33.pdf (“Taking photographs or recordings of a resident and/or his/her private space without the resident’s, or designated representative’s, written consent, is a violation of the resident’s right to privacy and confidentiality.”).

59. See N.M. STAT. ANN. § 24-26-3 (2018) (allowing electronic monitoring in residents’ rooms as long as the facility is given notice of the installation of the devices, among other restrictions); see also TEX. HEALTH & SAFETY CODE ANN. § 242.846(c) (2018) (stating that only those specified in Section 242.845, Texas Statutes, may consent to request the use of electronic monitoring through the form prescribed by the department).

60. See TEX. HEALTH & SAFETY CODE ANN. § 242.844 (2018) (stating that the prescribed form signed on admission requires certain provisions regarding the institutions release from civil liability for violations of privacy rights, that the person placing the electronic monitoring device “waive[s] any privacy right the resident may have in connection with images or sounds that may be acquired by the device,” and “basic procedures that must be followed to request authorized electronic monitoring”); see also Rose, *supra* note 23 (stating that long-term care facilities are required to acquire written consent before any recordings of residents to protect their privacy rights).

61. See *Beverly Enters.-Florida, Inc. v. Deutsch*, 765 So.2d 778, 784 (Fla. Dist. Ct. App. 2000) (suggesting that Florida’s Constitution strongly protected rights of privacy extend over the “pronounced concern for the privacy of nursing home [residents]”); see also Elizabeth Adelman, *Video Surveillance in Nursing Homes*, 12 ALB. L. J. SCI. & TECH. 821, 837 (2002) (stating that Florida laws aim to strongly protect rights of privacy in nursing homes).

62. See FLA. STAT. § 400.022(1)(m) (2018).

The right to have privacy in treatment and in caring for personal needs; to close room doors and to have facility personnel knock before entering the room, except in the case of an emergency or unless medically contraindicated; and to security in storing and using personal possessions. Privacy of the resident’s body shall be maintained during, but not limited to, toileting, bathing, and other activities of personal hygiene, except as needed for resident safety or assistance. Residents’ personal and medical records shall be confidential and exempt from the provisions of s. 119.07(1).

Id.; see also Adelman, *supra* note 61, at 826 (stating that this provision explicitly protects privacy

facilities”⁶³ where a resident’s room has “an established zone of privacy . . . with expected intrusions caused by the relationship between the resident and the employees.”⁶⁴

S.B. 896 states that “[e]lectronic monitoring is voluntary . . . [and to] the extent possible, such monitoring must protect the privacy rights of other residents and visitors to the nursing home.”⁶⁵ S.B. 896 also requires the nursing home to “make reasonable physical accommodation to facilitate electronic monitoring.”⁶⁶ However, it does not touch upon the resident’s control by imposing restrictions on the use of the electronic monitoring device during certain periods of the day.⁶⁷

Meanwhile, the Texas Statutes discuss that the resident must choose whether the resident wants the electronic monitoring device working at all times, whether the device will have a completely unobstructed view of the room, or whether there will be both audio and visual monitoring, or simply one of those features.⁶⁸ Additionally, if there are other residents in the room, that roommate (or authorized individual) must also consent to the electronic monitoring so that their expectations of privacy are not violated.⁶⁹ The roommate may choose whether the device will be facing them or simply at the initial consenting resident, and whether there should

of nursing homes residents).

63. See *People v. Marino*, 515 N.Y.S.2d 162, 166 (Just. Ct. 1986) (holding that nursing homes were at best a quasi-private facility); see also Adelman, *supra* note 61, at 828 (“[T]he nursing home setting has an established zone of privacy, but with expected intrusions inherent in the proper functioning of the institution.”).

64. See Kohl, *supra* note 42, at 2094 (discussing that courts have found that a zone of privacy can exist for certain places inside healthcare institutions, such as a patient’s room); see also Meier, *supra* note 51, at 36 (explaining that nursing homes are similar to prisons in which there is no definite expectation of privacy in the room or cells, but there is still a zone of privacy).

65. See S.B. 896, 2018 (Fla. 2018) (stating that any electronic monitoring conducted is not compulsory and must strive to preserve the resident’s privacy as much as possible).

66. See S.B. 896, 2018 (Fla. 2018) (stating that the nursing home must make accommodations for the electronic monitoring devices).

67. See S.B. 896, 2018 (Fla. 2018) (showing that the S.B. 896 lacks guidelines detailing the resident’s control over restrictions of the monitoring). But see TEX. HEALTH & SAFETY CODE ANN. § 242.846 (2018) (outlining that residents must be allowed to choose whether the camera should be obstructed or not and, in regard to roommates, whether or not the camera should be turned away from them).

68. See TEX. HEALTH & SAFETY CODE ANN. § 242.846 (2018) (outlining the resident’s control over restrictions for the electronic monitoring devices); see also Adelman, *supra*, note 61, at 837 (summarizing Texas law regarding the resident’s choice to set restrictions on the electronic monitoring).

69. See TEX. HEALTH & SAFETY CODE ANN. § 242.846(e) (2018) (explaining that the resident’s roommate may add restrictions to the electronic monitoring conducted in the room); see also Kohl, *supra* note 42, at 2097 (“Although a roommate implicitly consents to a slightly lower expectation of privacy by sharing a room, residents cannot implicitly consent to surveillance.”).

be a combination of audio and visual monitoring or just one of the two.⁷⁰ In order to avoid violating a resident's Fourth Amendment right to privacy,⁷¹ S.B. 896 should detail a resident's, and any roommate's, power to impose restrictions on the electronic monitoring.⁷²

To further protect the resident's privacy, S.B. 896 must detail who should have custody over the tapes or recordings made by the electronic monitoring device.⁷³ If the tapes or recordings were accessible to anyone or an unauthorized third-party, they could possibly violate the resident's privacy rights.⁷⁴ The custodian of the tapes or recordings should be either the nursing home or the resident (or authorized individual).⁷⁵ This can eliminate any privacy rights violations because those parties are already

70. See TEX. HEALTH & SAFETY CODE ANN. § 242.846(e)(1)–(2) (2018) (“When the proposed electronic monitoring device is a video surveillance camera, condition consent on the camera being pointed away from the consenting resident; and condition consent on the use of an audio electronic monitoring device being limited or prohibited.”); see also Cottle, *supra* note 12, at 129 (stating that per the roommates consent, “granny cams” can be positioned to only view the resident’s bed, without viewing the roommate’s bed).

71. See U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.; see also Cottle, *supra* note 12, at 2093 (discussing that allowing electronic monitoring in nursing home residents’ rooms would trigger a need for Fourth Amendment analysis).

72. See generally S.B. 896, 2018 (Fla. 2018) (providing the language of S.B. 896 which lacks guidelines in regard to the resident’s, and roommates’, power of restrictions on the electronic monitoring); cf. TEX. HEALTH & SAFETY CODE ANN. § 242.846 (2018) (detailing some restrictions that roommates may impose on the electronic monitoring devices).

73. See Patrick Kampert, *Video Watchdog*, CHICAGO TRIBUNE (Mar. 24, 2002), <https://www.chicagotribune.com/news/ct-xpm-2002-03-24-0203240452-story.html> (explaining that a successful nursing home in Lake City, FL, hired an independent company to control the recordings made by the cameras); see also Kohl, *supra*, note 42, at 2097 (noting that there should be guidelines for minimal standards of procedure regarding who would have access to view the recordings).

74. See FLA. STAT. § 400.022 (listing the nursing home resident’s rights, including the right to keep his or her medical records confidential); see also Vince Galloro, *Watching Out for Nursing Home Residents: Cameras Could Help Curb Abuse but Others Argue They Invade Privacy*, 31 MOD. HEALTHCARE 24, 24–26 (2001) (stating that cameras in resident’s room would likely record a patient’s medical information, such as during treatments, which may violate a resident’s right to confidentiality of personal and medical records).

75. See *Guidelines for Electronic Monitoring*, MD. DEP’T OF MENTAL HEALTH & HYGIENE, 1, 5 (Dec. 1, 2003), <https://health.maryland.gov/ohcq/lrc/docs/reports/149report.pdf> (stating that only the facility or the resident’s family can have custody of the recordings); see also *Electronic Monitoring of Resident’s Rooms*, VA. DEP’T OF HEALTH, 1, 2–3 (Aug. 1, 2004), http://townhall.virginia.gov/L/GetFile.cfm?File=GuidanceDocs%5C601%5CGDoc_VDH_2516_v2.pdf (stating that either the facility or the resident’s family would have custodial ownership of any recordings from electronic monitoring).

authorized to access the medical information.⁷⁶

b. Visitors and Employees

S.B. 896 states that to “the extent possible, such monitoring must protect the privacy rights of other residents and visitors to the nursing home.”⁷⁷ Florida is two-party consent state, meaning that all parties (those conducting the recording and those being recorded) must consent to the electronic monitoring.⁷⁸ Thus, S.B. 896 requires that the resident (or authorized individual who conducts the electronic monitoring) “post a notice on the door of the resident’s room” stating that the room is being monitored by an electronic monitoring device.⁷⁹

However, the Texas Statutes go one step further by requiring conspicuous notices, not only at the entrance to the resident rooms with electronic monitoring device, but also “at the entrance to the [nursing home] stating that the rooms of some residents may be monitored by, or on behalf of, the residents, and that the monitoring is not necessarily open and obvious.”⁸⁰ These two notices allow visitors and employees of the nursing

76. See *Guidelines for Electronic Monitoring*, *supra* note 75 (inferring that before the resident’s family gains custodial ownership of the recordings, requisite consent has been acquired); see also *Electronic Monitoring of Resident’s Rooms*, *supra* note 75 (expressing that if the facility has custodial ownership of the recordings, the recordings are considered to be part of the resident’s medical records).

77. See S.B. 896, 2018 (Fla. 2018) (stating that protection of the resident’s privacy is of the utmost importance); see also Cottle, *supra* note 12, at 129 (discussing states’ proposed legislation allowing the installation of electronic monitoring devices as long as they strive to protect the resident’s individual privacy right as much as possible).

78. See FLA. STAT. § 934.03(d) (2018) (“It is lawful under this section . . . for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception.”); see also *Reporter’s Recording Guide*, REP. COMM. FOR FREEDOM OF THE PRESS, 1, 9–10 (2012), <https://www.rcfp.org/rcfp/orders/docs/RECORDING.pdf> (“All parties must consent to the recording or the disclosure of the contents of any wire, oral or electronic communication in Florida.”).

79. See S.B. 896, 2018 (Fla. 2018) (explaining that in order to protect the privacy of visitors, a resident who chooses to conduct electronic monitoring in their room, must have a notice posted at the entrance of their room); cf. TEX. HEALTH & SAFETY CODE ANN. §§ 242.847(b), 242.850 (2018) (establishing requirements for conspicuous notices of electronic monitoring at both the entrance to the resident’s room and the entrance to the institution).

80. See TEX. HEALTH & SAFETY CODE ANN. §§ 242.847(b), 242.850 (2018) (requiring notices of electronic monitoring at both the entrance to the resident’s room and the entrance to the institution); see also Kohl, *supra* note 42, at 2084 (summarizing that the Texas Statute requires notices of electronic monitoring be posted at both the entrance to the nursing home and the entrance to the resident’s room).

homes to be aware that they may be subject to being monitored if they enter some residents' rooms.⁸¹

Employees have a lesser expectation of privacy, if any, in their workplace except for areas that a reasonable person would find "offensive or highly objectionable."⁸² If employees are given notice of any surveillance or monitoring, their consent to the monitoring is implied if they decide to continue their employment at the facility.⁸³ Some courts have found that a "social guest is entitled to a reasonable expectation of privacy within the host's residence"⁸⁴ However, "casual, transient visitor[s]" do not have any expectation of privacy because the privacy of a person's home should only extend to guests who may consider the premises a "temporary home."⁸⁵ Thus, notifying visitors of any monitoring should negate any expectation of privacy they may have.⁸⁶

81. See TEX. HEALTH & SAFETY CODE ANN. § 242.850 (2018) (requiring the conspicuous notices to protect the institution from potential privacy violations for visitors and employees); see also Adelman, *supra* note 61, at 835 (stating that an employee who has received notice of the electronic monitoring in the resident's rooms and continues their employment has impliedly consented to the monitoring).

82. See Lawrence E. Rothstein, *Privacy or Dignity?: Electronic Monitoring in the Workplace*, 19 N.Y. L. SCH. J. INT'L & COMP. L. 379, 382–83 (2000) ("[W]orkers in the workplace, except occasionally in restrooms and employee locker rooms, are not generally protected from surveillance on the grounds that the premises and equipment are possessions of the employer and the employee can have no legitimate expectation of intimacy or of protection from employer intrusion."); see also Adelman, *supra* note 61, at 831 n.74 (explaining that a resident's room would not be qualify as an area where monitoring an employee would be offensive and highly objectionable).

83. See Adelman, *supra* note 61, at 831 (stating that an employee who chooses to continue working at an establishment after being notified of any monitoring, impliedly consents to being monitored); see also Rothstein, *supra* note 82, at 402 (stating that even if an employee is at least aware that there may be monitoring, their continued employment can be seen as consent to the monitoring).

84. See Kohl, *supra* note 42, at 2099 (stating that generally social guests do have some expectation of privacy, but guests on commercial premises have less privacy); see also *United States v. Heath*, 259 F.3d 522, 533 (6th Cir. 2001) (holding defendant, as an overnight guest, had a legitimate expectation of privacy in host's home where host was defendant's cousin, defendant had a key to the home, and defendant slept on the couch at least once a week for almost two years).

85. See Kohl, *supra* note 42, at 2099–00 (explaining that courts generally look at factors such as whether the person has keys to the residence and the nature of the visitor's relationship with the host in determining whether the visitor considers the premises "home"); see also *Minnesota v. Carter*, 525 U.S. 83, 89 (1998) (stating that the text of the Fourth Amendment privacy protections apply only to people in their own homes).

86. See *Lewis v. Dayton Hudson Corp.*, 339 N.W.2d 857, 860–61 (Mich. Ct. App. 1983) (finding that signs notifying customers of video surveillance inside fitting rooms removed any reasonable expectation of privacy customers may have had); see also Kohl, *supra* note 42, at 2100–01 (stating that posting notices to visitors that the facility is being monitored eliminates any reasonable expectation of privacy).

As it stands, S.B. 896's requirement of providing notice solely to the electronic monitoring of a resident's room will only protect a visitor or employee's small expectation of privacy in the specific room with the notice posted.⁸⁷ More notice, such as notifications upon entrance to the facility, would advise visitors and employees that they have no reasonable expectations of privacy and would forgo such expectations upon entrance.⁸⁸ Therefore, S.B. 896 should mirror Texas law to include notices, not only at the entrance to a resident's room, but also at the entrance of the nursing home.⁸⁹

C. IT IS IN THE BEST INTEREST OF RESIDENTS AND NURSING HOMES

Allowing electronic monitoring devices in nursing home residents' rooms is in the best interest of both the resident and the nursing home.⁹⁰ With regard to the resident, these electronic monitoring devices can provide a sense of protection and comfort in knowing that someone is watching over their loved one in the nursing home.⁹¹ With regard to the nursing home, these devices can help reduce false accusations of mistreatment, abuse or neglect brought against the nursing homes and its employees.⁹²

87. See S.B. 896, 2018 (Fla. 2018) (requiring the person conducting the electronic monitoring to post a notice at the entrance to the resident's room). But see TEX. HEALTH & SAFETY CODE ANN. §§ 242.847(b), 242.850 (2018) (requiring notices of electronic monitoring to be posted at both the entrance to the resident's room and institution).

88. See Jan Hoffman, *Watchful Eye in Nursing Homes*, N.Y. TIMES: WELL (Nov. 18, 2013, 4:31 PM), <https://well.blogs.nytimes.com/2013/11/18/watchful-eye-in-nursing-homes/> (stating that president of the Health Facilities Association of Maryland, Joseph DeMattos, agrees that "[n]otification encourages transparency and reaffirms shared expectations of quality care"); see also Meier, *supra* note 51, at 39–40 (explaining that providing notice to both visitors and employees lessens or eliminates any expectation of privacy these individuals may have).

89. See Toben & Cordon, *supra* note 28, at 705 (stating that notice on both the entrance of the institution and the resident's door may deter people from participating in abuse or neglect); see also Meier, *supra* note 51, at 40 (stating that notice relieves the institution of some, if not all, liability regarding any expectation of privacy visitors and employees may have).

90. See Douglas J. Edwards, *All Eyes are on Granny Cams*, NURSING HOMES, Nov. 1, 2000, at 26, 26–30 (discussing how using electronic monitoring devices in nursing homes has its benefits and disadvantages, but overall technology upgrades are inevitable); see also Cottle, *supra* note 12, at 125 (opining that granny cams do benefit both residents and nursing homes).

91. See Amy Baxter, *'Granny Cam' Laws Target Assisted Living*, SENIOR HOUSING NEWS (Mar. 23, 2016) <https://seniorhousingnews.com/2016/03/23/granny-cam-laws-target-assisted-living/> ("These laws have been prompted by many family members that have sought increased accountability and protection for loved ones within skilled nursing facilities."); see also Carol Bradley Bursack, *An In-Depth Look at Using Cameras to Monitor Professional Caregivers*, AGINGCARE, <https://www.agingcare.com/articles/pros-and-cons-of-cameras-in-nursing-homes-169541.htm> (last visited Dec. 28, 2019) (stating that the goal of using electronic monitoring devices in resident's rooms is to give the residents an extra source of protection).

92. See Lisa Minuk, *Why Privacy Still Matters: The Case Against Prophylactic Video*

Opponents of electronic monitoring in nursing homes claim that the “camera movement” is motivated by greedy trial attorneys looking to gain more evidence.⁹³ They argue that these cameras will invade a resident’s privacy,⁹⁴ as well as, make it more difficult for nursing homes to find qualified caretakers by creating tension in the workplace.⁹⁵ Further, opponents suggest that nursing homes’ liability insurance will skyrocket upon installation of cameras.⁹⁶

It is plausible that if some abusive and negligent conduct toward a resident was caught on tape, the trial courts would admit it into evidence.⁹⁷ However, any case with a recording containing deplorable actions will

Surveillance in For-Profit Long-Term Care Homes, 32 QUEEN’S L.J. 224, 233 (2006) (expressing some caretakers see the cameras as a protection from false accusation from delusional residents); see also Ronni Sayewitz, *Debate Over Nursing Home Cameras Focuses on Florida*, S. FLA. BUS. J. (Feb. 25, 2002, 12:00 AM), <https://www.bizjournals.com/southflorida/stories/2002/02/25/story8.html> (noting that supporters of “granny cams” insist its use will be helpful in lawsuits because it provides proof against false accusations).

93. Sayewitz, *supra* note 92, at 2 (stating that the most active advocate in Florida is the Coalition to Protect Florida’s Elders, a group formed and supported by Tampa attorney Jim Wilkes, who built a large practice litigating against nursing homes); see Jack Silverstein, *Granny Cam Provision Included in Florida Power Generator Bill*, SENIOR HOUSING NEWS (Nov. 15, 2017) <https://seniorhousingnews.com/2017/11/15/granny-cam-provision-included-in-florida-power-generator-bill> (noting views from the Florida Health Care Association suggest legislation requiring “granny cams” in nursing home facilities will line the pockets of lawyers instead of improving the “safety and well-being” of nursing home residents).

94. See Jenni Bergal, *Nursing Home Cameras Create Controversy*, PEW CHARITABLE TRUSTS (Sept. 25, 2014), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/09/25/nursing-home-cameras-create-controversy> (discussing that nursing homes and health care workers unions have concerns regarding privacy violations and that the cameras may be too invasive); see also *Is it Legal to Install a Video Camera Inside a Nursing Home?*, BRILL & RINALDI, THE LAW FIRM (Jan. 5, 2018), <https://forpeopleforjustice.com/legal-install-video-camera-inside-nursing-home-2/> (explaining that installation of “granny cams” in nursing home facilities can become legally problematic when a resident consents to video surveillance, but roommates, who cite to privacy concerns, do not).

95. See Galloro, *supra* note 74 (noting that industry executives argue that increasing video monitoring will only cause more issues regarding retaining good employees); see also Kohl, *supra* note 42, at 2104 (stating that those opposing this legislation believe constant monitoring will deter qualified caretakers and add more stress to their already-stressful jobs).

96. See Kohl, *supra* note 42, at 2105 (discussing that insurance underwriter believe that video monitoring will increase the risk associates with insuring these facilities against tort liability); see also Sayewitz, *supra* note 92 (stating that nursing homes are worried that recordings will be misinterpreted and will bring about frivolous lawsuits).

97. See M. Alexander Otto, *Families Use ‘Granny Cams’ to Monitor Care*, 10 BNA HEALTH L. REP. 1747, 1747 (2001) (discussing that these recordings would be admitted due to relevance and as the best evidence of what happened); see also Kohl, *supra* note 42, at 2091 (“Video or audio tapes can also provide compelling evidence necessary to increase the efficiency with which abuse and neglect cases are reported and prosecuted.”).

likely never reach a jury, rather the facility will aim to settle the case before that point.⁹⁸ Further, with appropriate drafting, the recordings that these cameras capture will not violate any privacy rights of nursing home residents.⁹⁹ As long as the request to conduct electronic monitoring comes from the resident, or their guardian, and they can impose restrictions on the monitoring, then the electronic monitoring devices would be not be invasive.¹⁰⁰

Despite resistance to incorporate electronic monitoring devices in nursing homes, two nursing homes, one in Florida and one in California, have been using video surveillance at their facilities for years.¹⁰¹ Both facilities are huge advocates for allowing electronic monitoring because of the many benefits the cameras have brought.¹⁰² Families of the residents are comforted to know that their loved ones are being properly cared for and can check in on them whenever they wish.¹⁰³ Even the caretakers are satisfied with the installation of the electronic monitoring devices.¹⁰⁴

Generally, the nursing home industry is known for its high staff turnover, but some facilities have reported a lower staff turnover rating

98. See *Nursing Home Abuse Settlements*, NURSING HOME ABUSE CENTER, <https://www.nursinghomeabusecenter.com/compensation/settlements/> (last visited Dec. 28, 2019) (asserting that over ninety percent (99%) of nursing home abuse lawsuits are settled); see also Otto, *supra* note 97 (stating that nursing homes would generally rather settle the lawsuit than expose atrocious behavior to one of their residents by one of their employees).

99. See TEX. HEALTH & SAFETY CODE ANN. § 242.845 (2018) (identifying under what circumstances the resident, the resident's legal guardian, or legal representative are authorized to consent to the electronic monitoring); see also WASH. REV. CODE § 388-97-0400 (2018) (stating that the resident, the resident's legal guardian or the resident's decision maker are the only ones allowed to consent to the electronic monitoring).

100. See Galloro, *supra* note 74 (noting the National Citizens' Coalition for Nursing Home Reform supports cameras in residents' rooms when there is consent from both the resident and any roommates); see also Sayewitz, *supra* note 92 (emphasizing that with the consent, there is no invasion of privacy).

101. See Kampert, *supra* note 73 (discussing how both Southland Suites in Lake City, Florida, and Irvine Cottages in Irvine, California, have been conducting electronic monitoring in their facilities since the late 1990s); see also Kohl, *supra* note 42, at 2104–06 (explaining that both Southland Suites and Irvine Cottages have been successfully using video surveillance).

102. See Kampert, *supra* note 73 (quoting Southland Suites owner, Cindy O'Steen, stating that she and her husband, Mark O'Steen, "couldn't function without the cameras [and] wouldn't want to attempt to"); see also Kohl, *supra* note 42, at 2104 (stating that Irvine Cottages owner, Jacqueline DuPont, is grateful for the protection that the cameras provide to her staff and facility).

103. See Kampert, *supra* note 73 (stating that at Southland Suites, family can dial in via Internet to communicate with the resident at the facility); see also Toben & Cordon, *supra* note 28, at 694 (stating that allowing electronic monitoring has given families peace of mind).

104. See Kampert, *supra* note 73 (reporting that caretakers at Irvine Cottages feel protected with the use of electronic monitoring); see also Kohl, *supra* note 42, at 2104 (stating that these recordings are valuable for caretakers to be able to review use for training purposes).

than other facilities in the industry.¹⁰⁵ This lower turnover can be attributed to the caretakers feeling a sense of protection from false allegations and “weeding out” bad staff.¹⁰⁶ If caretakers are notified that they are being monitored, it will deter them from abusing or neglecting nursing home residents.¹⁰⁷

Additionally, the electronic monitoring has caused liability insurance premiums to drop for some nursing homes.¹⁰⁸ Southland Suites, a nursing home in Lake City, Florida, claims to have lowered their liability insurance premiums after having cameras installed in common areas.¹⁰⁹ After four years, Southland Suites’ liability dropped from fifty-seven thousand dollars (\$57,000) per year to ten thousand dollars (\$10,000) per year.¹¹⁰

With the use of electronic monitoring, both residents and nursing homes can feel protected.¹¹¹ Residents can feel comforted that someone is watching them, even if that person is far away.¹¹² In addition, family members such as the Younes, can feel more at peace knowing that their

105. See Kampert, *supra* note 73 (reporting that since allowing the cameras, Irvine Cottages has kept a low turnover rate compared to other facilities in the industry); see also Toben & Cordon, *supra* note 28, at 694 (stating that advocates for electronic monitoring have claimed to have lower staff turnover rates).

106. See Galloro, *supra* note 74 (noting that the cameras can lead to extra protection when delusional residents make false allegations); see also Kampert, *supra* note 73 (stating that sometimes residents claimed a caretaker hid their dentures, but after reviewing the video the allegation was dispelled).

107. See Bursack, *supra* note 91 (stating that when caretakers are aware of cameras in the resident’s room, there is a high likelihood of reduced mistreatment of residents); see also Schrade, *supra* note 21 (emphasizing that Texas’ long-term care ombudsman, Patty Ducavet, agrees that the cameras can influence how caretakers behave and treat residents).

108. See Kohl, *supra* note 42, at 2105–06 (finding that after installing cameras, Southland Suites’ liability insurance dropped significantly); see also Otto, *supra* note 97 (stating that cameras actually protect nursing homes from litigation and has lowered insurance rates).

109. See Kampert, *supra* note 73, at 4 (establishing that the liability insurance for Southland Suites went down from \$57,000 a year to \$10,000); see also Cottle, *supra* note 12, at 140 (stating that after the cameras were installed the premium dropped significantly).

110. See Kohl, *supra* note 42, at 2105–06 (emphasizing that prices decreased about five hundred dollars (\$500) per bed); see also Otto, *supra* note 97 (stating that liability rates fell from one thousand five hundred dollars (\$1,500) to four hundred seventy-five dollars (\$475) per bed).

111. See Chris Murray, *Should Nursing Homes Use Video Surveillance?*, CAITLIN-MORGAN INSURANCE SERVICES (Mar. 29, 2018), <https://www.caitlin-morgan.com/nursing-homes-video-surveillance/> (stating that surveillance cameras have many benefits for both residents and nursing home staff); see also Cottle, *supra* note 12, at 125 (opining that granny cams do benefit both residents and nursing homes).

112. See Laurie Orlov, *Web Cameras and the Elderly – Whose Right Is It To Decide?*, AGING IN PLACE TECHNOLOGY WATCH (July 22, 2009, 10:40), <https://www.ageinplacetechnology.com/blog/web-cameras-and-elderly-whose-right-it-decide> (noting that some people who are a long distance from their loved ones would see cameras as a safety feature); see also Kampert, *supra* note 73 (discussing Southland Suites uses cameras that allows residents’ families to dial in via Internet and interact with their loved one from a distance).

loved one is taken care of.¹¹³ Further, if they find that their loved one is not being taken care of, they can either attempt to deter mistreatment, or gather video proof of the person who is responsible.¹¹⁴ Meanwhile, nursing homes can be confident that they and their staff are protected against false allegations and employing immoral caretakers.¹¹⁵

IV. SOLUTION

S.B. 896 should mirror the Texas Statutes with regard to its specificity.¹¹⁶ Amending S.B. 896 by changing the language to better specify who can consent, and under what circumstances, will help S.B. 896 pass to amend Section 400.022, Florida Statutes, and allow residents of nursing homes to use electronic monitoring devices in their rooms.¹¹⁷ Additionally, S.B. 896 must adequately specify any restrictions the resident and their roommate(s) may implement with regard to the electronic monitoring devices.¹¹⁸ Lastly, in order to protect the privacy of visitors and employees, S.B. 896 must require the nursing homes to put notices at both the entrance of the facilities and at the entrance of the resident's rooms, thereby informing the visitors and employees of the electronic monitoring.¹¹⁹

113. See Afana, *supra* note 1 (stating that after becoming suspicious over his father's injuries, Salim Younes installed a hidden camera to look over his father); see also Bursack, *supra* note 91 (stating that cameras can provide peace of mind and a higher level of involvement for families).

114. See Jennifer Anderson, *Cameras Rate Low for Ensuring Nursing Home Care*, TODAY'S GERIATRIC MED. http://www.todayseriatricmedicine.com/news/ex_012315.shtml (last visited Dec. 28, 2019) (finding that the top two more motivating forces for wanting to install cameras in a resident's room are expected abuse and not receiving enough updates on the elder's condition); see also Cwiek, *supra* note 1 (showing that once Salim caught the abusive caretakers on camera, the family will now be able to use those clips against the attackers).

115. See Galloro, *supra* note 74 (emphasizing that Violette King, an executive director of a resident advocacy group in Illinois, asserts that cameras can weed out bad caretakers and discourage poor prospects from applying); see also Kohl, *supra* note 42, at 2104–05 (stating that cameras have protected staff in nursing homes from false allegations).

116. See S.B. 896, 2018 (Fla. 2018) (attempting to amend Section 400.022, Florida Statutes, by allowing nursing home residents to conduct electronic monitoring in their rooms). *But see* TEX. HEALTH & SAFETY CODE ANN. §§ 242.841–242.852 (2018) (outlining with specificity the laws regarding electronic monitoring in a resident's room).

117. See *supra* notes 40–51 and accompanying text.

118. See *supra* notes 66–76 and accompanying text (explaining the changes that S.B. 896 should make in regard to protecting any and all expectations of privacy that visitors and employees may have).

119. See *supra* notes 77–90 and accompanying text (explaining that Florida should require notices of the electronic monitoring both at the entrance of the facility and entrance to the resident's room so as not to infringe on privacy rights of nursing home visitors or employees).

V. CONCLUSION

Elder abuse in Florida, and the United States in general, is a serious issue.¹²⁰ The number of elderly persons is only continuing to grow, and nursing home facilities must be better equipped to aid in overcoming this epidemic.¹²¹ Despite the opposition to electronic monitoring devices being placed in resident's rooms, using these devices is actually in the best interest of both the residents and the nursing homes.¹²²

120. See Freeman, *supra* note 10 (stating that Florida has not yet incorporated any law regarding allowing electronic monitoring in a resident's room); see also Gleason, *supra* note 20 (stating that Florida has the nation's highest percentage of elder residents, but a recent study shows that Florida is not doing what it takes to care for them).

121. See *supra* Part II and accompanying text.

122. See *supra* notes 90–115 and accompanying text (opining that allowing electronic monitoring in nursing home residents' rooms is for the benefit of both the resident and the nursing homes).