No. S241431

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JANICE JARMAN,
Plaintiff and Appellant,

v.

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

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

APPELLANT JANICE JARMEN'S ANSWER TO AMICI CURIAE BRIEFS

*Jay-Allen Eisen, SBN 42788
Outside Counsel
DOWNEY BRAND, LLP
621 Capitol Mall, 18th Fl.
Sacramento, CA 95814
Tel: 916.444.1000
Fax: 916.520-5690
jeisen@downeybrand.com

Anthony C. Lanzone, SBN 215805
LANZONE MORGAN LLP
5001 Airport Plaza Drive
Suite 210
Long Beach, CA 90815
Tel.: 562.596.1700
Fax: 888.802.2854
acl@lanzonemorgan.com

Attorneys for Appellant Janice Jarman

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LANZONE MORGAN LLP
5001 Airport Plaza Drive
Suite 210
Long Beach, CA 90815
Tel.: 562.596.1700
Fax: 888.802.2854
acl@lanzonemorgan.com

Attorneys for Appellant Janice Jarman

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INTRODUCTION

None of the amici curiae supporting HCR explain how construing subdivision (b) of Health and Safety Code section 1430 to provide a maximum recovery of $500 per lawsuit serves the legislative intent and purpose of the statute: to protect the rights of residents and patients of care homes.[1] For that matter, neither do the cases on which the amici, like HCR, chiefly rely, *Nevarrez v. San Marino Skilled Nursing & Wellness Centre* (2013) 221 Cal.App.4th 102 and *Lemaire v. Covenant Care Cal., LLC* (2015) 234 Cal.App.4th 860 likewise fail to address how their interpretation of the statute achieves that legislative purpose.

The main theme of the HCR amici is that because section 1430(b) does not provide that a care home resident or patient may recover up to $500 "per violation," that shows the Legislature's intent to cap a facility's liability for all violations of a resident's or patient's rights at $500 per action. But section 1430(b) does not state that a plaintiff may recover only $500 "per action," either. The amici curiae offer no sound reason why the absence of the words, "per violation," is any more significant than the absence of the words, "per action."

They base their interpretation of section 1430(b) by inferences they draw from selective quotation of and citation to the legislative history, and by comparison of the section with other statutes. Their arguments that the court should accept their construction of the statute fail. The arguments amount to no more than an effort to circumvent the legislative intent of the statute and strip care home residents and patients of the protection the statute was expressly designed to afford them.

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[1] All further statutory references are to the Health and Safety Code except as otherwise indicated.

ARGUMENT

THE INTERPRETATION URGED BY AMICI CURIAE IN SUPORT OF HCR DOES NOT SERVE, BUT IS CONTRARY TO THE LEGISLATIVE INTENT AND PURPOSE OF SECTION 1430(B) AND THE STATUTORY SCHEME OF WHICH IT IS A PART.

A. Section 1430(b) must be given the interpretation that best serves its legislative purpose.

"The paramount goal of statutory interpretation is to 'ascertain the intent of the drafters so as to effectuate the purpose of the law.' " (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 160, quoting *Esberg v. Union Oil Co. of Cal.* (2002) 28 Cal.4th 262, 268.) The rules of statutory construction require the court to ascertain the Legislature's intent "so that we may adopt the construction that *best effectuates* the purpose of the law.' " (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 567, quoting *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715 [emphasis added].)[2]

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[2] Only one of the HCR amici curiae acknowledges that "[t]he 'foremost task' of the California courts when resolving a question of statutory interpretation is to 'give effect to the Legislature's purpose.' " (Amicus Curiae brief of Southern California Defense Counsel at p. 12 [quoting *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 293].)

B. The legislative intent and purpose of section 1430(b) is to improve and maintain the quality of care afforded to care facility residents and patients.

1. Section 1430(b) is expressly intended to provide care facility residents a necessary and effective means to assert and protect their rights.

Contrary to the arguments of HCR's amici curiae, the legislative history is replete with direct statements, which they ignore, of the intent and purpose of the statute: to provide the mechanism needed for care facility residents and patients to enforce the Patients' Bill of Rights and protect their dignity, health and safety. The numerous statements of that purpose are express, not implied, in an unbroken, consistent line at every step of the legislative process.

When Senator Petris introduced SB 1930 (1982-1983 Reg. Sess.), he issued the following statement: "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." (HCR motion for judicial notice, Exh. 1A, p. 216.) The Senator emphasized 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. My bill would provide that greatly needed avenue of relief.' "

The Senate Judiciary Committee explained, "The purpose of this bill is to protect and ensure the rights of people residing in nursing homes" because existing law [then section 1430, now 1430(a)], which allowed the Attorney General to sue a long-term care facility for violation of resident or patient rights, "is not sufficient to ensure a patient her rights." (*Id.* at pp. 212-213.)

The Assembly Judiciary Committee report likewise stated the purpose of the bill was to effectuate the Legislature's intent in sections 1599, et seq., "to ensure that nursing homes and intermediate care facilities respect the fundamental rights of their resident [sic]." (*Id.*, at p. 232). The bill, thus, provided "the needed enforcement mechanism" by giving care facility residents and patients "specific authority to initiate actions for violation of all the rights protected in the Patient's Bill of Rights." (*Ibid.*)

The Governor's Office enrolled bill report repeated, "The purpose of this bill is to protect and ensure the rights of people residing in skilled nursing or intermediate care facilities," which was necessary because, as the bill's proponents argued, "existing protection is not sufficient to ensure patient rights." (*Id.* at p. 286.) Likewise, the Department of Aging's enrolled bill report stated, "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 the amount of damages, and by not restricting damages to present amounts for 'A' or 'B' citations." (*Id.*, at p. 289.)

2. The purpose of the statutory scheme of which section 1430(b) is to protect vulnerable care facility residents and patients through deterrence and prevention.

As amicus curiae California Association of Health Facilities ("CAHF") recognizes, " '[T]he various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.' " (CAHF amicus brief at p. 8, quoting *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 231.)

Section 1430(b) is a provision of the Long-Term Care, Health, Safety and Security Act of 1973, section 1400, et seq. ("Act" or "Long-Term Care Act.") The Act is " designed 'to protect one of the most

vulnerable segments of our population, "nursing care patients ... who are already disabled by age and[/or] infirmity," and hence in need of the safeguards provided by state enforcement of patient care standards.' " (*State Dept. of Public Health v. Superior Court* (*Center for Investigative Reporting*) (2015) 60 Cal.4th 940, 95, quoting *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 295.) It "serves to 'protect patients from actual harm, and encourage health care facilities to comply with the applicable regulations....' " (*State Dept. of Public Health v. Superior Court, supra*, 60 Cal.4th at 951, quoting *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 148 [italics in original].)

The Act accomplishes that purpose through provisions intended to promote compliance with the Act by deterring violations. " 'The focus of the Act's statutory scheme is *preventative*.' " (*California Assn. of Health Facilities v. Department of Health Services*, 16 Cal.4th at p. 295, quoting *Kizer v. County of San Mateo, supra*, 53 Cal.3d at p. 148; *State Dept of Public Health v. Superior Court, supra*, 60 Cal.4th at 950-951 [same].)

As the legislative statements of purpose quoted in the previous section make clear, section 1430(b) was necessary to provide residents and patients of care homes the means to enforce those safeguards and deter violations because the law at the time, which gave that power to the state alone, and the state's ability to act were insufficient to accomplish that purpose. Yet, as amicus curiae California Advocates for Nursing Home Reform, Inc., powerfully shows, the need for an effective private cause of action has only grown as state enforcement of care standards and resident rights has deteriorated. (Amicus curiae brief of California Advocates for Nursing Home Reform, Inc., at pp. 9-19.)

C. The HCR amici curiae argue for an interpretation that defeats the intent and purpose of section 1430(b) and the statutory scheme of which it is a part.

The main argument of the amici curiae supporting HCR is that section 1430(b) should be read to provide up to $500 per action, not per violation. Jarman has already shown the critical flaw in their legislative history analysis: their complete disregard of the repeated, express statements of the intent and purpose of the section. Their effort to interpret the section by comparison with other statutes is equally unsound.

Before turning to the specific flaws in that analysis, it is first necessary to note that there is a major misquotation of a statute in the argument of two of the amici curiae, and significant self-contradiction in the position of a third.

1. Amici curiae Civil Justice Association of California and The California Chamber of Commerce misquote section 1430(a), and the California Association of Nursing Facilities contradicts its own prior interpretation of the statute.

a. The Civil Justice Association and Chamber of Commerce quote words that do not exist in the statute.

Amici curiae Civil Justice Association of California and The Chamber of Commerce of California assert that language in section 1430(a) shows that the Legislature did not intend subdivision (b) to provide $500 per violation of a patient's or resident's rights. They purport to quote words from subdivision (a) that are not in the statute.

They assert at page 14 of their brief that section 1430(b) does not say that the $500 recovery it provides is for each violation, "in contrast to the immediately preceding section 1430(a) that initially provided a facility was liable for monetary penalties 'for each and every violation' and now

provides that those penalties apply 'for each and every citation.' " Those words are not, and never have been, in section 1430(a).

Subdivision (a) was originally the entirety of section 1430. (Stats. 1973, ch. 1057, § 1.) It did not contain the words "for each and every." Under SB 1930, the section was subdivided to add subdivision (b), and former section 1430 became subdivision (a). It remained word-for-word the same as originally enacted. (Stats. 1982, ch. 1456, § 1.) It did not, and still does not, contain the words, "for each and every."

There is no difference between subdivisions (a) and (b) with respect to the term, "each and every."

b. The CAHF admitted to the Legislature that section 1430(b) provides $500 per action, not per violation.

CAHF's argues, "SECTION 1430(b) ESTABLISHES A $500 LIMIT PER LAWSUIT." (Brief of amicus curiae CAHF, p. 7, et seq. [capitalization in original]." Yet, CAHF previously interpreted section 1430(b) to provide $500 per violation.

CAHF asserted that interpretation in opposing AB 2791 (2003-2004 Reg. Sess.), which would have increased the amount provided in section 1430(b) from $500 to $5,000. CAHF told the Legislature that it was opposed to the bill, "which would raise the penalty for a resident's rights violation from $500 up to $5,000 per violation." (HCR Motion for Judicial Notice, Exh. 1B, at p. 60.)[3]

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[3] Other private interest groups that opposed the bill unanimously concurred with that interpretation. They included Helios Healthcare, LLC (HCR motion for judicial notice, Exh. 1B at p. 50), the California Healthcare Association (*id.* at p. 63), Crestwood Behavioral Health, Inc. (*id.* at p. 65), La Veta Healthcare Center (*id.* at p. 316), Victorian Healthcare Center (*id.* at p. 319), Foothill Oaks Care Center (*id.* at p. 320), Marina Care Center (*id.* at p. 287), Mission Carmichael HealthCare Center (*id.* at p. 325); Bayside Care Center (*id.* at p. 328), Victorian Healthcare Center (*id.* at p.

The "per violation" interpretation of section 1430(b) that CAHF stated to the Legislature is fatal to the "per action" interpretation that CAHF asks this court to adopt. "Though the statement of a representative of a special interest group ... is ordinarily an unreliable indication of the purpose of legislation affecting the interests of that group, this is not so where, as here, the statement concedes a purpose inimical to the goals of the interest group." (*American Tobacco Co. v. Superior Ct.* (1989) 208 Cal.App.3d 480, 488.)

2. The HCR amici's comparison of section 1430(b) with other statutes does not establish that a plaintiff in a section 1430(b) action may recover only $500.

The HCR amici curiae rely heavily on comparing section 1430(b) with other statutory provisions, invoking the bromide that language in one statute that does not appear in another statute on the same subject is evidence that the Legislature had a different intent with respect to each. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1090 ["*Coachella Valley*"].) That is far from a conclusive, infallible rule. It is "merely one of several guides to statutory construction; it applies generally but not universally...." (*Ibid.*) "The Legislature is not required to employ identical

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334), Linwood Gardens Convalescent Hospital (*id.* at p. 335), Vineyard Hills Health Center (*id.* at p. 337), Napa Nursing Center (*id.* at p. 342), Placerville Pines Convalescent Hospital, Inc. (*id.* at p. 309), Westgate Gardens Convalescent Center (*id.* at p. 348), Monterey Pines Skilled Nursing Facility (*id.* at p. 350), Hilltop Manor Convalescent Hospital (*id.* at p. 352), Lawton Healthcare Center (*id.* at p. 354), Country drive Care (*id.* at p. 355), Valley View Skilled Nursing Center, Inc. (*id.* at p. 366), Lakeport Skilled Nursing Center, Inc. (*id.* at p. 368), Hilltop Manor Convalescent Hospital (*id.* at p. 374), Danish Care Center (*id.* at p. 377), Roseville Convalescent Hospital (*id.* at p. 381), Live Oak Manor (*id.* at p. 390), and El Dorado Convalescent Hospital (*id.* at p. 392).

terminology in separate statutes serving similar policy objectives." (*Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 199.)

As amici curiae AARP, et al., point out, section 1430(b) serves a purpose different from other provisions of the Long-Term Care Act on which the HCR amici rely, sections 1424, 1424.5 and 1425. (Brief of Amici Curiae AARP, et al., in Support of Plaintiff/Appellant at p. 16.) Those sections provide for regulation of care facilities by the state, imposing monetary penalties paid to the state. Section 1430(b), however, compensates residents and patients who suffer not only humiliating indignities and neglect, but mental and physical suffering, even injury, from a facility's violation of their rights.

Furthermore, the generalization that different in language in two statutes dealing with the same subject is evidence of a different legislative intent, "although often helpful, will not be applied in the face of persuasive indicators of a contrary legislative intent." (*In re Alonzo J.* (2014) 58 Cal.4th 924, 934.) One persuasive indicator that section 1430(b) was intended to provide up to $500 per violation of a resident's or patient's rights is found in the repeated, consistent statements throughout the legislative history quoted at pp. 8-9, *supra*, that the purpose of the statute is to give residents and patients a much needed means to enforce their rights because of the state's inability to provide adequate enforcement.

Another persuasive indicator is that to construe section 1430(b) as providing only $500 per violation does not best further or effectuate that statutory purpose. (*Gattuso v. Harte-Hanks Shoppers, Inc.*, *supra*, 42 Cal.4th at p. 567.) It thwarts the statutory purpose, stripping section 1430(b) of any protective or preventative effect. It does not promote compliance with the Patient Bill of Rights. It does not deter violations. It allows long-term care facilities to violate resident or patient rights with impunity.

No matter how many of a plaintiff's rights are violated, no matter how many times, no matter what the consequences to plaintiff—for example, suffering repeated indignities and disrespect like Mr. Jarman, who was not incontinent but who was forced to wear diapers like a baby instead of being given assistance with toileting (Bill of Rights, Cal. Code Regs., tit. 22, § 72527, subd. (a)(12)); suffering mental or physical abuse or both (*id.*, subd. 10); 42 C.F.R. §§ 483.12, 482.13, subd. (c)(3)); being neglected like Mr. Jarman and left unattended to lie in his bodily waste (§ 1599.1, subd. (b); 42 C.F.R. § 483.12); suffering bed sores as Mr. Jarman did from not being given preventive care (§ 1599.1, subd. (b))—a facility's liability to the resident or patient would be no more than $500.

That provides no incentive for a facility to rectify deficient practices and afford residents and patients their rights and the quality of care the law demands. It provides only an incentive to pay a plaintiff resident or patient the trifling $500, be done with the matter, and continue doing business as usual in violation of the law and residents' and patients' rights.

In fact, it would not make economic sense for a facility to do anything else. Contesting a resident's or patient's section 1430(b) lawsuit for violation of his or her rights would cost the facility far more. Just filing an answer to the complaint or other first paper would cost the better part of $500; in some counties, it would be $450.[4] The actual cost of answering the lawsuit would actually be significantly higher because of attorney fees and expenses, even if just for initial consultation, preliminary investigation, and preparation of an answer or other response to the complaint.

A facility engaged in an unlawful but profitable practice—for instance, understaffing, or not providing care to prevent bedsores, or not

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[4] Judicial Council of California, "Superior Court of California Statewide Civil Fee Schedule" (2014), at pp. 1, 16.

taking measures to prevent and reduce incontinence, or not providing food of the quality and quantity to meet patients' needs in accordance with physicians' orders, or not maintaining a nurse's call system in operating order[5]—would have no incentive to discontinue its illegal profit-making if section 1430(b) does not provide a cumulative deterring consequence.

There is yet is another reason that renders inapplicable the view that language in one statute that is not included in another statute regarding the same subject is evidence of a different intent. "We construe related statutes so as to harmonize their requirements and avoid anomaly." (*Fair* v. *Bakhtiari*, *supra*, 40 Cal.4th at p. 199, citing *Coachella Valley*, *supra*, 35 Cal.4th at p. 1090.)

Applying that principle here would lead to the anomaly that, in an action by the state to enforce the Act, the nursing home or care facility is subject to liability for each and every citation. (§§ 1424, subds. (c)-(e), 1424.5, subds. (a)(1)-(4), 1425.)[6] But when an individual sues under section 1430(b) for violation of the Bill of Rights or any other rights that the section incorporates into the Act, the care facility is subject to no more than a maximum of $500, regardless of the number, seriousness or harmful consequences of the violations. The anomaly is inexplicable; there is no "plausible ground for the Legislature to draw such a distinction...." (*Coachella Valley*, *supra*, 35 Cal.4th at p. 1090.)

The Legislature knows how to draft a statute that caps the amount that may be recovered in an action. Indeed, subdivision (a) of section 1430

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[5] See Health and Safety Code § 1599.1, subs. (a)-(c) and (f), incorporated in the Bill of Rights, Cal. Code Regs., tit. 22, § 72527, subd. (a)(2).

[6] A citation is issued for a violation. (See § 1423, subd. (a).)

itself caps the civil damages that may be recovered in an action brought under that provision.[7]

The necessary corollary of the HCR amicis' argument that section 1430(b) provides only $500 per action because it does not say "per violation" is that a statute stating an amount that may be recovered for a violation limits the recovery to the stated amount per action unless it expressly includes words to the effect of "per violation." The court has not required rote recitation of those words to find that a statute provides a recovery per violation.

In *Ribas v. Clark* (1985) 38 Cal.3d 355, defendant violated plaintiff's rights under the Privacy Act (now the Invasion of Privacy Act), Penal Code sections 630, et seq. Section 637.2 then provided that " '[a]ny person who has been injured by a violation of" the Privacy Act may bring an action for $3,000 or three times his actual damages, whichever is greater." (*Ribas v. Clark*, *supra*, 38 Cal.3d at p. 364.) The statute did not state whether the $3,000 was per lawsuit or per violation. "Nevertheless," the court held, "the same statute authorizes civil awards of $3,000 for *each violation* of the Privacy Act...." (*Id.* at p. 365 [emphasis added]; see also *Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 925 (section prescribes damages "per violation"; *Lieberman v. KCOP Television, Inc.*

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[7] Another example is Penal Code § 490.5. It provides a civil liability of a parent of an unemancipated minor and of the minor who commits an act that would constitute petty theft of merchandise from a merchant's premises or of books or library materials from a library facility. "[T]otal damages, including the value of the merchandise or book or other library materials, shall not exceed five hundred dollars ($500) for *each action* brought under this section." (Emphasis added.) And, in an action under the Medical Injury Compensation Reform Act, Civil Code section 3333.2 provides, "In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)."

(2003) 110 Cal.App.4th 156, 365 [plaintiff may recover the statutory amount "for each incident."])[8]

As the United States Supreme Court said in holding that Congress must make a "clear statement" of intent regarding a particular type of statute, "[t]his is not to say that Congress must incant magic words in order to speak clearly." *Sebelius v. Auburn Regional Medical Center* (2013) 568 U.S. 145, 153, 133 S.Ct. 817, 824, 184 L.Ed.2d 627.

CONCLUSION

Section 1430(b) is not the Legislature's offer of a $500 ticket to violate patients' and residents' rights with impunity. Yet, that is what the interpretation urged by HCR's amici curiae gives nursing care facilities.

Their effort to read a damages cap per action into the remedial provisions of section 1430(b) is a refusal to acknowledge and effectuate the purpose of the statute: to protect vulnerable residents and patients of care facilities from violations of their by holding the offending care facility liable for the violations. Section 1430(b)'s purpose is not to protect facilities or limit their liability. (*Cf.*, *Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [refusing to apply damages cap of Civ. Code § 3333.2 to elder abuse claims in light of the purpose of the Elder Abuse Act].)

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[8] Section 637.2 has since been amended to provide a minimum of $5,000, which is now expressly recoverable "per violation." (Stats. 2016, ch. 855, § 4.)

In an unpublished decision, *Ronquillo-Griffin v. TELUS Communications, Inc.* (S.D. Cal. 2017) 2017 WL 2779329 at *6, the court considered the quoted statements in *Ribas v. Clark*, *Coulter v. Bank of America*, and *Lieberman v. KCOP Television, Inc.* to be dicta. But the court found them correct and convincing statements of California law. (*Ronquillo-Griffin v. TELUS Communications, Inc., supra*, 2017 WL 2779329 at *8.)

The arguments of the amici curiae in support of HCR should be rejected.

DATED: November 26, 2018 DOWNEY BRAND LLP

JAY-ALLEN EISEN
Attorneys for Plaintiff and Appellant
JANICE JARMAN

CERTIFICATE OF COMPLIANCE

The text of this brief consists of 3,911 words as counted by the Microsoft Office Word version 2010 word-processing program used to generate this brief.

DATED: November 26, 2018

DOWNEY BRAND LLP

JAY-ALLEN EISEN
Attorneys for Plaintiff and Appellant
JANICE JARMAN

PROOF OF SERVICE
(CCP Sections 1013a, 2015.5)

I, Karen Gould, declare:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within cause. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 95814.

On November 26, 2018, I served Appellant Janice Jarman's Answer to Amici Curiae Briefs as follows:

<table>
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<tr><td>Via FedEx
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Michael M. Berger
Barry S. Landsberg
Joanna S. McCallum
11355 W. Olympic Blvd.
Los Angeles, CA 90064
Tel: (310) 312-4000</td><td>PETRULLO,LLP
John P. Petrullo
Grace Song
Pacific Corp. Towers
222 N. Sepulveda Blvd.
Suite 806
El Segundo, CA 90245
Tel: (213) 627-0400</td></tr>
<tr><td>Via USPS
Regular Mail</td><td colspan="2">Fred J. Hiestand
COUNSELOR AT LAW
3418 Third Ave., Suite 1
Sacramento, CA 95817</td></tr>
</table>

Via USPS Regular Mail	Erika C. Frank Heather L. Wallace CALIFORNIA CHAMBER OF COMMERCE 1215 K Street, Suite 1400 Sacramento, CA 95814
Via USPS Regular Mail	Curtis A. Cole Cassidy C. Davenport COLE PEDROZA LLP 2670 Mission Street, Suite 200 San Marino, CA 91108
Via USPS Regular Mail	Mark E. Reagan Jordan Kearney HOOPER, LUNDY & BOOKMAN, P.C. 575 Market Street, Suite 2300 San Francisco, CA 94105
Via USPS Regular Mail	Harry W.R. Chamberlain II Robert M. Dato BUCHALTER, P.C. 1000 Wilshire Blvd., Suite 1500 Los Angeles, CA 90017
Via USPS Regular Mail	Anthony M. Chicotel CALIFORNIA ADVOCATES FOR NURSING HOME REFORM 650 Harrison Street, Second Floor San Francisco, CA 94107

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 26, 2018, at Sacramento, California.

By: Karen Gould
Karen Gould, CCLS