No. S241431

IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

SUPREME COURT
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JANICE JARMAN,

Plaintiff and Appellant,

vs.

HCR MANORCARE, INC. and
MANOR CARE OF HEMET CA, LLC,

Defendants and Appellants.

OPENING BRIEF ON THE MERITS

After a Published Opinion
of the Fourth District Court of Appeal, Division Three
Case No. G051086

Superior Court of the State of California
County of Riverside
Hon. Phrasel Shelton and Hon. John Vineyard
Case No. RIC10007764

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I. ISSUES FOR REVIEW

(1) Does Health and Safety Code section 1430, subdivision (b) (Section 1430(b)) authorize a maximum award of $500 *per "cause of action"* in a lawsuit, as held below, or $500 *per lawsuit*, as held in *Nevarrez* and *Lemaire*?[1]

(2) Does Section 1430(b) authorize an award of punitive damages?

II. INTRODUCTION

This case presents two issues of pure statutory interpretation. Section 1430(b) creates a private right of action for a nursing home resident to sue the facility for violating certain "rights of a resident." The statute authorizes injunctive relief, attorneys' fees and costs, and "up to five hundred dollars ($500)" in "a civil action." The Opinion below misinterpreted this statute in fundamental ways, requiring reversal.

Section 1430(b) is one strand of an extensive network of state and federal administrative monitoring and enforcement mechanisms and civil damages remedies, focused on nursing home resident safety and health. Section 1430(b), which caps any monetary award at $500, but also provides for attorneys' fees and costs as well as injunctive relief, specifically is intended to address violations of rights that have "only a minimal relationship" to resident health and safety. (22 Cal. Code Regs., § 72701, subd.(a)(4); see also *Nevarrez*, 221 Cal.App.4th at 135.) In contrast, violations that endanger patients are the subject of the companion statute, Health and Safety Code section 1430, subdivision (a) (Section 1430(a)),

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[1] *Nevarrez v. San Marino Skilled Nursing & Wellness Centre* (2013) 221 Cal.App.4th 102, 137, review denied Feb. 11, 2014, No. S215327; *Lemaire v. Covenant Care Cal., LLC* (2015) 234 Cal.App.4th 860, 868.

which authorizes administrative penalties and substantial civil damages on a per-citation basis. Section 1430(b) is not—as the court below seemed to believe—the fundamental remedy for nursing home residents. Various other remedies and disincentives are imposed under California law against nursing homes that violate residents' rights, including traditional compensatory and punitive remedies under other statutes and tort law. (*Lemaire*, 234 Cal.App.4th at 867 [Section 1430(b) "is not a substitute for the standard damage causes of action for injuries suffered by residents of nursing care facilities."].)

The Court of Appeal's Opinion warrants reversal on two grounds. First, as explained in the two recent opinions in *Nevarrez* and *Lemaire*, Section 1430(b) provides a single award of up to $500 in any one lawsuit, regardless of the number of resident rights violations proven. The Opinion here held contrarily that a plaintiff may recover multiple awards of up to $500 for each "cause of action." The upshot is that instead of one award of $500, the court below affirmed an award of $95,500 for 382 "violations."

This conclusion is unsupported by any of the authorities or rationales cited in the Opinion and is directly at odds with Section 1430(b)'s language, which authorizes a maximum of $500 in "a civil action." The Opinion ignores the larger statutory and regulatory context of Section 1430(b) and the multi-part administrative enforcement scheme and provision of substantial civil penalties and damages for a nursing facility's violations of laws that cause or threaten harm to residents. More importantly, the Opinion did not acknowledge the *eight separate legislative proposals* to increase or remove the maximum limitation on the Section 1430(b) award—none of which was adopted.

Contrary to the Opinion's view, limiting the award to the maximum imposed by the Legislature does not leave residents uncompensated if they have suffered harm. Section 1430(b) claims are invariably brought alongside claims for statutory elder abuse, wrongful death, negligence, and many other claims that can provide compensation for harm. Because of the other administrative and damages remedies available and the provision of injunctive relief and attorneys' fees, "the argument that the $500 statutory maximum must be applied on a 'per violation' basis in order to make private enforcement feasible does not withstand scrutiny." (*Nevarrez*, 221 Cal.App.4th at 135.) "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." (*Id.* at 132.)

The Opinion rejected both the per-lawsuit approach adopted in the prior case law and the per-violation approach urged by the plaintiff. It devised something no one had suggested or presented in the trial court, which it called a "third option": that Section 1430(b) authorizes an award of up to $500 for each "cause of action" proven. The number of "causes of action" would be determined by applying the primary right theory—which, as this Court recently observed, is "ill-suited" to application outside the res judicata context. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 395.)

The theory is particularly "ill-suited" here, as explained at pp. 39-48, *infra*. Among other reasons, the primary right doctrine is focused on the harm to the plaintiff; Section 1430(b) does not involve any notion of harm and imposes strict liability in cases where, in most instances, the resident has suffered no harm.

Second, compounding the damage done to the law by its "primary right" holding, the court below held sua sponte that punitive damages are

available for a violation of Section 1430(b), a proposition that not even the plaintiff—nor any plaintiff, to ManorCare's knowledge—ever asserted.[2] This holding contradicts settled analyses for determining whether punitive damages are available for a statutory violation. Specifically, courts will not read a punitive damages provision into a statute where the Legislature has expressed a "contrary" intent. (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215.) The Legislature unequivocally expressed a contrary intent in enacting Section 1430(b), when it considered adding an express punitive damages provision, and then deleted that provision. The Opinion did not address this dispositive point.[3]

Moreover, an award of compensatory damages is a necessary predicate for any punitive award; the $500 authorized by Section 1430(b) is without regard to harm suffered and thus is not compensatory. Granting punitive damages for a Section 1430(b) violation could result in a vastly larger award for an uninjured resident who experienced violations of laws with "only a minimal relationship" to his or her safety, while those residents suffering actual or threatened physical harm would have their damages capped by Section 1430(b)'s companion statute, Section 1430(a).

Both parts of the Opinion's holding are contrary to law and are bad policy. Neither can withstand scrutiny under basic principles of statutory interpretation. The Opinion's expansive interpretation to authorize substantial monetary awards under Section 1430(b) is contrary to that

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[2] Defendants HCR ManorCare, Inc. and Manor Care of Hemet CA, LLC are referred to as "ManorCare."

[3] As the plaintiff here had not sought punitive damages under Section 1430(b), this issue was not briefed to the Court of Appeal. ManorCare petitioned for rehearing and submitted the legislative history demonstrating the Legislature's specific rejection of a punitive damages remedy when it enacted Section 1430(b). The court denied rehearing.

statute's purpose, and is not necessary in order to effectuate the different purpose of protecting the health and safety of nursing home residents. The Court "will not presume . . . that any result consistent with [plaintiff's] account of the statute's overarching goal must be the law but will presume more modestly instead 'that [the] legislature says . . . what it means and means . . . what it says.'" (*Henson v. Santander Consumer USA Inc.* (2017) 137 S.Ct. 1718, 1725 [citations omitted].) The Legislature made clear what it meant in Section 1430(b): a single maximum award of $500 and no punitive damages. The Opinion should be reversed.

III. STATEMENT OF THE CASE

John Jarman was a resident for three months in 2008 at a skilled nursing facility operated by Manor Care of Hemet CA, LLC.[4] (1-CT-3 ¶ 7.[5]) Manor Care of Hemet CA, LLC is indirectly owned by HCR ManorCare, Inc. (1-CT-2 ¶¶ 3-4.)

The complaint alleged three causes of action: (1) violation of Section 1430(b); (2) elder abuse and neglect under Welfare & Institutions Code section 15657; and (3) negligence. (1-CT-6-12.) All of the claims were based on allegations that Mr. Jarman had not been properly cared for while a resident at the facility. (*Id.*)

The case was tried to a jury in June 2011. (11-CT-2531-2550.) The jury returned a special verdict on June 15, 2011. (1-CT-183-185; 11-CT-2548-2550.) The jury found in favor of the plaintiff on the Section 1430(b) and negligence claims.[6] The jury found that ManorCare had committed

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[4] The plaintiff is Mr. Jarman's daughter.

[5] The citations to the Clerk's Transcript reference the numbering at the top of the page.

[6] The special verdict form did not ask the jury to make findings on the elder

382 "violations" of Mr. Jarman's rights, and it awarded $250 "for each right violation occurrence," totaling $95,500. (1-CT-184.) The jury also awarded $100,000 on the negligence claim. (1-CT-185.)

The jury found on the special verdict form that "the defendant engage[d] in conduct that caused harm to the plaintiff with malice, oppression or fraud." (1-CT-185.) Following the verdict, the court granted ManorCare's motion to strike that finding on the ground of insufficient evidence. (4-RT-699:4-699-2:3.) Following an appeal and remand, judgment was entered on September 9, 2014 (5-CT-1160), and both parties appealed again.[7]

On March 14, 2017, Division Three of the Fourth District Court of Appeal issued a published decision reversing the trial court's striking of the punitive damages finding, affirming in all other respects, and remanding for further proceedings on the amount of punitive damages. ManorCare filed a Petition for Rehearing, asserting, inter alia, that the court had decided two key issues without briefing, citing Government Code section 68081. On April 5, 2017, the court denied the petition. This Court granted review.

IV. ARGUMENT

A. Section 1430(b) Authorizes a Single Monetary Award of Up to $500 in Any Civil Action.

The Opinion held that a plaintiff who prevails on a claim under Section 1430(b) is entitled to recover a maximum of $500 for each "cause of action." The court explained that the number of causes of action presented in a plaintiff's Section 1430(b) claim is to be determined under

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abuse cause of action. (1-CT-183-185.)

[7] Additional details are set forth in *Jarman v. HCR Manor Care, Inc.* (April 11, 2014) 2014 WL 1401086, and are not relevant here.

the primary right theory, and that the award is applied to each primary right found to have been violated. (Op. pp. 21-22, 25.)

This conclusion finds no support in—and is contrary to—the language of the statute, the statutory scheme of which it is a part, and the legislative history. Ignoring what the Legislature chose to do in drafting, enacting, and amending this statute, the court engaged in impermissible judicial legislation, based on its own views of how the statute should operate. The decision is wrong, as set forth below. The correct interpretation, as articulated in *Nevarrez* and *Lemaire*, is that Section 1430(b) authorizes a maximum award of $500 per lawsuit, i.e., per "civil action."

1. The Statutory Scheme Governing Nursing Facilities.

a. The Long-Term Care Act.

Section 1430(b) is part of the Long-Term Care, Health, Safety, and Security Act of 1973 (LTCA), which created an extensive system of agency monitoring, oversight, and citations for non-compliant facilities. (Health & Saf. Code, § 1417.1.) The LTCA states:

> It is the intent of the Legislature in enacting this chapter to establish (1) a citation system for the imposition of prompt and effective civil sanctions against long-term health care facilities in violation of the laws and regulations of this state, and the federal laws and regulations as applicable to nursing facilities . . . ; (2) an inspection and reporting system to ensure that long-term health care facilities are in compliance with state statutes and regulations pertaining to patient care; and (3) a provisional licensing mechanism to ensure that full-term licenses are issued only to those long-term health care facilities that meet state standards relating to patient care.

(*Ibid.*)

This Court has observed that the purpose of the LTCA is remedial and preventative, not punitive. (*California Ass'n of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 294-295 (*CAHF*); *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 146-148.)

b. Violations That Harm or Threaten Harm to Residents.

The LTCA initially established two classes of violations, which focus on residents' health and safety, and it authorized the Department of Health Services (now the Department of Public Health, or CDPH) to issue citations for violations. Class "A" violations are those that the CDPH "determines present either (1) imminent danger that death or serious harm to the patients or residents of the long-term health care facility would result therefrom, or (2) substantial probability that death or serious physical harm to patients or residents of the long-term health care facility would result therefrom." (Health & Saf. Code, § 1424, subd. (d).) Originally subject to civil penalties between $1,000 and $5,000 "for each and every violation" (Motion for Judicial Notice (MJN), Ex. 24, p. 112), Class "A" violations are now subject to civil penalties ranging from $2,000 to $20,000 "for each and every citation." (Health & Saf. Code, § 1424.5, subd. (a)(2).) The Legislature subsequently added a category for Class "AA" violations, which are Class "A" violations that the CDPH "determines to have been a direct proximate cause of death of a patient or resident of a long-term health care facility." (Health & Saf. Code, § 1424, subd. (c).) Originally subject to an award "for each violation," penalty amounts currently range from

$25,000 to $100,000 "for each and every citation." (Health & Saf. Code, § 1424.5, subd. (a)(1); MJN, Ex. 24, p. 111.)

Class "B" violations are those that the CDPH "determines have a direct or immediate relationship to the health, safety, or security of long-term health care facility patients or residents, other than class 'AA' or 'A' violations." (Health & Saf. Code, § 1424, subd. (e).) Originally subject to civil penalties between $50 and $250 "for each and every violation" (MJN, Ex. 24, p. 112), today they are subject to penalties of $100 to $2,000 "for each and every citation." (Health & Saf. Code, § 1424.5, subd. (a)(4).)

The LTCA also includes Section 1430(a) (formerly Section 1430), which provides that, if the CDPH does not take action, the Attorney General or any person may pursue a suit for an injunction or civil damages, or both, against a licensee who commits a class "A" or "B" violation. (Health & Saf. Code, § 1430, enacted by Stats. 1973, ch. 1057, § 1; see also Health & Saf. Code, § 1430, subd. (a).) Civil damages under Section 1430(a) are limited to the maximum amount that could be assessed for "A" or "B" citations. (*Id.*)

c. Violations With "Only a Minimal Relationship" to Resident Health and Safety.

At issue in this case are lower-level violations called Class "C," involving matters that have "*only a minimal relationship to the health, safety or security of the skilled nursing facility patients*." (22 Cal. Code Regs., § 72701, subd. (a)(4) [emphasis added].)

In 1975, a regulatory Patients' Bill of Rights was promulgated (currently 22 Cal. Code Regs., § 72527), and in 1979, the Legislature enacted the Skilled Nursing and Intermediate Care Facility Patient's Bill of Rights, sections 1599 to 1599.4 of the Health and Safety Code.

In 1982, Senator Petris introduced legislation (SB 1930) adding subdivision (b) to Section 1430, to address an omission in the 1979 legislation creating the Patient's Bill of Rights. (MJN, Ex. 2, p. 9.[8]) The author stated that "existing law does not provide adequate mechanisms to ensure [that residents'] rights are not abused." (MJN, Ex. 6, p. 17.) "Currently, violations [of patients' rights] are 'C' citations and, therefore, not subject to fine or to the civil remedies available to private citizens and the Attorney General as set out in Section 1430[a] of the Health and Safety Code." (*Ibid.*)

Thus, Section 1430(b) provides in relevant part:

> A current or former resident or patient of a skilled nursing facility, as defined in subdivision (c) of Section 1250, or intermediate care facility, as defined in subdivision (d) of Section 1250, 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 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. . . . 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. . . .*

(Health & Saf. Code, § 1430, subd. (b) [emphasis added].)

By providing a means to enforce "C"-level violations of rights that did not cause or threaten tangible harm, Section 1430(b) creates a complementary cause of action to Section 1430(a), which permits private enforcement of Class "A" or "B" violations. Where a resident suffers actual harm, he/she still has his/her traditional tort and statutory (such as elder abuse) remedies to pursue damages, and also may pursue a claim

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[8] The court granted ManorCare's motion to take judicial notice of the legislative history of Section 1430(b). (Op. p. 4, fn. 1.)

under Section 1430(a), which provides for a substantial monetary award for each citation. (Health & Saf. Code, § 1430, subd. (c).)

2. The Proper Statutory Analysis Demonstrates That Section 1430(b) Authorizes a Single Award of Up to $500 Per Lawsuit.

Interpreting Section 1430(b) "begin[s], as always, by examining the text of the statute, as 'the statutory language is generally the most reliable indicator' of legislative intent." (*Scher v. Burke* (2017) 3 Cal.5th 136, 143 [citation omitted].) And, "[i]f the statutory language is not clear, a court may resort to extrinsic sources, like legislative history." (*926 N. Ardmore Ave., LLC v. County of Los Angeles* (2017) 3 Cal.5th 319, 328.) This analysis demonstrates that Section 1430(b) authorizes a single maximum award of $500 in any lawsuit.[9]

a. The Language of Section 1430(b) Makes Clear That the Statute Provides for a Maximum of $500 Per Lawsuit.

Section 1430(b) states that a resident may bring "a civil action" against a facility that "violates any rights" and that "[t]he 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." On its face, the statute authorizes a single maximum $500 award. The statute does not say that a plaintiff may be awarded up to $500 "per cause of action,"

[9] The question argued in the trial court and Court of Appeal was whether the maximum $500 award was available on a *per-lawsuit* basis (as ManorCare contended) or a *per-violation* basis (as the plaintiff contended)—the same question argued and decided in *Nevarrez* and *Lemaire*. The Opinion created its own "third option"—a *per-cause-of-action* approach.

"per violation," or per anything else other than "a civil action."[10] As *Lemaire* put it: "The phrase 'up to five hundred dollars' refers to '[t]he suit' to 'be brought.' It is a liability cap for the action.'" (*Lemaire*, 234 Cal.App.4th at 867 [citation omitted]; see also *Nevarrez*, 221 Cal.App.4th at 130.)

Nevarrez held that "we should not read the phrase 'per violation' into section 1430, subdivision (b) since the Legislature did not include it here but did include it in statutes providing for civil penalties in other contexts." (*Nevarrez*, 221 Cal.App.4th at 130.) Indeed, the Legislature in many other statutes clearly expressed that an award may be multiplied on a particular basis, such as per violation or per day, demonstrating that the Legislature knows how to include language authorizing multiple awards when that is its intent. (*Ibid.* [citing Health & Safety Code, § 1280.1, subd. (a) [penalty of up to $25,000 "per violation"]; *id.* § 1317.6, subd. (c) [penalty "not to exceed five thousand dollars ($5,000) for each violation"]; *id.* § 1548, subd. (b) [penalty of "not . . . less than twenty-five dollars ($25) or more than fifty dollars ($50) per day for each violation of this chapter"]; *id.* § 1798.210, subd. (a) [penalty of up to $2,500 "per violation"]]; see also *Lemaire*, 234 Cal.App.4th at 867.) A Westlaw search of the Health & Safety Code alone turns up at least 85 statutes in which a monetary award is

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[10] A "civil action" is a lawsuit, not a right to recover for one specific harm. (See, e.g., Code Civ. Proc., § 307 ["There is in this State but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs."]; *id.* § 421 ["The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this Code."]; *id.* § 422.10 ["The pleadings allowed in civil actions are complaints, demurrers, answers, and cross-complaints."].)

authorized "per violation," for "each violation," or for each day that a violation occurs.

Most strikingly, in Section 1430(a)—another earlier enacted provision of the *same statute*—the Legislature provided that a facility may be liable for specified monetary penalties "for each and every citation," and initially provided penalties "for each and every violation." (Health & Saf. Code, § 1430, subd. (a); *id.* § 1424.5.) No such language was used in Section 1430(b), and that absence is telling. (*Nevarrez*, 221 Cal.App.4th at 132 ["When subdivision (b) was added to section 1430, administrative penalties were expressly to be assessed 'for each and every violation.' 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."] [citation omitted].)

"As a general rule, when the Legislature uses a term in one provision of a statute but omits it from another . . . we generally presume that the Legislature did so deliberately, in order 'to convey a different meaning.'" (*Scher*, 3 Cal.5th at 144-145 [citation omitted]; *Henson*, 137 S.Ct. at 1723 ["usually at least, when we're engaged in the business of interpreting statutes we presume differences in language . . . convey differences in meaning"].)

Had the Legislature intended to impose multiple awards on nursing facilities based on multiple causes of action or violations, it would not have said the statute provides up to $500 in "a civil action," and "'one would reasonably have expected that the Legislature simply would have directly imposed such liability in clear, understandable, unmistakable terms, as it

has done in numerous other statutes.'" (*Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 295 [citation omitted].)

b. The LTCA Statutory Scheme Demonstrates That Section 1430(b) Authorizes a Maximum Award of $500 Per Lawsuit.

The LTCA statutory scheme that includes Section 1430(b) confirms the per-lawsuit interpretation. The administrative penalty, injunctive relief, and per-citation civil damages provisions in the companion statute, Section 1430(a), allow the Attorney General or others to sue for unresolved Class "A" or "B" violations presenting issues directly related to resident health, safety, or security or presenting imminent danger or substantial probability of death or serious injury. This administrative enforcement scheme does not address Class "C" violations—those with "only a minimal relationship" to health and safety, including the sorts of rights violations that Section 1430(b) addresses in most instances. (*Nevarrez,* 221 Cal.App.4th at 131.)

As the *Nevarrez* court noted, Section 1430(b) fills this gap by allowing private suits to enforce any violation of a right, without regard to its administrative classification. (*Id.* at 132.) The court stated:

> [S]ection 1430, subdivision (b) apparently covers a broader spectrum of violations than subdivision (a). Some of these violations are not subject to administrative penalties at all, while others carry a broad range of such penalties and allow recovery of a broad range of damages in a civil action by the Attorney General. Because subdivision (b) is "distinct from the administrative enforcement of the Act[,]" *the fact that greater penalties or damages may be available in a public enforcement proceeding is not a reason to apply the $500 maximum in subdivision (b) "per violation."*
>
> *Indeed, it is a reason not to do so.* . . . The Long-Term Care Act provides a comprehensive scheme for the attainment of its objectives, including both public and private remedies.

> *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*, 221 Cal.App.4th at 132 [citations omitted; emphasis added].)

Section 1430(b) is not intended to provide substantial monetary compensation to residents who experience resident rights violations.

c. The Legislative History of Section 1430(b) Shows the Legislature's Intent to Allow a Single Maximum $500 Award Per Lawsuit.

"Where statutory text 'is unambiguous and provides a clear answer, we need go no further.'" (*Scher,* 3 Cal.5th at 148 [citation omitted].) However, "the available legislative history and historical circumstances surrounding the enactment [may] buttress our reading of the statute." (*Ibid.*) The legislative history does that here, confirming that $500 is the cap for each lawsuit. (*Lemaire*, 234 Cal.App.4th at 867; *Nevarrez*, 221 Cal.App.4th at 132-134.) The Opinion virtually ignores this key aspect of the case.

Since Section 1430(b) was enacted in 1982, there have been repeated attempts to increase above $500 the maximum liability of a facility for a Section 1430(b) violation—all of which were put before the Court of Appeal here. Repeatedly, the Legislature observed that current law imposes a $500 maximum award. It acknowledged concerns that the limit was too low and arguments that the cap of $500 should be increased or removed. In each instance, the Legislature rejected the suggestions and proposals to increase the award above the $500 maximum set in the original

legislation. In doing so, not once did the Legislature suggest that a $500 maximum was sufficient because a plaintiff could recover multiples of that amount. The remedies provision remains now as it was when adopted.

The Legislature's consistent view that the $500 stated in the statute is a maximum award for the entire lawsuit is consistently reflected in multiple legislative histories of the many failed proposals to remove or increase the maximum award.

1982: As originally proposed, Section 1430(b) permitted residents to recover the greater of $2,500 or three times actual damages and to obtain injunctive relief against ongoing violations of their rights. (MJN, Ex. 2, p. 10.) The proposed legislation was then amended to impose unlimited liability for proven damages. (MJN, Ex. 3, p. 12.) The bill was finally amended to provide for a $500 maximum award for all violations of the Patient's Bill of Rights. As so amended, it was adopted. (MJN, Ex. 5, p. 16.)

1990: Legislation was proposed (AB 2696) that would remove Section 1430(b)'s $500 cap and instead provide for actual damages. Legislative materials make clear that unless the law was changed, $500 was a cap, as the Bill Analysis described:

> Health and Safety Code Section 1430 currently allows a resident or patient in a long-term health care facility to institute litigation against the licensee of such a facility if the residents' or patients' rights have been violated pursuant to the Patients Bill of Rights in Title 22, Section 72527. . . . *This bill . . . changes the maximum recoverable amount from $500 to actual proven damages.*

(MJN, Ex. 9, p. 21 [emphasis added].) The Legislative Counsel's Digest agreed:

> A licensee is liable for up to $500 in damages in an action under [Section 1430(b)]. [¶] This bill would . . . eliminate the $500 damage limitation for a civil action maintained under these provisions.

(MJN, Ex. 10, p. 22.) Other materials in the legislative history of AB 2696 similarly reflect that $500 was the statutory maximum. (See, e.g., MJN, Ex. 11, p. 26 [Assembly Comm. of Judiciary Analysis stating "There is a $500 cap . . . on the civil penalty which can be awarded in such cases."]; *ibid.* [hypothetical conclusion that "attorneys are reluctant to advise frail elderly clients to pursue cases where the maximum award is $500"]; MJN, Ex. 12, p. 31; MJN, Ex. 13, p. 38.)

The proposed legislation was then amended to impose a cap of $25,000 (MJN, Ex. 14, p. 40), later reduced to $10,000 (MJN, Ex. 15, p. 43), and finally to $500, except in certain severe cases causing significant emotional trauma, in which case the maximum award would be $10,000. (MJN, Ex. 16, p. 49.) This legislation was never enacted.

1999: AB 1160 proposed to increase the amount of the award specified in Section 1430(b) from $500 to $25,000. (MJN, Ex. 17, p. 58; MJN, Ex. 18, p. 66.)

The bill described the reference to the $500 award as a limit on a plaintiff's recovery in a civil action, not per violation or per cause of action:

> Existing law authorizes a resident or patient of a skilled nursing or intermediate care facility to bring [a] civil action against a licensee of the facility who violates any rights set forth in the Patients Bill of Rights under state regulation. The licensee is liable for up to $500.

(MJN, Ex. 19, p. 77.) A Legislative Committee Analysis described the existing maximum $500 award in terms of a limit on liability in a civil action (not in terms of per violation or per cause of action):

> [This legislation i]ncreases from $500 to $25,000 *the amount a licensee is liable in a civil action* based on violations of any rights of the resident under state and federal law.

(MJN, Ex. 20, p. 85 [emphasis added].) This legislation did not pass.

2004: Section 1430(b) was amended by AB 2791 to broaden the scope of rights enforceable under Section 1430(b) to include "any other right provided for by federal or state law or regulation." (MJN, Ex. 21, p. 96.) AB 2791 proposed to increase the maximum $500 award, because the author believed that "attorneys will not take cases that involve many hours of work, if the time spent on the case greatly exceeds *the maximum damage award of $500.*" (*Id.* p. 97 [emphasis added]; *id.* p. 96 [noting that current law "limits a nursing home's liability to $500," resulting in attorneys' reluctance to take the cases].)

An Assembly Committee on Health report noted the argument that "raising the *maximum financial remedy* for rights violations from $500 to $5000 is necessary to provide effective enforcement of those rights." (*Id.* p. 97 [emphasis added].) And the report explained the view of opponents of the proposed increase, "that current resident rights penalties of up to $500 were enacted to provide residents with a *remedy when they have suffered an intangible harm of nominal value* and that increasing the penalty to $5000 creates a substantial financial incentive to sue facilities and dramatically changes the purpose of the law." (*Ibid.* [emphasis added].) The proposed increase was eliminated before passage of the legislation.

Thus, the Legislature was presented with, and did not adopt, *eight separate proposals* to allow for a monetary award greater than $500. "'The evolution of a proposed statute after its original introduction in the Senate or Assembly can offer considerable enlightenment as to legislative intent'"

(*Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 230 [citations omitted]), and "in some circumstances [unpassed legislation] may be a reliable indicator of existing legislative intent." (*Lemaire*, 234 Cal.App.4th at 868 [citing *Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 761].) When proposed legislation would have made changes to a statute that would have reflected a meaning urged by one party, the failure of that legislation to pass is relevant to an argument that the Legislature chose *not* to incorporate that meaning. (*Joannou*, 219 Cal.App.4th at 760-761.)

This legislative history demonstrates a clear legislative intent to limit the award under Section 1430(b) to a maximum of $500 in any lawsuit. Had one of the above proposals been adopted—for example, increasing the award from $500 to $25,000—then, according to the Opinion here, a resident could have been awarded $25,000 for each primary right at issue. That is absurd (especially in comparison with the far lower "per citation" awards available under Section 1430(a) for more serious violations). The Legislature would never have proposed such large amounts had it believed that the maximum specified in the statute could be multiplied in a single lawsuit. Thus, the same legislative history that negates a per-violation theory also negates any inference that the Legislature intended to allow an award of up to $500 for each "cause of action," the Court of Appeal's theory.

d. The Policy and Purpose of Section 1430(b) Demonstrate That the Legislature Intended Only a Single Maximum $500 Award Per Lawsuit.

Finally, "the statute's purpose and public policy" confirm that the award is capped at $500 per lawsuit. (*Nevarrez*, 221 Cal.App.4th at 134.) *Nevarrez* rejected expansive construction, explaining:

> [The LTCA's] focus is preventative; its purpose—to encourage regulatory compliance and prevent injury from occurring. . . . [The] assumption that section 1430, subdivision (b) aims solely or largely to protect the health and safety of nursing home residents [is] incorrect since . . . some patients rights violations are not related to health and safety. In fact, the legislative history of Senate Bill No. 1930 indicates the bill was intended largely as a mechanism for enforcement of those patients rights the Attorney General could not enforce because they were not directly related to health and safety.

(*Nevarrez*, 221 Cal.App.4th at 135; see also *Lemaire*, 234 Cal.App.4th at 867.)

Nor is a multiplier of the $500 statutory amount necessary to incentivize facility compliance with regulations or respect for resident rights. *Nevarrez* recognized that:

> The Long-Term Care Act provides an abundance of reasons for licensees not to transgress its health and safety objectives, and the additional private remedy in section 1430, subdivision (b) is not limited to the maximum $500 monetary relief. The licensee also is faced with the prospect of paying the other side's attorney fees and costs and suffering an injunction with its attendant fine for contempt of court. Thus, the argument that the $500 statutory maximum must be applied on a "per violation" basis in order to make private enforcement feasible does not withstand scrutiny.

(*Nevarrez*, 221 Cal.App.4th at 135; see *ibid.* [discussing injunctive relief]; *Lemaire*, 234 Cal.App.4th at 867.) The identical reasoning applies to any

argument that it is necessary to allow up to $500 for each "cause of action." Further, where there is actual or threatened harm to a resident, enforcement actions under Section 1430(a) would be available, as well as traditional tort or statutory causes of action. (Health & Saf. Code, §§ 1430, subd. (c), 1433.)

Nevarrez also noted that, where a plaintiff obtained injunctive relief, the case could qualify for substantial attorneys' fees irrespective of any damage award. (*Nevarrez*, 221 Cal.App.4th at 135.)

Beyond that, applying the $500 maximum on a per-violation basis, in the absence of a clear standard for defining a "violation," could implicate the facility's due process rights. (*Id.* at 135-36; see also *Lemaire*, 234 Cal.App.4th at 866-868.) As discussed in Part IV.A.3.b, applying the award on a per-cause-of-action basis poses the same problem.

e. The Opinion Fails to Demonstrate Any Error in the Per-Lawsuit Interpretation.

The Opinion rejected the *Nevarrez/Lemaire* per-lawsuit interpretation of Section 1430(b) in favor of a novel per-cause-of-action interpretation. The Opinion's reasoning does not withstand scrutiny.

First, the Opinion disagreed with *Nevarrez*'s conclusion that multiplying the $500 award was not necessary to accomplish the statute's purpose. The Opinion reached a polar opposite conclusion, based on the court's own policy views that "[a] statute which offers 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." (Op. p. 19.) This statement evidences a misunderstanding of Section 1430(b). Importantly, it

overlooks that this same argument was presented to the Legislature multiple times, and rejected.

The Legislature clearly did not intend Section 1430(b) to provide the only avenue of monetary relief to a resident, particularly one who alleges that he suffered harm. In Section 1430, subdivision (c), the Legislature provided that "[t]he remedies specified in this section shall be in addition to any other remedy provided by law." And Health & Safety Code section 1433 provides: "[t]he 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 of any party, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts." (See *Shaw v. Superior Court* (2017) 2 Cal.5th 983, 1003-1004 [applying similar provision].)

As this case shows, Section 1430(b) claims commonly are joined with other causes of action, such as negligence or statutory elder abuse, as well as wrongful death, infliction of emotional distress, or battery, and for civil damages under Section 1430(a), which are potentially far more lucrative and may provide for compensatory damages and punitive damages on a proper showing. Thus, the remedies under Section 1430(b) are rarely the only remedies sought by a nursing home resident plaintiff. (*Lemaire*, 234 Cal.App.4th at 867 [Section 1430(b) "is not a substitute for the standard damage causes of action for injuries suffered by residents of nursing care facilities."].) Section 1430(b) claims are thus not the primary means to compensate a plaintiff or penalize/deter a defendant.

Second, the Opinion disagreed with *Nevarrez* by concluding (based on neither evidence nor even argument of the parties) that the primary injunctive remedy provided by Section 1430(b) is not meaningful. The

Opinion speculated that most plaintiffs likely would no longer reside at the facility at the time of the lawsuit, and therefore would not be able to show a likelihood of continuing harm to support an injunction. (Op. p. 20 ["If a resident or patient of such a facility felt aggrieved enough to pursue a lawsuit, *we think it unlikely* the person would voluntarily remain at that facility—and we could not endorse a rule that effectively required him or her to do so as a condition of obtaining meaningful statutory relief."] [emphasis added].) "Conjecture and speculation are not proper bases for statutory interpretation." (*Donorovich-Odonnell v. Harris* (2015) 241 Cal.App.4th 1118, 1132.)

Regardless of the Court of Appeal's views on the effectiveness or availability of the injunctive remedy that the Legislature expressly gave to *every* current or former resident whose rights are violated, those views do not support increasing the monetary award that the Legislature decided to cap and repeatedly declined to increase. (*Nevarrez*, 221 Cal.App.4th at 132 ["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.*"] [emphasis added].)

Third, the Opinion misinterpreted and misapplied a discussion in *Nevarrez* regarding the significance of Section 1430(b)'s provision for an award of attorneys' fees and costs. The *Nevarrez* plaintiff urged that the statute's "syntax"—its reference in the same sentence to a maximum $500 award and an injunction to end "the violation"—supported "application of the monetary relief provision on a 'per violation' basis." (*Nevarrez*, 221 Cal.App.4th at 131.) The *Nevarrez* court concluded that the attempt to link the two remedies in this way was "frustrated" by the fact that the reference to costs and attorneys' fees—which are not awarded on a per-violation

basis—appeared in the same sentence, between the two remedies. (*Ibid.* [citing Code Civ. Proc., § 1032's reference to costs awarded to a prevailing party "in any action"].)

In attempting to justify its rejection of *Nevarrez*, the Opinion misconstrued this discussion in two ways, so the Opinion's conclusion that Section 1430(b)'s fees and costs provision could support a per-cause-of-action interpretation is incorrect.

The Opinion took issue with the premise that attorneys' fees and costs are not awarded on a per-violation basis. The Opinion pointed out that Code of Civil Procedure section 1032, subdivision (b) (CCP Section 1032(b)) states that costs are awarded to a prevailing party "in any action" "[e]xcept as otherwise expressly provided by statute." (Op p. 24 [citing CCP Section 1032(b)].) According to the Opinion, Section 1430(b) "would seem to qualify as an express provision, [so] we cannot assume it automatically requires adherence to [CCP Section 1032(b)'s] general rule." (Op. p. 24.)

But Section 1430(b)'s reference to fees and costs is neither "express" nor an "exception" to CCP Section 1032(b)'s award of costs to a prevailing party in the "action." Section 1430(b) merely says that a losing defendant is liable for the plaintiff's fees and costs, which is fully consistent with CCP Section 1032(b). In an analogous context, this Court has shown that any statutory exception to CCP Section 1032(b) must be truly *express*. (*Williams v. Chino Valley Ind. Fire Dist.* (2015) 61 Cal.4th 97, 105 [concluding that the Fair Employment and Housing Act's provision that a court has *discretion* to award costs to a prevailing party is an express exception to CCP Section 1032(b)'s requirement that costs are *mandatory*

to the prevailing party].) Section 1430(b) does not create any such express exception.

It is true, as the Opinion notes, that attorneys' fees may be awarded only as to certain "causes of action." (Op. p. 24.) But this does not support a per-cause-of-action interpretation of Section 1430(b) because the Opinion conflates two meanings of the term "cause of action." "'[T]he term "cause of action[]" . . . has various meanings. It may refer to distinct claims for relief as pleaded in a complaint. . . . But the term may also refer generally to a legal claim possessed by an injured person, without reference to any pleading.'" (*Baral*, 1 Cal.5th at 381; see also *Bay Cities Paving & Grading Inc. v. Lawyers Mut. Ins. Co.* (1993) 5 Cal.4th 854, 860, fn. 1 [noting that the term "cause of action" is often used to refer to pleading "counts"].) In the sense that a particular "cause of action" authorizes an award of attorneys' fees, "cause of action" has the same meaning as "count in a complaint." (*Baral*, 1 Cal.5th at 382 ["'cause of action' in its ordinary sense[] mean[s] a count as pleaded"].) Where only certain counts of a complaint authorize attorneys' fees, fees may be awarded on a "cause of action" basis. This has nothing whatsoever to do with "causes of action" in the sense of a plaintiff's right to pursue the violation of separate primary rights. It relates only to how the complaint was pleaded and whether the Legislature (or a contract) chose to provide for a fee award where a plaintiff has prevailed in establishing the required elements of a particular count.

Thus, the Opinion's analysis does not support its own conclusion that "the reference to fees and costs in section 1430, subdivision (b), would also be consistent with a 'per cause of action' measure of recovery." (Op. pp. 24-25.)

3. The Opinion's Per-Cause-of-Action Interpretation Is Unsupported.

In rejecting *Nevarrez*'s and *Lemaire*'s interpretation of Section 1430(b) as authorizing one maximum $500 award per lawsuit, the court did not adopt the plaintiff's per-violation interpretation, which *Nevarrez* and *Lemaire* had thoroughly discredited. Instead, the court created its own "third option," holding that the award is available on a per-cause-of-action basis, with the number of causes of action determined by how many of the plaintiff's primary rights were violated.[11] (Op. p. 21.)

This conclusion was not based on the statute's language, context, or history, and the plaintiff never advanced this theory. Instead, the conclusion was based on the court's own notions of policy and what the court believed was "appropriate." (See, e.g., Op. p. 19 [holding that a per-lawsuit approach "would be inconsistent with the statute's goal of protecting nursing home residents because it fails to provide them with any meaningful remedy"]; Op. p. 8 [stating that the court "cannot agree" with *Nevarrez* and *Lemaire* "that a 'per lawsuit' limitation is appropriate"].)

Yet general policy objectives cannot alter the analysis of clear statutory language.[12] "[I]t is quite mistaken to assume . . . that 'whatever'

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[11] Under the "primary right" doctrine, "a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) A single "cause of action" arises from the invasion of a single primary right. (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.) "The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action." (*Crowley*, 8 Cal.4th at 681.)

[12] As *Nevarrez* explained, "the assumption that section 1430, subdivision (b) aims solely or largely to protect the health and safety of nursing home residents [is] incorrect since . . . some patients rights violations are not related to health and safety." (*Nevarrez*, 221 Cal.App.4th at 135.)

might appear to 'further[] the statute's primary objective must be the law.' . . . [W]e will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead 'that [the] legislature says . . . what it means and means . . . what it says.'" (*Henson*, 137 S.Ct. at 1725 [citations omitted]; *Scher*, 3 Cal.5th at 145 [an expressed legislative goal or concern "'"does not mean that a court may add this concept as a separate requirement in the operative sections of the statute' when the Legislature chose not to do so."] [citation omitted].) As *Nevarrez* observed, "the general rule is that in construing a statute, we are not permitted to 'insert qualifying provisions not included' in the statute, nor edit it 'to conform to an assumed intention which does not appear from its language.'" (*Nevarrez*, 221 Cal.App.4th at 130 [citation and some internal quotation marks omitted].)

The Opinion's selection of the primary right doctrine as the basis for allowing multiple awards under Section 1430(b) is fundamentally flawed. The primary right/per-cause-of-action approach to awards under Section 1430(b) cannot be supported by basic principles of statutory analysis. And even if it could, there are additional reasons why the primary right doctrine is an unworkable and improper basis for determining the maximum size of an award under Section 1430(b). This Court has recently noted that the primary right theory may be "ill-suited" to application outside the res judicata context. (*Baral*, 1 Cal.5th at 395.) In the context of Section 1430(b), which imposes liability on a facility without any injury suffered by the resident, the primary right theory—based on "the plaintiff's right to be free from the particular injury suffered"[13]—is particularly "ill-suited."

[13] *Crowley*, 8 Cal.4th at 681-682.

a. Basic Principles of Statutory Analysis Do Not Support a Per-Cause-of-Action Award.

The Opinion ignored the statutory language limiting the award to $500 in "a civil action" and discounted the Legislature's important choice not to include in Section 1430(b) any language supporting an award based on any measure other than "a civil action." The Opinion stated that the absence of per-violation language does not preclude a legislative intent to allow the award on a per-cause-of-action basis. (Op. pp. 23-24.) But just as there is no basis to read a per-violation qualifier into the statute, there also is no basis to read in a per-cause-of-action qualifier, and to do so violates the rule that a court "may not broaden or narrow the scope of the [statutory] provision by reading into it language that does not appear in it . . . ." (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545 [citations and internal quotation marks omitted].) The statute says what it means—one maximum $500 award per "civil action."

The Opinion also ignored the legislative history that uniformly evidences a legislative intent to limit the award to $500 per lawsuit. Instead, the Opinion—in a footnote—simply declared this copious and revealing on-point legislative history "thin and contain[ing] nothing which definitively resolves the issue of how statutory damages were to be measured." (Op. p. 23, fn. 7.) Eight rejections of the idea of awarding more than $500 in any civil action are not "thin" in any language.

The Opinion acknowledged only a single item from the legislative history: a *minority* analysis of the 1982 bill that refers to a per-violation recovery. (*Ibid.*) *Nevarrez* showed that this same outlier minority bill analysis could not overcome the overwhelming history to the contrary. (*Nevarrez*, 221 Cal.App.4th at 133.)

b. The Primary Right Doctrine Is "Ill-Suited" to Determining the Maximum Award Under Section 1430(b).

The Court of Appeal's "third option"—allowing a plaintiff to recover a maximum of $500 for each cause of action, based on a primary right analysis—is flawed.

First, the primary right doctrine has no relevance to whether a plaintiff may recover multiples of $500 in a Section 1430(b) lawsuit. Rather, the doctrine applies to the different question of whether a second lawsuit asserting the same primary right as an earlier action is barred by doctrines of res judicata or the prohibition against claim-splitting.

> [T]he primary right theory is notoriously uncertain in application. "Despite the flat acceptance of the . . . theory . . . by California decisions, the meaning of 'cause of action' remains elusive and subject to frequent dispute and misconception." . . . We have observed that the "primary right theory has a fairly narrow field of application. It is invoked most often when a plaintiff attempts to divide a primary right and enforce it in two suits."

(*Baral,* 1 Cal.5th at 395 [citations omitted]; see *Crowley,* 8 Cal.4th at 682; *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904.) This Court explained that the primary right theory may be "ill-suited" to application in numerous contexts. (E.g., *Baral,* 1 Cal.5th at 395 [anti-SLAPP context]; *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1146 [declining to apply to statute of limitations]; *Crowley,* 8 Cal.4th at 682-683 [declining to apply to determine probable cause element of malicious prosecution suit].)[14]

[14] In *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, discussed *infra,* the court asserted that using the primary right theory to determine whether a plaintiff was entitled to multiple statutory awards in one lawsuit was no different from using the doctrine to decide whether a

Second, the primary right doctrine focuses on *harm* suffered by the plaintiff. (*Crowley*, 8 Cal.4th at 681; *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797-798.)

Harm, however, is irrelevant to Section 1430(b) actions and cannot drive the interpretation of how much money may be awarded under that statute. As discussed *supra* Part IV.A.1.c, a suit for rights violations under Section 1430(b) has nothing to do with harm. The statute imposes strict liability without regard to harm, and the rights enforced under Section 1430(b) are those that cause no or minimal harm. If a resident suffers harm, she has different remedies through numerous other statutory and tort claims, but not through Section 1430(b). A doctrine premised on the concept of "harm suffered" is not useful in interpreting a statute that does not involve harm.

Third, the primary right doctrine, which is "notoriously uncertain in application" (*Baral*, 1 Cal.5th at 395), is especially unworkable in the Section 1430(b) context because it would require clear delineation among primary rights or at least a method to make that delineation, in order to determine how many multiples of up to $500 to award.[15] Reading the

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plaintiff could split his claims. (*Id.* at 1005.) There is no support for this leap. But at any rate, *Miller* concluded that the claim before it presented only a single cause of action, and did not hold that a larger statutory award would have been appropriate had the case involved multiple causes of action.

[15] *See generally* Heiser, *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine* (1998) 35 San Diego L. Rev. 559 (detailing history of the primary right doctrine and comparing it unfavorably to the transactional approach in the Restatement (Second) of Judgments); James, *Res Judicata: Should California Abandon Primary Rights?* (1989) 23 Loy. L.A. L. Rev. 351 (discussing ambiguities of California's res judicata doctrine and its substantive diseconomies, and concluding that California should abandon its reliance on the primary right doctrine).

primary right doctrine into Section 1430(b) would require additional litigation about whether each violation alleged involves a primary right and warrants a separate statutory damage award. "[T]he court-made primary rights doctrine contains few explanations or illustrations to guide litigants and courts." (Heiser, at 570; *id.* at 608.) Some decisions employ a broad definitional approach. (*Slater*, 15 Cal.3d at 795 [right to be free from injury to person]; *Holmes v. David H. Bricker, Inc.* (1969) 70 Cal.2d 786, 788 [right to be free from bodily harm or injury, and right to be free from injury to property]; *Balasubramanian v. San Diego Cmty. Coll. Dist.* (2000) 80 Cal.App.4th 977, 992 [right to be employed]; *Boeken*, 48 Cal.4th at 798 [right not to be wrongfully deprived of spousal companionship and affection].) Other decisions use a narrow formulation. (*Bay Cities*, 5 Cal.4th at 860 [right to be free from negligence of attorney in connection with particular debt collection for which attorney was retained]; *Nicholson v. Fazeli* (2003) 113 Cal.App.4th 1091, 1102 [right of party to family law proceeding to adequate opportunity to litigate]; *Craig v. County of Los Angeles* (1990) 221 Cal.App.3d 1294, 1301 [right to be employed as a Harbor Patrol officer); see also *Villacres v. ABM Indus. Inc.* (2010) 189 Cal.App.4th 562, 581 [declining to reach the question of whether PAGA claims involve the same primary right as the underlying Labor Code violations].) Although the level of generality at which a right is expressed can drive the results, courts have not articulated a clear rule to address how to frame the question or limit the scope of primary rights.

The decision below to transmute 382 violations found by the jury into 382 violations of separate "primary rights" and causes of action

illustrates the problem.[16] (Op. p. 26.) Many individual violations of residents' rights would simply be instances of violation of a single "primary right," rather than of multiple separate rights. Here, the same conduct of the defendant is alleged to have violated multiple *resident* rights (1-CT-6-7 ¶ 23), which is not the same thing as causing multiple harms or violating multiple *primary* rights. The Opinion itself noted that a continuing violation would not create a distinct cause of action. (Op. p. 25.) But the Opinion used the jury's finding of 382 violations as a proxy for distinct causes of action, demonstrating how elusive and subject to abuse the per-cause-of-action approach is.

Fourth, relatedly, in Section 1430(b) claims, the plaintiff typically alleges the facility's violation of multiple aspects of the Patients' Bill of rights, based on a common set of facts and contentions regarding the defendant's conduct. Here, the complaint alleged violations of rights under seven different laws, all based on allegations that the facility was understaffed, resulting in the facility's failure to promptly meet Mr.

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[16] The Opinion stated that "[f]or 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." (Op. p. 26.) But it cannot be assumed that the 382 violations found by the jury constituted 382 causes of action, because the determination of what is a primary right—and therefore a cause of action—must be made in the first instance by the trial court, not by the jury. (*State Farm Gen. Ins. Co. v. WCAB* (2013) 218 Cal.App.4th 258, 268, fn. 4 [determination of elements of res judicata is question of law]; *Boeken*, 48 Cal.4th at 797-798 [discussing determination by courts of whether two claims assert same primary right].) The trial court here made no such determination; the issue was never even raised. Moreover, the jury was specifically asked to make an award *per violation* (1-CT-184), so the presumption must be that this is what they did. Finally, it was improper for the Court of Appeal to imply findings into the special verdict form. (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 303.)

Jarman's needs. (1-CT-6-7 ¶ 23; see also 2-CT-249-250 [listing 10 rights].) It is not clear that a violation of, for example, the requirement that a facility "employ an adequate number of qualified personnel to carry out all of the functions of the facility" (Health & Saf. Code, § 1599.1, subd. (a)) gives rise to a distinct primary right from the laws regarding assistance with activities of daily living and dignity (which Mr. Jarman alleged) or those regarding receipt of adequate hygiene, prompt responses to call lights, etc. (*Id.* § 1599.1, subds. (b), (f).) As another example, the plaintiff in *Lemaire* proved violations of the rights to (1) complete and accurate health records and (2) meaningful and informative nurses' progress notes, which likely are duplicative or at least overlap. (*Lemaire*, 234 Cal.App.4th at 864.)

The Opinion acknowledged the *Nevarrez* court's concern that applying the $500 maximum on a per-violation basis, in the absence of a clear standard for defining a "violation," could implicate the facility's due process rights. (Op. p. 25 [citing *Nevarrez*, 221 Cal.App.4th at 135-136].) The Opinion stated that the per-cause-of-action approach would avoid this concern because a continuing violation of the same right "would presumably qualify as a single cause of action" (Op. p. 25), but this overlooks the serious due process issues raised by the uncertainty in identifying distinct primary rights using a per-cause-of-action approach.

Fifth, the Opinion's concern that plaintiffs would circumvent a $500-per-lawsuit limit by filing multiple lawsuits, each asserting a separate primary right (Op. p. 22), appears unfounded. The rule is that:

> *A party cannot by negligence or design withhold issues and litigate them in consecutive actions.* Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable.

(*Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 755 [emphasis added; citation omitted]; see also *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202; *Villacres*, 189 Cal.App.4th at 576; *Franceschi v. Franchise Tax Bd.* (2016) 1 Cal.App.5th 247, 258-259.)

A plaintiff who has a Section 1430(b) claim based on multiple rights violations cannot deliberately withhold some of those violations from her lawsuit and then assert the withheld parts in subsequent seriatim lawsuits to seek multiple $500 awards. Here, the plaintiff alleged multiple violations arising from the same core alleged inadequate facility staffing. If she had brought an initial suit alleging only a violation of staffing regulations, any later suits alleging the contemporaneous failure to assist with activities of daily living or violation of Mr. Jarman's right to dignity would have been barred. Res judicata means that a party "should not be permitted to litigate [an issue] again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation." (*Villacres*, 189 Cal.App.4th at 575 [citation omitted].) Thus, the Opinion's primary rationale for rejecting a per-lawsuit interpretation does not withstand scrutiny.

However, to the extent that the Court of Appeal's concern had any validity—i.e., seriatim lawsuits asserting separate primary rights—that only highlights the well-recognized problems with California's use of the confusing primary right theory as a basis for res judicata rather than the prevailing rule adopted by federal and the considerable majority of state courts. That rule, as set forth in the Restatement (Second) of Judgments, is that a cause of action is defined by the scope of the "transaction, or series of connected transactions out of which the cause of action arose." (Rest. (Second) of Judgments, § 24.) Compared with the primary right doctrine,

the transactional approach is more predictable and easier to understand, and it presents no problems with how to define the scope of a "cause of action." (James, at 411-412; Heiser, at 608.) It also promotes judicial economy, in contrast to the primary right doctrine, which can "frustrate[]" that goal (James, at 404), as shown by the Court of Appeal's own hypothetical. The cases cited above demonstrate that courts struggling with the primary right doctrine have expanded its boundaries so that it may be seen to resemble the transactional rule, in substance though not in form. (See *Federation of Hillside and Canyon Ass'ns v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1203 [noting cases that apply the primary right theory but "indicate that in defining the injury suffered, primary rights theory incorporates to some degree a transactional standard"].)[17]

c. *Miller* Is Not Persuasive Authority for Applying a Per-Cause-of-Action Approach to Section 1430(b).

In addition to being unworkable as a practical matter, a per-cause-of-action theory is not even supported by the sole authority on which the Opinion relied, *Miller v. Collectors Universe, supra*, 159 Cal.App.4th 988.

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[17] This case might support adopting the prevailing transactional rule in California. The Opinion and ManorCare's arguments demonstrate the unwieldiness of applying primary right analysis in any context. Adoption of the transactional rule could materially impact the result in this case, to the extent the transactional rule undermines the Opinion's conclusions in a way that a strict application of the primary right theory might not. (*Mycogen*, 28 Cal.4th at 909, fn. 13 [declining request to reconsider the primary right doctrine where the result in the case would be the same under the transactional theory].) Adoption of the transactional rule would not unfairly prejudice the reasonable expectations of the plaintiff, who never asserted a primary right theory in the first place.

Miller involved a lawsuit under Civil Code section 3344, which authorizes an award of the greater of $750 or actual damages for a defendant's "unauthorized use" of the plaintiff's name or likeness for advertising or sale. (*Id.* at 994-995.) The plaintiff proved that the defendant used his name on over 14,000 separate certificates of authenticity, and sought an award of $750 for each use. (*Ibid.*) The *Miller* court concluded that the plaintiff had suffered a violation of only a single primary right, and limited the award accordingly. (*Id.* at 1008-1009.)

The Opinion asserted that Civil Code section 3344 is similar to Section 1430(b) and that *Miller*'s discussion of whether the plaintiff stated one or more causes of action was relevant to interpreting Section 1430(b). (Op. pp. 21-22.) But the Opinion overlooked important differences between Section 1430(b) and Civil Code section 3344, making *Miller* inapposite.

Unlike Section 1430(b), Civil Code section 3344's provision for statutory or actual damages is squarely based on the concept of harm to the plaintiff caused by the defendant's conduct. Thus, the question of whether a plaintiff is entitled to more than one statutory award from a defendant's unauthorized use(s) corresponds well with the central inquiry of the primary right doctrine of what harm the plaintiff has suffered. As repeatedly shown in *Miller*, Civil Code section 3344's language and legislative history demonstrate that the purpose of the statute is to provide an *injured* plaintiff with *compensation* for the *harm* that the defendant *caused.* (Civ. Code, § 3344, subd. (a) ["the person who violated the section shall be liable to the *injured* party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the *actual damages suffered* by him or her *as a result* of the unauthorized use . . ."] [emphasis added];

Miller, 159 Cal.App.4th at 1002 ["by enacting section 3344(a), the Legislature provided a practical remedy for a non-celebrity plaintiff whose damages are difficult to prove and who suffers primarily mental harm from the commercial misappropriation of his or her name"].) And in selecting the primary right theory as the basis for its analysis, the *Miller* court made this very connection: "the idea [of the primary right doctrine] that '[t]he cause of action is based upon the *injury* to the plaintiff' provides parameters useful in determining whether a plaintiff has violated the rule against splitting a single cause of action." (*Miller*, 159 Cal.App.4th at 1005 [emphasis in original; citation omitted].)

The concepts of injury, harm, compensation, damages, and causation are absent from Section 1430(b).

Moreover, the $750 award under Civil Code section 3344 is a *minimum* award designed to compensate the plaintiff when actual damages are intangible or hard to measure. A plaintiff who can prove tangible loss is entitled to recover more. (*Miller*, 159 Cal.App.4th at 1005-1006.) In contrast, a nursing facility resident who suffers actual harm is not entitled to any more than the maximum $500 under Section 1430(b); he or she has multiple other avenues to recover for actual harm.

Finally, *Miller* did not address the merits of a per-lawsuit versus per-cause-of-action approach. Either approach would have achieved the same result, because the lawsuit presented a series of related acts constituting a single violation of a single primary right. (*Miller*, 159 Cal.App.4th at 1005.) "An opinion is not authority for propositions not considered." (*People v. Knoller* (2007) 41 Cal.4th 139, 155 [citation omitted].)

In relying on *Miller*, the Opinion considered it significant that *Nevarrez* rejected the defendants' reliance on *Miller* to argue that a Section

1430(b) suit presents only a single cause of action, even where it alleges multiple resident rights violations. (Op. p. 22.) According to *Nevarrez*, statutory damages under Section 1430(b) might not always be pegged to a single primary right. (*Nevarrez*, 221 Cal.App.4th at 137 ["Certainly, not all violations [of Section 1430(b)] will be based on the same facts."].) However, *Nevarrez* did not analyze whether any of the resident rights enforceable under Section 1430(b) are separate primary rights or how to make that determination, and *Nevarrez*'s rejection of *Miller* in this precise context confirms that *Miller* is a thin reed for supporting a per-cause-of-action approach to Section 1430(b).

Importantly, whether the case involved one or more primary rights was entirely irrelevant in *Nevarrez*. *Nevarrez* acknowledged that a Section 1430(b) claim could be predicated on violations of more than one primary right. But that did not change the court's central conclusion: that the language, context, purpose, and legislative history of Section 1430(b) demonstrate that only one award is available per lawsuit. The number of causes of action simply does not matter.

The Opinion's holding that Section 1430(b) authorizes up to $500 for each cause of action is an erroneous and unsupported interpretation. The correct interpretation, as shown by the statute's language, legislative history, and other factors, is that a plaintiff may be awarded up to $500 in any lawsuit.

B. Punitive Damages Are Not Available for Violations of Section 1430(b).

The Opinion separately held that Section 1430(b) authorizes punitive damages. ManorCare is not aware of any Section 1430(b) case, including

this one, in which the plaintiff even claimed that this statute authorizes punitive damages.[18]

1. The Opinion Ignored the Proper Analysis for Determining Whether a Statute Authorizes Punitive Damages.

Generally, "[w]hen 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*, 32 Cal.3d at 215 [emphasis added]; see also *Turnbull & Turnbull v. ARA Transportation, Inc.* (1990) 219 Cal.App.3d 811, 826-827 [same].)

Where no contrary legislative intent appears, courts examine whether the statute codifies a cause of action that existed at common law. If so, punitive damages may be allowed; otherwise, punitive damages are not available for the statutory violation. (*De Anza Santa Cruz Mobile Estates Homeowners' Ass'n v. De Anza Santa Cruz Mobile Estates* (2001)

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[18] Not only does the Opinion allow courts and juries to award punitive damages for Section 1430(b) claims, but it allows imposition of punitive damages against a corporate owner of multiple skilled nursing facilities based on nothing more than a single facility's nursing director's general awareness of patient complaints, contrary to Civil Code section 3294, subd. (b). While the Opinion cited this Court's requirement that a corporate managing agent is a person who "'exercise[s] substantial discretionary authority over decisions that ultimately determine corporate policy'" (Op. p. 16 [quoting *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 577]), there was no evidence to meet that standard. The Opinion's own references to the evidence demonstrate nothing about ability to exercise discretionary authority over company policy. (See, e.g., Op. p. 16 [noting an inference that a "department head" "was a person authorized by the facility to resolve patient complaints" and a reference in the employee handbook to supervisors having "direct responsibility to see the company goals such as quality care . . . are met"].)

94 Cal.App.4th 890, 912 ["[w]here a statute creates new rights and obligations *not previously existing in the common law*, the express statutory remedy is deemed to be the *exclusive remedy* available for statutory violations, unless it is inadequate"] [emphasis added].)[19]

a. Legislative History Shows Conclusively That the Legislature Intended That Section 1430(b) Does Not Authorize Punitive Damages.

Where the Legislature indicates "a contrary legislative intent" that punitive damages are not available under a statute, the inquiry ends. (*Commodore*, 32 Cal.3d at 215; *Turnbull*, 219 Cal.App.3d at 826-827.) Where a statute does not explicitly address a subject, "'[v]arious extrinsic aids, including the history of the statute, committee reports and staff bill reports may be used to determine the intent of the Legislature . . . .'" (*In re Chavez* (2004) 114 Cal.App.4th 989, 993.) The legislative history demonstrates that the Legislature specifically considered *and rejected* allowing punitive damages under Section 1430(b).

As introduced in March 1982, the statute would have permitted residents to recover the greater of $2,500 or three times actual damages, and costs and attorneys' fees, and injunctive relief. (MJN, Ex. 2, p. 10.)

The bill was amended in May to add punitive damages: "damages according to proof, *punitive damages* upon proof of repeated or intentional violations, and . . . costs and attorney fees." (MJN, Ex. 3, p. 12.)

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[19] The remedies provided by Section 1430(b) are adequate, as the Legislature has confirmed repeatedly, with each rejection of the eight proposed amendments to increase the amount recoverable under Section 1430(b). As discussed above, the Legislature clearly did not intend Section 1430(b) to provide the only avenue of monetary relief to a resident.

But by amendment dated August 2, 1982, *the punitive damages provision was eliminated.* Also eliminated was characterization of the award as "damages," meaning that the monetary award no longer included the baseline prerequisite for any punitive damages award. (MJN, Ex. 4, p. 14; see also *infra* Part IV.B.2.a.) The remedy language in the August 2, 1982 amendment is in the statute as enacted and as it exists today. (MJN, Ex. 5, p. 16.)

The Legislature's decision not to authorize punitive damages was knowing and deliberate. The topic of punitive damages was the subject of specific debates and negotiations involving the bill's author, the industry trade group, and other interested stakeholders. (MJN, Ex. 7, p. 19 [letter from Sen. Petris's office to industry group, stating that amendments to the bill "delete the punitive damages language and reduce the fine from $2500 to $500, as per our discussions"]; MJN, Ex. 8, p. 20 [memorandum to Sen. Petris stating that the punitive damages provision had been deleted and the bill "[w]ent back to the Fine, but down to $500 or treble damages . . ."].)

Deletion of the punitive damages provision shows the Legislature's unequivocal intent to foreclose punitive damages. Where, during the enactment process, the Legislature amends a bill to add a provision and later amends the bill to delete that provision, that shows unambiguously that the Legislature meant to "preclude[]" that provision from the statute as enacted. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 531-532.) For instance, in *Hess*, the Court held that a judgment under Civil Code section 3291 did not include accrued interest. The Court observed that "[e]ven if the language of Civil Code section 3291 were arguably ambiguous, the legislative history is not." (*Id.* at 531.) During enactment of the statute, the Legislature added a provision to include interest in the judgment and then

deleted it. "In light of this sequence of events, we are confident the Legislature did not intend to include prejudgment interest accrued pursuant to Civil Code section 3291 in the judgment." (*Id.* at 532.)

City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 88-89, considered whether Evidence Code section 1043 required an affidavit based on personal knowledge. That requirement was deleted before passage. Thus, "[t]he legislative history of section 1043 reveals that the Legislature expressly considered and *rejected* a requirement of personal knowledge." (*Ibid.* [emphasis original]; see also *People v. Tingcungco* (2015) 237 Cal.App.4th 249, 256 ["The Legislature's rejection of a specific provision which appeared in the original version of an act supports the conclusion that the act should not be construed to include the omitted provision."] [citation omitted].)

The Opinion here relied on another part of Section 1430—subdivision (c)—to support its conclusion. (Op. p. 11.) Section 1430, subdivision (c) provides that "[t]he remedies specified in this section shall be in addition to any other remedy provided by law." (See also Health & Saf. Code, § 1433 ["[t]he 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 of any party . . ."].) These statutes cannot be construed as catch-all provisions authorizing punitive damages, given the Legislature's specific decision *not* to authorize them. Section 1430 included the identical sentence *before* subdivision (b) was added to create a cause of action for violation of residents' rights. (MJN, Ex. 22, p. 108.) Similarly, Health and Safety Code section 1433 was enacted in 1973 and has not been changed since. (MJN, Ex. 23, p. 110.) Had the Legislature believed these statutes supported punitive damages

under Section 1430(b), it would not have added, and later deleted, the specific provision in Section 1430(b) that authorized punitive damages.

In fact, statutes referencing the nonexclusive nature of statutory remedies are not unusual, and are not interpreted to authorize additional remedies for breach of a particular statute that go beyond the specific remedies enumerated in that statute. For instance, the UCL contains a provision purporting not to limit available remedies (Bus. & Prof. Code, § 17205), although it is clear that the UCL's remedies are limited to injunctive and equitable relief. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1148; see also *Brewer v. Premier Golf Co.* (2008) 168 Cal.App.4th 1243, 1253, fn. 8 [discussing similar Labor Code provision].)

b. The Rights Enforceable Under Section 1430(b) Did Not Exist at Common Law.

In cases (unlike here) where the legislative history of a statute does not show an intent to disallow punitive damages, courts find that the remedies enumerated in the statute are exclusive unless the right set forth in the statute previously existed in the common law. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 79; *Turnbull*, 219 Cal.App.3d at 826-827; *De Anza*, 94 Cal.App.4th at 912.)

The Opinion held that Section 1430(b) "does not create new rights and obligations. It merely authorizes a private enforcement remedy for violations of obligations established by other laws and regulations." (Op. p. 11.) That misreads the standard. In order to allow punitive damages, the obligations imposed by the statute must have "exist[ed] *at common law*" (*Turnbull*, 219 Cal.App.3d at 826-827 [emphasis added]), not created by statute or regulation. (*Rojo*, 52 Cal.3d at 79; *De Anza*, 94 Cal.App.4th at

912; see also *Brewer*, 168 Cal.App.4th at 1255; *Strauss v. A.L. Randall Co.* (1983) 144 Cal.App.3d 514, 520-521; *McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 301-302 .)

As the cited cases show, whether a cause of action existed at common law is the critical divider in the case law between statutes for which statutory remedies are exclusive and those for which they are not. While a plaintiff might be entitled to an award of punitive damages under another cause of action, punitive damages are not available under Section 1430(b) itself. (*De Anza*, 94 Cal.App.4th at 912-913.)

Section 1430(b) does not create substantive rights (*Nevarrez*, 221 Cal.App.4th at 137), but rather creates an enforcement mechanism for a set of rights created by other *statutes* and *regulations*—the Patients' Bill of Rights and other rights-creating laws. It is one part of a "comprehensive set of rights and remedies" for nursing home residents. (See *De Anza*, 94 Cal.App.4th at 916.) The underlying rights enforceable under Section 1430(b) were created by regulation or statute—there was no actionable tort for violations of resident rights prior to their creation by statute or regulation. Section 1430(b) was enacted precisely because there was no preexisting way to enforce resident rights. (MJN, Ex. 6, p. 17 [letter from office of bill's author stating that "existing law does not provide adequate mechanisms" to enforce Class "C" violations and that Section 1430(b) would "create a remedy" and "create a private right of action"].)

That the resident rights enforceable under Section 1430(b) were created by statute or regulation is shown by the CDPH's "approved" "final documentation" of a "comprehensive Resident Bill of Rights" on its web site. (MJN, Ex. 27, p. 139; see also Health & Saf. Code, §§ 1599.61, 1599.74.) The rights listed are purely creatures of statute or regulation,

including 22 Cal. Code Regs., §§ 72527, 73523; Health & Saf. Code, §§ 1599.1-1599.4; Welf. & Inst. Code, §§ 4502-05, 4512, 5325-26; and 42 C.F.R. §§ 483.10, 483.12, 483.13, and 483.15. That the rights are created by statute or regulation is reinforced by the 2006 amendment to the Patients' Bill of Rights adding specific rights that already existed in federal law for Medicare patients but that, absent legislative action, were not rights of non-Medicare patients governed by California law. (MJN, Ex. 25, pp. 116-117; Health & Saf. Code, § 1599.1, subd. (i).)

The Opinion relied heavily on *Greenberg v. Western Turf Association* (1903) 140 Cal. 357, where this Court held that a statutory award imposed automatically without regard to fault was not punitive, and allowed punitive damages for a violation of the statute. (Op. pp. 12-13.) But the court below ignored that the *Greenberg* claim "did have a common law analogue—'the common law doctrine that a business affected with a public interest must serve all customers on reasonable terms without discrimination.'" (*Brewer*, 168 Cal.App.4th at 1255, fn. 10 [citation omitted]; see also *Orloff v. Los Angeles Turf Club* (1947) 30 Cal.2d 110, 114 [declining to decide whether the right established by the same statute at issue in *Greenberg* was "unknown at common law"].) *Greenberg* does not support punitive damages under Section 1430(b).

2. Numerous Other Factors Show That Punitive Damages Are Not Available Under Section 1430(b).

a. Punitive Damages Are Not Available in the Absence of Compensatory Damages.

Punitive damages cannot be awarded where a plaintiff is not awarded at least nominal compensatory damages. "[A]ctual damages are an absolute predicate for an award of exemplary or punitive damages."

(*Kizer*, 53 Cal.3d at 147.) The monetary award under Section 1430(b) is not damages, as confirmed by the Legislature's deletion in 1982 of the reference to "damages." (*Ibid.* ["Civil penalties under the Act, unlike damages, require no showing of actual harm per se. Unlike damages, the civil penalties are imposed according to a range set by statute irrespective of actual damage suffered."] [footnote omitted].)

The Legislature's choice to use the word "damages" in Section 1430(a), yet not to use that word in (in fact, to delete it from) Section 1430(b), indicates that the Legislature did not intend to authorize damages of any kind under Section 1430(b). (*Romano v. Mercury Ins. Co.* (2005) 128 Cal.App.4th 1333, 1343 ["'Where a statute referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent.'"] [citation omitted].)

b. Allowing Punitive Damages Under Section 1430(b) Would Lead to Absurd Results.

If a plaintiff could obtain punitive damages for Class "C" violations under Section 1430(b)—those with "only a minimal relationship to [resident] health, safety or security" (22 Cal. Code Regs., § 72701, subd. (a)(4))—he could obtain a far larger award than is available for serious Class "A" or "B" violations under Section 1430(a)—those presenting "imminent danger" or "substantial probability" that death or serious physical harm would result. (See *supra* Part IV.A.1.b; Health & Saf. Code, § 1424, subds. (d), (e).) Section 1430(a) limits the damages for Class "A" or "B" violations: "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." The maximum civil penalties are $20,000 per citation for Class "A" violations and $2,000 per citation for Class "B" violations. (Health & Saf. Code, § 1424.5, subds. (a)(2), (a)(4).)

If Section 1430(b) allowed punitive damages for Class "C" violations, then a plaintiff who proved the facility's conduct caused serious bodily injury could recover only limited damages for Class "A" or "B" violations, while a plaintiff who proved Class "C" violations, with no showing of harm or causation under this strict liability statute, could recover punitive damages limited only by the constraints of due process. Statutes should not be construed to produce absurd results. (*San Jose Unified Sch. Dist. v. Santa Clara County Office of Ed.* (2017) 7 Cal.App.5th 967, 982.)

c. Punitive Damages Are Not Available Under Penalty Statutes.

Punitive damages are not available under Section 1430(b) because a "plaintiff cannot recover both punitive damages and statutory penalties, as this would constitute a prohibited double penalty for the same act." (*De Anza*, 94 Cal.App.4th at 912; *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)

Numerous aspects of Section 1430(b) show it is a penalty. The award is mandatory. (Health & Saf. Code, § 1430, subd. (b).) Mandatory awards are construed as penalties. (*The TJX Companies, Inc. v. Superior Court* (2008) 163 Cal.App.4th 80, 86.) Awards not based on actual losses incurred, like Section 1430(b), are penalties. (*GHII v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 277.) The Legislature included the maximum $500 award as a substitute for an award of actual and punitive damages, and chose to refer to the award as a "fine," not "damages." (See *infra* p. 51.)

This Court should hold that punitive damages are not available under Section 1430(b).

V. CONCLUSION

ManorCare respectfully requests that the Court reverse the decision below, and hold that $500 is the maximum monetary award in any lawsuit under Section 1430(b) and that punitive damages are not available under Section 1430(b).

Dated: September 22, 2017 MANATT, PHELPS & PHILLIPS, LLP

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WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, Rule 8.504, subdivision (d), I certify that this Opening Brief on the Merits contains 13,822 words, not including the table of contents, table of authorities, the caption page or this certification page.

Dated: September 22, 2017 MANATT, PHELPS & PHILLIPS, LLP

By: s/ Barry S. Landsberg
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PROOF OF SERVICE

I, Carlyn Falls, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On **September 22, 2017**, I served the within: **OPENING BRIEF ON THE MERITS** on the interested parties in this action addressed as follows:

SEE ATTACHED PROOF OF SERVICE MAILING LIST

☒ **(BY MAIL)** By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Manatt, Phelps & Phillips, LLP, Los Angeles, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made and that the foregoing is true and correct. Executed on **September 22, 2017**, at Los Angeles, California.

/s/ Carlyn Falls

Carlyn Falls

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