Case No.

S241431

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JANICE JARMAN,

Plaintiff and Appellant,

v.

HCR MANOR CARE, INC., et al.,

Defendants and Appellants.

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANTS AND APPELLANTS

Review After a Decision by the Court of Appeal
Fourth Appellate District, Division Three (No. G051086)
(Riverside County Super. Ct. No. RIC10007764)

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APPLICATION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, amicus curiae Association of Southern California Defense Counsel (hereafter ASCDC or Association) requests leave to file the accompanying brief in support Defendants and Appellants HCR Manor Care, Inc. and Manor Care of Hemet CA, LLC,[1] and respectfully urges this court to reverse the Court of Appeal's published decision in *Jarman v. HCR Manor Care, Inc.* (2017) 9 Cal.App.5th 807 (*Jarman*).

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[1] No party or counsel for a party in this matter authored the proposed amicus brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of this brief, other than the amicus curiae and its members. (See Cal. Rule of Court 8.520(f)(4).)

ASCDC is the nation's largest and preeminent regional organization of trial and appellate lawyers devoted to defending civil actions, comprised of approximately 1,000 attorneys in Southern and Central California. ASCDC is actively involved in assisting the courts and organized bar in addressing legal issues of interest to its members and the public.

In addition to involvement in appellate matters of public interest, the Association provides members with specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas focusing on the improvement of the administration of justice and civil litigation practice in this State.

ASCDC's member-attorneys often represent healthcare providers in professional negligence cases, as well as nursing homes and custodial care facilities charged with "elder abuse" and actions seeking statutory remedies under the Patients' Bill of Rights of the Long Term Care Act, similar to the claims asserted against defendants in this litigation. The Association and its members have participated before this court as amicus curiae in many prior cases involving questions of statutory interpretation affecting health care and custodial care providers and other professionals — including among others, *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148 (*Winn*), *Lee v. Hanley* (2015) 61 Cal.4th 1225, *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541 and *Kibler v. Northern Inyo County Hosp. Dist.* (2006) 39 Cal.4th 192.

ASCDC and its members therefore have a substantial interest in the proper resolution of the important questions of statutory interpretation and constitutional law raised by the Issues Presented for review in this case. Accordingly, ASCDC respectfully requests leave to file the following amicus curiae brief.

BUCHALTER
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By: 

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AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANTS AND APPELLANTS

I. PRELIMINARY STATEMENT REGARDING ISSUES PRESENTED

This case presents the following issues:

(1) Does Health and Safety Code section 1430, subdivision (b), authorize a maximum award of $500 per "cause of action" in a lawsuit against a skilled nursing facility for violation of specified rights or only $500 per lawsuit?

(2) Does section 1430, subdivision (b), authorize an award of punitive damages in such an action?

This case arises from a jury's verdict imposing multiple civil penalties for violations of the so-called Patient's Bill of Rights (Health & Saf. Code, § 1430, subd. (b); 22 Cal. Code Regs., § 72527). Section 1430(b) and related regulations authorize the imposition of "up to $500" as a penalty in "a civil action" for violation of certain Class C regulations; i.e., violations involving a patient's rights that do not cause or threaten substantial harm.

Prior decisions interpreting the same statute had previously held that the Legislature intended to impose a maximum civil penalty of "up to $500" *per lawsuit* in such cases. The *Jarman*

opinion "disagrees" with that approach.[2] (*Jarman, supra,* 9 Cal.App.5th at pp. 824-827, declining to follow *Nevarrez* and *Lemaire.*) Instead, the Court of Appeal's published decision would apply the $500 penalty on a "per cause of action" basis, holding that multiple causes of action may be brought in a single case based upon each alleged violation of the Patient's Bill of Rights. (*Ibid.*) In essence, reaching the same conclusion as the jury by other means.

This court granted review to settle the important questions of California law stated above. The Court of Appeal's "per cause of action" approach cannot be reconciled with the plain meaning of section 1430, nor the legislative history underlying the enactment of the $500 maximum penalty available in "a civil action." The Legislature clearly and unequivocally intended that $500 is the maximum civil penalty that may be imposed *per lawsuit.*

Turning to the second issue, on its face, the statute does not authorize any separate award of punitive damages beyond the $500 maximum civil penalty per lawsuit. Permitting *multiple* awards of punitive damages either at common law, or civil penalties up to $500 per violation or per cause of action in a single patient's action, raises Due Process implications that would render the Court of Appeal's interpretation unconstitutional. Accordingly, its decision should be reversed with instructions to address the jury's monetary award consistent with the plain language of section 1430.

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[2] See, e.g., *Nevarrez v. San Marino Skilled Nursing & Wellness Centre* (2013) 221 Cal.App.4th 102, 137 (*Nevarrez*) ($500 statutory award per action, not per claim); *Lemaire v. Covenant Care Cal., LLC* (2015) 234 Cal.App.4th 860, 868 (*Lemaire*) (same).

II.
FACTUAL AND PROCEDURAL BACKGROUND

John Jarman (later represented by his daughter, Janice Jarman, as successor in interest), sued HCR Manor Care, Inc., and Manor Care of Hemet CA, LLC (collectively referred to by the Court of Appeal as "Manor Care"), which own and operate a nursing home facility in Hemet. Jarman was a patient at the Hemet nursing facility for three months in 2008. He alleged claims for violations of patient's rights pursuant to section 1430, elder abuse, and negligence, arising from the care he received at the nursing home. (*Jarman, supra*, 9 Cal.App.5th at p. 810.)

The jury returned a special verdict finding that Manor Care committed 382 violations of Jarman's rights, and that its conduct was negligent. The jury awarded Jarman $95,500 in statutory damages under section 1430 (calculated at a rate of $250 for "each violation" of his rights) plus $100,000 in damages caused by the negligence. The jury also made a finding that Manor Care had acted with malice, oppression or fraud. However, the trial court granted Manor Care's oral motion to strike the punitive damage claim, agreeing with Manor Care that there was insufficient evidence to support the jury's finding of malice, oppression or fraud. Both sides appealed. The Manor Care parties disputed liability and the $500 "per violation" monetary award by the jury under section 1430; Jarman sought reinstatement of his punitive damages claim. (*Jarman, supra*, 9 Cal.App.5th at pp. 810-811.)

Eschewing prior interpretations of section 1430 provided by relatively recent decisions such as *Nevarrez* and *Lemaire*, the Court of Appeal affirmed the jury's verdict on "damages" under section 1430, and the trial court's award of statutory attorney fees against both Manor Care entities. (*Jarman, supra*, 9 Cal.App.5th at pp. 812, 817-820.)

Neither party raised or briefed what the Court of Appeal saw as the determinative issue concerning violations of the Patients' Bill of Rights — i.e., whether the $500 civil penalty provided by section 1430(b) can be imposed on a "per cause of action" basis. Manor Care urged that the statute plainly provides for a maximum $500 civil penalty "per action"; plaintiff contended that the "per violation" approach was the proper measure justifying the multiple civil penalties awarded by the jury in this case. The Court of Appeal on its own initiative adopted a "per cause of action" measure. This alternative method reached the same result as the verdict. (*Jarman, supra*, 9 Cal.App.5th at pp. 817-818, 824-827.)

In addition, the Court of Appeal concluded that section 1430 separately authorized a common law award of punitive damages over and above the $500 maximum civil penalty. The case was "remanded to the trial court with directions to conduct further proceedings to *establish the amount of punitive damages* Jarman is entitled to recover *as a result of Manor Care's 382 violations of his rights*." (*Id.* at p. 832, italics added; see also *id.* at pp. 815-818.)

Manor Care's petition for rehearing was denied. (Pet. for review at pp. 7, 9 and App. B.) This court granted review.

III.
LEGAL ARGUMENT

A. Applying the Plain Meaning of Health & Safety Code Section 1430(b), $500 is the Maximum Monetary Award Available to a Private Litigant in "A Civil Action" Under That Statute

The "foremost task" of the California courts when resolving a question of statutory interpretation is to "give effect to the Legislature's purpose." (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 293.) The starting point is the plain and ordinary meaning of the statute itself. (*Ibid.*)

As Manor Care aptly points out, applying both the plain language of section 1430, subdivision (b) and the legislative history of its enactment, the statute authorizes no more than a maximum award of $500 *per lawsuit* — without regard to the number of alleged violations of a single patient's rights proven in *that* action. (OBM at pp. 17-31.) Prior published decisions by other Courts of Appeal agreed with Manor Care's position regarding the "per lawsuit" *cap* on this $500 civil penalty. (*Nevarrez, supra,* 221 Cal.App.4th at pp. 131-136 (District Two, Div. Four); *Lemaire, supra,* 234 Cal.App.4th at pp. 867-868 (District Two, Div. Six).)

Section 1430, subdivision (b) provides: "A current or former resident or patient of a skilled nursing facility ... or intermediate care facility ... *may bring a civil action* against the licensee of a facility *who violates any rights of the resident or patient* as set forth

in the Patient's 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. *The suit* shall be brought in a court of competent jurisdiction. The licensee shall be liable for the acts of the licensee's employees. *The licensee 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." (Italics added.)

The Court of Appeal disagreed with *Nevarrez/Lemaire*'s interpretation of section 1430(b) as imposing a $500 "per lawsuit" cap on the monetary award. On the other hand, the opinion also ostensibly rejected Jarman's "per violation" theory. (Typed opn. at pp. 17-21.) Instead, citing *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988 (*Miller*), *Jarman* held that "a third option exists, which is to award statutory damages on a "per *cause of action"* basis." (*Jarman, supra,* 9 Cal.App.5th at p. 824.)

Respectfully, *Jarman*'s analysis concerning the nature and scope of the monetary remedy ("up to $500") provided under section 1430 (b) in "a civil action" cannot be reconciled with the rules governing statutory interpretation. The courts must construe "the ordinary meaning of the statutory language, its relationship to the text of related provisions, terms used elsewhere in the statute, and the overarching structure of the statutory scheme." (*Winn, supra,* 63 Cal.4th at pp. 155-156; accord *Nevarrez, supra,* 221 Cal.App.4th at p. 129; *Lemaire, supra,* 234 Cal.App.4th at p. 867.)

Nevarrez and *Lemaire* consistently adhere to these principles of statutory construction; *Jarman* does not. In the context of the legislated purpose of section 1430, a resident or patient of a custodial care provider may bring "a civil action" for violation of "any rights" under regulations governing the operation of the caretaker. In *that lawsuit*: "The licensee 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." (Health & Saf. Code, § 1430, subd. (b).)

Employing the ordinary and common sense meaning: "The statute allows a single award of up to $500 ***per lawsuit*** ... ." (*Nevarrez, supra,* 221 Cal.App.4th at pp. 129-135, emphasis added, detailing the history and purpose of this particular $500 civil penalty]; accord, *Lemaire, supra,* 234 Cal.App.4th at pp. 865-868.)

The words "up to $500" ... "in a civil action" connotes this is the maximum award available "per lawsuit." (Cf. OBM at p. 25.)

But the Court of Appeal in *Jarman* insists another interpretation is still possible. In the context of this $500 private party remedy, prior cases rejected the identical "ambiguity" argument raised by Jarman in the trial court and on appeal; namely, that a civil award of "up to $500" should be assessed on a "per violation" basis. (See ABM at pp. 24-26; cf. RBM at pp. 10-13.)

Manor Care responds with a comprehensive analysis of the legislative history underlying the Long-Term Care, Health, Safety and Security Act of 1973 (hereafter Long-Term Care Act) of which

section 1430, subdivision (b) is a part. (See OMB at pp. 17-31; RMB at pp. 18-24.) Consistent with the plain meaning of section 1430, the legislative history of the private remedies adopted by the Legislature refutes Jarman's "per violation" argument, as well as the Court of Appeal's "per cause of action" interpretation.

This legislative history was considered in detail by *Nevarrez, supra,* 221 Cal.App.4th at pages 131-134. The *Nevarrez* court took judicial notice of many of the same documents relied upon by Manor Care in this case. Section 1430 is part of the Long-Term Care Act, which also sets up the administrative enforcement for more serious Class A and Class B regulatory violations that are subject to the jurisdiction of state agencies. Under that scheme, violations directly related to health, safety or security are class B violations. Those presenting imminent danger or substantial probability of death or serious injury are class A violations, which become class AA violations if they cause death. (Health & Saf. Code, § 1424, subds. (c)-(e).) Each of these classes is subject to a range of administrative penalties. Violations with only a minimal relationship to health, safety, or security are administratively classified as "class 'C' violation[s]." (22 Cal. Code Regs. § 72701.)

Those are not subject to an administrative penalty. Section 1430(b) provides for limited civil remedies to address Class C violations. (*Nevarrez, supra,* 221 Cal.App.4th at pp. 131-132.) After closely reviewing the legislative history, *Nevarrez* held "that the $500 maximum in section 1430, subdivision (b) applies per civil action rather than per violation." (*Id.* at p. 137.)

Nevarrez's analysis is most persuasive: "When subdivision (b) was added to section 1430, administrative penalties were expressly to be assessed 'for each and every violation. ([Citation].)'" (*Nevarrez, supra,* 221 Cal.App.4th at p. 132.) "The absence of this phrase from subdivision (b) supports the inference that the phrase was intentionally left out of that subdivision, especially in light of the regularity with which it appears in penalty provisions throughout the Health and Safety Code. The Long-Term Care Act provides a comprehensive scheme for the attainment of its objectives, including both public and private remedies." (*Ibid.*)

Indeed, "the fact that the private monetary remedy is not greater reflects a legislative choice with respect to that remedy, rather than a basis for a court to enhance the statutory scheme. ... [T]he $500 monetary remedy is not the only and certainly not the costliest of the private remedies. The prevailing party also is entitled to attorney fees, which, depending on the case, may far exceed the amount paid to the plaintiff." (*Nevarrez, supra,* 221 Cal.App.4th at p. 132; OBM at pp. 32-35 [describing other relief].)

Next, *Lemaire* examined the identical "per violation" argument raised by Jarman here in connection with another similar jury verdict that also found multiple Class C violations.

In *Lemaire*, after her mother died, plaintiff filed an action against the custodial caretaker for neglect, elder abuse, and violation of the mother's "patients' rights" under section 1430, subdivision (b). After trial, the jury found that the defendant did

not provide "complete and accurate health records" or "nurses' progress notes as often as the patient's condition warrants." (*Lemaire, supra,* 234 Cal.App.4th at p. 863.) The jury found 468 violations in the first category of inadequate record-keeping, 72 violations in the second. The verdict awarded $500 for each "violation" under section 1430(b). The trial court entered judgment for $270,000 as statutory damages, and awarded Lemaire over $866,000 in attorney fees and costs. (*Ibid.*) The *Lemaire* court reversed the jury's award of multiple civil penalties; applying section 1430(b)'s $500 per lawsuit cap.[3]

Responding to Lemaire's identical claim that the statutory language and legislative history showed that lawmakers intended this statutory damage provision to be applied to *each violation*: "[T]he words of the statute do not support this result. The phrase 'up to five hundred dollars' refers to '[t]he suit' to 'be brought.' (§ 1430, subd. (b).) It is a liability cap for the action. Had the Legislature intended an award of statutory damages for each violation it would have used the phrase 'up to $500 *per violation.*'

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[3] A topic of debate among prior cases is whether the $500 private party remedy is appropriately characterized as "damages" or a "civil penalty." No actual harm or damage needs to be proven; according to *Nevarrez*: "[S]ection 1430, subdivision (b) does not require proof of a particular injury and imposes liability solely upon the showing a violation of a statute or regulation that comes within its scope." (*Nevarrez, supra,* 221 Cal.App.4th at p. 137; *id.* at p. 135 [""The 'focus' of the private right of action is 'to encourage regulatory compliance and prevent injury.'"]; cf. *Shuts v. Covenant Holdco LLC* (2012) 208 Cal.App.4th 609, 624-625, fn. 9 [declining to consider whether an award under § 1430, subd. (b) is a civil penalty]; see also Cal. Med. Assn. Amici Curiae Br. at pp. 37-39.)

(See *Nevarrez*[,] *supra,* 221 Cal.App.4th at p. 132.)" (*Lemaire, supra,* 234 Cal.App.4th at pp. 866-867.)

Bolstering this interpretation, *Lemaire* also judicially noticed later-proposed amendments to *increase* the $500 "per lawsuit" cap on any statutory award imposing a civil penalty as declarative of the Legislature's intent about "existing law":

> The proponents of Assembly Bill No. 1160 (1999-2000 Reg. Sess.) noted that "[e]xisting law" made the licensee "liable for up to $500." (Legis. Counsel's Dig., Assem. Bill No. 1160 (1999-2000 Reg. Sess.).) Assembly Bill No. 1160 provided, in relevant part, "This bill would authorize, instead, this civil action for violations of any rights of the resident or patient as set forth under state and federal law and *would increase the maximum liability* to $25,000." (Italics added.) This supports Covenant's position that lawmakers intended the $500 figure to be a maximum liability cap.
>
> Consequently, where the statutory damage award exceeds the $500 limit, as here, the damage award must be reversed. (*Nevarrez*[,] *supra,* 221 Cal.App.4th at p. 129.)

(*Lemaire, supra,* 234 Cal.App.4th at p. 868.)

The *Jarman* court rejected these prior interpretations of the statute's plain meaning. The Court of Appeal was equally unpersuaded by either side's resort to legislative history. (See, e.g., *Jarman, supra,* 9 Cal.App.5th at pp. 825-826 & fn. 7 ["There is nothing that supports a 'per lawsuit' measure"]; cf. pet. for review at pp. 14-15.)

Instead, the Court of Appeal adopted a "third option" based upon its "per cause of action" treatment of another statutory damage remedy in *Miller, supra,* 159 Cal.App.4th 988. (Civ. Code,§ 3344, subd. (a) [misappropriation of name or likeness]; see and compare *Nevarrez, supra,* 221 Cal.App.4th at p. 137, rebuffing *Miller*'s approach: "'action' refers to the judicial remedy to enforce an obligation,' whereas 'cause of action' refers to the obligation itself"].) The Legislature presumptively knows how to qualify a private right to statutory damages on a "per violation" or "per cause of action" basis. (*Lemaire, supra,* 234 Cal.App.4th at pp. 866-867 [rejecting "per violation" as unsupported by the plain language]; *Nevarrez, supra,* 221 Cal.App.4th at pp. 132, 137 [rejecting *Miller*'s "per cause of action" approach].) In the decades since enacting section 1430(b), it has not done so.

And contrary to *Jarman*, the private right of action under section 1430 affords substantial legal remedies to a potential plaintiff to deter future regulatory violations—e.g., attorney fees and injunctive relief. (*Nevarrez, supra,* 221 Cal.App.4th at p. 135; compare typed opn. at p. 19 [a $500 damage cap is "suitable only for those who like litigating far more than they like money"] with

Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1148 ["the fact that attorney fees and damages, including punitive damages, are not available under the UCL is clear evidence that deterrence by means of monetary penalties is not the act's sole objective"].) "The fact that the private monetary remedy is not greater reflects a legislative choice with respect to that remedy, rather than a basis for a court to enhance the statutory scheme." (*Nevarrez, supra,* 221 Cal.App.4th at p. 132.)

The opinion ignores that all of the "remedies specified in [section 1430] *shall be in addition* to any other remedy provided by law," such as claims for elder abuse, which Jarman additionally pleaded. (*Lemaire, supra,* 234 Cal.App.4th at p. 867; see *Winn, supra,* 63 Cal.4th at pp. 155-160 [clarifying the statutory criteria to recover "enhanced" remedies for elder abuse under Welf. & Inst. Code, § 15600 et seq.)].)

Jarman nevertheless suggests that its "per cause of action" approach will avoid "manipulation" of section 1430(b) damage claims. (*Jarman, supra,* 9 Cal.App.5th at pp. 825-826.) How so? Assuming such "policy" considerations are within the province of the courts, rather than the Legislature, this case illustrates why the opposite is true.

Manor Care opposed any statutory damage award above the $500 per lawsuit cap. Jarman countered (just like the plaintiffs in *Nevarrez/Lemaire*) that $500 per violation is proper. The Court of Appeal chose the altogether different "cause of

action" approach, then admonished the Manor Care parties for not accurately predicting the adoption of this new test by arguing for a reduction of the verdict based on *Miller*: "For all we know, the 382 violations found by the jury reflect circumstances establishing 382 separate causes of action; and in the absence of an affirmative showing to the contrary, we are obligated to presume they do." (*Jarman, supra*, 9 Cal.App.5th at p. 828.) In the process, the Court of Appeal upheld the jury's "per violation" damage award by another name. Such a speculative notion cannot be reconciled with the statutory language and purpose of section 1430(b).

There are countless examples of California statutes providing for private monetary remedies on *either* a "per violation" or "per action" basis. Presumably, the Legislature knew the difference when it enacted the specific language of section 1430 providing for *these* specific private party remedies. (See OBM at pp. 22-23 [noting that in addition to those mentioned by *Nevarrez* and *Lemaire*, at least 85 statutes in the Health & Safety Code alone provide for "per violation" monetary awards].)

Even if the Legislature *might* have chosen a different method, neither the litigants nor the courts may rewrite the statutory scheme simply because they believe a "fairer" or more "reasonable" remedy should be afforded. The Court of Appeal should not have done so here.

B. Section 1430(b) Does Not Authorize an Award of Punitive Damages Beyond the Maximum $500 Penalty That May Be Imposed in "A Civil Action"

The *Jarman* court impermissibly takes its analysis of the Patient's Bill of Rates one step farther — deciding as a matter of first impression that section 1430(b) separately supports the imposition of liability against the defendants for *punitive damages.* (*Jarman, supra,* 9 Cal.App.5th at p. 127; criticizing *Nevarrez, supra,* 221 Cal.App.4th at pp. 135-136 [which raised due process concerns that the plaintiff's "per violation" argument may "result in an unreasonable or oppressive statutory penalty"].)

The Court of Appeal's order remanding the case "to establish *the amount of punitive damages* Jarman is entitled to recover *as a result of Manor Care's 382 violations of his rights*" under section 1430 is not supported by the statute or legislative history. (*Jarman, supra,* 9 Cal.App.5th at p. 832, italics added.)

Manor Care and other amici correctly observe that the legislative history of section 1430(b) reflects the enactment of the $500 statutory damage cap *did not* contemplate additionally imposing "punitive damages" under *that* statute. Nor do the private remedies of the Long-Term Care Act authorize civil litigants to pursue additional common law claims for punitive damages under its auspices. (See pet. for review at pp. 23-26; OBM at pp. 48-58; Cal. Med. Assn. Amici Br. at pp. 38-41.)

A jury's finding of "negligence" or "breach" of a custodial care contract cannot support punitive liability. (OBM at pp. 49-55; *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572.) The $500 maximum cap on the civil penalty that may be awarded by section 1430(b) does not represent "compensatory" damages that would separately support an additional punitive award. (*Nevarrez, supra,* 221 Cal.App.4th at pp. 135-137; accord, *Lemaire, supra,* 234 Cal.App.4th at p. 866 [the focus of section 1430(b) is remedial, not compensatory and not punitive]; see discussion and authorities cited in Section I.A. Legal Argument at p. 17 & fn. 3, *ante.*)

Due process considerations require a court reviewing the defendant's liability for punitive damages to independently assess the legal basis for the punitive award in relation to the factual circumstances of each case — including the nature and availability of civil penalties or other remedies that could arbitrarily result in duplicative "punishment" for the same alleged harm. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1185-1187 [reducing punitive damages awarded from $1.7 million to $50,000 on due process grounds, citing *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418 (*State Farm*); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 436-443]; see also *Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 376-377 [more recently discussing the "constitutional calculus" of punitive damage jurisprudence].)

The United States Supreme Court has developed a set of "substantive guideposts" governed by Fourteenth Amendment Due

Process considerations that reviewing courts must consider to avoid the arbitrary imposition of punitive damages awards, including: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*Nickerson v. Stonebridge Life Ins. Co., supra,* 63 Cal.4th at pp. 371-372, citing *State Farm, supra,* 538 U.S. at p. 418.)

Generally speaking, where a statute already provides for a civil penalty, additional punitive damage awards based upon the identical conduct proscribed by that statute are not permitted. The courts are mindful of Due Process prohibitions against imposing "multiple punitive damages awards for the same conduct ...." (*State Farm, supra,* 538 U.S. at p. 423.)

Hence, *Nevarrez* rightly observed that imposing *multiple* civil penalties under section 1430(b) on a "per violation" basis would likely give rise to impermissibly excessive penalties. (*Nevarrez, supra,* 221 Cal.App.4th at pp. 135-136.) *Jarman's* "per cause of action" approach also implicates Due Process guideposts, calling into question the constitutionality of *that* application of the statutory scheme as well. The canons of construction operate to avoid absurd results and unconstitutional applications. (*Briggs v. Brown* (2017) 3 Cal.5th 808, 835.) This court should apply the plain language of section 1430(b) as prior cases have done.

IV.
CONCLUSION

The decision of the Court of Appeal should be reversed.

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WORD COUNT CERTIFICATION
[CRC 8.504(d)]

Counsel for amicus curiae hereby certify that this application for leave to file brief and amicus curiae brief of Association of Southern California Defense Counsel in Support of Defendants and Appellants contains 4,570 words, including footnotes, as measured by Microsoft Office Word 2010 word processing software.

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PROOF OF SERVICE
(BY U.S. PRIORITY MAIL)

I am employed in the Counties of Los Angeles and Sacramento, State of California. I am over the age of 18 years and not a party to this action; my business address is BUCHALTER, APC, 1000 Wilshire Boulevard, Suite 1500, Los Angeles, CA 90017 and 500 Capitol Mall, Suite 1900, Sacramento, CA 95814.

I served the **Application to File Amicus Curiae Brief and Brief of Association of Southern California Defense Counsel in Support of Defendants and Appellants** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

This Application and Brief was electronically-submitted on this date to the Clerk of the California Supreme by True Filing with eight additional copies and all other copies served on each of the addresses by U.S. Priority Mail.

I am readily familiar with Buchalter's practice for collecting and processing correspondence and packages for delivery by U.S. Priority Mail with the United States Postal Service. Such envelopes addressed to each addressee were placed for collection and mailing with the Postal Service, with postage fully prepaid, on that same day following ordinary business practices.

I declare under penalty of perjury of the laws of the State of California that the above is true and correct. Executed on October 18, 2018, at Sacramento, California.

HARRY W.R. CHAMBERLAIN II

SERVICE LIST
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