No. 124019

IN THE
SUPREME COURT OF ILLINOIS

LAKEWOOD NURSING & REHABILITATION CENTER, LLC, Plaintiff-Appellee, v. THE ILLINOIS DEPARTMENT OF PUBLIC HEALTH, and DIRECTOR LAMAR HASBROUCK, Defendants-Appellants, and HELEN SAUVAGEAU, Defendant.	)	On Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-17-0177 There Heard on Appeal from the Circuit Court for the Twelfth Judicial Circuit, Will County, Illinois, No. 14 MR 1184 The Honorable JOHN C. ANDERSON, Judge Presiding.

REPLY BRIEF OF APPELLANTS ILLINOIS DEPARTMENT OF PUBLIC HEALTH AND ITS DIRECTOR

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ARGUMENT

A mandatory/directory analysis — like other statutory construction questions — seeks to determine legislative intent. *In re M.I.*, 2013 IL 113776, ¶ 15. Under this Court's guidance, overcoming the presumption that procedural commands are directory — which is necessary to impose a mandatory construction — generally requires a showing that (1) "there is negative language prohibiting further action in the case of noncompliance" or that (2) "the right the provision is designed to protect would generally be injured under a directory reading." *Id.* at ¶ 17; AT Br. at 20-21.

For the 10-day hearing time and 14-day decision time in section 3-411 of the Nursing Home Care Act, 210 ILCS 45/3-411 (2016), neither exception to a directory construction is satisfied. As addressed in the Department's opening brief, the appellate court erred in applying the "negative language" exception to the 10-day hearing time. The court placed undue weight on the isolated phrase "not later than," and overlooked other indicia of legislative intent — most importantly, the Act's fundamental purpose of protecting nursing home residents. AT Br. at 21-35.

As further addressed, to avoid thwarting that purpose, the "rights generally injured" exception (which the appellate court did not consider) likewise points to a directory construction for section 3-411's 10-day hearing time. *Id*. at 13-14, 35. In contrast, a mandatory construction harms residents

by cutting off their hearing rights based on matters beyond their control, including situations where a resident cannot meaningfully participate within the specified time. *Id.* at 25-26, 35. Section 3-411's 14-day decision time — which the appellate court did not construe — should also receive a directory construction for the same reasons. *Id*. at 13-14, 25-26, 35.

In response, Lakewood fails to demonstrate that the legislature intended to withdraw residents' protections against involuntary removal if the hearing was not held in 10 days, or the decision reached in 14. It fails to show that either of this Court's exceptions to a directory construction apply. And it fails to offer anything else that supports a mandatory construction.[1]

I. Lakewood Fails to Show That Either Exception to a Directory Construction Applies.

A. Lakewood Fails to Show That the "Negative Language" Exception Supports a Mandatory Construction.

Lakewood fails to show that the "negative language" exception supports a mandatory construction. Because section 3-411's 14-day decision time contains no language that conceivably could be construed as negative, that

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[1] Despite Lakewood's contentions, AE Br. at 1, 3, 6 n.2, 34, the Department did not "violate" the parties' circuit court stipulated facts. The stipulation did not appear to contemplate specific wording in the "Issue Presented" section, *see* C.109, and the Department's fact statement quotes the stipulation's description of the issues, AT Br. at 7-8. Moreover, the Department's fact statement includes the stipulated facts, *see* C.107-08; AT Br. at 4-6. As for the Department's discussion of federal law, *see infra* at 21-26, the Department agrees — as the stipulation reflects, C.109 — that the Act applies to the question presented.

exception is inapplicable. *See* 210 ILCS 45/3-411 (2016). For the provision's 10-day hearing time, as the Department addressed, the phrase "not later than" does not prohibit further action (or specify other consequences) for non-compliance, which has been this Court's focus in addressing the "negative language" criterion. *See* AT Br. at 22-23. Moreover, because "not later than" is at best a weak indicator of intent, the appellate court should have considered the Act's purpose of protecting nursing home residents, the language used in related provisions, the incorporation of detailed procedural requirements inconsistent with a rigid insistence on 10 days, and the risk of rendering Illinois non-compliant with federal law — all of which point to a directory construction. *Id*. at 24-31.

Lakewood fails to persuasively rebut this. It merely asserts that "not later than" is "self-evident[ly]" negative. AE Br. at 18. And it contends that the Department "ignores" the decision in *Frances House, Inc. v. Dep't of Pub. Health*, 269 Ill. App. 3d 426 (3rd Dist. 1995), in which the appellate court construed a different timing provision of the Act as mandatory. AE Br. at 19. But the Department addressed — and distinguished — *Frances House*. AT Br. at 31-35.

The Department noted that *Frances House* predates this Court's more recent guidance on "negative language." *Id*. at 31-32. And it noted that, unlike the enforcement proceeding in *Frances House*, 269 Ill. App. 3d at 428,

involuntary removal proceedings are initiated by residents, not the Department, 210 ILCS 45/3-410 (2016), and a mandatory construction penalizes them based on procedural matters outside their control, AT Br. at 34-35. For these and the other reasons discussed, *id*. at 31-35, *Frances House* should not dictate the outcome here.

B. Lakewood Fails to Show That the "Rights Generally Injured" Exception Supports a Mandatory Construction.

Additionally, Lakewood fails to show that the "rights generally injured" exception supports a mandatory construction. When this exception is invoked, courts "must first determine what right the statute intends to protect." *M.I.*, 2013 IL 113776, ¶ 24. Here, the Act's paramount concern is to protect the vulnerable population of nursing home residents. *Moon Lake Convalescent Ctr. v. Margolis*, 180 Ill. App. 3d 245, 255-56 (1st Dist. 1989); AT Br. at 13-14. Section 3-411 and related provisions protect residents by ensuring that they will not be subject to involuntary removal without the opportunity for review by the Department — a neutral decision-maker not associated with the facility. *See, e.g,* 210 ILCS 45/3-401 - 45/3-413 (2016).

An inflexible 10-day cutoff harms residents by taking away their hearing rights based on timing factors beyond their control, encouraging haphazard decision-making, and incentivizing facilities to run out the clock to evict unwanted residents. *See* AT Br. at 25-26, 35. Moreover, an inflexible cutoff harms residents that, due to illness or similar disadvantage, are unable to

meaningfully participate within that narrow window. *See id.* at 26, 35; *see also* Brief of Prairie State Legal Servs., pp. 8-11; Brief of LAF, *et al.*, pp. 14-19.

In response, Lakewood contends that a directory construction would injuriously affect "public and private rights," supplying a multi-page chart of purported harms to the facility's business interests, and derivatively, to the public. AE Br. at 11-18. For multiple reasons, none of this shows that the legislature intended to allow facilities an inflexible 10-day (or 14-day) eviction time at the expense of residents' rights.

1. Lakewood Makes Improper Assumptions.

Initially, Lakewood's chart and related assertions make improper assumptions. It contends, without support, that residents have no "constitutionally protected right [ ] to stay at any nursing home." *Id*. at 30. This overlooks that both Illinois and federal law give residents the substantive statutory right to remain in a nursing home except in specified instances involving medical needs, safety, or non-payment. 210 ILCS 45/3-401 (2016); 42 U.S.C §1396r(c)(2)(A). Although this Court need not resolve the issue, this may well create "property interests" subject to constitutional due process protections. *See* AT Br. at 26; *Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of Chi.*, 2012 IL 112566, ¶¶ 11-13 (discussing state-law-created property interests); *see also* Brief of Prairie State Legal Servs., pp. 17-18; Brief of LAF, *et al.*, pp. 16-21.

Moreover, Lakewood's chart implicitly assumes that a facility's decision to involuntarily remove a resident is always justified, treating the hearing as a mere formality. *See* AE Br. at 13-17. In a related vein, Lakewood asserts with no support that involuntary transfer or discharge hearings are invariably "simple" and conducted in no more than an hour. *Id*. at 32-33. The amicus briefs offer a different perspective. Brief of Prairie State Legal Servs., pp. 4, 8-11; Brief of LAF, *et al.*, pp. 4, 14-21.

2. Lakewood Ignores Residents' Rights.

In addition to those problems, glaringly missing from Lakewood's list of asserted "public and private rights," *see* AE Br. at 13-17, are the rights of residents — the group that the legislature sought to protect. Lakewood fails to show that facilities' business interests and their purported derivative effects on the public were concerns that motivated legislative choices. But even if such matters were *a* concern, nothing indicates that the legislature intended to promote facilities' interests at the expense of residents' rights to receive a fair, neutral determination about where they will live.

Besides, many of Lakewood's bare assertions do not withstand scrutiny. Lakewood's contentions primarily relate to proceedings involving non-payment. *Id*. at 13-16. It proclaims that — without an inflexible 10-day hearing/14-day decision cut-off — nursing homes will be forced out of business to the detriment of everyone. *Id*. at 15-16, 26. To be sure, prompt resolution

benefits residents and facilities alike. But a facility has voluntarily undertaken to do business in an area heavily regulated under federal and state law. And myriad factors affect a facility's costs and business viability. (Lakewood acknowledges as much by noting that the State "is behind in paying its bills." *Id*. at 18 n.5.) In a system with many "moving parts," Lakewood hangs a lot on the involuntary transfer/discharge component — in which some residents contest a removal (but many do not), not all proceedings involve non-payment, some proceedings take longer than others, not all proceedings result in the facility being able to remove a resident, and not all non-payment removals necessarily leave the facility unable to collect for its services.

And, of course, a facility retains a cause of action against a resident, who remains contractually obligated (when he or she is the payor) to pay for the services provided.[2] Although Lakewood would prefer not to provide services in the first place, this business-related remedy weighs heavily in favor of a directory reading: such a construction ensures that a vulnerable population will be safeguarded from improper removal, while facilities that voluntarily choose to do business in this heavily regulated environment retain enforcement options.

This remedy is meaningful. If a non-paying resident has assets, the nursing home can pursue those assets. If a non-paying resident has no assets,

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[2] The circuit court took judicial notice that Lakewood pursued legal action against Sauvageau, resulting in a payment agreement. C.237.

that resident will likely qualify for Medicaid, and so the facility will be paid through that system. A facility can also employ other risk-reducing tools, such as screening procedures to determine relevant financial information, and, when applicable, proactively working with residents to ensure that Medicaid/Medicare paperwork is timely filed.

To the extent that some of Lakewood's contentions pertain to proceedings involving alleged medical or safety issues, *see*, *e.g.*, *id.* at 11, 14, they likewise do not support a mandatory construction. When medical or safety concerns warrant, both the Act and federal regulations permit an involuntary removal to proceed in advance of an administrative decision from the Department. *See* 210 ILCS 45/3-402(a),(b), 45/3-404 (2016); 42 C.F.R. § 483.15(c)(1)(ii). Thus, such instances can be accommodated without cutting off the hearing rights of all residents beyond the 10-day period.

Invoking the public interest, Lakewood suggests that delays in involuntary discharge or transfer could increase nursing home costs or reduce available beds. *E.g.*, AE Br. at 11, 13, 15, 26. Again, it offers no empirical evidence that occasional involuntary removal proceedings are appreciably skewing the costs or availability of care, and ignores that myriad other factors play a part. Likewise, Lakewood refers to residents with "no medical need for care," *id*. at 10, 15-16, but fails to show that the system is overburdened with residents who do not need care striving to remain in nursing homes. At

bottom, Lakewood fails to demonstrate that the legislature intended such attenuated considerations to outweigh its immediate concern with protecting residents against improper removal.

Similar flaws underlie Lakewood's assertion that a directory reading would "chill" facilities from accepting residents whose Medicare or Medicaid eligibility is pending but not yet approved. *Id*. at 17-18. The vast majority of nursing homes utilize Medicare/Medicaid as a source of payment. *See* Brief of Prairie State Legal Servs., p.14. Facilities know the eligibility criteria. Lakewood fails to show that accepting Medicare/Medicaid-pending residents does not, overall, yield economic benefit, regardless of whether any particular resident's application is denied.

Finally, to the extent that Lakewood implies that residents would have adequate alternatives if their hearing rights were cut off, that is not so. Lakewood observes that, in certain circumstances, the Act allows residents to bring a circuit court action against facilities. AE Br. at 8-9; *see* 210 ILCS 45/3-601 (2016) (facilities liable for "intentional or negligent act or omission" that injures resident); *see also id.* 45/3-602 - 45/3-604.

Even if a resident could utilize this avenue after an involuntary removal to possibly obtain eventual recompense, it would be an exceptional and difficult undertaking with limited potential for benefit. An after-the-fact circuit court action would leave residents facing eviction far less protected

than does the relatively simpler, faster pre-eviction administrative process that the legislature bestowed upon them. If anything, the legislature's provision for certain circuit court actions by residents reinforces its concern with protecting this vulnerable population, and the unlikelihood that it intended to divest them of administrative hearings.

3. Lakewood's Claimed Injuries Would Not "Generally" Arise.

Additionally, under the "rights generally injured" exception, this Court has looked beyond whether protected rights merely might be impinged in some cases. *See M.I.*, 2013 IL 113776, ¶¶ 24-26 (determining that right to fair hearing would not be "generally injured" by directory construction); *People v. Robinson*, 217 Ill. 2d 43, 57 (2005) ("While the right to appeal might be injured by untimely service in a given case, there is no reason to believe that it generally would be."). Here, the purported harms posited by Lakewood would not "generally" arise.

Despite various phrasing, in seeking a mandatory construction, Lakewood primarily asserts a greater risk of unreimbursed service costs, *see* AE Br. at 13-17, a complaint that pertains only to non-payment cases. But many involuntary transfer or discharge proceedings involve alleged medical or safety issues, 210 ILCS 45/3-401 (2016); 42 U.S.C. § 1396r(c)(2)(A); 42 C.F.R. § 483.15(c)(1)(i), and thus do not implicate potentially unreimbursed costs. And, even for non-payment cases, any particular case exceeding the time

frames would not necessarily result in unreimbursed costs (*e.g.*, the resident could prevail, the parties could reach an accord, etc.). Thus, Lakewood's business interests are not "generally injured" by exceeding the time frames.

4. Lakewood Fails to Show That Any Constitutional Considerations Are Implicated.

Another problem with Lakewood's chart and related assertions is that it largely relies on purported constitutional considerations that it has never developed. *See* AE Br. at 11, 13-17, 30. Lakewood contends that requiring it to provide services to non-paying residents would amount to a governmental taking or an impermissible interference with contract. *Id*.

It is unclear whether administrative delay in involuntary removal proceedings can sometimes result in a facility having colorable constitutional claims. But here Lakewood has not pursued or briefed any constitutional challenges. Indeed, it has not cited a single case that supports that constitutional concerns could be relevant, let alone one that suggests that such concerns somehow spring into being on the 11th day if the Department retains jurisdiction. Lakewood's unsupported declarations of governmental takings and contractual interference should be deemed forfeited. *See*, *e.g.*, *Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010) (discussing forfeiture). At a minimum, they are unpersuasive.

5. Lakewood Cites No Caselaw That Supports a Mandatory Construction.

Finally, Lakewood cites no caselaw that supports a mandatory construction. It quotes a passage from *Carrigan v. Ill. Liquor Control Comm'n*, 19 Ill. 2d 230, 233 (1960), that refers to effects on "public interests or private rights." AE Br. at 11-12. Current precedent is clear: for the exception Lakewood attempts to invoke, a mandatory construction is justified only "when the right the provision is designed to protect would generally be injured under a directory reading." *M.I.*, 2013 IL 113776, ¶ 17. And *Carrigan* — which construed as directory a provision requiring the Liquor Control Commission to rule on a rehearing application within 20 days, 19 Ill. 2d at 231-36 — involved no particular similarity to the circumstances here.

In *People v. Four Thousand Eight Hundred Fifty Dollars*, 2011 IL App (4th) 100528, ¶¶ 1, 20-35 — also cited by Lakewood, AE Br. at 12, 23-24 — the appellate court construed as mandatory the cumulative 97-day deadline for notifying an owner of a pending forfeiture of seized property. Determining that the purpose of the timing requirements was to protect owners through the specified post-deprivation procedures, the court held that notice beyond the statutory time frame required dismissal of the State's forfeiture complaint. 2011 IL App (4th) 100528 at ¶¶ 1, 34-35.

In that case, construing deadlines as mandatory meant that delay by governmental actors precluded the State from pursuing forfeiture. It did not

result in cutting off rights accorded to a protected group that has no control over timing, as would occur here. Moreover, Lakewood's position is not comparable to that of the dispossessed property owners that the forfeiture statute sought to protect. Nothing suggests that the legislature intended section 3-411's time frames for the protection of facilities' business interests, let alone that it intended them to protect such interests by eliminating residents' rights to contest involuntary removal.

In sum, given the legislature's primary goal of protecting residents, it is unlikely that it intended facilities to proceed unchecked with evictions beyond 10 days or 14 days regardless of the circumstances.

II. None of Lakewood's Additional Contentions Warrant a Mandatory Construction.

A. Lakewood's Assertions of a "34-Day Cycle" Do Not Show That the Legislature Intended to Cut off Residents' Hearing Rights.

Lakewood's assertions of a "34-day discharge cycle" do not support a mandatory construction. AE Br. at 21-23. Thirty-four days corresponds to the statutory time frames absent extension. Section 3-410 accords residents 10 days from receiving notice to request a hearing. 210 ILCS 45/3-410 (2016). Section 3-411 provides 14 days for hearing and decision. *Id*. 45/3-411. And section 3-413 provides that, if the Department approves a discharge, a resident may not be required to leave before an additional ten days. *Id*. 45/3-413.

But there is no inflexible "34-day discharge cycle." Lakewood ignores that section 3-413 reads in relevant part: "If the Department determines that a transfer or discharge is authorized . . . the resident shall not be required to leave the facility before the 34th day following receipt of [the facility's ITD Notice], or *the 10th day following receipt of the Department's decision, whichever is later." Id*. 45/3-413 (emphasis added).

Section 3-413 shows the legislature's recognition that the hearing or decision times might be exceeded. It highlights that the legislature regarded a decision by the Department as a precondition to implementing a contested removal. And, if the legislature contemplated that the statutory time frames would never be exceeded, or that doing so would shut down the process, its provision for Department decisions received "later" than 34 days after receipt of the facility's notice would mean little. *See* AT Br. at 27-28. Section 3-413, then, supports a directory construction.

Moreover, Lakewood appears to wrongly regard the statutory time frames as balancing the residents' and facilities' interests. *E.g.*, AE Br. at 25 ("a limited expense in exchange for a limited protection"). But merely because the legislature inserted time frames for various steps, it does not follow that it intended to invalidate action outside those time frames. *See* discussion *infra* at 15-17. And Lakewood's assumption that the legislature intended to further

its business interests at the expense of residents' protection against improper removal is flawed for all the reasons discussed above.

B. The Legislature's Insertion of 10-Day and 14-Day Time Frames Does Not Warrant a Mandatory Construction.

Some of Lakewood's assertions misunderstand the mandatory/directory analysis. Mandatory/directory questions can be confused with mandatory/permissive ones, as both use the term "mandatory," albeit with different implications. *See M.I.*, 2013 IL 113776, ¶ 16; *Robinson*, 217 Ill. 2d at 51-54. Under a mandatory/permissive analysis, statutory language is "mandatory" if it "has the force of a command that imposes an obligation." *Robinson*, 217 Ill. 2d at 52. Here, "mandatory" in this first sense would mean that the legislature commanded that hearings take place within 10 days and that decisions issue within 14.

A mandatory/directory inquiry, however, poses a different question — asking what the legislature intended to happen if its procedural command was not followed. *M.I.*, 2013 IL 113776, ¶ 16; *Robinson*, 217 Ill. 2d at 52. "Mandatory" in this second sense means that the legislature intended noncompliance to invalidate the pertinent governmental action. *M.I.*, 2013 IL 113776, ¶ 16. A directory construction too may have consequences. *Id.* But — in itself — it triggers no specific consequences and noncompliance does not necessarily invalidate the governmental action. *Id.*

Here, Lakewood repeatedly contends that section 3-411's time frames are not "discretionary." AE Br. at 11, 18, 19, 26. Further, it observes that the provision "unambiguously" specifies 10 day and 14 days, asserting that these time frames should be enforced as written. *Id*. at 21, 31. But such contentions pertain to whether section 3-411's time frames create procedural obligations — a proposition that can be assumed for argument's sake. They leave unanswered the pertinent question here: whether — if those obligations are not met — the legislature specifically intended to foreclose the Department from holding a hearing or issuing a decision, in every case, regardless of the reason for delay. *See M.I.*, 2013 IL 113776, ¶ 16.

The same confusion underlies Lakewood's assertion that, because residents would benefit from timely hearings, their rights would be better served by a mandatory construction. AE Br. at 29-30. A mandatory construction does not guarantee a hearing within the statutory time frames. It just eliminates hearings when this does not occur, and thus works to injure residents. Moreover, as noted, when medical or safety issues warrant, an involuntary removal may precede a decision from the Department. *See supra* at 8.

Analytic confusion also underlies Lakewood's protest that the Department "has yet to answer" the "simple question" of "what [ ] time period [it] want[s] this [C]ourt to interpret the statute as allowing." AE Br. at 25.

And it underlies Lakewood's suggestion that the legislature could have omitted specific time frames if it did not want them followed. *Id*. at 30. The Department is not asking the Court to substitute different time frames or suggesting that the legislature did not want prompt hearings.

Rather, the Department asks that this Court consider what the legislature would have wanted when the promptness sought is not forthcoming. That should result in a directory reading for all the reasons discussed. AT Br. at 24-35; *supra* at 2-15. And not least because the legislature did not specify section 3-411's time frames in a vacuum — it expressly incorporated other detailed procedural requirements inconsistent with inflexible adherence to 10 days and 14 days. *See* AT Br. at 29-31.

C. A Directory Construction Does Not Preclude Lakewood from Raising Other Challenges.

Lakewood further asserts that a mandatory construction is warranted to avoid leaving it without a remedy for administrative delay. AE Br. at 27-28, 32. Thus, it appears to assert that either the Department is unqualifiedly precluded from acting beyond 10 days and 14 days or the acceptable time frame becomes "infinity" and Lakewood has no potential remedies. *Id*. at 25, 27, 32. Such an "all or nothing" approach presents a false dichotomy.

In disclaiming other potential remedies, Lakewood ignores its own repeated, albeit undeveloped, assertions of governmental takings and contractual interference. *Id*. at 11, 13-16, 30. It is unclear whether some

length of administrative delay could give rise to such purported challenges (or other ones). But such claims are distinct from a mandatory/directory question. And Lakewood has pursued no other claims here.

Moreover, Lakewood's contention that it cannot not seek mandamus relief, *id*. at 27, is questionable. Mandamus may be invoked to enforce "the performance of official duties by a public officer where no exercise of discretion on his part is involved." *Cordrey v. Prisoner Review Bd.*, 2014 IL 117155, ¶ 18 (internal quotation marks and citation omitted).

Asserting that mandamus would be unavailable, Lakewood cites *Guerrero v. Gardner*, 397 Ill. App. 3d 793 (2d Dist. 2010). There, the appellate court determined that plaintiffs could not use mandamus to circumvent the Administrative Review Law as the exclusive vehicle for seeking review of the agency's final decisions regarding their applications for medical assistance. *Id*. at 794-96. *Guerrero*, then, merely stands for the proposition that mandamus cannot be used as a substitute for judicial review of final administrative decisions. Nothing in that case prevents using mandamus to compel an agency to hold a hearing (or take some other action) specified by statute.

At bottom, whatever potential remedies Lakewood may have, they are not foreclosed or diminished by a directory construction. As this Court has recognized, in appropriate circumstances, consequences can follow from a directory reading even though noncompliance, in itself, would not void further

action in all cases. *M.I.*, 2013 IL 113776, ¶ 16. But Lakewood cannot raise a mandatory/directory question as a stand-in for claims it did not pursue. *See also* discussion *supra* at 11. Regarding section 3-411, the one and only claim that Lakewood has put before this Court is that the provision should be construed as mandatory. Because it failed to overcome the presumption that the legislature intended a directory construction, this Court should reject that claim.

D. Lakewood's Claims That "Just Cause" for Delay Was Lacking in the Administrative Proceedings Here Does Not Support a Mandatory Construction.

Lakewood's claims that "just cause" for delay was lacking in the underlying administrative proceedings also does not support a mandatory construction. AE Br. at 2, 6, 25. Again, a mandatory construction does not take into account the specifics of particular cases. *M.I.*, 2013 IL 113776, ¶ 16. Here, a mandatory reading means that a lack of strict compliance with section 3-411's time frames, for whatever reason, voids a Department hearing and decision. *See id*.

Thus, Lakewood's assertion that, in this case, the resident did not face obstacles in preparing for hearing, AE Br. at 24, 31, does not bolster its position. Moreover, as the amicus briefs illustrate, many residents do face obstacles. *See* Brief of Prairie State Legal Servs., pp. 4, 8-11; Brief of LAF, *et al.*, pp. 4, 14-16.

Lakewood also criticizes the Department's handling of the proceedings, asserting that it "refused" to hold a hearing and decided to conduct the hearing whenever it wanted. AE Br. at 2, 5-6, 24-25, 27, 31-32. Indeed, Lakewood goes further — appearing to accuse the Department of purposeful delay to allow residents to stay at nursing homes "for free" until they "eventually die" to ease an ALJ's "docket and conscience." *Id*. at 31-32.

Needless to say, there is no support for Lakewood's more extreme assertions, which are improper. And review of the record here does not show a "refusal" to proceed. The administrative proceedings continually moved forward toward resolution, with one step fairly proximal to the next. *See* AT Br. at 4-6. At their conclusion, the Department approved Sauvageau's discharge. C.116-18.

That said, besides lacking support, Lakewood's assertions are misplaced because a mandatory/directory analysis does not consider why (or by how much) time frames are exceeded. To the extent Lakewood takes issue with actions by the Department specific to this case (or to any particular cases), that is not the claim it chose to bring.

E. The Potential to Seek Legislative Change Does Not Warrant a Mandatory Construction.

Lakewood also contends that the legislature took into account the purported "easy ability for [the Department] to change the statute." AE Br. at 27. Lakewood's suggestion that the legislature should simply lengthen the

time frames undercuts its assertions of supposed harm from exceeding the current time periods. And Lakewood's assumption that the Department can "simply draft a proposed amendment to their statute," *id*. at 27, overlooks that the Department is not the legislature.

More to the point, the potential to seek legislative change does not warrant a mandatory construction. This Court's task is to construe the statute before it. It is unlikely that the legislature intended to cut off residents' rights in the here and now because it possibly could amend the statutory time frames in the future. Indeed, if a provision is mandatory merely because the legislature "knows" that it can be subsequently amended, it is hard to see when a provision would *not* be mandatory.

F. Lakewood's Assertions That Federal Law Has No Relevance Are Incorrect, but Section 3-411 Should Be Construed as Directory Regardless of Federal Law.

Lakewood accuses the Department of discussing federal law as a "red herring," purportedly because it "cannot win under the plain language of the [Act] at issue, so [is] hoping to get this Court to focus on another statute." *Id*. at 34. The Department — properly — discussed federal law to aid understanding of the underlying administrative proceedings, and the interplay between state and federal law in the heavily regulated area of long-term nursing care. AT Br. at 4, 14-17. But, to be clear, the question before the Court involves interpreting the Act; the Department has never contended

otherwise. And this Court should construe section 3-411's time frames as directory regardless of anything in federal law.

Lakewood's dissatisfactions notwithstanding, a relevant backdrop of federal law exists. Numerous federal requirements pertain to states and facilities that participate in the Medicare or Medicaid programs. 42 U.S.C. §§ 1395i-3, 1396r. Among these, states are required to have an appeals process — which must meet certain standards — for residents to contest involuntary transfer or discharge from nursing homes. 42 U.S.C. §§ 1396r(e)(3), (f)(3); 42 C.F.R. §§ 431.220(a)(2), 431.205, 483.204.

Federal law also requires that states ensure that participating facilities meet multiple requirements, 42 U.S.C. §§ 1396r(b)-(d), 1396a(a)(28)(A), which include restrictions on involuntarily removing residents except for certain reasons, 42 U.S.C. § 1396r(c)(2)(A); 42 C.F.R. § 483.15(c)(1)(i). *See Gruby v. Dep't of Pub. Health*, 2015 IL App (2d) 140790, ¶¶ 16-27, 34-39 (discussing state and federal law for states and facilities participating in Medicaid); *Slepicka ex rel. Kaminski v. State*, 2015 IL App (4th) 121103-B, ¶¶ 1, 58-64 (in appeal from Department's approval of involuntary discharge for non-payment from Medicaid-certified facility, reviewing assertion that facility violated federal regulation); Brief of Prairie State Legal Servs., pp. 14-17; Brief of LAF, *et al.*, pp. 5-7, 12-14.

Also, contrary to Lakewood's apparent belief, AE Br. at 35-36, 38, 40, participating facilities' obligations extend to all residents, not just Medicaid recipients. *See* 42 U.S.C § 1396r(a) (defining "nursing facility" subject to requirements); 42 U.S.C. §§ 1396r(c)(1)(A), (c)(2)(A) (addressing facilities' obligations to "each resident"); 42 C.F.R. § 483.10(a)(2) (requiring same transfer and discharge policies for all residents).[3]

Thus, to the extent that Lakewood asserts that states and facilities that participate in Medicaid have no obligations under federal law, it is wrong. Its multi-page chart alluding to "two very different statutes" contains no citations and may be inaccurate. AE Br. at 36-38. More to the point, it lacks relevance: it says nothing about the obligations of the State, the Department, or the facilities that participate in Medicaid regarding involuntary transfer or discharge. And Lakewood's repeated characterization of Medicaid as a "voluntary reimbursement program," *id*. at 35-38, adds nothing. That does not mean participation is obligation-free.

Because Lakewood's brief leaves in confusion how federal law relates to this case, a brief review is warranted. First, because Lakewood is federally certified to accept Medicare/Medicaid, the ALJ applied the substantive reasons for involuntary transfer or discharge available under federal law. C.186. This

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[3] One qualification is that Medicaid certification is sometimes sought for a distinct physical part of a facility, making only that distinct part subject to federal regulation. *See* 42 U.S.C. § 1396r(a); *Slepicka*, 2015 IL App (4th) 121103-B at ¶ 76.

appears proper under the framework addressed above, notwithstanding Lakewood's preference for an explicit pronouncement within the Act.[4] AE Br. at 34-35, 39.

Moreover, section 3-401(d) lists late/nonpayment as a discharge reason under the Act "except as prohibited by Titles XVIII and XIX of the federal Social Security Act" (*i.e.*, Medicare and Medicaid), thus recognizing the role of federal law in non-payment cases. 210 ILCS 45/3-401(d) (2016). But most importantly here, the matter is tangential. This Court is not reviewing whether Sauvageau was correctly discharged, or what criteria had to be met to evict her.

Second, the Medicaid stay involves the interplay between federal and state law. The administrative proceeding here was stayed while Sauvageau's Medicaid application was pending. C.108, 129, 185. Because approval often eliminates or reduces the debt a resident owes a facility, a stay typically benefits both parties. The Department explained that a stay finds support in the definition of non-payment under the federal regulations (which contemplates a Medicaid denial). *See* AT Br. at 16-17 (discussing 42 C.F.R. § 483.15(c)(1)(i)(E) and predecessor); *see also* 210 ILCS 45/3-401(d) (2016) (described above). And the Department also noted that the Act may provide

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[4] Whether a facility also must comply with the discharge reasons listed in the Act is largely academic because the available reasons are similar under federal and state law. *Cf.* 42 U.S.C. § 1396r(c)(2)(A); 42 C.F.R. § 483.15(c)(1)(i) *with* 210 ILCS 45/3-401 (2016).

for a stay pending a determination on a Medicaid application in section 3-406 read together with the qualifying clause of section 3-411. *See* 210 ILCS 45/3-406, 45/3-411 (2016); AT Br. at 17.

Lakewood now says that it did not agree to a stay, and questions whether the law supports one. AE Br. at 3 n.1, 7 n.3, 40. Nonetheless, it acknowledges that it did not (and does not) contest the stay pending determination on Sauvageau's Medicaid application. *Id*. at 3 n.1. Thus, as Lakewood admits, *id*. at 40, the Court need not further consider the propriety of staying involuntary removal proceedings pending Medicaid eligibility determinations.

Finally, a review of federal law shows that a mandatory construction risks putting Illinois out of compliance with federal requirements. This is because, as noted, states receiving Medicaid funds are required to have an administrative appeals process for residents facing involuntary discharge/ transfer. *See supra* at 22; AT Br. at 14, 31; *see also* Brief of Prairie State Legal Servs., pp. 14-18; Brief of LAF, *et al.*, pp. 5-7, 12-16. That the legislature presumably did not intend noncompliance with federal law further supports a directory construction. AT Br. at 31. But even without this reinforcement, the Act's purpose and structure counsel against inflexibly cutting off residents' hearing rights outside section 3-411's short time frames. *See id*. at 13-14, 25-31, 35.

In sum, the Department discussed this federal law backdrop to promote informed decision-making, and reduce confusion about a complex regulatory scheme with federal/state overlap. That said, the parties apparently agree that the question before the Court is whether the Department loses jurisdiction to act outside section 3-411's time frames. AE Br. at 40. The answer should be no.

CONCLUSION

For these reasons, and those set forth in their opening brief, Defendants-Appellants Illinois Department of Public Health and its Director request that this Court reverse the appellate court's judgment on the construction of section 3-411, and affirm the circuit court's judgment on that issue, which, in turn, affirmed in part the Department's final administrative decision.

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief under Rule 342(a), is 5,915 words.

/s/ Laura Wunder
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CERTIFICATE OF FILING AND SERVICE

I certify that on July 30, 2019, I electronically filed the foregoing Reply Brief of Appellants Illinois Department of Public Health and its Director with the Clerk of the Court for the Illinois Supreme Court by using the Odyssey eFileIL system.

I further certify that other participants in this appeal, named below, are not registered service contacts on the Odyssey eFileIL system, and thus were served by transmitting a copy from my e-mail address to all primary and secondary e-mail addresses of record designated by those participants on July 30, 2019.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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