**Case No. S241431**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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JANICE JARMAN,

*Plaintiff and Appellant,*

v.

HCR MANORCARE, INC. *et al.*,

*Defendants and Respondents,*



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After a Published Decision of the Court of Appeal,

Fourth Appellate District, Division 3, Case No. G051086,

Superior Court of the State of California, County of Riverside, Case No. RIC10007764
(Honorable Phrasel Shelton and Honorable John Vineyard)

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# APPLICATION TO SUBMIT *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF CALIFORNIA ADVOCATES FOR NURSING HOME REFORM, INC. (CANHR) IN SUPPORT OF APPELLANT JANICE JARMAN

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ANTHONY M. CHICOTEL, SBN 195164
CALIFORNIA ADVOCATES FOR NURSING HOME REFORM
650 Harrison Street, Second Floor
San Francisco, California 94107
Telephone (415) 974-5171
Facsimile (415) 777-2904
*tony@canhr.org*

Staff Attorney for *Amicus Curiae*,
California Advocates for Nursing Home Reform

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## APPLICATION TO SUBMIT *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, California Advocates for Nursing Home Reform ("CANHR") respectfully requests leave to file the attached *amicus curiae* brief in support of Appellant Janice Jarman.

Federal and state laws establish and protect the rights of nursing home residents. These laws are routinely ignored by nursing homes, which causes profound dignitary and psychological harm to the individuals CANHR is dedicated to protecting. This appeal presents the Court with an opportunity to affirm the ability of residents to meaningfully protect their own rights and prevent and discourage violations of their rights. This amicus brief provides CANHR's unique perspective on resident rights and the state of nursing home care in California, drawing on CANHR's substantial experience in this area, and seeks to help resolve the legal issues pending before this Court. CANHR has written this brief in its entirety.

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## INTEREST OF THE *AMICUS CURIAE*

*Amicus curiae* California Advocates for Nursing Home Reform ("CANHR") is a statewide nonprofit organization dedicated to improving the care and quality of life for California's nursing home residents. CANHR has a substantial interest in this appeal because for thirty-five years, we have been dedicated to enhancing and defending residents' rights.

Violations of residents' rights occur routinely in California nursing homes. CANHR's advocates and attorneys regularly speak and correspond with hundreds of victims of residents' rights violations and the family members of victims through our toll-free consumer hotline and email "feedback forms." CANHR's fact sheets on nursing home resident rights are among the most popular consumer publications on our website, reviewed by five-thousand people each year. We have a manual on enforcing residents' rights for attorneys in legal services programs and we frequently provide residents' rights training for attorneys, social workers, and long-term care Ombudsman programs.

CANHR has supported and been involved in the drafting and passage of legislation regarding nursing home resident rights including sponsorship of Senate Bill 1248 (Alquist) in 2006, which made federal nursing home residents' rights applicable to all nursing homes in the state.

Nursing home residents' rights are meant to protect the most vulnerable citizens of California from harm and poor care and to ensure their dignity and fair treatment. This amicus brief seeks to elucidate and protect those rights and help resolve the legal issues pending before this Court.

## INTRODUCTION

Health and Safety Code Section 1430(b) (hereafter "1430(b)") was adopted to improve nursing home care by empowering residents to defend their own rights via civil actions. The legislature felt this approach was necessary due to the shortcomings of the state's own enforcement system. Unfortunately, the promise of 1430(b) has yet to be realized. Just as the statute began to gain traction following the 2010 *Lavender v. Skilled*

*Healthcare* case, it was dealt a destructive blow in the *Nevarrez* case, leaving nursing home residents with a damaged private right of action and newly vulnerable to rights violations.

1430(b)'s statutory damages remedy applies to each violation of a nursing home resident's rights. 1430(b) is a remedial statute that must be construed to fulfill its clear purpose to prevent resident rights violations and assign damages commensurate with the harm caused by such violations. Imposing an artificial cap of $500 on residents with no account for how many rights violations they endure would discourage actions by aggrieved residents and provide facilities with no incentive to comply with the law. A damages cap is therefore directly contrary to the rationale of 1430(b). 1430(b) is meant to be a robust vehicle for meaningful rights enforcement, not an inconsequential trifle that fails to address facility misconduct.

## ARGUMENT

### I. The Purpose of Section 1430(b) Is to Protect Nursing Home Residents from Harm.

The amount of available damages in 1430(b) is subject to two competing interpretations. One makes sense, the other one does not. The first interpretation is *recovery of up to $500 for each violation a resident suffers*. The more a facility violates a resident's rights, the more liability it incurs; otherwise, nursing homes could enjoy "free" rights violations after they have committed an initial offense. This version of 1430(b) protects residents, making each violation they suffer meaningful for purposes of liability and recovery.

The second interpretation of the available damages in 1430(b) is *a maximum $500 recovery*, regardless of how many residents' rights the facility violates, or how often it violates them. In this version, the purpose of 1430(b) damages is to immunize nursing homes that violate resident rights from meaningful financial consequences. This version is antithetical to the language, history, and intent of 1430(b).

1430(b) was enacted in 1982 as Senate Bill 1930 ("SB 1930") to respond to what the Legislature perceived as declining State enforcement of nursing home resident

rights. (CANHR Request for Judicial Notice ("CANHR RJN"), Exhibit A.) The Legislature's answer to this problem was to arm residents with a private right of action against nursing homes that violate their rights. The availability of such actions and their eventual prosecution was expressly intended to "protect and ensure the rights of people residing in nursing homes." (CANHR RJN, Exhibit B, p. 2.)

Senator Nicholas Petris, the author of SB 1930, eloquently summarized his motivation for the bill:

> It is so tragic when basic rights . . . are violated and there is no where to turn for help. Presently the government has the responsibility of enforcing an individual's civil rights. This bill would allow a resident or patient of a nursing facility to personally bring suit against the facility. Since the State has made major cuts in services to people, it is more important than ever to allow the institutionalized individual the ability to protect their own constitutional rights in the private sector. My bill would provide that greatly needed avenue of relief. There is no known opposition to the bill. (CANHR RJN, Exhibit C.)

Other documents in the SB 1930 legislative history further demonstrate the bill was designed to protect and ensure the rights of nursing home residents because State enforcement of such rights was deficient. The Department of Aging ("DOA") wrote in support of the bill: "enforcement of long-term care residents' personal rights has been difficult." (CANHR RJN, Exhibit D.) The DOA also found that creating a private right of action for residents means "responsibility is more appropriately placed." (CANHR RJN, Exhibit E, p.2.) "The protections [of resident rights] are mere words without meaning if there is no way to guarantee these basic rights." (CANHR RJN, Exhibit F, p.2.)

With the ability to seek statutory damages from the nursing home in which they live, residents were given a critical and potent tool for enforcing their individual rights. The Legislature clearly meant to provide separate damages to residents for each violation of their rights. Liability was expressly linked to "the violation," [singular] providing statutory damages of up to $500 for the victim. The Assembly Judiciary Committee expressly remarked that the penalty for violating a resident right was "*for*

*each violation*." (CANHR, Exhibit G.) Similarly, the DOA stated SB 1930 would free residents from the limited remedies and damages for "A" (fines up to $10,000) or "B" (fines up to $1000) citations available to DPH in its regulatory enforcement. (CANHR RJN, Exhibit E; Health & Saf. Code § 1424.5(d) and (e).)

When 1430(b) was amended in 2004 pursuant to AB 2791 (Simitian), even the bill's opponents recognized the statutory damages were, a priori, "per violation" (CANHR RJN, Exhibit H, p.1; CANHR RJN, Exhibit I, p.1.) The Legislature itself still described the amount as applying to "each violation." (CANHR RJN, Exhibit G: "For each violation the patient could recover a maximum of $500...."; CANHR RJN, Exhibit J, p.1: this change would "increase the financial penalty for ***each*** violation of a patient's right by 1,000 percent." [emphasis added].)

1430(b)'s legislative history clearly demonstrates a vision of a robust enforcement tool for resident rights to improve care throughout the state. The legislature wanted resident rights to MEAN something and recognized that each and every violation has a negative impact on residents. The State enforcement agency was not up to the task of enforcement so the legislature empowered the residents to do it themselves. The legislature also understood traditional tort actions are not helpful in most rights violations cases because the primary damages are to the residents' dignity, safety, and peace of mind.[1]

## II. Nursing Home Care in California Has Never Been Worse and 1430(b) Has Never Been Needed More.

Since 1430(b) was enacted, the need for a meaningful private right of action has grown. Nursing home care is worse today than it has ever been. Complaints are exploding and the State's enforcement of care standards and resident rights has continued

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[1] And contrary to the briefing from HCR Manorcare, Section 1430(a) is no help to nursing home residents because no one knows what it means. There is no known instance of a successful Section 1430(a) case in California, ever.

to decline. In 2017-18, 10,021 complaints were filed against nursing homes in California, an all-time high. The total number of complaints is **up 54%** from just four years ago (6,517 in 2013-14). (California Department of Public Health Licensing and Certification Division Field Operations, *Complaints/Entity Reported Incidents* (see "Statewide Metrics" tab) at *www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/FieldOperationsComplaints_ERIs.aspx.*) With such an overwhelming number of complaints, the Department of Public Health ("DPH") is unable to timely respond to most of them. The backlog of complaint and entity-reported incident investigations in long-term care facilities stands at **15,889 open cases** as of June 30, 2018. (*Id.*, "Volume" tab) Nearly 7,000 of these cases have been open for more than a year. (*Id.*, "Timeliness" tab.)

The failure of the State to timely or meaningfully address poor nursing home care is well documented and has been the subject of legislative hearings, state audits, media reports, and threatening letters from the federal government. As a result of a barrage of negative reports, DPH hired Hubbert Systems, Inc. ("Hubbert") to perform an analysis and issue a report. The subsequent 228-page report revealed an agency mired in dysfunction that had missed 12 of 18 state performance measures from 2008-2012, failing to complete its work or remotely fulfill its mission of resident protection. (Hubbert Systems Consulting, *California Department of Public Health, Licensing & Certification Program, Initial Assessment and Gap Analysis Report, August 2014*, p.4.) Additionally, the report found zero of 73 reviewed subject areas where DPH had an "aligned and integrated [desired] program-wide approach." (*Id.*, pp. 50, 55, 77, 82, 93, 96, 113, 117, 123, 126, 131, 137, 149, 155, 164, 169, 176, and 182.) DPH was found lacking on all 73 measures.

Since the Hubbert report was released, state oversight has continued to wane, leaving more and more residents to fend for themselves when faced with abuse, neglect, or rights violations. Earlier this year, the California State auditor painted a grim picture of nursing home care, lowlighted by the Department of Public Health's diminished capacity or appetite for enforcing nursing home care standards and resident

rights. (California State Auditor, *Absent Effective State Oversight, Substandard Quality of Care Has Continued*, Report 2017-109 (May 2018).)

Numerous other reports, from analyses by government agencies (GAO, HHS OIG) to academic studies, have documented widespread persistence of resident abuse and neglect enabled by tepid government enforcement. Among them:

- A 2014 HHS Office of Inspector General study found that an astounding **one-third of residents who went to a nursing home for short-term care were harmed**, and that almost 60% of that harm was preventable and likely to be attributable to poor care. As a result, 6% of those who were harmed died, and more than half were re-hospitalized at an annualized cost of $2.8 billion in 2011. (U.S. Office of the Inspector General, *Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries*, (February 2014).)

- 42% of U.S. nursing homes have "chronic deficiencies" - three or more repeat citations for the *same* safety standard in a three-year period. (Voices for Quality Care, *Chronic Deficiencies in Care: The Persistence of Recurring Failures to Meet Minimum Safety & Dignity Standards in U.S. Nursing Homes,* http://nursinghome411.org/nursing-homes-with-chronic-deficiencies/.)

- One in five nursing homes have serious violations each year that jeopardize the health and safety of residents. (The Henry J. Kaiser Foundation, *Nursing facilities, Staffing, Residents, and Facility Deficiencies, 2009 through 2016*, (April 2018), p. 3, http://files.kff.org/attachment/REPORT-Nursing-Facilities-Staffing-Residents-and-Facility-Deficiencies-2009-2016.)

While nursing home care and the state enforcement of nursing home care standards worsens, the need for a meaningful private right of action grows. This need is particularly acute in cases where the violated rights are uniquely personal and where damage is certain, but difficult to quantify. With a dearth of state enforcement, nursing homes find it is much more cost effective to violate, rather than honor, residents' rights.

The following is a short list of rights violations that are common, deleterious to resident health, safety, and dignity and will no doubt continue if 1430(b) is given a narrow, per case or per violation, interpretation:

1. Staffing. Illegal understaffing in nursing homes is rampant. Nursing homes are required to have adequate staffing and residents have the right to staffing sufficient to meet their needs. (Health & Saf. Code § 1599.1(a); 22 CCR § 72501(e); 42 U.S.C. § 1395i–3(b)(4)(C)(i).) Since labor is by far the greatest expense in nursing homes, many facilities maximize their profits by cutting staffing at the expense of resident outcomes.

The extent of understaffing is hard to overstate. Almost 60 percent of facilities staff below their expected level based on the needs of their residents, and almost 80 percent have a shortage of registered nurses. (Harrington et al., *The Need for Minimum Staffing Standards in Nursing Homes*, (2016) Health Services Insights, 9:13-19.) Three-hundred and forty-four nursing homes have applied for a waiver from the state's numerical requirement for direct care staff members. (DPH, *Workforce Shortage Waiver Applicants, https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/Workforce-Shortage-Waiver-Applicants.aspx*; Health and Saf. Code & 1276.5.) This represents nearly 30% of all California nursing homes that choose not to meet the state's bare minimum for proper staffing.

The impact of understaffing is equally difficult to overstate. Staffing is critical to quality care and the factor most associated with good or poor outcomes for residents. (Harrington, *The Need for Minimum Staffing Standards in Nursing Homes*, (2016), *supra.*) All nursing home residents need some level of assistance and their reliance on staff is sometimes total. Insufficient staffing leads to inattention and failures to provide needed assistance; e.g., neglect, unanswered call lights, dehydration.[2] Unable to meet all of the residents' needs, the staff cut corners. One staff person will attempt to transfer a resident when two are needed. The resident falls and breaks multiple bones.

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[2] The lack of sufficient staffing clearly caused much of John Jarman's mistreatment, suffering, and indignity at ManorCare.

Residents who require regular turning and repositioning to alleviate skin pressure are left alone for hours, resulting in painful, deep, and infected bed sores from a lack of movement. Other residents are left in their own waste for hours at a time, suffering indignity that cannot be measured.

The reasons for understaffing are simple: it is profitable. Many large for-profit chains use staffing shortages as a corporate strategy for reaping profits for owners and shareholders (Charlene Harrington and Toby S. Edelman, *Failure to Meet Nurse Staffing Standards: A Litigation Case Study of a Large US Nursing Home Chain*, (2018) Inquiry.) For-profit nursing homes and for-profit chains operate with lower staffing and more regulatory violations compared to non-profit facilities (Charlene Harrington et al., *Nurse Staffing and Deficiencies in the Largest For-Profit Chains and Chains Owned by Private Equity Companies*, (2012) Health Services Research, 47(1), Part I: 106-128.) Facilities with the highest profit margins have been found to have the poorest quality (C. O'Neill, et al., *Quality of Care in Nursing Homes: an Analysis of Relationships Among Profit, Quality, and Ownership*, (2003) Med Care, 1318-1330.) Profit-maximizing nursing homes know they will be paid the same from Medicare and Medi-Cal regardless of the staffing level they provide – understaffed facilities enjoy the same revenue but face fewer costs.

Nursing homes are able to staff below legal minimums because DPH lets them. Despite data that is available to the public and shows hundreds of nursing homes understaffed day after day, these facilities suffer no penalty. (Centers for Medicare & Medicaid Services ("CMS"), Payroll Based Journal Nurse Staffing, *https://data.cms.gov/browse?category=Special+Programs/Initiatives+-+Long+Term+Care+Facility+Staffing+Payroll-Based+Journal*; Jordan Rau, *"It's Almost Like a Ghost Town." Most Nursing Homes Overstated Staffing For Years*, NY Times (July 7, 2018).) In response to an understaffing complaint, DPH will sometimes cite "failure to answer call light" or some other diluted euphemism instead of calling out,

and appropriately penalizing, a facility's strategy to endanger residents and pad its bottom line through understaffing.[3]

2. Hospital dumping. Nursing home residents are often dumped at hospitals despite myriad rights to be free from inappropriate or poorly planned discharges. (*St. John of God Retirement & Care Center v. Department of Health Care Services Office*, 2 Cal.App.5th638 (2nd District, 2016.) In these cases, residents are sent to the hospital for acute care as a ruse to perpetrate an illegal eviction. Nursing homes widely engage in this loathsome practice. (Ina Jaffe, *Nursing Home Evictions Strand The Disabled In Costly Hospitals*, (Feb. 25, 2016), NPR, *http://www.npr.org/sections/health-shots/2016/02/25/467958665/nursing-home-evictions-strand-the-disabled-in-costly-hospitals*; Anna Gorman, *The Agonizing Limbo Of Abandoned Nursing Home Residents*, (Feb. 26, 2016) Kaiser Health News, *http://khn.org/news/the-agonizing-limbo-of-abandoned-nursing-home-residents/*; Matt Sedensky, *Nursing homes turn to eviction to drop difficult patients*, (May 8, 2016) AP, *http://bigstory.ap.org/article/95c33403b5024b4380836d3ed3dfecb0/nursing-homes-turn-*

[3] See e.g., *Federal Deficiencies*, Event LIHK11 *https://www.cdph.ca.gov/Programs/CHCQ/LCP/CalHealthFind/Pages/ASPEN_FEDERAL_2567.aspx?EventID=LIHK11*, facility cited for "insufficient" staff but issued as a "no harm" deficiency for "failing to answer the call lights promptly and assist the residents with their needs."

*eviction-drop-difficult-patients#*; Carolyn Rosenblatt, *Outrageous! Nursing Homes Illegally Dump Residents They Don't Want*, (Nov. 2, 2017) Forbes.)[4]

Bruce Anderson was one resident whose life was particularly upended when his nursing home dumped him into a hospital. Stuck inappropriately in a hospital for nearly a year, Bruce had no therapy, activities, opportunities to go outdoors, or other care and programming that nursing home residents – but not hospital patients - routinely receive. (Jaffe, *Nursing Home Evictions Strand the Disabled In Costly Hospitals, Supra.*) He was subsequently moved to a second, faraway nursing home after extraordinary advocacy efforts were made.

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[4] For additional information about the extent of the hospital dumping / illegal eviction problem, see the Centers for Medicare and Medicaid Services (CMS) memo (CMS Center for Clinical Standards and Quality/Survey & Certification Group, *An Initiative to Address Facility Initiated Discharges that Violate Federal Regulations*, S&C 18-08-NH, Dec. 22, 2017: "Despite [resident] protections, discharges which violate Federal regulations continue to be one of the most frequent complaints made to State Long Term Care Ombudsman Programs."); see also, Orna Intrator, *Maintaining Continuity of Care for Nursing Home Residents: Effect of States' Medicaid Bed-Hold Policies and Reimbursement Rates*, (Feb. 2009) Health Services Research, pp. 33-55. Table 1 shows that 92.5% of all U.S. nursing home residents who go to the hospital go back to their nursing home when the hospitalization is over and 5.4% go to a different nursing home. California has the second highest rate of residents who are sent to a different nursing home (11.8% - more than double the national average), indicating that California has an acute enforcement problem when it comes to residents' bed hold rights. California's status as an outlier is even more troublesome when one considers the state pays for bed holds, unlike all other states with high rates of second nursing home placement.

Bruce Anderson, and hundreds of residents like him, are abandoned in hospitals because of a combination of financial incentives and anemic state enforcement.[5] Nursing homes are able to rid themselves of "challenging" low-paying residents without fear of meaningful state sanction. While a few residents exercise their right to an administrative hearing to gain readmission to the nursing home, nursing homes routinely ignore the hearing decisions and the State does nothing. The problem is so bad that Bruce Anderson and other hospital dumping victims filed a lawsuit against the State to compel it to start enforcing the hearing decisions to readmit them. (*Bruce Anderson v. Michael Wilkening*, Ninth Circuit Court of Appeals, Case No. 16-16193.)

In response to the lawsuit, the State doubled down on its shameful strategy of wholesale abandonment of these very vulnerable residents. The State's naked disdain for illegally evicted residents was made evident in a recent Ninth Circuit argument in which the State claimed it owes no duty to residents to ensure their readmission when they have been found by a state administrative law judge to have been illegally evicted. Judge Marsha Berzon pointedly asked the State if it is bound by the discharge hearing decisions, and Deputy Attorney General Hadara Stanton's reply was the State is not bound by its own decisions.[6]

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[5] The California Department of Public Health will issue "deficiencies" finding a violation of residents' rights has occurred but does not issue any monetary fines. See e.g., Federal Deficiencies, Event IT7X11 https://www.cdph.ca.gov/Programs/CHCQ/LCP/CalHealthFind/Pages/ASPEN_FEDERAL_2567.aspx?EventID=IT7X11; Event ID CD8T11 https://www.cdph.ca.gov/Programs/CHCQ/LCP/CalHealthFind/Pages/ASPEN_FEDERAL_2567.aspx?EventID=CD8T11; Event ID KZ4T11 https://www.cdph.ca.gov/Programs/CHCQ/LCP/CalHealthFind/Pages/ASPEN_FEDERAL_2567.aspx?EventID=KZ4T11

[6] The Ninth Circuit oral argument can be viewed at *https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014222*

Hospital dumping cases occur because there are no consequences. DPH is disinterested, so residents are left on their own. 1430(b) is all they have. In these cases, a 1430(b) injunction is not helpful. Even if a resident is successful in obtaining an injunction compelling readmission (which is difficult as most courts consider these mandatory, not prohibitory, injunctions), the injunction is stayed pending the inevitable appeal that is filed. The only tool for justice is the statutory damages available in 1430(b) because it creates a real disincentive to nursing home obstinance to a resident's bed hold rights. If 1430(b) is limited to $500 per case, the only available remedy to combat hospital dumping will be eviscerated.

3. Drugging Residents. Another common residents' rights violation that is poorly enforced is drugging residents to sedate and subdue them, particularly those with dementia, using psychotropic drugs. (Department of Health and Human Services, *Medicare Atypical Antipsychotic Drug Claims for Elderly Nursing Home Residents*, (May, 2011); Human Rights Watch, *They Want Docile: How Nursing Homes in the United States Overmedicate People with Dementia*, (Feb. 5, 2018).) Despite recent publicity and a federal campaign to reduce inappropriate drugging of residents, **nearly two-thirds (63.5%) of all nursing home residents receive a psychotropic drug** that is reported to CMS. (Kaiser Family Foundation, *Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 through 2015*, (July, 2017).) Plenty of residents are on other psychotropic drugs that are not reported to CMS. (Blake Ellis and Melanie Hicken, *The Little Red Pill Being Pushed on the Elderly: CNN Investigation Exposes Inappropriate Use of Drug in Nursing Homes*, (Oct. 12, 2017) *https://www.cnn.com/2017/10/12/health/nuedexta-nursing-homes-invs/index.html.*)

One example, among a vast universe of examples, of blatant chemical restraint use resulting in a "no harm" finding by DPH comes from St. Francis Convalescent Pavilion in Daly City, a "4-star" facility. The facility was issued a low-level deficiency for inappropriately drugging two residents (Federal Deficiencies, Event GIPK11, *https://www.cdph.ca.gov/Programs/CHCQ/LCP/CalHealthFind/Pages/ASPEN_STATE_2567.aspx?EventID=GIPK11.*) The residents were drugged for no good reason and one

of them was restrained with four (!) separate psychotropic drugs: Ativan, Nuedexta, Risperdal, and Depakote. The deficiency report does not mention how informed consent was obtained or why anyone would agree to the dangerous administration of drugs meant to subdue the residents.

This example epitomizes both the horrible drugging in nursing homes and why it continues. Residents are often given these extraordinarily dangerous drugs, without explanation of the side effects, risks, or viable alternatives, for no reason other than the staff's desire to shut them down. Confronted with this outrageous abuse, DPH treats it as a minor infraction.

Like understaffing and hospital dumping, drugging residents into submission occurs due to financial incentives (sleeping residents means decreased staffing) and anemic DPH enforcement.[7] The harmful consequences of inappropriate drug use are often not obvious; affected residents may end up sleepier, quieter, and more "compliant." Traditional tort law claims are typically unavailing. Nonetheless, the effects of altering otherwise healthy brain functioning restricts the residents' feelings, personality, and their ability to interact with the people and world around them - the kinds of things that make us human.

The foregoing major rights violations, and many others, ache for a remedy that is proportionate to the victimization. Vaporous DPH enforcement creates a system where breaking the rules and violating residents' rights is not only an option, but a profitable one. The violations are not borne of mistake or accident - they are borne of cold-blooded financial calculations. Meanwhile, the damages from these violations is hard to quantify

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[7] According to CMS data, in 2018 there have been 1,726 deficiencies issued for the unnecessary use of psychotropic drugs. (CMS, Quality, Certification & Oversight Reports, *Nursing Home Provider Reports*, searching "Deficiency Count," "Deficiency Tag F0758" accessible at *https://qcor.cms.gov/report_select.jsp?which=0)*. Only ten (0.5%) of those 1,726 deficiencies have been issued at a "harm" level. The message to nursing homes is that drugging residents is no big deal.

as the injuries are mainly psychological and the harm dignitary. Victims were given a private right of action meant to ensure their self-protection but it will be rendered meaningless if the damages are limited to $500. In that case, residents will continue to be victimized by the insidious, unsafe practices listed above.

### III. 1430(b) Makes Far More Sense When Nursing Homes Are Liable Per Day or Per Incident Rather Than Per Case.

Given 1430(b)'s goal of increasing compliance with residents' rights and protecting vulnerable residents from abuse and neglect, the fairest interpretation of 1430(b)'s damages provision is that damages are linked to each violation of residents' rights. Without individualized consideration of each rights violation, nursing homes would face no additional liability for multiple or continuous rights violations. Deterrence of illegal conduct would be effectively nullified and justice would not be served.

A restrictive $500 liability cap would undermine the efficacy of 1430(b)'s remedial reach and California public policy by dramatically limiting the potential remedy for residents whose rights are intentionally and continuously violated. Absurd results would occur if a $500 total cap were imposed on residents whose rights were violated daily. Residents whose rights were violated would have to choose between filing a case for a maximum of $500 damages or file a separate lawsuit for each right that was violated, straining the court system and judicial economy. Given their infirmity and lack of resources, nursing home residents have a difficult time filing one lawsuit, let alone multiple suits.

In other cases, where the nursing home is engaged in a continuous or daily course of illegal action, a $500 cap will induce facilities to violate residents' rights using simple cost-benefit analysis. Any nursing home knowingly engaged in an illegal practice would have absolutely no financial disincentive to end its practice because its maximum penalty is fixed at $500. This interpretation of 1430(b) provides scofflaw nursing homes with fixed, rather than aggravated, liability to its victims for intentional and continuous bad practice.

Additionally, a nursing home that failed to staff at appropriate levels on three nonconsecutive days during the course of a month would be subject to civil penalty determinations for three violations. A nursing home that illegally understaffs continuously *for the entire month*, however, would be liable for only one violation. This inapposite scenario results in the more appropriately staffed nursing home facing three times the liability for damages in a 1430(b) action than that of the nursing home that fails to staff appropriately every day. A $500 cap not only limits the goal of deterrence set forth in the Long-Term Care Act and 1430(b) but inadvertently turns it on its head by providing financial incentives for facilities to continue to break the law once it has done so.

Considering continuous rights violations as separate and distinct violations on a daily basis for purposes of ascribing liability for damages would provide the deterrence the Legislature sought in adopting 1430(b). The potential for escalating liability would serve as a profound disincentive for continued illegal practices.[8] California courts have regularly found that the interpretation of civil penalty statutes must be consistent with the overriding public policy sought in the statute, allowing single instances to constitute multiple "violations" and repeated occurrences to be considered separate and distinct acts. (See *People v. Nat'l Ass'n of Realtors*, (1984) 155 Cal. App. 3d 578; See also *People v. Superior Court (Olson)*, (1979) 96 Cal.App.3d 181.) Without such a mandate,

[8] Assigning 1430(b) liability on a per violation basis will not lead to "excessive" liability. In fact, the "up to $500" language in 1430(b) allows the trier of fact to consider relevant evidence and award an appropriate amount, which could be zero or some other number up to $500 for each violation – as was done in the present case where the jury awarded the $250 per violation it felt was appropriate. Given the way nursing homes often treat their residents, their desire to avoid liability that corresponds with its conduct is understandable.

the efficacy of protective statutes would be lost as multiple or repeat offenders face liability that is fixed regardless of the nature and severity of their conduct.

When a court is faced with competing constructions of statutory language, "one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.*, (1989) 49 Cal. 3d 408, 425.) "A court should not adopt a statutory construction that will lead to results contrary to the Legislature's apparent purpose." (*Id.*) A $500 cap on total nursing home liability to its resident victims would assuredly lead to results contrary to the Legislature's purpose by eviscerating the express goals of both 1430(b) and the Long-Term Care Act: to protect the rights of nursing home residents. Limiting an action to vindicate residents' rights to a maximum $500 penalty not only unduly erodes the effectiveness of the enforcement system by constraining civil remedies available to victims, but also indirectly encourages rights violations by effectively removing nearly any disincentive to nursing homes for violating resident rights. Among the two competing interpretations of 1430(b) presented to the Court, Appellant's is the one most consistent with State policy and legislative intent.

## CONCLUSION

Nursing home care in California has never been more objectionable. Complaints are at historic levels and DPH has largely abandoned its consumer protection role. These are not coincidental developments. Since 1430(b) was adopted in 1982 to counter weak enforcement of residents' rights, enforcement has further withered while violations have exploded. The Legislature sought to empower residents like John Jarman to do their own enforcement and protect their own rights. In order to do that, the statutory damages must be available on a per violation basis, and in cases of continuous and intentional violations, on a per day basis. Otherwise, nursing homes will continue to violate residents' rights with impunity.

Dated: October 17, 2018 Respectfully submitted,

California Advocates for Nursing Home Reform

Anthony Chicotel
Staff Attorney

## CERTIFICATE OF COUNSEL REGARDING WORD COUNT

Counsel for *Amicus Curiae* hereby certifies, pursuant to California Rule of Court 8.204(c), that the foregoing brief contains 4,933 words.

Anthony Chicotel

Dated: October 17, 2018

Anthony M. Chicotel
Counsel for Amicus Curiae
CALIFORNIA ADVOCATES FOR
NURSING HOME REFORM

## PROOF OF SERVICE

*Janice Jarman v. HCR ManorCare, Inc. et al.*,, No. S241431.
Fourth Appellate District, Case No. G051086, Superior Court of the State of California, County of Riverside, Case No. RIC10007764 (Honorable Phrasel Shelton and Honorable John Vineyard)

I, Anthony Chicotel certify and declare:

I am, and was at the time of service of the papers herein referred to, over the age of 18 years. I am not a party to this action. I am employed in the County of San Francisco, California. My business address is California Advocates for Nursing Home Reform, 650 Harrison Street, 2nd Floor, San Francisco, CA 94107, and is located in the county where the mailing described below took place.

I further declare that on the date hereof I served a copy of CALIFORNIA ADVOCATES FOR NURSING HOME REFORM'S APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT JANICE JARMAN

by mail, at my place of business at San Francisco, CA, I deposited with the United States Postal Service the above named document. Said document was placed for deposit in the United States mail in a sealed envelope, and said envelope was placed for collection and mailing on that date following ordinary business practices. I am readily familiar with my office's procedure for collecting and processing of correspondence for mailing with the United States Postal Service on this date.

Superior Court of Riverside County
Appellate Division
4100 Main Street
Riverside, CA 92501

Court of Appeal
Fourth Appellate District
Division 3
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

Anthony C. Lanzone, Esq.
Anna Cronk, Esq.
Lanzone Morgan, LLP
5001 Airport Plaza Drive, Suite 210
Los Angeles, CA 90013

John Patrick Petrullo Esq.
Caroline J. Wu, Esq.
Petrullo, LLP
222 N. Sepulveda Blvd., Ste. 806
El Segundo, CA 90245

Jay-Allen Eisen, Esq.
Jay-Allen Eisen Law Corporation
c/o Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814

Joanna Sobol McCallum, Esq.
Barry S. Landsberg, Esq.
Manatt, Phelps & Phillips, LLP
11355 West Olympic Blvd.
Los Angeles, CA 90064

Wendy York
The York Law Corporation
1111 Exposition Boulevard, Building 500
Sacramento, CA 95815

Cassidy C. Davenport
Cole Pedroza, LLP
2670 Mission Street, Suite 200
San Marino, CA 91108

I declare under penalty of perjury under the laws of the State of California that the foregoing is true.

Executed on October 17, 2018

Anthony Chicotel