No. S241431

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JANICE JARMAN,
Plaintiff and Appellant,

v.

HCR MANORCARE, INC., *et al*.,
Defendants and Appellants,

Court of Appeal of the State of California, Fourth Appellate District
Division Three, Civil No. G051086
Superior Court of the State of California, County of Riverside
Case No. RIC 10007764
Hon. Phrasel Shelton and Hon. John Vineyard

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF AARP, AARP FOUNDATION, CENTER FOR MEDICARE ADVOCACY, CONSUMER ATTORNEYS OF CALIFORNIA, JUSTICE IN AGING, THE LONG TERM CARE COMMUNITY COALITION, AND THE NATIONAL CONSUMER VOICE FOR QUALITY LONG-TERM CARE IN SUPPORT OF PLAINTIFF/APPELLANT

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Pursuant to California Rules of Court, rules 8.50 and 8.200(c), AARP, AARP Foundation, Center For Medicare Advocacy, Consumer Attorneys Of California, Justice In Aging, The Long Term Care Community Coalition, The National Consumer Voice For Quality Long-Term Care, And The National Union Of Healthcare Workers (collectively, "*Amici"*) respectfully request leave to file the concurrently lodged *amicus* brief in support of Plaintiff and Appellant Janice Jarman.

INTEREST OF THE AMICI CURIAE

AARP and AARP Foundation: AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. Among other things, AARP and AARP Foundation fight to protect the rights of nursing facility residents to obtain redress when they have been victims of neglect and abuse through both litigation and participation as *amici curiae* in state and federal courts. (*See Shuts v. Covenant Holdco LLC* (2012) 208 Cal.App.4th 609; *Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102.) AARP California advocated for passage of the 2004 amendments to Health & Safety Code section 1430(b) which broadened that section to allow a nursing facility resident to bring an action for violation of the Patient's Bill of Rights "or any other right provided for by federal or state law or regulation."

Center for Medicare Advocacy: The Center for Medicare Advocacy (the "Center") is a national, private, non-profit law organization,

founded in 1986, that provides education, analysis, advocacy, and legal assistance nationwide, primarily to assist the elderly and people with disabilities to obtain necessary healthcare, therapy, and Medicare. The Center focuses on the needs of Medicare beneficiaries, people with chronic conditions, and those in need of long-term care, and provides nationwide training regarding Medicare and healthcare rights. It advocates on behalf of beneficiaries in administrative and legislative forums, and serves as legal counsel in litigation of importance to Medicare beneficiaries and others seeking healthcare coverage. The Center supports full enforcement of high standards of care for nursing home residents and recognizes the importance and need for both public enforcement and private litigation.

Consumer Attorneys of California: Consumer Attorneys of California is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent injured individuals, including those injured due to poor conditions in nursing homes. Consumer Attorneys has taken a leading role in advancing and protecting the rights of those most vulnerable to abuse both in the courts and the Legislature.

Justice in Aging: Justice in Aging's principal mission is to protect the rights of low-income older adults. Through advocacy, litigation, and the education and counseling of legal aid attorneys and other local advocates, Justice in Aging seeks to ensure the health and economic security of older adults with limited income and resources. Since 1972, Justice in Aging (formerly the National Senior Citizens Law Center) has worked to promote the independence and well-being of low-income elderly and persons with disabilities, especially women, people of color, and other disadvantaged minorities. Justice in Aging works to preserve and strengthen Medicaid, Medicare, Social Security, and SSI benefits programs that allow low-

income older adults to live with dignity and independence. In addition, Justice in Aging seeks to ensure their access to the courts and to keep the courts open for justice. Justice in Aging is concerned about the impact of the lower court's decision on its clients' ability to enforce their rights and hold nursing facilities accountable in California state courts.

Long Term Care Community Coalition: The Long Term Care Community Coalition ("LTCCC") is a nonprofit organization dedicated to improving quality of care, quality of life and dignity for elderly and disabled people in nursing homes, assisted living and other residential settings. LTCCC focuses on systemic advocacy, researching relevant national and state policies, laws and regulations in order to identify relevant issues and develop meaningful recommendations to improve quality, efficiency, and accountability. In addition to providing a foundation for advocacy, LTCCC uses this research and the resulting recommendations to educate policymakers, consumers, and the general public.

National Consumer Voice for Quality Long-Term Care: The National Consumer Voice for Quality Long-Term Care ("Consumer Voice") was formed as the National Citizens' Coalition for Nursing Home Reform in 1975 due to public concern for substandard care in nursing facilities. Since that time, Consumer Voice has become the leading national voice representing consumers in issues relating to long-term care and has become the primary source of information and tools for consumers, families, caregivers, ombudsmen, and other advocates to help ensure quality care for all residents. Consumer Voice is dedicated to advocating for quality care, quality of life, and protection of rights for all individuals receiving long-term services and support.

NEED FOR FURTHER BRIEFING

This appeal presents legal issues that affect *Amici* and their involvement in the elder care industries in California. Counsel for *Amici*

have reviewed the briefs filed by the Parties in this Court and in the Court of Appeal. *Amici* believe that this Court will benefit from additional briefing. *Amici's* brief largely supplements, but does not duplicate, the parties' briefs.

DISCLAIMER OF AUTHORSHIP AND MONETARY CONTRIBUTION

The proposed brief, lodged herewith, was not authored, either in whole or in part, by any party to this litigation or by any counsel for a party to this litigation. No party to this litigation or counsel for a party to this litigation made a monetary contribution intended to fund the preparation or submission of the brief.

CONCLUSION

For all of the foregoing reasons, *Amici Curiae* AARP, AARP Foundation, Center For Medicare Advocacy, Consumer Attorneys Of California, Justice In Aging, The Long Term Care Community Coalition, The National Consumer Voice For Quality Long-Term Care, And The National Union Of Healthcare Workers respectfully request that the Court grant the foregoing application and accept the enclosed brief for filing and consideration.

Dated: October 18, 2018

Respectfully Submitted,

BRAUNHAGEY & BORDEN LLP

By: _____
Matthew Borden

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SUMMARY OF ARGUMENT

The Legislature enacted Health & Safety Code section 1430(b) in recognition that State regulatory efforts and existing tort remedies could not protect the fundamental human rights to care, autonomy and dignity that the Legislature had created in the Patients' Bill of Rights. Section 1430(b) establishes a mechanism for residents to enforce systemic statutory protections, such as the right to adequate staffing. It also secures basic individual liberties, such as the right to be fully informed about medical decisions, the right "to be free from psychotherapeutic drugs used as a chemical restraint," and the right to "be allowed privacy for visits with family, friends, clergy, social workers or for professional or business purposes." It further protects the right "[t]o be treated with consideration, respect and full recognition of dignity and individuality, including privacy in treatment and in care of personal needs." Without meaningful enforcement under section 1430(b), many of these rights, especially the latter ones, would be dead letters.

Section 1430(b) states that a facility "shall be liable for up to five hundred dollars ($500), and for costs and attorney fees, and may be enjoined from permitting the violation to continue." This language provides for up to $500 in statutory damages for each violation of a resident's rights. The construction adheres to the statutory language by applying the damages award to "the violation," makes victims whole, deters misconduct, ensures that facilities are accountable for each wrongful act, and impels practitioners to pursue resident rights cases as the Legislature envisioned.

Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC (2013) 221 Cal.App.4th 102, held that section 1430(b) damages are capped at $500 per case. Thus, once a facility violates any resident's right, it can violate all the resident's other rights, as many times as it wants, with

impunity. The *Nevarrez* decision incorrectly transformed a statute that was supposed to protect residents into a law that immunized facilities. After *Nevarrez*, resident-rights violations increased by more than 50 percent.

Interpreting section 1430(b) as a liability-limiting statute is contrary to the Legislature's intent, the statutory language and structure, and basic rules of construction. The legislative history shows that section 1430(b) was enacted to protect residents and encourage private actions to protect resident rights, and nothing suggests that the provision in section 1430(b) creating statutory damages was meant to upend the common law principle that a wrongdoer must bear responsibility for each separate offense it commits.

ManorCare's contentions about section 1430(b) do not withstand scrutiny. It argues that relief under section 1430(b) should be limited because nursing facilities are regulated by the government, and residents have other tort remedies. This argument ignores that the same regulation and tort remedies preexisted the passage of section 1430(b), and that the Legislature enacted section 1430(b) in recognition that these solutions failed to protect resident rights. ManorCare also asserts that residents can obtain injunctive relief. Such relief, however, does not adequately compensate victims, deter facilities from violating the law, incentivize facilities to identify and correct violations, or encourage counsel to take on cases. Finally, ManorCare argues that the failure to interpret section 1430(b) as a liability-limiting statute would expose facilities to unjust damages awards. The statute, however, creates the precise amount of damages intended by the Legislature — "up to $500," an amount that gives juries discretion to prevent outsized awards, if appropriate. Moreover, if forced to pick between an interpretation that immunizes the very misconduct that the statute was supposed to redress versus one that is

allegedly over inclusive, the only approach consistent with legislative intent is the latter.

Various medical care provider *amici* argue that section 1430(b) is duplicative of tort claims. The statute, however, expressly states that "the remedies specified in this section shall be in addition to any other remedy provided by law." (§ 1430, subd. (c).) Moreover, section 1430(b) compensates victims for a wide range of conduct beyond the infliction of physical injuries. ManorCare unnecessarily diapered Mr. Jarman, left him in his own excrement while his calls went unanswered, and humiliated him in many other ways in violation of the Patient's Bill of Rights. He is entitled to statutory damages for each of the 382 times that occurred. Nothing in the statutory language, legislative history or common law would indicate that after the first violation, the Legislature intended section 1430(b) to immunize ManorCare's 381 subsequent violations. To the contrary, what happened to Mr. Jarman is the very conduct the Legislature intended to stop when it enacted section 1430(b).

The Court below was also correct in its ruling on punitive damages. Under Civil Code section 3294, punitive damages are allowed for any claim other than ones specifically exempted by the Legislature. Nothing in section 1430(b) prohibits awarding punitive damages. To the contrary, awarding punitive damages is consistent with the statutory goal of protecting residents and deterring wrongful conduct.

BACKGROUND

Amici Curiae are public interest organizations dedicated to protecting the rights of the elderly. Many of the *Amici* advocated for the passage and amendment of section 1430(b) and have litigated cases under section 1430(b) to protect nursing home residents' fundamental rights and to improve the quality of care for residents in California. As detailed below, the purpose of section 1430(b) is to protect residents and to create a

means for residents to be able to retain counsel to protect their rights. Since the decision in *Nevarrez*, which gutted the statutory remedy created by the Legislature, facilities have violated resident rights at a precipitously increasing rate.

A. The Purpose of Section 1430(b) Is to Protect Resident Rights

The Legislature enacted section 1430 in 1982 to enable private enforcement of the Patients' Bill of Rights, which are "fundamental human rights to which all patients in skilled nursing or intermediate care facilities are entitled." (ManorCare Request for Judicial Notice ("MC RJN") Ex. 1 at 212.) As explained by the Senate: "The purpose of this bill is to protect and ensure the rights of people residing in nursing homes." (*Id*. at 213.) This understanding was shared by the Governor's Office, which explained that the "objective of this Bill is consistent with those of the Department, the Agency and the Administration, which is to maintain and protect the rights of the elderly." (*Amici* Request for Judicial Notice ("Amici RJN") at 42.)

The Report by the Assembly Judiciary Committee explained that section 1430(b) achieved these protections by creating a new right of action for resident-rights violations. It stated: "This bill is intended to provide residents of skilled nursing or intermediate care facilities with a private cause of action for violation of regulations promulgated under the Patients Bill of Rights." (MC RJN Ex. 1 at 232.) It further explained that the statutory damages applied to each violation, stating: "For each violation the patient could recover a maximum of $500 plus attorneys fees at cost. The patient could also obtain an injunction against future violations." (*Id.* at 239.)

B. The Legislature Passed Section 1430(b) Because Government Enforcement and Tort Law Did Not Sufficiently Protect Residents

The need for section 1430(b) arose because the mechanisms that then existed to ensure that residents actually received the protections in the Patient's Bill of Rights, enforcement by State regulators and private tort litigation, were insufficient to protect these rights. The Senate Report explained: "Existing law authorizes the Attorney General, upon her own complaint or upon the complaint of any board, officer, person, corporation, or association, to bring an action against a licensee who violates specified licensing provisions. [¶] According to the author, this protection is not sufficient to ensure a patient her rights." (MC RJN, Ex. 1 at 7.)[1] The Governor's analysis likewise identified the insufficiency of the existing regulatory regime as reason to pass the law. (*Amici* RJN, Ex. 4A at 41.) It noted that Section 1430(b) "makes it practical for attorneys to pursue a civil action suit on behalf of a [resident?] whose private rights have been violated." (*Ibid*.) It further stated: "The intent of this Bill could not be met through regulation. When individual rights are in jeopardy, the force of law is required." (*Id.* at 42.)

The Legislature amended section 1430(b) in 2004 to extend to all federal and state laws in recognition that its previous protections were still inadequate. (*Amici* RJN, Ex. 1.) The Senate Health and Human Services Committee noted that "supporters argue that residents are illegally evicted, denied phone calls or visitors, and are subjected to humiliation by being paraded naked through a facility — all actions that are violations of their

[1] The author of the SB 1930 (which became section 1430(b)) further explained: "Since the State has made major cuts in services to people, it is more important than ever to allow the institutionalized individual the ability to protect their own constitutional rights in the private sector." (JC RJN, Ex. 1 at 7.)

rights." (*Id.*, Ex. 1-D at 128.) The Assembly Committee on Health reiterated the statute's regulatory purpose given that "the State is facing severe health care cost pressures that are likely to continue and that the number of seniors in California is expected to double in the next 15 years. With such cost and demographic pressures, the author believes that state functions such as licensing and certification of health facilities may suffer, and it thus becomes more important than ever to ensure that residents' rights be respected and enforced." (*Id.*, Ex. 1-A at 3.)

The concerns expressed by the Assembly Committee on Health when it first adopted section 1430(b) have not abated. In May 2018, the California State Auditor issued a report finding that "From 2006 through 2015, the number of substandard care deficiencies that nursing facilities received increased by 31 percent." (Skilled Nursing Facilities: Absent Effective State Oversight, Substandard Quality of Care Has Continued at iii, available at https://www.bsa.ca.gov/pdfs/reports/2017-109.pdf.) The report stated: "We found that Public Health in particular has not fulfilled many of its oversight responsibilities, which are meant to ensure nursing facilities meet quality of care standards." (*Ibid.*)

C. Section 1430(b)'s Use as a Regulatory Tool

Since its enactment, section 1430(b) has been used to prevent, deter, and remedy a wide array of violations of the Patients' Bill of Rights. It has been used in cases such as this one, where a facility has repeatedly violated a resident's rights hundreds of times. It has been used to redress illegal evictions of individual residents. (*Amici* RJN, Ex. 2.) And it has also been used to curb widespread, unlawful business practices, such as systemic misuse of psychotropic drugs to subdue residents or failing to meet statutorily-mandated staffing levels. (*Id.*, Ex. 3.)

D. *Nevarrez* and Its Aftermath

After the decision in *Nevarrez*, California saw a significant statistical increase in resident complaints. The total number of complaints rose 54 % from just four years ago.[2] Additionally, after *Nevarrez*, facilities began making $500 offers of compromise under Code of Civil Procedure section 998 at the outset of every case, which turned a statute designed to encourage private enforcement into a weapon for threatening cost shifting against residents who attempt to enforce their rights.

ARGUMENT

Statutory construction begins "with the fundamental rule that [the Court's] primary task is to determine the lawmaker's intent." (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1095.) The starting point is the language of the statute itself. (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1016 ["We begin with the text of the statute."].) If the plain language is ambiguous, the Court may "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*In re R.V.* (2015) 61 Cal.4th 181, 192, quoting *People v. Scott* (2014) 58 Cal.4th 1415, 1421, internal quotations omitted.)

I. SECTION 1430(B) WAS MEANT TO CREATE, NOT LIMIT LIABILITY FOR VIOLATING RESIDENT RIGHTS

Section 1430(b) provides that residents may recover up to $500 for each violation of their rights. Granting residents relief for each separate harm they suffer is the only way to interpret section 1430(b) that honors its

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[2] California Department of Public Health Licensing and Certification Division, "Field Operations – Complaints/Entity Reported Incidents" (Statewide Metrics tab) available at https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/FieldOperationsComplaints_ERIs.aspx.

language, legislative history, and purpose. The plain language of section 1430(b) shows that statutory damages apply to each violation of a resident's rights. Moreover, the statute must be construed in light of the Legislature's intent to protect residents and encourage private enforcement of resident rights. Imposing statutory damages for each violation of a resident's rights makes victims whole, deters violations and enables victims to secure legal representation.

ManorCare makes semantic arguments about the text of section 1430(b), but it cannot dispute that the purpose of the statute is to protect nursing home residents, not nursing homes. ManorCare's reference to various "rules" of statutory construction is not an effort to glean legislative intent; it is an attempt to subvert a legal principle so deeply rooted in the law that it was first articulated in cuneiform writing — that damages should be commensurate with culpability. ManorCare cites no evidence to support its argument that the Legislature intended to divorce statutory damages from a facility's degree of fault, much less the substantial proof required to show that such a counterintuitive result was intended. Adopting the construction ManorCare proposes would be inconsistent with the language, history and purpose of section 1430(b), and would cause continuing harm to the vulnerable population that the Legislature enacted the statute to protect.

A. The Statutory Language Ties Damages to "the Violation," Not to the Lawsuit

The plain language of section 1430(b) states that statutory damages apply to "the violation." ManorCare and the *Nevarrez* decision improperly ignore this language in favor of implying limitations based on the language "attorney's fees and costs." (Jarman AB at 25-27.) But ignoring the plain language contorts the meaning and import of the statute and conflicts with

the Legislature's understanding that "For each violation the patient could recover a maximum of $500 plus attorneys fees." (MC RNJ, Ex 1 at 239.)[3]

ManorCare also places great emphasis on the language that a current or former resident "may bring a civil action." (ARB at 14.) But "an action is simply the right or power to enforce an obligation." (*Frost v. Witter* (1901) 132 Cal. 421, 426.) Nothing in the statute limits residents to bringing only one civil action or prevents a resident from combining multiple causes of action into one lawsuit as allowed by Code of Civil Procedure section 427.10. As the decision below points out, if section 1430(b) was intended to cap statutory damages at $500 per suit, this would lead to the absurd result of residents such as Mr. Jarman having to file 382 separate lawsuits instead of one. That waste of judicial resources cannot be what the Legislature intended, and the statute should not be interpreted to create such a senseless result. (E.g., *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist*. (1989) 49 Cal.3d 408, 425; *Younger v. Superior Court* (1978) 21 Cal.3d 102, 113.)

Without reference to any language in section 1430(b), ManorCare also asserts that section 1430(b) only applies to Class C violations, and that section 1430(a) (which can only be enforced by the State) must be used for more serious offenses. (ARB at 15-17.) This distinction appears nowhere in section 1430(b), which has always broadly applied to "any rights" in the Patients' Bill of Rights. (§ 1430(b) (1982 Rev.).) The statute was expanded in 2004 to capture all resident-right violations, so that it now may be used when a facility "violates any rights of the resident or patient as set

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[3] The Legislature's understanding was shared by the California Association of Health Facilities ("CAHF"), the main opponent of amending section 1430(b). CAHF expressly recognized that the amendment proposed in 2004 would raise damages "for a resident's rights violation from $500 up to $5,000 per violation." (*Amicus* Ex. 1-A at 60.)

forth in the Patients Bill of Rights in Section 72527 of Title 22 of the California Code of Regulations, or any other right provided for by federal or state law or regulation." (§ 1430, subd. (b).)

Finally, ManorCare argues that the damages available under sections 1430(a) and 1430(b) are disproportionate. (ARB at 17-18.) This argument is incorrect for many reasons. First, both sections 1430(a) and 1430(b) similarly allow for damages per violation, and thus provide similar recovery. Second, there is no reason that these two provisions should result in the same damages. Section 1430(a) was passed in 1973, and has nothing to do with section 1430(b), which was passed in 1982. The two provisions serve different purposes: section 1430(a) is a government enforcement statute that provides for damages to the State, and section 1430(b) is a private attorney general statute that provides compensatory damages to the victims. Different recovery under each provision would not be incongruous with legislative intent, as the purposes of both provisions differ. Further, unlike damages to compensate residents in section 1430(b), the State's damages are expressly capped ("The amount of civil damages that may be recovered in an action brought pursuant to this section may not exceed the maximum amount of civil penalties that could be assessed on account of the violation or violations"). That the State's damages are expressly constrained and residents' damages are not is only further evidence that the Legislature did not intend to limit residents' statutory damages to $500 per lawsuit.

Most importantly, in all of its statutory machinations, ManorCare offers no evidence that the Legislature intended section 1430(b) to enable facilities to commit recurring violations with impunity. Similarly, it offers no evidence that the Legislature intended to undercompensate residents by requiring them to seek relief for all of a facility's violations in one lawsuit that only provides for up to $500 total in statutory damages. Nor does it

explain why the Legislature would do such things or how such an interpretation squares with the history and purposes of the statute. As shown below, it does not.

B. Statutory Damages Compensate Victims and Safeguard the Rights Section 1430(b) Was Enacted to Protect

Awarding damages for each wrong is necessary to compensate the victims and to ensure that counsel will file suits to enforce resident rights. ManorCare offers no legitimate argument suggesting that the Legislature intended section 1430(b) to undercompensate the victims it was enacted to protect. Yet capping damages at $500 per suit (roughly equivalent to the fine for parking in a bus zone) would virtually ensure that residents are not made whole. For example, ManorCare abandoned Mr. Jarman to lay naked in his own excrement (2 RT 180:14-27, 217:2-4), put him in diapers when he was continent, then neglected to change them (2 RT 186:12-15, 264:18-265:3 4 RT 557:3-6), and refused to respond to his calls for help. (1 RT 108:22-24, 2 RT 180:1-12.) ManorCare committed 382 similar violations in the course of only 90 days. Yet under ManorCare's construction of section 1430(b), Mr. Jarman would receive less than $2 per violation.

Limiting damages to $500 per lawsuit makes many claims for violations of resident rights infeasible, especially insults to basic human dignity that do not involve personal injuries. It makes little sense for a resident to pay $450 in filing fees and endure a trial for only a $500 recovery, and lawyers will not take on well-heeled facilities in hopes of someday getting paid.[4] As the Court below put it: "A statute which offers

[4] This case provides a good example of how burdensome taking on resident-rights cases can be. The action was filed in April 2010. It went to trial in June 2011. "After substantial postverdict wrangling, including an appeal [], the trial court entered judgment against ManorCare." (*Jarman* v. HCR ManorCare (2017) 9 Cal.App.5th 807, 811.) The instant appeal then followed.

the opportunity to file a lawsuit for a maximum recovery of $500 — no matter how many wrongs are proved — would be a remedy suitable only for those who like litigating far more than they like money."

Consider the case where a resident is denied the right to make a phone call every day for a year, then finally is able to transfer to a different facility. If the only remedy was up to $500 and an injunction to help other residents, which might not even go into effect during the victim's lifetime, no victim would pursue such a claim.[5] Nor would any lawyer. This would defeat the Legislature's intent to "make[] it practical for attorneys to pursue a civil action suit" under section 1430(b)." (*Amici* RJN, Ex. 4A at 41.) Moreover, even if the victim brought a case and prevailed, $500 would be little recompense.

In contrast, if the remedy was "up to $500" per wrong, then the facility would face significant damages, as well as fee shifting and the possibility of being enjoined from its misconduct in the future. That is a claim worth pursuing, would fairly compensate the victim, and would likely cause the facility to think twice before embarking on that course of conduct in the first place, or allowing it to continue — which is how the statute is supposed to work.

C. Statutory Damages Achieve Deterrence

Section 1430(b)'s goal of resident protection and supplementing State enforcement efforts is also achieved through deterring violations. The interpretation advanced by ManorCare eliminates the deterrent effect of section 1430(b), removes any incentive for facilities to detect and correct violations, and would even encourage facilities to violate resident rights after committing one violation. For example, after improperly denying a

[5] Section 1430(b) states that "A current or former resident . . . may bring a civil action." In practice, former residents are generally the plaintiffs who brings suits under section 1430(b) because current residents fear retaliation.

resident a visit from a loved one, a facility could then administer a chemical restraint, or continue to deny visits and phone calls every day thereafter, without any consequence.

The Legislature passed section 1430(b) to protect residents and because government enforcement and tort litigation were failing to do so. (*Shuts v. Covenant Holdco LLC* (2012) 208 Cal.App.4th 609,623–624.) Eliminating any incentive for facilities to stop committing recurring violations undermines the Legislature's purpose in passing the statute.

This Court has recognized the importance of deterrence in analogous contexts. In interpreting Labor Code section 5814, which creates a penalty for delayed payments, the Court rejected the argument that the statute did not allow "multiple penalties for successive delinquencies" simply because the statute did not use the language "per violation."[6] (*Gallamore v. Workers' Comp. Appeal Bd*. (1979) 23 Cal.3d 815, 823.) The Court explained:

> Were the threat of penalty limited to a single instance of delinquency, an employer or insurer who had unreasonably delayed payment of compensation and been assessed a 10 percent penalty could thereafter procrastinate indefinitely, subject only to the accrual of interest at the statutory rate . . . . For deterrent effect a penalty must have a prospective operation. We give the penalty section its intended deterrent effect and carry out the statute's basic policy of liberal construction by holding that successive delays in the payment of compensation may give rise to the imposition of successive penalties.

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[6] The provision states in relevant part: "When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars ($10,000)." (Lab. Code, § 5814, subd. (a).)

(*Ibid*., quotations omitted, ellipses in original.)

Although section 1430(b) pertains to damages, rather than a penalty, the same principle applies. Without prospective damages, nursing facilities have no reason to abate wrongful conduct — and even have a perverse incentive to engage in new misconduct. Since it, too, is a remedial statute, section 1430(b) should be subject to a liberal construction similar to Labor Code section 5814 to achieve its statutory purpose.

D. Section 1430(b) Does Not Override the Common Law Rule that a Wrongdoer Is Liable for Each Wrongful Act

A person who has committed multiple offenses is more culpable than a person who has committed only one offense.[7] Similarly, a facility that violates a resident's rights 382 times is more culpable than a facility that commits one, isolated violation. ManorCare offers no compelling evidence that the Legislature intended to disassociate liability from fault in a manner entirely foreign to any remedial statute.

Because culpability for multiple transgressions is greater than for single acts, the common law rule has long been that a wrongdoer is responsible for each separate, successive wrongful act. (See, e.g., *Phillips v. City of Pasadena* (1945) 27 Cal.2d 104, 107-108 ["Every repetition of a continuing nuisance is a separate wrong for which the person injured may bring successive actions for damages"]; *People v. Harrison* (1989) 48 Cal.3d 321 [criminal defendant liable for three counts of digital penetration over the course of a single assault because each offense was completed on moment of penetration]; *Carr v. Cove* (1971) 33 Cal.App.3d 851 [plaintiff

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[7] See, e.g., *People v. Perez* (1979) 23 Cal.3d 545, 551 ["A defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act."]; *People v. Correa* (2012) 54 Cal.4th 331, 342 ["a felon who possesses several firearms is more culpable than one who possesses a single weapon"].

injured in successive car accidents may obtain full recovery for each accident]; *Carbine v. Meyer* (1954) 126 Cal.App.2d 386, 390 ["successive trespasses give rise to successive causes of action"]; *Vernon v. Plumas Lumber Co*. (1925) 71 Cal.App. 112, 127 ["The prosecutions were based upon complaints and warrants and were separate and distinct from the previous false imprisonments; that they followed each other in successive events does not in any wise merge the wrongs inflicted or take away from the plaintiff the right to recover damages for both of the periods when he was falsely incarcerated, nor to recover damages for the malicious prosecutions which were thereafter instituted by the subsequent filing of complaints, issuance of warrants, and following arrests."]; *Yates v. Cool* (1955) 130 Cal.App.2d 536, 539–540 [successive violations of plaintiff's water rights gave rise to separate causes of action]; *Summers v. Dominguez* (1938) 29 Cal.App.2d 308, 312-313 [hitting plaintiff with car and then failing to care for him afterwards were successive torts]; see also Civ. Proc. Code, § 1047 ["Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom."].)[8]

Absent a clear legislative directive to the contrary, this rule should not be disturbed. "As a general rule, [u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. A statute will be construed in light of common law decisions, unless its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter . . . ." (*Cal.*

[8] For the same reasons, a plaintiff may seek relief for successive torts in the same action. (See, e.g., *Kraft v. Smith* (1944) 24 Cal.2d 124.)

Ass'n of Health Facilities v. Dep't of Health Servs. (1997) 16 Cal.4th 284, 297,internal quotations omitted, alterations in original.)

There is nothing in the plain language of the statute or legislative history that seeks to eliminate this baseline common law concept. This legal principle, against which the statute was written, underscores that section 1430(b) creates separate liability for each separate violation of a right thereunder.

E. ManorCare's Policy Arguments Lack Merit

The Legislature already has rejected most of the "policy" arguments that ManorCare advances. These arguments — all of which seek to turn section 1430(b) into a liability-limiting mechanism — make little sense in any event.

First, ManorCare contends that State enforcement and tort liability provide sufficient regulation and deterrence. This assertion ignores that the Legislature passed and expanded section 1430(b) expressly because it found these existing mechanisms insufficient to protect resident rights. (MC RJN at Ex. 1 at 7.)[9] Indeed, the facilities unsuccessfully asserted these same arguments in opposing the 2004 amendment to the statute. (Amici RJN, Ex. 1A at 34, 52, 60-62.)

Moreover, in light of the budgetary concerns noted by Legislature, regulatory failure has only become more profound since the last time the Legislature rejected the facilities' same arguments. As the State Auditor recently found:

> This report concludes that the State has not adequately addressed ongoing deficiencies related to the quality of care that nursing facilities provide. From 2006 through 2015, the number of substandard care deficiencies that

[9] There have been no published decisions under section 1430(a) since the inception of the law.

> nursing facilities received increased by 31 percent. California assigns oversight responsibilities for nursing facilities to three state agencies: the California Department of Public Health (Public Health), the Department of Health Care Services (Health Care Services), and the Office of Statewide Health Planning and Development. We found that Public Health in particular has not fulfilled many of its oversight responsibilities, which are meant to ensure nursing facilities meet quality of care standards. Additionally, all three agencies have not adequately coordinated their oversight efforts, creating inefficiencies.[10]

Indeed, since *Nevarrez*, resident rights violations have seen a 54 percent upswing.[11]

Second, the court in *Nevarrez* concluded that damages are limited under section 1430(b) because the main relief is injunctive. The ability to obtain an injunction requiring a facility to follow the law (which was already available under Business & Professions Code section 17200, et seq.) is only part of the picture, because it does not compensate the victims or deter resident rights violations. Such relief also has little benefit to former residents, who are the usual plaintiffs in these cases.

Finally, ManorCare argues that holding facilities accountable for each violation could subject them to unjust damages. However, section 1430(b) provides for an award of damages of "up to $500" per violation.

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[10] California State Auditor, "Skilled Nursing Facilities: Absent Effective State Oversight, Substandard Quality of Care has Continued," available at https://www.bsa.ca.gov/reports/2017-109/index.html.

[11] California Department of Public Health Licensing and Certification Division "Field Operations – Complaints/Entity Reported Incidents" (Statewide Metrics tab) available at https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/FieldOperationsComplaints_ERIs.aspx.

This gives juries discretion to make the damages fit the offense. This case, itself, provides a good example of how the statute is supposed to work. The jury awarded $250 per violation as the measure it felt appropriate.

II. SECTION 1430(B) DOES NOT PRECLUDE PUNITIVE DAMAGES

"When a statute recognizes a cause of action for violation of a right, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears." (*Commodore Home Sys. v. Superior Court* (1982) 32 Cal.3d 211, 215, citing *Orloff v. Los Angeles Turf Club* (1947) 30 Cal.2d 110, 113; *Greenberg v. Western Turf Assn.* (1904) 140 Cal. 357, 363–364). Nothing in section 1430(b) prohibits awarding punitive damages. To the contrary, as shown below, awarding punitive damages is consistent with the statutory goal of protecting residents and deterring wrongful conduct.

A. Punitive Damages Are Necessary to Deter Despicable Conduct

The purpose of punitive damages is "a purely public one. The public's goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or other potential wrongdoers. (*Adam v. Murakami* (1991) 54 Cal.3d 105, 110.) In other words, "the quintessence of punitive damages is to deter misconduct." (*Ibid.*)

The case below highlights the need to deter violations of section 1430(b). ManorCare's conduct was "despicable," and the evidence supported a finding that it subjected Mr. Jarman to "cruel and unjust hardship." (*Jarman v. HCR ManorCare, Inc.* (2017) 9 Cal. App. 5th 807, 819.) ManorCare failed to notice that Mr. Jarman had suffered a stroke, leaving him to lay naked in his own excrement. (2 RT 180:14-27, 217:2-4.) ManorCare put Mr. Jarman into diapers, despite the fact that he was continent when admitted, and then neglected to change them. (2 RT

186:12-15, 264:18-265:3 4 RT 557:3-6.) The nursing staff did not respond to Mr. Jarman's calls for help, including when he finished using the bedpan and when he needed pain medication. (1 RT 108:22-24, 2 RT 180:1-12.) As a result of ManorCare's refusal to provide adequate care, Mr. Jarman contracted a UTI (2 RT 241:12-27), and suffered from "horrible, open bed sores" (2 RT 184:24-185:2). Moreover, ManorCare staff failed to follow doctor's orders to treat Mr. Jarman's sores, further exacerbating his condition. (2 RT 245:26-246:6, 258:20-260:13.) A punitive damage award will deter ManorCare and other skilled nursing facilities from exposing others to such treatment.

The need for punitive damages is particularly acute in light of the vulnerability of patients at ManorCare and other similarly situated skilled nursing facilities. When he was admitted to ManorCare, Mr. Jarman was 91 years old. (2 RT 174:28-175.) He had just had surgery to repair his broken hip, and could not move, get up, or even turn on his side without assistance. (2 RT 183:7-15, 220:5-7.) And Mr. Jarman suffered a stroke while he was residing at ManorCare. (2 RT 216:15-217:4.) Likewise, a large percentage of persons in skilled nursing facilities are aged and disabled. In cases such as this, where plaintiffs have limited means of asserting their own rights, punitive damages are an important tool for ensuring that nursing facilities comply with their statutory duties.

B. The Legislative History Supports the Imposition of Punitive Damages

The Court of Appeal found that punitive damages are available for violations of section 1430(b) because the statute did not create new rights or obligations and because the statute explicitly states the remedies it provides are not exclusive. (*Jarman*, *supra*, 9 Cal.App.5th at p. 817.) ManorCare's argument that the legislative history shows that the

Legislature deliberately refused to provide for punitive damages (Br. at 31-32) does not withstand scrutiny.

It is true that at, one point, SB 1930 was amended to expressly provide for punitive damages, and this amendment was later deleted. But this is not dispositive. The rejection by the Legislature of a specific provision contained in an act as originally introduced is sometimes persuasive evidence that the act should not be construed to include the omitted provision. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17.) But that principle does not apply "if the specific language is replaced by general language that includes the specific instance." (*Ibid.*)

Such is the case here, as section 1430 contains general language broad enough to encompass punitive damages. Section 1430(c) states that the statute's remedies are "in addition any other remedy provided by law." And section 1433 states that: "The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit or any party." Thus, the Legislature may have amended SB 1390 because an express reference to punitive damages was unnecessary and superfluous.

ManorCare argues that the Legislature deleted the punitive damages provision, not because it believed the provision unnecessary, but because it decided that punitive damages are not available for violations of section 1430(b). (ARB at 32.) However, ManorCare cites nothing from the legislative history that would support such an interpretation. The brief excerpt from the Legislative Counsel's Digest that ManorCare does cite (ARB at 31-32) merely shows that the Legislature amended SB 1390 to delete the express reference to punitive damages. It does not state the intent behind the amendment, or even explain the amendment's impact on the bill. ManorCare's reliance on an ambiguous entry in the Legislative Counsel's

Digest is not dispositive. "Although a legislative counsel's digest may be helpful in interpreting a statute, it is not the law." (*In Re Barry W.* (1993) 21 Cal.App.4th 358, 367.)

ManorCare further argues that section 1430(b) cannot be construed to allow for punitive damages because "courts may not speculate that the legislature meant something other than what it said." (ARB at 32, quoting *Page v. MiraCosta Cmty. Coll. Dist.* (2009) 180 Cal.App.4th 471, 492.) But ManorCare points to nothing in the plain language of the section 1430(b) that shows legislative intent to depart from the default rule that punitive damages are available.

C. Section 1430(b) Allows for Punitive Damages Because It Does Not Provide for a Comprehensive and Detailed Remedial Scheme

A statutory remedy is exclusive only where the statute "creates a right that did not exist at common law and provides a comprehensive and detailed remedial scheme for its enforcement." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 79.) As explained in Mr. Jarman's brief and in the Court of Appeal's opinion, section 1430(b) did not create a new right that did not exist at common law, and therefore its remedies are not exclusive. Moreover, the statute does not provide for a comprehensive and detailed remedial scheme, a point that ManorCare does not dispute.

A statute provides for a detailed and remedial scheme where " 'course of conduct, parties, things affected, limitations and exceptions are minutely described.' " (*Rojo*, *supra*, 52 Cal.3d at p. 80, quoting *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285.) For example, in *Rojo*, this Court found that FEHA "lacked the comprehensiveness necessary to infer a legislative intent to displace all preexisting or alternative remedies for employment discrimination." (*Ibid.*) The Court explained that FEHA applied only to employers of five or more

persons, excluded religious associations, and did not protect against discrimination on the grounds of sexual orientation. (*Ibid.*) Further, the court found that the Act was limited as remedial scheme because the Fair Employment and Housing Commission was not authorized to award either punitive or general compensatory damages, which in some cases, could provide the only adequate form of relief. (*Ibid.*)

Likewise, here, section 1430(b) does not "minutely" describe the course of conduct, parties, or limitations and exceptions of the regulatory scheme. While the statute allows persons to bring suits for violations of certain rights, it did not create those rights. Nor does it even describe them in detail. And like FEHA it has serious limitations as a remedial scheme, as it only provides for injunctive relief and $500 per violation and does not allow for the recovery of compensatory damages.

D. Compensatory Damages are Not a Prerequisite for an Award of Punitive Damages

As explained in Jarman's Brief, an award of compensatory damages is not necessary before punitive damages may be awarded. Rather a plaintiff need only show that he or she has been damaged. (*James v. Public Finance Corp*. (1975) 47 Cal.App.3d 995, 1001-1002; *Contento v. Mtichell* (1972) 28 Cal.App.3d 356.)

The authority cited by ManorCare does not hold otherwise. *Kizer v. County of San Mateo* (1991) 43 Cal.3d 139, merely holds that Government Code section 1818 — which states that a public entity is not liable for exemplary or punitive damages — does not preclude the imposition of statutory civil penalties on a county-operated long-term healthcare facility. In *Kizer*, the court did not even consider whether punitive damages could be awarded in situations such as this, where a plaintiff suffers actual damages as a result of the conduct of a private defendant, but the statutory scheme does not allow for the award of compensatory damages.

ManorCare acknowledges that, in certain cases, a showing the plaintiff has been damaged is all that is required. For example, "in an action for damages based on language defamatory per se, damage to plaintiff's reputation is conclusively presumed and he need not introduce any evidence of actual damages in order to obtain or sustain an award of [punitive] damages." (*Contento*, *supra*, 28 Cal.App.3d at p. 358.) Nevertheless, ManorCare argues this rule does not apply here because a section 1430(b) award is available without any showing of injury. But ManorCare does not and cannot dispute that 1430(b) violations can give rise to significant damages to a plaintiff. Mr. Jarman is a prime example. He suffered significant injury and pain and suffering as a result of ManorCare's repeated violations of section 1430(b). In such cases, a section 1430(b) should be able to recover punitive damages.

E. Allowing Punitive Damages Would Not Produce Absurd Results

ManorCare's argument that allowing for the award of punitive damages for section 1430(b) violations would lead to absurd results should also be rejected. ManorCare reasons that, if punitive damages were allowed, a plaintiff with no or nominal harm could obtain punitive damages, but a plaintiff with actual harm cannot, as section 1430(a) caps damages. The argument disregards the fact that section 1430(a) actions are "prosecuted by the Attorney General in the name of the people of the State of California" (§ 1430, subd. a.), while section 1430(b) actions are prosecuted by skilled facility residents who suffered the consequences of a defendant's statutory violation. Moreover, as discussed above, a plaintiff who does not suffer actual damages would not be entitled to recover punitive damages under section 1430(b). And there is nothing absurd about allowing punitive damages where despicable conduct has been shown by

clear and convincing evidence, especially in cases such as this, where the victims of such despicable conduct are among society's most vulnerable.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be affirmed.

Dated: October 18, 2018

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.520(c), I certify that this Brief of *Amicus Curiae* AARP, AARP Foundation, Center For Medicare Advocacy, Consumer Attorneys Of California, Justice In Aging, The Long Term Care Community Coalition, The National Consumer Voice For Quality Long-Term Care, And The National Union Of Healthcare Workers contains 6,865 words, not including the Table of Contents, Table of Authorities, this Certificate, the caption page, signature blocks, or attachments.

Dated: October 18, 2018

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