

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,*

SUPREME COURT  
**FILED**

OCT 25 2018

Jorge Navarrete Clerk

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Deputy

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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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**CALIFORNIA ADVOCATES FOR NURSING HOME REFORM'S MOTION  
FOR JUDICIAL NOTICE; DECLARATION OF ANTHONY CHICOTEL;  
[PROPOSED] ORDER**

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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  
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[tony@canhr.org](mailto:tony@canhr.org)

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

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REQUEST FOR JUDICIAL NOTICE

Pursuant to California Evidence Code Sections 452, 453, and 459, *amicus curiae* California Advocates for Nursing Home Reform (“CANHR”) respectfully requests the Court take judicial notice of the exhibits identified below and attached. The exhibits are referenced in CANHR’s amicus brief.

Exhibits A – J are legislative history documents from Senate Bill 1930 (Petris, 1982) and Assembly Bill 2791 (2004) and relevant to the interpretation of Health and Safety Section 1430(b). These documents were provided to CANHR by Legislative Research and Intent LLC and Legislative Intent Service, Inc. (See attachments to the Declaration of Anthony Chicotel.)

Respectfully submitted,

Dated: October 17, 2018



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

**EXHIBIT A**

FROM THE OFFICE OF  
Senator Nicholas C. Petris  
State Capitol, Room 5080  
Sacramento, California

Press Release #28  
March 16, 1982

Contact: Felice Tanenbaum  
(916) 445-6577

#### NURSING HOME VIOLATIONS CURBED

Today, Senator Nicholas C. Petris (D-Oakland) introduced Senate Bill 1930 a bill to protect and insure the private rights of people residing in nursing homes.

Petris remarked, "It is so tragic when basic rights such as privacy in medical treatment, freedom from mental and physical abuse, accessibility to visitors, or ability to make confidential phone calls are violated and there is no where to turn for help." Presently, 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. Petris continues, "since the State is making 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."

**EXHIBIT B**

SB 1930 (Petris)  
 As amended April 26  
 Health & Safety Code  
 MRR

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CIVIL ACTIONS  
-PATIENT'S BILL OF RIGHTS-

HISTORY

Source: Author

Prior Legislation: None

Support: CRLA; United Neighbors in Action; Grey  
 Panthers; Alameda County Legal Aid  
 Society; Standing Committee on Legal  
 Problems of Aging of the Legal Services  
 Section of the State Bar

Opposition: No Known

KEY ISSUE

SHOULD A RESIDENT OF A SKILLED NURSING OR INTERMEDIATE  
 CARE FACILITY BE AUTHORIZED TO BRING A CIVIL ACTION  
 AGAINST THE FACILITY FOR VIOLATION OF THE PATIENT'S  
 BILL OF RIGHTS?

PURPOSE

AB 1203 (Levine) of 1979 enacted the Patient's Bill of  
 Rights, which sets forth fundamental human rights to  
 which all patients in skilled nursing or intermediate  
 care facilities are entitled. A licensee who violates  
 these rights may be enjoined from permitting the  
 violation to continue or may be sued for civil damages  
 by the Attorney General.

This bill would, in addition, authorize a patient or  
 resident of a skilled nursing or intermediate care

(More)

facility to bring an action for damages or for an injunction under the Patient's Bill of Rights.

The purpose of this bill is to protect and ensure the rights of people residing in nursing homes.

COMMENT

1. Inadequacy of existing law

Existing law authorizes the Attorney General, upon her own complaint or upon the complaint of any board, officer, person, corporation, or association, to bring an action against a licensee who violates specified licensing provisions.

According to the author, this protection is not sufficient to ensure a patient her rights. The author argues that "since the State is making 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."

2. Rights protected

The Patient's Bill of Rights grants the following to residents of nursing homes:

- (a) An adequate number of qualified personnel to carry out all the functions of the facility;
- (b) Good personal hygiene, care to prevent bedsores, measures to prevent and reduce incontinence;

(More)

- (c) Food of a quality and quantity in accordance with physician's orders;
- (d) An activity program staffed and equipped to meet each patient's orders;
- (e) A clean facility in good repair;
- (f) A nurses' call system;
- (g) Additional rights guaranteed by regulation.

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Additional rights that would be protected by this bill include those listed in Title 22, Sec. 72527 of the Administrative Code. These include the opportunity to visit people of the patient's choice, to participate in planning medical treatment, the right to be fully informed of fees and rates, to be free from mental and physical abuse, and to confidential treatment of personal and medical records.

3. Facilities affected

The facilities against which a patient could bring a civil action under this bill would be skilled nursing facilities and intermediate care facilities.

The former are defined as health facilities that provide skilled nursing care and supportive care to patients whose primary need is for skilled nursing care on an extended basis.

The latter are health facilities that provide inpatient care to ambulatory or semiambulatory patients who have a recurring need for skilled

(More)



nursing supervision and supportive care but who do  
not require continuous skilled nursing care.

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4. Damages and injunction allowed

This bill would authorize a patient or resident whose rights under the Patient Bill of Rights had been violated to bring an action for damages and an injunction against the licensee of the facility.

The damages for which a licensee could be liable under this bill would be limited to \$2,500 or three times the actual damages, whichever was greater, and for costs and attorney fees. Licensees would be liable for their employee's acts.

The bill would provide also that any attempted waiver of the right to sue on the part of a patient would be void.

\*\*\*\*\*

**EXHIBIT C**

OPENING STATEMENT

SENATE BILL 1930

SB 1930 is a bill to protect and insure the private rights of persons living in nursing homes. It is so tragic when basic rights such as privacy in medical treatment, freedom from mental and physical abuse, accessibility to visitors, or ability to make confidential phone calls 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.

**EXHIBIT D**

## DEPARTMENT OF AGING

1020 19th STREET  
SACRAMENTO, CALIFORNIA 95814

(916) 322-5290  
(TDD 445-1788)



August 2, 1982

Honorable Nicholas C. Petris  
Member of the Senate  
State Capitol, Room 5080  
Sacramento, CA 95814

Dear Senator Petris:

The Department of Aging is in support of your bill SB 1930 which creates private right of action for violation of nursing home residents' personal rights.

Enforcement of long-term care residents' personal rights has been difficult. Existing law does not spell out specific rights of action and damages when the rights of nursing home residents have been violated. This bill addresses the problem for this very vulnerable population by creating a specific private right of action. We have long felt the need for a statutory base, such as SB 1930, for the enforcement of patients' rights.

Thank you for your continued support for senior services and the rights of seniors.

Most sincerely,

A handwritten signature in cursive script that reads 'Janet J. Levy'.

JANET J. LEVY  
Director

AUG 4 1982

**EXHIBIT E**

SUMMARY

Creates private right of action for violation of nursing home residents personal rights.

HISTORY, SPONSORSHIP, AND RELATED BILLS

- a) Senator Nicholas C. Petris sponsored this bill to strengthen existing law.
- b) Previous legislation by Senator Charles Percy (1974) introduced a Patients' Bill of Rights, and the California licensing standards for nursing homes, which included patients' rights provisions, became law in 1975.
- c) For changes made by this bill create a specific private right of action for long-term care residents when their personal rights are violated.
- d) The Department has had an approved support position.

VOTE

	<u>Ayes</u>	<u>Noes</u>
Assembly	78	0
Senate	37	0

SPECIFIC FINDINGS

- a) Health and Safety Code, Section 1430, currently allows that a licensee of certain health facilities who violates licensing provisions may be enjoined from permitting the violation to continue or sued for civil damages. The Health and Safety Code, Section 1509, includes within existing licensing regulations a skilled nursing and intermediate care facility patients' bill of rights.

Current efforts to protect patients' rights are limited to annual inspections by the Facilities Licensing Unit (Department of Health Services), and the right of Ombudsmen to enter long-term care facilities (AB 1433, Chapter 851, 1979). \*There is currently a trend at the federal level to decrease inspections to once every two years.

- b) If enacted, this bill will not establish a new program or expand an existing program.

If passed, Section 1430 of the Health and Safety Code, relating to health facilities, will be amended.

This is an improvement of the current method in that a facility licensee is held accountable for their employees actions, liability of licensee is clarified, and it allows a practitioner or attorneys to pursue a civil action suit on behalf of a resident whose private rights have been violated.

(CONTINUED)

<i>Don J. Levy</i>	8/25/82	<i>Paul J. [Signature]</i>	8/25/82
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SPECIFIC FINDINGS (Cont.)

The intent of this bill could not be met through regulation. When individual rights are in jeopardy, the force of the law is required.

- c) The objective of the bill is consistent with those of the Department, the Agency and the Administration, which is to maintain and protect the rights of the elderly.
- d) By creating a more meaningful private right of action for long-term care facility residents, responsibility is more appropriately placed.

FISCAL IMPACT

- None to this Department.

RECOMMENDATION

- Sign.
- This bill should help assure better quality of care and provide recourse for long-term care residents by creating a more meaningful private right of action, by specifying amount of damages, and by not restricting damages to present amounts for "A" or "B" citations. The bill is consistent with the program objectives of the Department, and should be enacted into law.



**EXHIBIT F**

PLEASE RETURN IMMEDIATELY TO  
ASSEMBLY COMMITTEE ON JUDICIARY

6031 State Capitol

Bill Analysis

Work Sheet

RE: Bill No.

SB 1930 - Petrus

Please complete this form and return it to the Assembly Committee on Judiciary as soon as possible.

PLEASE INDICATE THE RECORD OF FINAL VOTE IN EACH SENATE COMMITTEE IN WHICH THIS BILL WAS ANALYZED. IN ADDITION, KINDLY SUPPLY THE SENATE FLOOR VOTE.

1. Origin of the Bill:

- (a) What is the source of the bill? (What person, organization or governmental entity, if any, requested introduction?)

Western Center on Law & Pverty  
United Neighbors in Action

- (b) Has a similar bill been before either this or a previous session of the Legislature? If so, please identify the Session, bill number and disposition of the bill.

No

- (c) Has there been an interim committee report on the bill? If so, please identify the report.

No

2. Problem or deficiency in the present law which the bill seeks to remedy: Existing statuet establishes basic rights of dignity and self-respect to persons residing in nursing homes. The Patient Bill of Rights (Title 22, Sect. 72527) establishes these rights in regulation. (OVER )

3. Please attach copies of any background material in explanation of the bill, or state where such material is available for reference by the committee staff and letters of support or opposition.

4. Hearing: 10 Min.

- (a) Approximate amount of time necessary for hearing.

10 Min.  
(b) Preference for date of hearing.

August 4, 1982

- (c) Names of witnesses to testify at the hearing.

Eric Gold, Western Centers

2. SB 1930 establishes a clear mechanism of enforcing these rights. By setting up a private right of action and awarding a fine and attorney fees the personal and private rights of these residents can be protected. The protections are mere wards without meaning if there is no way to guarantee these basic rights.

**EXHIBIT G**

ASSEMBLY JUDICIARY COMMITTEE - MINORITY  
CHARLES R. IMBRECHT, VICE-CHAIRMAN

SB 1950  
BILL NUMBER

APPROPRIATION: No

AMENDED: 8/2/82

LOCAL MANDATE: No

AUTHOR: Petris

URGENCY: No

CONSULTANT: Prosser

COMMENTS: This bill is intended to provide residents of skilled nursing or intermediate care facilities with a private cause of action for violation of regulations promulgated under the Patients Bill of Rights

For each violation the patient could recover a maximum of \$500 plus attorneys fees at cost. The patient could also obtain an injunction against future violations.

The policy question involved is whether or not violation of administrative regulation is and of itself should give to a cause of action for damages. These regulations are established by the Department of Health which reflect conformity with federal requirements.

A copy of the regulation is attached.

SUPPORT/OPPOSITION:

S: Western Center on Law & Poverty  
Gray Panthers  
United Neighbors in Action  
California Assoc. of Health Services

O: Unknown

RECOMMENDATION: Policy

**EXHIBIT H**

CALIFORNIA  
ASSOCIATION OF

HEALTH FACILITIES

OFFENDING COMMAND: show



*Supporting the  
Health and  
Quality of Life*

The Honorable Rebecca Cohn  
Chair, Assembly Health Committee  
State Capitol Building  
Sacramento, CA 95814

RECEIVED APR 20 2004

**RE: AB 2791 (Simitian): Oppose**

2201 K Street  
P.O. Box 537004  
Sacramento, CA  
(95816) 95853-7004  
fax (916) 441-6441  
(916) 441-6400

1125 West Sixth Street  
Suite 304  
Los Angeles, CA  
90017  
fax (213) 627-6106  
(213) 627-3000

P.O. Box 370  
La Jolla, CA  
92038  
fax (760) 944-1049  
(760) 944-1666

**Paul Tunnell**  
Chairman of the Board

**Floyd Rhoades**  
Vice Chairman of the Board

**Frances Foy**  
Secretary/Treasurer

**Richard Mendlen**  
Immediate Past Chairman

**James H. Gomez**  
CEO/President

Dear Assembly Member Cohn:

The California Association of Health Facilities (CAHF), a non-profit professional organization representing a majority of the state's licensed long-term health care facilities, is opposed to AB 2791 (Simitian), which would raise the penalty for a resident's rights violation from \$500 up to \$5,000 per violation.

#### **"Resident's Rights" Are All Inclusive In Nursing Facilities**

Resident's Rights have been substantially expanded by both state and federal law over the years. This is evident in current regulations, which have been broadly drafted in very general terms to cover every aspect of care. The "resident rights" category was designed to catch violations of a personal nature, which do not involve any resident harm, or even the potential thereof. Typical violations include not offering a preferred food alternative as a substitute for a specific menu item, resident privacy curtains left open, and caregivers not speaking in the resident's language while providing services. The Legislature never intended this section to be abused in the way it has under current practice by attorneys who dress up a complaint with alleged behavior that has artfully been plead to meet the technical definitions of a resident's right violation. AB 2791 would absolutely encourage more of this behavior given the increased penalty amount.

#### **Available Remedies Against Facilities Are Not Limited To \$500**

In addition to being liable for civil damages of \$500 per violation (plus litigation costs, attorneys fees and injunctive relief) for a resident's rights violation, a facility is also liable for administrative penalties that range anywhere from \$100 to \$100,000 (if the violation meets the definition of a class "B", "A" or "AA" citation), and for any civil damages awarded under the Elder and Dependent Adult Civil Protection Act (EADACPA), which gives long-term care residents an additional private right of action and the ability to collect significant enhanced remedies (i.e., attorney's fees and costs, and a \$250,000 pain and suffering award) for any harm suffered.

Administrative penalties are based on a direct relationship between the severity of the violation and actual or potential harm suffered by a resident. A lesser violation that does not actually cause (nor poses even a potential for) harm to the resident, but rather might cause disrespect or embarrassment is appropriately categorized as a resident's rights violation and is assigned a civil penalty of \$500, plus litigation costs and attorneys fees. If the resident's rights violation leads to actual harm, the EADACPA statute confers enhanced remedies upon any resident who has suffered harm and is a strong catalyst for litigation. By increasing the value of a resident's rights violation from \$500 to \$5,000 per violation, AB 2791 only serves to encourage plaintiffs to add another cause of action to an EADACPA claim.

LEGISLATIVE



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The components of AB 2791 argue that this bill is necessary because it has been over twenty years since Health & Safety Code §1430 was enacted to allow a private right of action and it has allegedly “completely ineffective because of the \$500 limit on civil damages.” When the Legislature enacted EADACPA in 1991, it encouraged another private right of action for residents who have experienced harm due to “neglect or abuse” in a facility. Virtually every complaint that is filed by a resident for harm suffered in a facility to include a claim under EADACPA. The vast majority of these complaints also include a claim for damages based on a resident’s rights violation. The last thing the system needs is additional incentives for litigation.

### **Increased Penalties Are Inappropriate and Unwarranted**

The last round of nursing home “reform” (AB 1731\Shelley\Statutes of 2000) enacted huge new fine levels against facilities for violations of statute that result in a class “AA” or “A” citation. The increased penalty included in AB 2791 was discussed and rejected as part of this reform. Under existing criteria, penalties are awarded for acts or omissions by the facility that range from causing death to having a loose relationship to the health, safety, or security of residents at the facility. Citations are issued without any differentiation between incidents involving an isolated, unintentional mistake on the part of a single employee and incidents involving an actual failure on the part of facility management. There is no reason, and especially no data, to suggest that additional fines will reduce the incidence of violations or increase quality. In fact, these fines and penalties reduce facility funds available for staffing and other critical resident care activities.

### **LTC Facilities And The State Budget Would Be Negatively Impacted**

Providers have seen a tidal wave of litigation created by the enhanced remedies and the broad definition of neglect under EADACPA, which in turn has caused LTC provider's liability premiums to skyrocket from \$300 per bed per year in 1999 to more than \$2,500 in 2003. In fact, the high cost of coverage triggered a \$36 million Medi-Cal rate increase to cover the liability component of the rate in 2002; if this trend continues, the additional cost to Medi-Cal for liability coverage will soon be more than \$100 million per year. With annual premiums approaching \$200,000, many facilities have been forced to go without coverage altogether, others are declaring bankruptcy and some are closing. One million deductibles are common place and many facilities are one claim away from financial ruin. AB 2791 will make the overall situation worse without adding anything to improve resident care.

### **Long Term Care Facilities Are Already Heavily Regulated**

As with many industries, long-term care providers are heavily regulated by both the state and federal governments. Nearly 300 state survey staff spend an average of 200 hours in each facility per year to identify areas of improvement and to examine facility compliance with hundreds of conditions of participation that allow that provider to remain in the Medicaid and Medicare system. Each facility must go through an annual survey, at which time the Department of Health Services (DHS) sends a team of surveyors (usually for a period of one week) to examine facility records, interview staff and residents, and to make observations to determine whether the facility is in compliance with the law. If the facility is found to have been out of compliance with any provision of the law, including resident rights, then DHS has the ability to seek remedies in the form of deficiencies, citations, fines, and/or directed plans of correction.

Moreover, if the state survey agency does not find any deficiencies during the annual survey process, the federal government automatically initiates its own “look-back” survey within ten (10), but not



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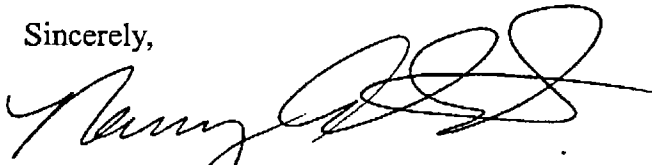
( )  
Facilities are also subject to “complaint surveys,” which are in addition to the annual and comparative surveys. DHS must investigate any complaint that is called in, whether it be from the resident, the resident's family, the Ombudsman, or other source. During the complaint survey, if a violation is found, then DHS has the ability to again seek remedies in the form of deficiencies, citations, fines, and directed plans of correction.

Finally, facilities are also subject to unannounced reviews by the Attorney General's office and regular visits by the LTC Ombudsman. The AG's “Operation Guardian” surprise inspections, which are conducted by a multi-disciplinary team of investigative and clinical personnel, can result in criminal charges and/or referral for administrative action. The Ombudsman conducts its own complaint investigations and can also make referrals to administrative or law enforcement personnel.

If 20 years of continual increases in penalties and enforcement activities has not improved nursing home care in the minds of the sponsors of this bill, additional penalties will never be the answer. If there really is a concern over Resident's Rights, perhaps mandating that specific instruction on preventing Resident's Rights violations be included in the total minimum hours of continuing education or in-service training required for certified nurse assistants under Health & Safety Code §1337.1.

AB 2791 does nothing to improve the quality of resident care in a facility. For these reasons, you are urged to vote “No” on AB 2791.

Sincerely,



Nancy C. Armentrout  
Director of Legislative Affairs

cc: Members of the Assembly Health Committee  
Assembly Member Joseph Simitian  
Teri Boughton, Consultant, Assembly Health Committee  
Peter Anderson, Consultant, Assembly Republican Caucus



**EXHIBIT I**

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**CALIFORNIA  
HEALTHCARE  
ASSOCIATION**

*Providing Leadership in  
Health Policy and Advocacy*

STACK:

April 8, 2004

The Honorable Rebecca Cohn  
Chair, Assembly Health Committee  
State Capitol, Room 6005  
Sacramento, California 95814

**SUBJECT: AB 2791 (Simitian) – OPPOSE**

Dear Assembly Member Cohn:

The California Healthcare Association (CHA), which represents California's 500 hospitals and health systems, many of which operate skilled nursing facilities opposes AB 2791 (Simitian), which would (1) increase the penalty for a residents' rights violation from \$500 to \$5,000 per violation, and (2) expand the residents' rights that serve as a basis for such penalty.

The residents' rights penalty was enacted to provide residents with a remedy when they have suffered an intangible harm of nominal value. In enacting the statute, the legislature recognized a balance between acknowledging these intangible harms and creating an incentive to sue. Increasing the penalty to \$5,000, however, creates a substantial financial incentive to sue facilities and dramatically changes the purpose of this statutory provision.

CHA supports residents' rights. Enumeration of these rights in law makes it clear that public policy values the personal integrity and dignity of residents. It does not logically follow, however, that people should be able to obtain a monetary windfall by stringing together a series of alleged rights violations into a lawsuit. It is not difficult for a resident to claim that their rights have been violated; relatively minor behavior can be framed as a residents' rights violation.

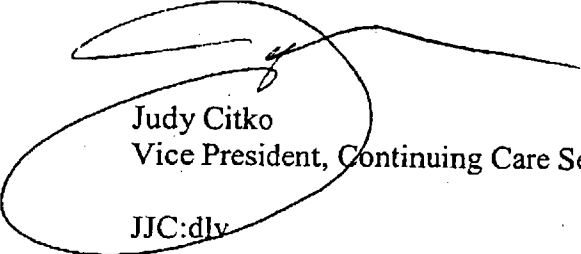
The Elder and Dependent Adult Civil Protection Act; which provides nursing home residents with enhanced remedies (including attorneys' fees and cost and treble punitive damages); already creates a significant incentive to sue nursing homes. Additional incentive to sue is not necessary and will exacerbate the existing liability insurance coverage crisis that nursing homes are experiencing.

In addition to personal causes of action, the state has extensive enforcement authority over nursing homes, including oversight by the Department of Health Services in the form of annual and complaint surveys, the Ombudsman program in the form of spontaneous visitations, the Attorney General through "Operation Guardian" inspections and criminal prosecution. The federal Centers for Medicare and Medicaid also conducts "look back" surveys on nursing homes

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quality, including the respect of residents' rights.  
STACK:

For the above-stated reasons, CHA urges your "No" vote on AB 2791.

Sincerely,



Judy Citko  
Vice President, Continuing Care Services

JJC:dly

cc: Assembly Member Joseph Simitian  
Members of the Assembly Health Committee  
John Gilman, consultant, Assembly Health Committee  
Peter Anderson, consultant, Assembly Republican Caucus

**EXHIBIT J**

AB 2791 (SIMITIAN)

SKILLED NURSING AND INTERMEDIATE CARE FACILITIES: LIABILITY.

Version: 4/1/04 Last Amended

Vice-Chair: Todd Spitzer

Vote: Majority

Tax or Fee Increase: No

Oppose

Increases the limit from \$500 to \$5,000 for violating any right of a resident or patient in a skilled nursing or intermediate care facility.

Skilled nursing and intermediate care facilities provide a valuable service for the frail elderly and disabled. Patients, their families or the industry wants the provision of quality care. If a facility is providing poor care, their practices should be corrected or they should not be permitted to stay in business. However, to increase the financial penalty FOR EACH VIOLATION OF A PATIENT'S RIGHT BY 1,000 PERCENT (THAT'S ONE THOUSAND PERCENT) is unreasonable and will only encourage lawsuits by attorneys, put nursing homes out of business, and discourage companies from establishing facilities in California.

Why doesn't the Legislature just shut down all of the facilities, then elderly patients rehabilitating after surgery can just remain in the hospital for an additional two months and we can just let the Alzheimers patients wander the streets.

Policy Question

Should the Legislature increase the limit by 1,000 percent for violating any right of a resident or patient in a skilled nursing or intermediate care facility in California?

Summary

AB 2791 increases the limit from \$500 to \$5,000 for violating any of the Patients Bill of Rights of a resident or patient in a skilled nursing or intermediate care facility.

Support

California Senior Legislature (sponsor)  
AARP California  
American Federation of State, County and Municipal Employees  
California Advocates for Nursing Home Reform

Assembly Republican Health Votes (0-0) 4/20/04

Ayes: None  
Noes: None  
Abs./NV: None

Assembly Republican Votes (0-0) 1/1/03

Ayes: None  
Noes: None  
Abs./NV: None

Assembly Republican Votes (0-0) 1/1/03

Ayes: None  
Noes: None  
Abs./NV: None

Assembly Republican Votes (0-0) 1/1/03

Ayes: None  
Noes: None  
Abs./NV: None

Consumer Attorneys of California  
National Senior Citizens Law Center

Opposition

California Association of Health Facilities  
California Association of Homes and Services for the Aging  
California Healthcare Association  
Crestwood Behavioral Health, Inc.  
658 individuals including facility administrators

Arguments In Support of the Bill

1. The California Advocates for Nursing Home Reform contends that current law "provides for the only remedy available for violation of residents' rights in California. Unfortunately, since this law was first enacted in 1982, fewer than five such actions have been filed. Although remedies available under this section include injunctive relief - an important remedy for violation of residents' rights the \$500 limit on damages so reduces the likelihood of legal representation, any opportunity for relief is moot.
2. The National Senior Citizens Law Center argues that "[a]lthough federal and state law is reasonably good in establishing rights, too often enforcement of those rights is negligible or nonexistent. There are good and bad nursing homes, and the bad nursing homes will violate the law based on a cynical calculus that poor care is cheaper (and thus more profitable) than compliance with law. . . By raising the cap on actual damages from \$500 to \$5,000, for a violation of a resident's rights, AB 2791 will help to compel compliance with law."
3. The Consumer Attorneys of California note that "elder abuse in California is a serious problem. In California, a recent report found that more

(800) 666-1917

LEGISLATIVE INTENT SERVICE



than 40% of the state's 1,352 nursing homes were cited for abuse. In Los Angeles County, 37% of the homes were cited."

**Arguments In Opposition to the Bill**

1. The California Association of Health Facilities (CAHF) makes the following points in opposing the bill:

**"Resident's Rights" Are All Inclusive In Nursing Facilities**

Resident's Rights have been substantially expanded by both state and federal law over the years. This is evident in current regulations, which have been broadly drafted in very general terms to cover every aspect of care. The "resident rights" category was designed to catch violations of a personal nature, which do not involve any resident harm, or even the potential thereof. Typical violations include not offering a preferred food alternative as a substitute for a specific menu item, resident privacy curtains left open, and caregivers not speaking in the resident's language while providing services. The Legislature never intended this section to be abused in the way it has under current practice by attorneys who dress up a complaint with alleged behavior that has artfully been plead to meet the technical definitions of a resident's right violation. AB 2791 would absolutely encourage more of this behavior given the increased penalty amount.

**Available Remedies Against Facilities Are Not Limited To \$500**

In addition to being liable for civil damages of \$500 per violation (plus litigation costs, attorneys fees and injunctive relief) for a resident's rights violation, a facility is also liable for administrative penalties that range anywhere from \$100 to \$100,000 (if the violation meets the definition of a class "B", "A" or "AA" citation), and for any civil damages awarded under the Elder and Dependent Adult Civil Protection Act (EADACPA), which gives long-term care residents an additional private right of action and the ability to collect significant enhanced remedies (i.e., attorney's fees and costs, and a \$250,000 pain and suffering award) for any harm suffered.

Administrative penalties are based on a direct relationship between the severity of the violation and actual or potential harm suffered by a resident. A lesser violation that does not actually cause (nor poses even a potential for) harm to the resident, but rather might cause disrespect or embarrassment is appropriately categorized as a resident's rights violation and is assigned a civil penalty of \$500, plus litigation costs and attorneys fees. If the resident's rights violation leads to actual harm, the EADACPA statute confers enhanced remedies upon any

resident who has suffered harm and is a strong catalyst for litigation. By increasing the value of a resident's rights violation from \$500 to \$5,000 per violation, AB 2791 only serves to encourage plaintiffs to add another cause of action to an EADACPA claim.

**Ample Opportunity And Incentives Exist For Private Right of Action**

The proponents of AB 2791 argue that this bill is necessary because it had been over twenty years since Health & Safety Code § 1430 was enacted to allow a private right of action and it has allegedly been "completely ineffective because of the \$500 limit on civil damages." When the Legislature enacted EADACPA in 1991, it encouraged another private right of action for residents who have experienced harm due to "neglect or abuse" in a facility. Virtually every complaint that is filed by a resident for harm suffered in a facility to include a claim under EADACPA. The vast majority of these complaints also include a claim for damages based on a resident's rights violation. The last thing the system needs is additional incentives for litigation.

**Increased Penalties Are Inappropriate and Unwarranted**

The last round of nursing home "reform" in 2000 (AB 1731) enacted huge new fine levels against facilities for violations of statute that result in a class "AA" or "A" citation. The increased penalty included in AB 2791 was discussed and rejected as part of this reform. Under existing criteria, penalties are awarded for acts or omissions by the facility that range from causing death to having a loose relationship to the health, safety, or security of residents at the facility. Citations are issued without any differentiation between incidents involving an isolated, unintentional mistake on the part of a single employee and incidents involving an actual failure on the part of facility management. There is no reason, and especially no data, to suggest that additional fines will reduce the incidence of violations or increase quality. In fact, these fines and penalties reduce facility funds available for staffing and other critical resident care activities.

**LTC Facilities And The State Budget Would Be Negatively Impacted**

Providers have seen a tidal wave of litigation created by the enhanced remedies and the broad definition of neglect under EADACPA, which in turn has caused LTC provider's liability premiums to skyrocket from \$300 per bed per year in 1999 to more than \$2,500 in 2003. In fact, the high cost of coverage triggered a \$36 million Medi-Cal rate increase to cover the liability component of the rate in 2002; if this



## Assembly Republican Bill Analysis

AB 2791 (Simitlan)

trend continues, the additional cost to Medi-Cal for liability coverage will soon be more than \$100 million per year. With annual premiums approaching \$200,000, many facilities have been forced to go without coverage altogether, others are declaring bankruptcy and some are closing. One million deductibles are common place and many facilities are one claim away from financial ruin. AB 2791 will make the overall situation worse without adding anything to improve resident care.

2. The California Healthcare Association notes that "the residents' rights penalty was enacted to provide residents with a remedy when they have suffered an intangible harm of nominal value. In enacting the statute, the legislature recognized a balance between acknowledging these intangible harms and creating an incentive to sue. Increasing the penalty to \$5,000, however, creates a substantial financial incentive to sue facilities and dramatically changes the purpose of this statutory provision." They add that "[I]t does not logically follow, however, that people should be able to obtain a monetary windfall by stringing together a series of alleged rights violations into a lawsuit. It is not difficult for a resident to claim that their rights have been violated; relatively minor behavior can be framed as a resident's rights violation."

### Fiscal Effect

Unknown.

### Comments

#### Resident Rights in Skilled Nursing Facilities Title 22, Division 5, California Code of Regulations Section 72527

1. To be fully informed of these rights and of all rules and regulations governing resident conduct.
2. To be fully informed of services available in the facility and of related charges, including any charges for services not covered by the facility.
3. To be fully informed by a physician of his or her total health status and to be afforded the chance to participation an immediate and ongoing basis in the total plan of care including the identification of medical, nursing and psychosocial needs and the planning of related services.
4. To consent or to refuse any treatment or procedure or participation in experimental research.
5. To receive all information that is material to an individual's resident's decision concerning whether to accept or refuse to accept any proposed treatment or procedure.
6. To be transferred or discharged only for medical reasons, or the residents welfare or that of other residents or for nonpayment for his or her stay and to be given reasonable advance notice to ensure orderly transfer or discharge.
7. To be encouraged and assisted throughout the period of stay to exercise rights as a resident and as a citizen, and to this end to voice grievances and recommend changes in policies and services to facility staff and/or outside representatives of resident's choice, free from restraint, interference, coercion, discrimination or reprisal.
8. To manage personal financial affairs, or to be given at least a quarterly accounting of financial transactions made on the residents behalf should be facility accept written delegation of this responsibility.
9. To be free from mental and physical abuse.
10. To be assured confidential treatment of financial and health records and to approve or refuse their release, except as authorized by law.
11. To be treated with consideration, respect and full recognition of dignity and individuality, including privacy in treatment and in care of personal needs.
12. Not to be required to perform services for the facility that are not included for therapeutic purposes in the patient's plan of care.
13. To associate and communicate privately with persons of the resident's choice and to send and receive mail unopened.
14. To meet with others and participate in activities of social, religious and community groups.
15. To retain and use personal clothing and possessions as space permits, unless to do so would infringe upon the health, safety or rights of the residents or other residents.
16. If married, to be assured privacy for visits by the resident's spouse and if both are residents in the facility, to be permitted to share a room.
17. To have daily visiting hours established.
18. To have visits from members of the clergy at any time at the request of the resident or the resident's representative.
19. To have visits from persons of the resident's choosing at any time if the resident is critically ill, unless medically contraindicated.
20. To be allowed privacy for visits with family, friends, clergy, social workers or for professional or business purposes.
21. To have reasonable access to telephones and to make and receive confidential calls.
22. To be free from any requirement to purchase drugs or rent or purchase medical supplies or equipment from any particular source.
23. To be free from psychotherapeutic drugs and physical restraints used for the purposes of resident discipline or staff convenience and to be free from psychotherapeutic drugs used as a chemical restraint, except in an emergency which threatens to bring immediate injury to the resident or others.

EXHIBIT E





## Assembly Republican Bill Analysis

AB 2791 (Simitian)

### Elder Abuse and Dependent Adult Protection Act

In 1991, the Legislature enacted the Elder Abuse and Dependent Adult Protection Act (EADACPA), which provided incentives for bringing elder abuse claims against nursing home and long-term care (LTC) providers. In California, this law has severely eroded the original MICRA protections for long-term care providers. In response, the plaintiff's bar has stopped filing most garden-variety medical negligence cases against long term care providers under California's professional negligence law in favor of the "alternative" elder abuse or neglect cause of action, where there are no caps on non-economic damages and attorney's fees.

Over the years, information produced by the regulatory system, combined with loopholes in the civil system, has triggered a remarkable erosion for LTC providers from the protections that other health care providers enjoy. The focal point for this erosion was the decision by the California Supreme Court in *Delaney v. Baker* (1999) 20 Cal.4th 23, which held health care providers liable for punitive damages under EADACPA. Following the *Delaney* decision, virtually every lawsuit against a LTC provider contains an allegation of elder abuse or neglect because there is no practical way to distinguish between a claim for 'professional negligence' under MICRA and a claim for 'neglect' under the EADACPA.

A recent line of cases decided post-*Delaney* has focused on the extent to which the trier of fact in an EADACPA case would be allowed to consider the underlying regulatory provisions governing patient care in deciding whether the defendant had committed actionable abuse or neglect. Recently, the Fourth District Court of Appeals determined in *Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal. App.4th 1233, 1244, that EADACPA liability could be directly premised on a finding of a regulatory violation.

The prevalence of litigation resulting from *Delaney* has pushed up liability insurance premiums for all facilities serving the elderly. California liability premium trends have escalated more than 350% from 1999 to 2002. Given this trend, the additional cost to the State through the Medi-Cal program caused by the erosion of MICRA protections could reach \$236 million annually by 2006. More than two-thirds of nursing home residents rely on the Medicaid (i.e., Medi-Cal) and/or Medicare programs to fund part or all of their health care. However, the skyrocketing costs of civil liability are a real threat to the viability of the entire long-term care system.

### Expanded Liability

Over the past seven years, there have been no less than 11 bills that have raised penalties or added

enforcement remedies, or have expanded the requirements for reporting/investigating abuse/neglect (in addition to AB 2791). They have all increased the level of scrutiny and the liability for any negligent act or "ommission" that happens in a facility, and have led to the liability crisis facilities face today:

AB 1133 (Gallegos) - Ch. 650, Statutes of 1998

- Increased civil penalties for violations affecting the health of patients in skilled nursing facilities.

AB 1731 (Shelley) - Ch. 451, Statutes of 2000

- Significantly increased civil penalties for skilled nursing facilities up to \$100,000.
- Established a state remedy to allow for a temporary manager to be appointed by DHS to run a facility; made it easier for DHS to appoint a court-appointed receiver; and, allows DHS the authority to grant provisional licenses.
- Requires allegations of suspected abuse and neglect to be investigated by DHS within 24-hours.

AB 828 (Cohn) - Ch. 680, Statutes of 2001

- Requires DHS to establish a centralized consumer response unit to respond to complaints about resident care in long-term care facilities.

AB 1212 (Shelley) - Ch. 685, Statutes of 2001

- Clean-up bill to AB 1731 (Shelley) and, subject to penalties, the bill requires skilled nursing facilities to post a "Notice of Violation Remedies" form on all doors of the facility if specified remedies are imposed.

SB 333 (Escutia) - Ch. 301, Statutes of 2002

- Authorizes each county to establish an interagency elder death review team to assist local agencies in identifying and reviewing suspicious elder deaths.

AB 255 (Zettel) - Ch. 54, Statutes of 2003

- Makes changes to the individual mandated reporting requirements for reporting suspected or alleged elder abuse.

AB 1946 (Corbett) - Ch. 550, Statutes of 2003

- Requires each facility, upon admission of a resident, to ask the resident if s/he would like the facility to provide the resident's responsible party with materials regarding resident's rights and responsibilities.

SB 339 (Ortiz) - Ch. 242, Statutes of 2004

- Subject to penalties, the bill imposes new requirements upon long-term care facilities to carrying out a lengthy process of assessment and notification prior to transferring residents from the facility.

AB 634 (Steinberg) - Ch. 242, Statutes of 2004

- Creates a statewide policy prohibiting confidential settlement agreements or agreements to keep information obtained during discovery confidential if the case includes a cause of action for elder abuse or neglect.

SB 577 (Kuehl) - Ch. 878, Statutes of 2004

- Expands the authority of Protection and Advocacy Inc to enter long-term care facilities

(800) 666-1917

LEGISLATIVE INTENT SERVICE



**Assembly Republican Bill Analysis**

**AB 2781 (Simitian)**

to investigate any incident of abuse or neglect of  
any person with a disability.  
SB 130 (Chesbro) - Ch. 750, Statutes of 2004

- Prohibits facilities from using any type of  
seclusion or restraint unless there is a behavioral  
emergency.

Policy Consultant: Peter Anderson 5/1/04  
Fiscal Consultant:

LEGISLATIVE INTENT SERVICE (800) 666-1917



**EXHIBIT E**

DECLARATION OF ANTHONY CHICOTEL

I, Anthony Chicotel, state:

1. I am a member of the State Bar of California and I am a staff attorney for California Advocates for Nursing Home Reform (“CANHR”). I make this declaration in support of CANHR’s Request for Judicial Notice (“RJN”).
2. I have personal knowledge of the matters set forth in this declaration.
3. Filed concurrently with this declaration are Exhibits A – J of CANHR’s RJN. These Exhibits are true and correct copies of legislative history material sent to CANHR by: Legislative Research and Intent LLC pursuant to a request for all legislative history material related to the enactment of Senate Bill 1930 in 1982 and Legislative Intent Service, Inc. pursuant to a request for all legislative history material related to the enactment of Assembly Bill 2791 in 2004.
4. A declaration signed by a representatives of Legislative Research and Intent LLC and Legislative Intent Service, Inc. are attached as Attachments 1 and 2.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on October 17, 2018.

  
\_\_\_\_\_  
Anthony Chicotel

**ATTACHMENT 1**



# Legislative Research & Intent LLC

1107 9th Street, Suite 220, Sacramento, CA 95814  
(800) 530.7613 · (916) 442.7660 · fax (916) 442.1529  
www.lrihistory.com · intent@lrihistory.com

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## *Authentication of the Records and Table of Contents*

Legislative History Research Report Regarding:  
CALIFORNIA HEALTH & SAFETY CODE § 1430  
*As Amended By Statutes of 1982, Chapter 1455, § 1, SB 1930 – Petris*

I, Carolina C. Rose, declare that this report includes:

- *Historical documents surrounding the adoption of the above enactment.* These documents were obtained by the staff of Legislative Research & Intent LLC and are true and correct copies of the originals obtained from the designated official, public sources in California unless another source is indicated, with the following exceptions: In some cases, pages may have been reduced in size to fit an 8 ½” x 11” sized paper. Or, for readability purposes, pages may have been enlarged or cleansed of black marks or spots. Lastly, paging and relevant identification have been inserted.

Since 1983 LRI has specialized in the historical research surrounding the adoption, amendment and/or repeal of California statutes, regulations and constitutional provisions pursuant to California Code of Civil Procedure § 1859 which states in pertinent part: "In the construction of a statute the intention of the Legislature ... is to be pursued, if possible ...." Our research and expert witness services have assisted the courts in understanding and applying the underlying purpose of enactments in countless cases, such as *Redlands Community Hospital v. New England Mutual Life Insurance Co*, 23 Cal. App.4th 899 at 906 (1994). LRI also provides similar research for other states and at the federal level. (Formerly Legislative Research Institute and Legislative Research, Incorporated.)

- *A table of contents itemizing the documents.* This table of contents cites the sources of the documents.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that I could and would so testify in a court of law if called to be a witness.

Executed December 12, 2011, in Sacramento, California.

Carolina C. Rose, President

**ATTACHMENT 2**

# LEGISLATIVE INTENT SERVICE, INC.

712 Main Street, Suite 200, Woodland, CA 95695  
(800) 666-1917 • Fax (530) 668-5866 • www.legintent.com

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## DECLARATION OF FILOMENA M. YEROSHEK

I, Filomena M. Yeroshek, declare:

I am an attorney licensed to practice before the courts of the State of California, State Bar No. 125625, and am employed by Legislative Intent Service, Inc. a company specializing in researching the history and intent of legislation.

Under my direction and the direction of other attorneys on staff, the research staff of Legislative Intent Service, Inc. undertook to locate and obtain all documents relevant to the enactment of Assembly Bill 2791 of 2004. Assembly Bill 2791 was approved by the Legislature and was enacted as Chapter 270 of the Statutes of 2004.

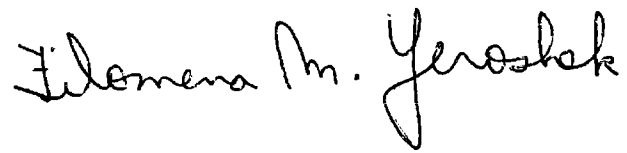
The following list identifies all documents obtained by the staff of Legislative Intent Service, Inc. on Assembly Bill 2791 of 2004. All listed documents have been forwarded with this Declaration except as otherwise noted in this Declaration. All documents gathered by Legislative Intent Service, Inc. and all copies forwarded with this Declaration are true and correct copies of the originals located by Legislative Intent Service, Inc. In compiling this collection, the staff of Legislative Intent Service, Inc. operated under directions to locate and obtain all available material on the bill.

### ASSEMBLY BILL 2791 OF 2004:

1. All versions of Assembly Bill 2791 (Berg-2004);
2. Procedural history of Assembly Bill 2791 from the September 2, 2004 Assembly Recess History;
3. Analysis of Assembly Bill 2791 prepared for the Assembly Committee on Health;
4. Material from the legislative bill file of the Assembly Committee on Health on Assembly Bill 2791;
5. Analysis of Assembly Bill 2791 prepared for the Assembly Committee on Appropriations;
6. Material from the legislative bill file of the Assembly Republican Caucus on Assembly Bill 2791;
7. Analysis of Assembly Bill 2791 prepared for the Senate Committee on Health and Human Services;

8. Material from the legislative bill file of the Senate Committee on Health and Human Services on Assembly Bill 2791;
9. Third Reading analysis of Assembly Bill 2791 prepared by the Office of Senate Floor Analyses;
10. Material from the legislative bill file of the Office of Senate Floor Analyses on Assembly Bill 2791;
11. Post-enrollment documents regarding Assembly Bill 2791 - (Governor Schwarzenegger's legislative files are under restricted access and are not available to the public.).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 26th day of February, 2008 at Woodland, California.



---

FILOMENA M. YEROSHEK



**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,*

---

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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**[PROPOSED] ORDER**

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The Court grants CANHR's motion and takes judicial notice of the following documents:

Exhibit A \_\_\_\_\_

Exhibit B \_\_\_\_\_

Exhibit C \_\_\_\_\_

Exhibit D \_\_\_\_\_

Exhibit E \_\_\_\_\_

Exhibit F \_\_\_\_\_

Exhibit G \_\_\_\_\_

Exhibit H \_\_\_\_\_

Exhibit I \_\_\_\_\_

Exhibit J \_\_\_\_\_

IT IS SO ORDERED.

Date: \_\_\_\_\_, 2018

\_\_\_\_\_  
Justice of the Supreme Court

## 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 MOTION FOR JUDICIAL NOTICE, DECLARATION OF ANTHONY CHICOTEL, and [PROPOSED] ORDER

by mail, at my place of business at San Francisco, CA, I deposited with the United States Postal Service the above named documents. Said documents were 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.  
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Wendy York  
The York Law Corporation  
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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