No. S241431

SUPREME COURT
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IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

JANICE JARMAN,

Plaintiff and Appellant,

vs.

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

Defendants and Appellants.

DEFENDANTS/APPELLANTS' RESPONSE TO BRIEFS OF AMICI CURIAE CALIFORNIA ADVOCATES FOR NURSING HOME REFORM AND AARP *ET AL.*

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

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

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I. INTRODUCTION

This case is about the meaning of a statute. Amici seek to overwhelm the statute with policy arguments that are at odds with the plain text of Section 1430(b), its legislative history, and its limited role in the statutory and regulatory scheme governing nursing homes.[1] Section 1430(b) is and was intended as a limited vehicle for a specific purpose: to provide a private enforcement mechanism for violation of resident rights having "only a minimal relationship" to resident health and safety, and thus not causing or threatening harm to residents' health or safety.[2] The important policies of protection of residents and compensation for any harm they might suffer are the focus of myriad other claims and laws, including other public and private enforcement provisions of the Long Term Care Act (LTCA) itself. Amici shed the larger context and attempt to bloat Section 1430(b)'s limited monetary remedy into a major tool for obtaining substantial monetary compensation for harm covered by other statutes.

The fact that Section 1430(b) provides a monetary cap of $500 in a lawsuit is demonstrated by the plain language of the statute, by the provision's place in the overall statutory and regulatory scheme applicable to skilled nursing facilities, by the legislative history, and by its limited purpose. This Court arguably presaged this conclusion in 1991, when it decided *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139 (*Kizer*), and held that county-owned nursing homes did not enjoy Government Code

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[1] Amici are California Advocates for Nursing Home Reform (CANHR) and AARP, AARP Foundation, Center for Medicare Advocacy, Consumer Attorneys of California, Justice in Aging, The Long Term Care Community Coalition, and the National Consumer Voice for Quality Long-Term Care (collectively AARP).

[2] Cal. Code Regs., tit. 22, § 72701, subd. (a)(4).

immunity and were subject to citations for Class A and B violations. In so holding, the Court reviewed the LTCA and observed "a resident or patient of a skilled nursing facility or an intermediate care facility may bring *a civil action* against the licensee of any such facility that violates certain rights of any resident or patient; *in such an action the licensee is liable for up to $500* and may be enjoined from permitting the violation to continue. (§ 1430, subd. (b).)"[3]

The amici supporting Plaintiff ignore what the Court said on this subject in *Kizer* and they avoid nearly everything else ManorCare brought to light about the statute, its context, and its legislative history.[4] For instance, they argue that Section 1430(b) provides up to $500 per violation, but they do not address the fact that the Legislature included no such language in the statute, but did include it in other statutes, including those defining the citations enforceable under Section 1430(a), the companion statute.[5] Amici do not address the fact that the Legislature rejected eight separate proposals to increase the amount of the Section 1430(b) award, in the face of arguments that $500 was not enough. And they do not meaningfully address the fact that there are multiple other statutory and tort claims available to injured residents that can provide precisely the compensation and deterrence that they seek to force in through Section 1430(b).

The briefs also are misleading. Both briefs assert that "the Legislature" expressed its understanding that the Section 1430(b) award

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[3] *Kizer*, 53 Cal.3d at 143, fn. 3 (emphasis added).

[4] In contrast, the four amicus briefs supporting ManorCare comprehensively discuss the relevant statutory language, history, and other authorities.

[5] Health & Saf. Code, § 1424.5.

was "for each violation," concealing the fact that they quote from a minority committee report—hardly the voice of "the Legislature." As the *Nevarrez* court correctly explained, that report is an outlier, and contrary to substantial legislative history materials that amici do not mention. (*Nevarrez v. San Marino Skilled Nursing & Wellness Centre* (2013) 221 Cal.App.4th 102, 133 (*Nevarrez*).) AARP also repeatedly asserts that Section 1430(a)—which allows a resident to sue for substantial civil damages on a per-violation basis for violations that cause or threaten harm—is available only to the government. The plain language of Section 1430(a) shows that it not true; it specifically authorizes private enforcement.

AARP also argues that punitive damages are available in a Section 1430(b) claim. The arguments it makes are nearly identical to those made by Plaintiff, which ManorCare already negated in its Reply Brief. The few arguments AARP adds are wrong.

Amici's briefs demonstrate that they are pushing for an aspirational interpretation of Section 1430(b) that embodies what they want it to be, not what the Legislature chose to make it. (See CANHR Br. 18 [arguing that certain offenses "ache for a remedy," without accepting that the Legislature considered and rejected lifting the $500 cap].) But the fact that a particular policy might be served by a larger award does not empower courts to rewrite legislation. (*Scher v. Burke* (2017) 3 Cal.5th 136, 145 (*Scher*).) "[I]t is quite mistaken to assume . . . that 'whatever' might appear to 'further[] the statute's primary objective must be the law.' . . . [W]e will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead 'that [the] legislature says . . . what it means and means . . . what it

says.'" (*Henson v. Santander Consumer USA Inc.* (2017) 137 S.Ct. 1718, 1725 [citations omitted].) If the award provided by the statute is too small to accomplish its purpose, change is for the Legislature. (*Nevarrez*, 221 Cal.App.4th at 132.) The Legislature has repeatedly declined requests to increase the award.

II. SECTION 1430(b) AUTHORIZES A MAXIMUM $500 AWARD PER LAWSUIT

A. Amici Ignore Basic Statutory Interpretation Principles.

Amici pay lip service to the well-established framework for statutory interpretation, starting with an examination of the legislative text and, if necessary, the legislative history. (AARP Br. 13; see *Scher* 3 Cal.5th at 143; *926 N. Ardmore Ave., LLC v. County of Los Angeles* (2017) 3 Cal.5th 319, 328.) Here, those steps unequivocally compel the conclusion that the award is per-lawsuit, not per-violation. Amici cannot come to terms with the text or legislative history, so they ignore the overwhelming evidence contrary to their position, ignore ManorCare's arguments that already demonstrated the fallacy of the same arguments, and misrepresent the legislative record.

1. The Text of Section 1430(b) Demonstrates That the Award Is One Single Maximum Per Lawsuit.

Section 1430(b) authorizes a single award of up to $500 in "a civil action." A civil action is a lawsuit. (Code Civ. Proc., § 30 ["Civil action defined. A civil action is prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong."].) "The phrase 'up to five hundred dollars' refers to '[t]he suit' to 'be brought.' It is a liability cap for the action.'" (*Lemaire*

v. Covenant Care Cal., LLC (2015) 234 Cal.App.4th 860, 867 (*Lemaire*) [citation omitted]; see also *Nevarrez*, 221 Cal.App.4th at 130.) The single per-lawsuit award was a legislative choice, and, as stated in a case cited by CANHR, "[t]he decision to provide for the imposition of a monetary sanction for a violation of a regulatory statute is a matter resting well within the discretion of the Legislature." (*People v. Superior Court (Olson)* 96 Cal.App.3d 181, 195 (1979) (*Olson*).)

Amici repeatedly assert that the statute's text provides a per-violation recovery.[6] The statute does not say "per violation" or any similar phrase. The Legislature frequently uses such easily deployed language when it intends that a monetary award be available for each occurrence—as it did, for example, in Health & Safety Code section 1424.5, which specifies the award available under Section 1430(a), the companion statute to Section 1430(b). The Legislature also used similar language in at least 85 sections of the Health and Safety Code alone. (ManorCare Op. Br. 16-17; see also *Nevarrez*, 221 Cal.App.4th at 130 [noting that Legislature used "per violation" language in other Health & Safety Code penalty statutes].) Neither amicus brief acknowledges that important fact, nor its significance to statutory interpretation. "As a general rule, when the Legislature uses a term in one provision of a statute but omits it from another . . . we generally presume that the Legislature did so deliberately, in order 'to convey a different meaning.'" (*Scher*, 3 Cal.5th at 144-145 [citation omitted].) The

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[6]Neither amicus brief attempts to defend the Court of Appeal's unsupported holding that the award is available "per cause of action." In reaching that conclusion, even the Court of Appeal implicitly recognized that the award was not per violation. (See Op. p. 21 [rejecting the suggestion that the only options for the Section 1430(b) award are "per lawsuit" or "per violation," and relying instead on "a third option": "per cause of action"].)

Legislature omitted "per violation" language here, and, "[a]s such, California courts generally deny per violation damages except when explicitly provided by statute." (*Franklin v. Ocwen Loan Servicing, LLC* (N.D. Cal. Nov. 13, 2018) 2018 WL 5923450, at *5 [citing and following *Nevarrez* and *Lemaire*].)

The only text cited by either amicus brief for its interpretation are the words "the violation" in the sentence "[t]he licensee shall be liable for up to five hundred dollars ($500), and for costs and attorney fees, and may be enjoined from permitting *the violation* to continue." But the statutory reference to "the violation" cannot authorize per-violation awards unless the statute says so. (*Franklin*, 2018 WL 5923450, at *5 [rejecting contention that a statute's reference to "an action" against a person who committed "the violation" was ambiguous and allowed a per-violation recovery not mentioned in the statute].) ManorCare also explained why the intervening reference to costs and attorneys' fees breaks any link between the monetary award and the phrase "the violation."[7] (ManorCare Op. Br. 29-31; see also *Nevarrez*, 221 Cal.App.4th at 131 ["[t]his interpretation is frustrated by the [sentence's] intervening reference to 'costs and attorney fees,' as these are awarded to the prevailing party in a civil action, but not on a 'per violation' basis"].) AARP says that ManorCare improperly "impl[ies] limitations based on the language 'attorney's fees and costs'" (AARP Br. 14), but AARP never addresses the disconnect. Manorcare's

[7] AARP dismisses ManorCare's textual arguments as "semantic." (AARP Br. 14.) However, any discussion of the meaning of statutory text is "semantic." (See https://www.merriam-webster.com/dictionary/semantic [defining "semantic" as "of or relating to meaning in language"].)

and *Nevarrez*'s interpretation is not a "limitation," but rather a demonstration that AARP's textual argument is wrong.

CANHR cites several cases as examples of courts construing a statute to impose a per-violation penalty, arguing that "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." (CANHR Br. 20.) The statutes discussed in the cited cases, however, explicitly imposed a penalty for each violation. (See *People v. National Ass'n of Realtors* (1984) 155 Cal.App.3d 578, 584-585 [considering multiple penalties under Bus. & Prof. Code § 17206, which imposes a penalty "for each violation"]; *Olson*, 96 Cal.App.3d at pp. 186-187 [considering multiple penalties under Bus. & Prof. Code § 17206, *supra*, and § 17536, which also imposes a penalty "for each violation"].)

AARP attacks ManorCare's observation that interpreting Section 1430(b) as allowing a per-violation recovery would mean that an uninjured plaintiff could obtain far more money than an injured plaintiff under Section 1430(a). AARP argues that any disproportionality between awards under the two statutes is not surprising because the two statutes are different. (AARP Br. 16.) This misses the point. Under Section 1430(a), which allows for an award of damages per violation, the total award is capped at the amount of civil penalties recoverable in an action by the State. Section 1430(b) contains no such cap, and thus, under AARP's view, an award to a Section 1430(b) plaintiff is potentially limitless. This disproportionality makes no sense and serves no policy. Notably, when Section 1430(b) was enacted in 1982 with a maximum $500 award

provision, the maximum award for each Class B violation was $250—half that amount. (ManorCare's Motion for Judicial Notice (MJN) Ex. 24, p. 112.) AARP would have the Court conclude that the Legislature chose to allow a plaintiff who experienced a violation with "a direct or immediate relationship to the health, safety, or security of long-term health care facility patients or residents" (Health & Saf. Code § 1424, subd. (e)) to receive up to $250 per violation and a plaintiff who experienced a violation with "only a minimal relationship to the health, safety or security of the skilled nursing facility patients" (Cal. Code Regs., tit. 22, § 72701, subd. (a)(4)) to receive up to $500 per violation.[8] This construction does not hold up.

2. The Legislative History Demonstrates That the Award Is Per Lawsuit, Not Per Violation.

Both amicus briefs ignore another critical fact: the Legislature considered eight separate proposals to impose a monetary award larger than the $500 per-lawsuit award that has existed since the statute was first enacted in 1982 (including actual damages, treble actual damages, various larger amounts ranging from $5,000 to $25,000, and punitive damages).[9]

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[8] Even today, the maximum per-violation award for a Class B violation is $2,000 (Health & Saf. Code § 1424.5, subd. (a)(4)), still far less than every proposed increase to the Section 1430(b) award. (ManorCare MJN Exs. 1, 2, 8, 9, 11.) In considering proposals to increase the $500 award to $5,000, $10,000, or $25,000, the Legislature never mentioned that the increase would result in far larger awards than those under Section 1430(a)/Class B—presumably because, as Class B awards are per violation and Section 1430(b) awards are per lawsuit, the Legislature knew that even an increased Section 1430(b) per-lawsuit award would not necessarily exceed the amount of per-violation damages in a Section 1430(a) action.

[9] AARP concedes the relevance of the failed proposals. (See AARP MJN p. 4 [arguing that the Court should take judicial notice of failed legislation that would have amended an existing statute].)

(See ManorCare Op. Br. pp. 19-24.) In the numerous times the Legislature was asked to amend the statute, it never once proposed to change any aspect of the per-lawsuit language relating to the remedies in a single civil action, other than the amount. The proposed huge increases were clearly intended to be a single amount per lawsuit and made no sense at all if the increases were understood to be unleashing per violation recoveries. Amici (and Plaintiff) fail to come to terms with the necessary extension of *their* argument that a recovery of up to $25,000 (under one such proposed increase) meant that the Legislature would have been authorizing multiple per violation recoveries of that amount. On each occasion, the Legislature was presented with arguments regarding the need to increase the single per "civil action" award in order to better incentivize lawsuits. And not once did the Legislature say, when rejecting those large increases, that they were unnecessary because plaintiffs already could recover multiples of $500 on a per violation basis.

Amici have nothing to say in response to this history, and so they ignore it. For instance, even though they repeatedly mention the 2004 amendment that expanded the rights enforceable under Section 1430(b), they do not mention that in the same session, the Legislature rejected an attempt to increase the penalty from $500 to $5,000, which supporters urged was necessary to encourage lawsuits. As noted, the per-violation maximum amount for Class B is to this day substantially less than $5,000. Even Class A violations are currently subject to smaller amounts than what was proposed for Section 1430(b)—$2,000 to $20,000 per violation. (Health & Saf. Code, § 1424.5, subd. (a)(2).)

Ignoring the actual legislative history, amici instead misrepresent it, to create the false impression that the Legislature acknowledged that the

$500 award was "for each violation." No such thing ever happened. AARP repeatedly asserts that "the Legislature" stated that the award was "for each violation," and implies that it is quoting from a report by the Assembly Judiciary Committee. (AARP Br. 10, 14-15.) CANHR also attributes the same statement to the Assembly Judiciary Committee. (CANHR Br. 8-9.) But the quoted document is nothing more than the same outlier "minority" report addressed in *Nevarrez*. (ManorCare MJN Ex. 1 p. 239 [cited by AARP]; CANHR Motion for Judicial Notice Ex. G [cited by CANHR].) *Nevarrez* put the minority report into context, noting that *no* legislative history *except* this one report supported the per-violation theory. (*Nevarrez*, 221 Cal.App.4th p. 133 ["*With the exception* of the minority analysis for the Assembly Committee on the Judiciary, *no legislative history* material on Senate Bill No. 1930 . . . suggests that the $500 maximum was to be recovered per violation."] [emphasis added].) Plaintiff, who also relies on the same quotation, at least forthrightly identifies it as a minority report.[10] (Jarman Br. 28.)

Finally, AARP implies that a court cannot adopt a legislative intent argument without "compelling" or "substantial" proof of legislative intent.[11] (AARP Br. 14, 20.) There is no such standard; but in any event,

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[10] CANHR cites letters from supporters of the bill, which are not indicia of legislative intent. (*Kaufman & Broad Comms. v. Performance Plastering* (2005) 133 Cal.App.4th 26, 35 [treating letters to legislators as not relevant to determining legislative intent].)

[11] AARP also concedes, inconsistently, that failed legislation is relevant evidence of legislative intent. (See *supra* fn. 9.) Here, the Legislature failed to enact numerous proposed bills that would have increased the Section 1430(b) award and, in doing so, demonstrated its understanding that the award was per-lawsuit, not per-violation. (ManorCare Brief Part IV.A.2.c.)

eight rejections of proposed increases to the $500 maximum certainly are compelling and substantial.

B. Section 1430(b) Is Not Intended to Compensate Residents for Harm.

There is a fundamental misconception at the heart of both amicus briefs: the erroneous contention that Section 1430(b) is intended to compensate injured residents for harm suffered.

Both amicus briefs squarely focus on the supposed compensatory purpose of Section 1430(b) as the primary support for their arguments that the statute must be interpreted to allow up to $500 per violation in order to adequately compensate those residents who suffer harm. (See, e.g., AARP Br. 7, 14, 17; [arguing that a per-violation award is necessary to "make[] victims whole"]; CANHR Br. 7 [Section 1430(b) "assign[s] damages commensurate with the harm caused by such violations"].)

Section 1430(b) is not about compensation or harm or making victims "whole." Section 1430(b) was intended to provide a means for private enforcement of violations of resident rights having "only a minimal relationship" to resident health and safety. (Cal. Code Regs., tit. 22, § 72701, subd. (a)(4).) Other sections of the LTCA, other statutes, and tort claims may provide compensation where harm has occurred.

Section 1430(b) does not require a plaintiff to prove that harm occurred, to prove that the harm was caused by the resident rights violation, or to prove damages. The award of up to $500—even if it were construed (contrary to the statute) as per-violation—is not tied to the amount or degree of any harm. When Section 1430(b) is correctly viewed as only one thread in the network of laws applicable to nursing facilities and their residents, the underpinnings of amici's arguments disappear.

1. Other Laws, Not Section 1430(b), Compensate Residents for Harm.

Section 1430(b) "is not a substitute for the standard damage causes of action for injuries suffered by residents of nursing care facilities." (*Lemaire*, 234 Cal.App.4th at 867.) Residents have available numerous laws that provide a range of remedies, including compensatory and potential punitive damages, where a facility's violation of a resident's rights has caused harm. Amici mostly skirt this fact and provide no meaningful response.

In fact, AARP misrepresents the law and ignores this Court's treatment of the subject. ManorCare explained that another prong of the same statute, Section 1430(a), provides residents with a means to obtain substantial monetary civil damages, on a per-violation basis (as the statute makes explicit), where the violation of a resident right has caused or threatened harm to a resident's health or safety.[12] This Court in *Kizer* observed that a cause of action under Section 1430(b) was "[i]n addition" to the LTCA's provision of a government or private civil damages suit under Section 1430(a). (*Kizer*, 53 Cal.3d at 143, fn. 3.) CANHR's sole mention of this important statute is to state, in a footnote, that "no one knows what it means." (CANHR Br. 9, fn. 1.) AARP, in contrast, claims to know what it means—but only by flatly misrepresenting what that statute says. AARP dismisses Section 1430(a) as only "a government enforcement statute that provides for damages to the State." (AARP Br. 16.)

AARP is wrong. Section 1430(a) says:

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[12] This Court has explained that the government may impose the *penalties* set forth in Section 1424.5 merely for violation of the regulations, without any showing of injury. (*Kizer*, 53 Cal.3d at 147, fn. 6.) This is "unlike damages" (*id.* at 147), including the "civil damages" under Section 1430(a).

> An action for injunction or civil damages, or both, may be prosecuted by the Attorney General in the name of the people of the State of California upon his or her own complaint or upon the complaint of a board, officer, person, corporation, or association, *or by a person acting for the interests of itself, its members, or the general public.*

(Health & Saf. Code, § 1430, subd. (a) [emphasis added].) In *Kizer*, the Court said squarely:

> *A civil action for damages may be prosecuted by* either the Attorney General or *a private party.* The damages recoverable in such an action are not to exceed the maximum amount of civil penalties that could be assessed for the violation. (§ 1430, subd. (a).) *Section 1430 does not foreclose civil actions for damages by patients who have been injured by a violation*; the remedies specified in that section are "in addition to any other remedy provided by law." (§ 1430, subd. (c).)

(*Kizer*, 53 Cal.3d at 143 [emphasis added; footnote omitted].)

Similarly, the author of the 1982 bill that added Section 1430(b) described the need for the new cause of action, explaining that "[c]urrently, violations [of the Patients' Bill of Rights] are 'C' citations and, therefore, not subject to fine or to *the civil remedies available to private citizens and the Attorney General as set out in Section 1430[a] of the Health and Safety Code*." (ManorCare MJN Ex. 6 at 17 [emphasis added].) Section 1430(a) expressly grants an *individual* the ability to bring a lawsuit for damages to redress Class A or B violations that cause or threaten harm to resident health or safety. AARP goes so far as to use Section 1430(a)'s cap on total damages as support for interpreting Section 1430(b) to allow a per-violation award. (AARP Br. 16 ["That the State's damages [under Section 1430(a)] are expressly constrained and residents' damages are not is only further evidence that the Legislature did not intend to limit residents' statutory damages to $500 per lawsuit [under Section 1430(b)]."].) But this is not

evidence of a per-violation interpretation of Section 1430(b); this is a misrepresentation about the damages available to residents under Section 1430(a).

Section 1430(a) is properly invoked for violations, including violations of residents' rights under the Patients' Bill of Rights or other laws, if those violations cause or threaten harm—and it provides larger awards on a per-violation basis. It is not necessary to interpret Section 1430(b) as providing per-violation awards in order to assure that a resident who is harmed can obtain damages. The LTCA expressly provides that a violation of the Patients' Bill of Rights—ordinarily a Class C violation enforceable only under Section 1430(b)—becomes a Class "A" or "B" violation (enforceable under Section 1430(a)) *if* it causes or threatens harm:

> Unless otherwise determined by the state department to be a class "A" violation ..., any violation of a patient's rights as set forth in Sections 72527 and 73523 of Title 22 of the California Code of Regulations, that is determined by the state department to *cause, or under circumstances to be likely to cause, significant humiliation, indignity, anxiety, or other emotional trauma* to a patient is a class "B" violation.

(Health & Saf. Code, § 1424.5, subd. (a)(4) [emphasis added].) And if a resident right violation results in the intangible harms with which amici are concerned, including "humiliation, indignity, anxiety, or other emotional trauma," it may well become a Class B violation redressable privately under Section 1430(a). The nature of the violation, not the nature of the underlying right, determines whether a plaintiff can bring a claim under Section 1430(a) instead of, or in addition to, a claim under Section 1430(b). The fact that violation of a particular resident right *could* cause harm does not mean the violation *does* cause or threaten harm in every instance.

Thus, Section 1430(a) is a private attorney general statute. Indeed, its language specifying the parties who may bring a Section 1430(a) civil damages or injunction claim is virtually identical to the Unfair Competition Law prior to its amendment by Proposition 64—the quintessential private attorney general law. (Bus. & Prof. Code § 17204; https://vig.cdn.sos.ca.gov/2004/general/propositions/prop64text.pdf; *In re Tobacco II Cases*, 46 Cal.4th 298, 329 (2009) (Baxter, J., conc. & dis.).) AARP refers to Section 1430(b) as a private attorney general statute (AARP Br. 16), but AARP focuses on the wrong section.

Having failed to respond properly to ManorCare's argument about Section 1430(a),[13] amici also fail to address the numerous other statutory and tort claims that can compensate residents for harm—including, for example, claims for elder abuse, negligence, professional negligence, infliction of emotional distress, assault, battery, fraud, and unfair competition. CANHR ignores this point altogether. AARP merely points out that these claims existed before the enactment of Section 1430(b). AARP implies that by enacting Section 1430(b), the Legislature showed that it believed existing causes of action were inadequate to compensate residents, and enacted Section 1430(b) to provide greater compensation. But Section 1430(b) clearly was intended not to *replace* these claims or increase the compensation and other remedies they provide, but rather to accomplish something that these claims could not accomplish: enforcement of resident rights that have "only a minimal relationship to the health, safety or security of the skilled nursing facility patients" (Cal. Code Regs., tit. 22, § 72701, subd. (a)(4)), known as Class C violations. (ManorCare

[13] Plaintiff also failed to respond to this argument, not even citing Section 1430(a) in her brief. (ManorCare Reply Br. 8.)

MJN Ex. 15 p. 17 ["existing law does not provide adequate mechanisms to ensure [that residents'] rights are not abused"].)

A plaintiff who has experienced a Class C violation may bring a Section 1430(b) claim even where no other cause of action could be stated on the applicable facts. In those cases where the resident did experience harm from violation of a resident right, the Section 1430(b) claim is available—but that plaintiff also may have other options, and it is the other options that can provide compensation to him or her. The fact that the resident might be harmed by a resident right violation does not provide a reason to increase the award available under Section 1430(b); rather, it provides a reason to bring other available claims that can compensate for that harm.

Thus, ManorCare never argued that Section 1430(b) claims are available *only* for Class C violations. (AARP Br. 15.) Nor did ManorCare argue that Section 1430(a) "must" be used for more serious offenses. (*Ibid.*) The point is simply that if a plaintiff wants compensation for a rights violation that caused harm, he or she needs to use Section 1430(a) (and/or other statutory and tort claims) and not rely on Section 1430(b) because its purpose and effect are not compensatory and its monetary award is small. "The fact that the private monetary remedy is not greater reflects a legislative choice with respect to that remedy, rather than a basis for a court to enhance the statutory scheme." (*Nevarrez,* 221 Cal.App.4th at 132.)

2. Nothing About Section 1430(b) Supports an Intent to Compensate for Harm.

Amici generally ignore the text, context, and legislative history of Section 1430(b), and focus exclusively on the purported purpose to

compensate victims for harm. As shown above, that is not the purpose of Section 1430(b).

There is nothing in the text of Section 1430(b) that would indicate such a purpose. Instead, the statute imposes strict liability on a facility without any showing of harm or fault, and it awards a flat monetary award without any connection to or proof of harm allegedly suffered. By its nature, this award is a non-compensatory penalty.[14] "The characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform . . . ." (*Garrett v. Coast & So. Fed. Sav. & Loan* (1973) 9 Cal.3d 731, 739.) "Civil penalties under the Act, unlike damages, require no showing of actual harm per se. Unlike damages, the civil penalties are imposed according to a range set by statute irrespective of actual damage suffered." (*Kizer*, 53 Cal.3d at 147; see also *id.* fn. 6 ["Imposition of a class A or B citation requires no showing of injury at all."].)

Likewise, the legislative history of the 1982 bill enacting Section 1430(b) and the 2004 bill amending it to expand the enforceable rights contains *no mention* of resident compensation as a purpose or goal of Section 1430(b). (See generally ManorCare MJN Ex. 1.)

Finally, amici are well aware that the award under Section 1430(b) is not compensation for harm. As AARP's brief later admits, Section 1430(b)

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[14] This would be true even if $500 could be awarded on a per-violation basis. CANHR laments the notion of imposing any "cap" under Section 1430(b), but the award clearly is capped at $500. A $500 per-violation award would reflect a larger cap than a $500-per-lawsuit cap, but it still would not necessarily be commensurate with any harm suffered.

"does not allow for the recovery of compensatory damages." (AARP Br. 28.)[15]

3. Section 1430(b) Provides Additional Remedies.

Proper interpretation of Section 1430(b) as not intended to compensate for harm does not make the law ineffective. The statute provides for injunctive relief, "the classic remedy to prevent future violations, with monetary and coercive sanctions for contempt." (*Nevarrez*, 221 Cal.App.4th at 135; see also *Lemaire*, 234 Cal.App.4th at 867.) This is consistent with the fact that "[t]he focus of the Act's statutory scheme is *preventative.*" (*Kizer*, 53 Cal.3d at 148 [emphasis in original]; *Nevarrez*, 221 Cal.App.4th at 135 ["[The LTCA's] focus is preventative; its purpose—to encourage regulatory compliance and prevent injury from occurring."].)

Section 1430(b) also provides for attorneys' fees and costs. *Nevarrez* identifies this significant incentive to sue, but amici say nothing

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[15] AARP argued, in support of increasing the maximum award: "Although remedies available under [Section 1430(b)] 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." (ManorCare MJN Ex. 1, AB 2791 file, p. 51 of .pdf [emphasis added].) Again, if $500 were available per violation, a plaintiff could frame a complaint so as to seek a substantial monetary award. CANHR also has acknowledged that "$500 [is a] *limit* on civil damages, [so] few residents' rights lawsuits have been filed, despite thousands of documented residents' rights violations." (Cal. Advocates for Nursing Home Reform, Nursing Home Abuse and California's Broken Enforcement System p. 7 (May 2006), available at http://www.canhr.org/reports/2006/Abuse_Report_2006_solo.pdf [emphasis added]; *id.* p. 8 ["The California Legislature should strengthen nursing home residents' ability to obtain fair compensation when their rights are violated by increasing the limit on damages (set at Health and Safety Code Section 1430(b)) from $500 to $5,000."].)

(CANHR) or very little (AARP) about this. (*Nevarrez*, 221 Cal.App.4th at 135.) The prospect of attorneys' fees incentivizes lawyers to take and pursue Section 1430(b) claims; a per-violation award is not necessary to accomplish that. Notably, the UCL does not allow private plaintiffs to recover damages of any kind, and it does not authorize mandatory attorneys' fees to a prevailing party; yet the UCL has for years been a primary statutory vehicle for redressing consumer harm without any need for additional incentives to sue.

AARP appears to say that fee-shifting is available only if the award is per-violation, arguing that with a maximum $500 recovery, "lawyers will not take on well-heeled facilities in hopes of someday getting paid" if a multiple award is not available. (AARP Br. 17.) But attorneys' fees are always available under Section 1430(b). Moreover, the Legislature heard that precise argument multiple times, and rejected it multiple times. (See, e.g., ManorCare MJN Ex. 21 at 12-13 [noting argument of supporters of increasing award in 2004 bill that "residents' rights cases can be complicated and attorneys will not take cases that involve many hours of work, if the time spent on the case greatly exceeds the maximum damage award of $500."].)

Because of the other administrative and damages remedies available for other claims and the provision of injunctive relief and attorneys' fees in Section 1430(b), "the argument that the $500 statutory maximum must be applied on a 'per violation' basis in order to make private enforcement feasible does not withstand scrutiny." (*Nevarrez*, 221 Cal.App.4th at 135.) Again, "[t]he fact that the private monetary remedy is not greater reflects a legislative choice with respect to that remedy, rather than a basis for a court to enhance the statutory scheme." (*Id.*, p. 132.)

C. A Per-Violation Award Is Not Necessary to Achieve Deterrence.

Amici also argue that unless Section 1430(b) is interpreted to impose a per-violation award, the statute will not deter facilities from violating residents' rights.[16] The Legislature heard these arguments each time it was asked to increase the award, and it chose to keep the award as is. As discussed, plaintiffs have numerous other avenues to recover substantial monetary awards far greater than $500.

"The Long-Term Care Act provides an abundance of reasons for licensees not to transgress its health and safety objectives, and the additional private remedy in section 1430, subdivision (b) is not limited to the maximum $500 monetary relief. The licensee also is faced with the prospect of paying the other side's attorney fees and costs and suffering an injunction with its attendant fine for contempt of court." (*Nevarrez*, 221 Cal.App.4th at 135.) This Court has explained that "[w]hile the civil penalties [for Class A and B violations] may have a punitive or deterrent aspect, their primary purpose is to *secure obedience to statutes and regulations* imposed to assure important public policy objectives." (*Kizer*, 53 Cal.3d at 147-148 [emphasis added].) Section 1430(b) fulfills this purpose with injunctive relief, which is enforceable by contempt sanctions—a deterrent. It is not the role of the Court to judge the wisdom of the Legislature's policy choices. (*Scher*, 3 Cal.5th at 145.)

AARP goes so far as to suggest that a per-lawsuit interpretation will actually incentivize facilities to repeatedly violate residents' rights. (AARP

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[16] The legislative history of the 1982 and 2004 bills contains no reference to a deterrent purpose of Section 1430(b), other than a sole mention in a letter from a supporter, which, again, is not indicative of legislative intent. (*Kaufman & Broad*, 133 Cal.App.4th at 35.)

overlooks the possibility of contempt citations for violating an injunction.) AARP states that after *Nevarrez*, facilities rushed to take advantage of its per-lawsuit holding by flagrantly violating resident rights as much as possible. AARP asserts that the number of resident complaints increased by 54 percent following the *Nevarrez* decision in 2013. (AARP Br. 13.) For this statistic, AARP cites a report by the California Department of Public Health Licensing and Certification Division at https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/FieldOperationsComplaints_ERIs.aspx under the "Statewide Metrics" tab along the top of the Field Operations Dashboard. If one unchecks the boxes on the left-hand side for "Immediate Jeopardy" and "Non-Immediate Jeopardy," which are quality of resident care issues, the report reflects that the number of complaints has actually decreased since 2013. Amici also cite various other reports regarding alleged deficiencies in quality of care, threats to health and safety, and harm to patients. Those are Class A or B violation level issues, potentially redressable under Section 1430(a).

AARP cites *Gallamore v. Workers' Comp. Appeal Board* (1979) 23 Cal.3d 815 for the proposition that statutes should be interpreted to provide multiple penalties to achieve greater deterrence. (AARP Br. 19-20.) *Gallamore* is inapposite. The penalty provided in the workers' compensation statute at issue was not based on discrete violations of a statutory prohibition.[17] Instead, the statute imposed a 10-percent multiplier on the amount of workers' compensation benefits due when the carrier "unreasonably delayed or refused" to make the payment.[18] The Court

[17] The workers' compensation statute does not create a cause of action; it simply increases money already due. (Lab. Code, § 5814, subd. (f).)

[18] AARP quotes the current version of the statute, not the older version

considered the question of whether multiple 10-percent penalties could be imposed when the carrier had delayed in making multiple separate benefits payments, and concluded that they could. In the portion of the opinion quoted by AARP, the Court explained that successive penalties for successive delays were permissible only after imposition of a first penalty and a further unreasonable delay.

In response to AARP's similar argument in an amicus brief in *Nevarrez*, the court distinguished *Gallamore* because of the requirement that the carrier get notice of the possibility of multiple penalties. In contrast, "Section 1430, subdivision (b) provides no notice as to what evidentiary facts constitute a single continuing violation or separate violations of a patient's right, or whether a practice or a course of conduct gives rise to one or more violations." (*Nevarrez*, 221 Cal.App.4th at 136.)

Unlike the statute in *Gallamore*, Section 1430(b) provides injunctive relief to incentivize a defendant to comply with applicable laws. This serves essentially the same deterrent function as successive penalties, and also provides the requisite notice.

Moreover, the statute in *Gallamore* ambiguously imposes the penalty "when" there is a delay, which can reasonably be read to mean that a separate penalty may be imposed each time a delay occurs.[19] Section

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quoted in *Gallamore*. (AARP Br. 19, fn. 6.)

[19] As stated in the opinion relied on by the *Gallamore Court*: "A literal reading of the statute gives an inconclusive answer to the question of successive penalties. The text of the statute simply states that *when* there has been unreasonable delay or refusal in the payment of compensation the full amount of the award shall be increased by 10 percent. The word *when* in the statute refers to a condition which may occur any time after the obligation to make payments has accrued, but there is no indication whether or not the condition may occur more than once and thus give rise to successive penalties." (*Davison v. Industrial Acc. Comm.* (1966) 241

1430(b)'s text is unambiguous that the only monetary penalty is a per-lawsuit award of up to $500.

D. Common Law Principles Are Not Relevant to This Question of Statutory Interpretation.

AARP relies heavily on common-law principles regarding providing a larger recovery for a greater number of offenses. The common law is not relevant to the pure question of statutory interpretation presented here (see *Olson*, 96 Cal.App.3d at 195 ["[t]he decision to provide for the imposition of a monetary sanction for a violation of a regulatory statute is a matter resting well within the discretion of the Legislature"]), particularly where the language of the statute cannot support the interpretation AARP urges. When Section 1430(b) was enacted, there was no common law on the subject of enforcement of resident rights, which themselves are created by statute or regulation. (ManorCare MJN Ex. 15 at 275 ["existing law does not provide adequate mechanisms to ensure [that residents'] rights are not abused"].) "[T]he legislative history of Senate Bill No. 1930 indicates the bill was intended largely as a mechanism for enforcement of those patients rights the Attorney General could not enforce because they were not directly related to health and safety." (*Nevarrez*, 221 Cal.App.4th at 135.)

E. Amici Fail to Address the Substantial Due Process Implications of a Per-Violation Award.

ManorCare explained that a per-violation approach causes due process concerns because of the lack of clarity over what counts as a

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Cal.App.2d 15, 17 [emphasis in original] [construing this language in favor of multiple penalties given the express statutory direction that the workers' compensation statutes be construed liberally].)

distinct "violation" and the potential for excessive awards.[20] (ManorCare Op. Br. 40; Reply Br. 29-30.) As *Nevarrez* explained, "[t]he 'per violation' approach, as applied in a private action under section 1430, subdivision (b), presents its own problems since that subdivision provides no standard for determining a licensee's liability in the case of continuing violations, such as the understaffing and failure to offer restraints here. The suggestion that section 1430, subdivision (b) should be 'liberally construed' to allow an unlimited monetary recovery because it is not tied to the administrative enforcement scheme raises due process concerns." (*Nevarrez*, 221 Cal.App.4th at 135-136.)[21]

Amici argue that excessive awards will not occur because the factfinder may make awards anywhere on a scale of zero to $500. But the ability to adjust the per-violation amount does not deal with the problem of uncertainty, lack of notice, and manipulation as to the number of potential violations. (See Brief of Amicus Curiae California Association of Health Facilities (CAHF) pp. 25-28.) Here, for instance, the jury found 382 "violations"; the Court of Appeal stated that a continuing violation would count as a single "cause of action," and presumed (contrary to the special verdict form) that the jury actually found 382 separate causes of action; and amici here reject the Court of Appeal's per cause of action and continuing violation approach. (CANHR Br. 20 [arguing that Section 1430(b) should be construed to "[c]onsider[] continuous rights violations as separate and distinct violations on a daily basis"].) Using individual violations as the

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[20] ManorCare made the argument in the context of the Court of Appeal's "per cause of action" construction of Section 1430(b), but it is equally applicable to a per-violation construction.

[21] The Court of Appeal agreed with this concern, but erroneously believed it was alleviated by allowing an award per cause of action. It is not.

bases for multiple awards would provide facilities with inadequate understanding and notice of the parameters of an individual "violation" of a resident right and cannot pass due process concerns.[22]

III. PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER SECTION 1430(b)

CANHR's brief does not address the punitive damages issue. AARP's brief does, but it largely duplicates Plaintiff's arguments and authorities. ManorCare addressed those arguments and authorities in its Reply Brief, but AARP does not acknowledge those responses or the fact that they negate AARP's (and Plaintiff's) arguments.

A. The Legislature Considered and Rejected a Punitive Damages Provision in Section 1430(b).

It is a well-established principle of statutory interpretation that when the Legislature deleted a provision from a statute before it was enacted, the statute should be interpreted not to include that provision. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 531-532.) The Legislature here deleted a provision from Section 1430(b) that would have authorized an award of punitive damages, invoking this principle. The deletion demonstrates that the Legislature intended not to permit punitive damages in an action under Section 1430(b). (*Commodore Home Sys., Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215 ["[w]hen a statute recognizes a cause of action for violation of a right, all forms of relief granted to civil litigants generally,

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[22] CANHR refers to *Lavender v. Skilled Healthcare* (the Humboldt County case discussed in CAHF's brief at p. 27) as an example of a successful use of Section 1430(b), by which CANHR means that the jury awarded the plaintiffs $677 million in Section 1430(b) penalties on a per violation basis, prior to *Nevarrez* and *Lemaire*. *Lavender* is not precedential authority and was never appealed.

including appropriate punitive damages, are available *unless a contrary legislative intent appears*."] [emphasis added].)

AARP repeats Plaintiff's argument that the deletion of the punitive damages provision is not dispositive, citing *California Association of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, the same case Plaintiff cited. That case stands for the proposition that the deletion of a provision from a statute before enactment may not indicate a legislative intent that the statute not include the provision—*if* the deleted legislative language was *replaced* with more general language broad enough to encompass that provision. (*Id.* at 17-18.) Section 1430(b)'s deleted punitive damages provision was replaced, not by general language encompassing punitive damages, but by a flat "fine" of up to $500 that the Legislature declared was "instead" of punitive damages. (ManorCare MJN Ex. 1, p. 256.) AARP relies on Section 1430(c), but that did not "replace" the punitive damages provision; in fact, the language of Section 1430(c) was enacted in 1973, nine years before the Legislature enacted Section 1430(b). (*Id.* Ex. 22, p. 108.)

Moreover, Section 1430(c)'s language does not encompass punitive damages as a remedy for a Section 1430(b) claim. It merely confirms that a plaintiff who brings a Section 1430(b) claim may also bring *other claims* and may be entitled to other remedies under those claims. (ManorCare Reply Br. 33-34; see *Kizer*, 53 Cal.3d at 143 [citing Section 1430(c) to illustrate the point that "Section 1430 does not foreclose civil actions for damages by patients who have been injured by a violation; the remedies specified in that section are 'in addition to any other remedy provided by law'"]; see also *Shaw v. Superior Court* (2017) 2 Cal.5th 983, 1004-1005 [holding that a clause providing that a statute "does not 'abrogate[ ] or

limit[ ] any other theory of liability or remedy otherwise available at law'" means only that an aggrieved party may pursue other causes of action and remedies arising from the same conduct].) Some of those other claims, such as elder abuse and certain torts, may support an award of punitive damages on appropriate proof. But Section 1430(b) does not.

AARP (like Plaintiff) suggests that the legislative history is not definitive as to why the Legislature chose to delete the punitive damages provision, and it too speculates that it may have done so because it believed that Section 1430(c) already authorized punitive damages. But the legislative history file shows that the Legislature added and then deleted the provision as part of a negotiation with the industry group, not in an attempt to streamline the statute by eliminating extraneous language. (ManorCare Op. Br. 48-49; Reply Br. 32; CAHF Br. 19-20.) One of those documents is the Legislative Counsel's Digest, which stated "[t]he Assembly amendments, ***instead*** [of punitive damages] make the licensee civilly liable for up to $500." (ManorCare MJN Ex. 1, p. 256 [emphasis added].) The Legislative Counsel's Digest may not be "the law" (AARP Br. 27), but it is "entitled to some weight" (*Scher*, 3 Cal.5th at 149) and, as AARP notes, is "'helpful in interpreting a statute.'" (AARP Br. 27 [citation omitted].)

AARP again focuses on deterrence, arguing that punitive damages are needed for that purpose. But in Section 1430(b), the Legislature decided that the monetary award was capped and that punitive damages were not available. There is no basis to override that decision based on a disagreement with the Legislature's policy choice. (*Scher*, 3 Cal.5th at 145.)

B. Section 1430(b) Did Not Codify a Common Law Right.

AARP also repeats Plaintiff's argument that punitive damages are available when a statute codifies a common law right. ManorCare demonstrated that Section 1430(b) created a new right, not existing in the common law; in fact, it was enacted specifically because residents had no vehicle for private enforcement of their statutory and regulatory residents' rights. (ManorCare Op. Br. 52-55; Reply Br. 35-36.)

C. A Comprehensive Remedial Scheme Is Irrelevant to Whether a Statute Provides Punitive Damages.

AARP argues that punitive damages are available under a statute unless the statute provides a comprehensive and detailed remedial scheme. The LTCA does provide a comprehensive and detailed remedial scheme, but in any event, that is irrelevant to whether punitive damages are available.

Rojo v. Kliger (1990) 52 Cal.3d 65 does not support AARP. When *Rojo* considered whether FEHA contained a comprehensive and detailed remedial scheme, it was considering a different subject: whether the statute was the *exclusive* means of addressing employment discrimination, displacing all other causes of action. (*Rojo*, 52 Cal.3d at 70 ["We conclude that the FEHA does not supplant other state laws, including claims under the common law, relating to employment discrimination"]; *id.* at 80 ["we reject defendant's argument that the FEHA is such a 'general and comprehensive legislation' as to imply a legislative intent to displace or preclude employees' common law rights"].) Thus, the Court concluded, plaintiffs who were victims of sexual harassment by their employer could pursue claims under FEHA as well as for intentional infliction of emotional

distress, assault, battery, and tortious discharge in violation of public policy. (*Rojo*, 52 Cal.3d at 71, 82.)

Here, no one has suggested that Section 1430(b) supplants any other cause of action. To the contrary, as ManorCare has argued and as the statute explicitly provides, Section 1430(b) is only one of numerous causes of action that a plaintiff can bring to address the same conduct.

D. As AARP Admits, Section 1430(b) Does Not Provide a Compensatory Award on Which to Base Punitive Damages.

"In California, as at common law, actual damages are an absolute predicate for an award of exemplary or punitive damages." (*Kizer*, 53 Cal.3d at 147.) "'[A]ctual damages' are those which compensate someone for the harm from which he or she has been proven to currently suffer or from which the evidence shows he or she is certain to suffer in the future. . . . '[A]ctual damages' is a term synonymous with compensatory damages . . . ." (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1543-1544 [citations omitted].) As explained above, under Section 1430(b), a plaintiff does not obtain actual damages, as AARP finally concedes. (AARP Br. 28 [arguing Section 1430(b) "does not allow for the recovery of compensatory damages"].) The absence of actual damages precludes any punitive award.

AARP attempts to downplay this Court's statement in *Kizer*, trying to limit it to the scenario in that case, where the Court was determining whether the civil penalties under the LTCA were punitive damages from which a public entity is exempt. But *Kizer*'s statement of the *general rule* was unequivocal. *Kizer* itself cited prior decisions in other contexts. For instance, it cited *Mother Cobb's Chicken Turnovers v. Fox* (1937) 10

Cal.2d 203, 205, where this Court noted the trial court's "express finding that plaintiff has not suffered any actual damages" and explained that "[i]n view of this finding, the court was without right to award exemplary damages." The *Mother Cobb's* Court explained the rule that "[t]he foundation for the recovery of punitive or exemplary damages rests upon the fact that substantial damages have been sustained by the plaintiff. Punitive damages . . . can[not] . . . be made the basis of recovery independent of a showing which would entitle the plaintiff to an award of actual damages. Actual damages must be found as a predicate for exemplary damages. This is the rule announced in many authorities. [and] has been cited with approval in this state . . . ." (*Id.* at 205-206 [internal quotation marks omitted].)

AARP also cites the same two cases Plaintiff cited for the proposition that "an award of compensatory damages is not necessary before punitive damages may be awarded. Rather a plaintiff need only show that he or she has been damaged." (AARP Br. 28.) This principle does not apply here, as ManorCare has explained. (Reply Br. 37-38.) *Contento v. Mitchell* (1972) 28 Cal.App.3d 356 involved a claim for defamation per se, where damage is conclusively presumed without evidence. In that case, the jury had awarded a sum as punitive damages without expressly awarding even a nominal amount for actual damages. The court held that this could be deemed "a technical error of form in the verdict" and that the conclusive presumption of harm in a defamation per se case "should of itself be sufficient to replace the proof-of-damage function of a nominal damage award." (*Contento*, 28 Cal.App.3d at 359.) That has no application here, where the issue is not that the jury did not make an award of actual damages, but that no actual damages are available under the

statute. The same fact also distinguishes *James v. Public Finance Corp.* (1975) 47 Cal.App.3d 995, which also has been held to have been "wrongly decided" because it "fail[ed] to cite or consider *Mother Cobb's Chicken.*" (*Jackson v. Johnson* (1992) 5 Cal.App.4th 1350, 1358-1359; see also *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 532.)

AARP explains that it is arguing for a rule that would allow punitive damages to a Section 1430(b) plaintiff only when that plaintiff sustained actual harm. (AARP Br. 28-29.) This would be an improper use of punitive damages under Civil Code section 3294, which focuses on the conduct of the defendant and is not about harm to the plaintiff. And it would allow a court to award punitive damages under Section 1430(b) based on mere speculation. As discussed, Section 1430(b) has nothing to do with harm. A plaintiff may prove a Section 1430(b) claim without ever demonstrating that a regulatory violation caused harm. Thus, the finder of fact never has occasion to decide whether the plaintiff suffered harm. There would be no basis for drawing the line between Section 1430(b) plaintiffs who did or did not suffer harm from the violation, and thus no basis for deciding whether a punitive award is available under AARP's theory.

In fact, as discussed above, a plaintiff under Section 1430(a), who is required to establish actual or threatened harm, would stand to recover much less money than an uninjured Section 1430(b) plaintiff if AARP's position were adopted, because Section 1430(a) caps damages at the amount of civil penalties while Section 1430(b) does not. AARP argues that ManorCare "disregards the fact that section 1430(a) actions are 'prosecuted by the Attorney General in the name of the people of the State of California' (§ 1430, subd. a.), while section 1430(b) actions are

prosecuted by skilled facility residents who suffered the consequences of a defendant's statutory violation." (AARP Br. 29.) As noted, AARP misrepresents Section 1430(a), which allows a suit by a "private" plaintiff. (*Kizer*, 53 Cal.3d at 143.)

IV. CONCLUSION

The amicus briefs do not provide any argument or authority to support amici's or the Court of Appeal's erroneous interpretation of Section 1430(b). For the reasons discussed in ManorCare's briefs, the decision below should be reversed.

Dated: November 26, 2018 MANATT, PHELPS & PHILLIPS, LLP

By: _____
BARRY S. LANDSBERG
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WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, Rule 8.504, subdivision (d), I certify that this Defendants/Appellants' Response to Briefs of Amici Curiae California Advocates for Nursing Home Reform and AARP *et al.* contains 9,146 words, not including the table of contents, table of authorities, the caption page or this certification page.

Dated: November 26, 2018 MANATT, PHELPS & PHILLIPS, LLP

By: 
BARRY S. LANDSBERG
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PROOF OF SERVICE

I, Brigette Scoggins, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On **November 26, 2018**, I served the within: **DEFENDANTS/APPELLANTS' RESPONSE TO BRIEFS OF AMICI CURIAE CALIFORNIA ADVOCATES FOR NURSING HOME REFORM AND AARP *ET AL*** on the interested parties in this action addressed as follows:

SEE ATTACHED SERVICE LIST

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

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made and that the foregoing is true and correct. Executed on **November 26, 2018**, at Los Angeles, California.

Brigette Scoggins

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