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Hit 'em Where It Hurts—Their Pocketbooks: Why the California Legislature Must Amend the Law to Protect Nursing Home Residents' Rights

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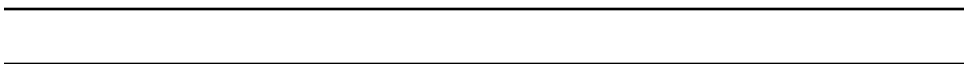
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Hit ‘em Where It Hurts—Their Pocketbooks: Why the California Legislature Must Amend the Law to Protect Nursing Home Residents’ Rights

Francesca Torres*

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2022; B.A. in Political Science and Criminal Justice, California State University, Chico, 2019. First, I would like to thank Professor Brown for sparking my interest in elder law and teaching me the foundational principles necessary to write this Comment. I would also like to thank the Law Review staff for their attention to detail throughout the writing and editing process. Special thanks to Thomas Gerhart for his impeccable editing skills, and always pushing me to be a better writer. Thank you to my family, Justin Whitman, and Luna for their constant love, support, and encouragement. Lastly, I dedicate this article to my mom who has devoted her entire career to serving the elderly and educating the next generation of compassionate medical professionals. From a young age, she taught me that with hard work and kindness anything is possible. Mom, thank you for being my biggest supporter and inspiration; without you, I would not be the person I am today.

I. INTRODUCTION

In January 2018, Monterey Palms nursing home staff notified the wife of an elderly resident that an employee had sexually exploited her husband.¹ The staff informed the wife that the employee recorded the incident in a Snapchat video.² In the video, the employee exposed the elderly resident's genital area.³ At the conclusion of the video, three employees stood around the elderly resident laughing at his nude body.⁴ The employee then shared the video with her friends.⁵ The nursing home resident suffered from various ailments, including dementia and an anxiety disorder.⁶

Sadly, similar heinous behavior occurs daily in nursing homes, and the insignificant fines the health department levies against complicit nursing homes suggests that government leadership tolerates this behavior.⁷ The California Department of Health and Human Services fined the Monterey Palms nursing home \$2,000—"a slap on the wrist"—for violating the elderly resident's right to privacy.⁸ In contrast, the elderly resident received no monetary compensation for the gross exploitation of his rights.⁹

In California, the Patient's Bill of Rights guarantees a nursing home resident certain fundamental rights.¹⁰ These rights include the right "to be free from mental

1. See Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal. Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (citing Monterey Palms Health Care Center for various violations relating to a nursing home resident's right to be free from abuse, neglect, and exploitation).

2. See *id.* (defining "Snap Chat" as "an image messaging and multimedia mobile application used for creating messages referred to as 'snaps' [consisting of a photo or a short video of up to 10 seconds]").

3. *Id.*

4. *Id.*

5. *Id.*

6. See *id.* explaining that the nursing home resident "was admitted to the facility on January 25, 2017, with diagnoses that included dementia (memory loss), diabetes mellitus (high blood sugar), hypertension (elevated blood pressure), and anxiety disorder").

7. See Linda K. Chen, *Eradicating Elder Abuse in California Nursing Homes*, 52 SANTA CLARA L. REV. 213, 215–16 (2012) (detailing the number of elder abuse and neglect cases in the nation to be "between 500,000 and five million individuals each year" and over 132,000 in California alone).

8. Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal. Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*); see, e.g., CAL. CODE REGS. tit. 22, § 72527(a)(12) (West 2022) (explaining that nursing home residents retain the right "to be treated with consideration, respect and full recognition of dignity and individuality, including privacy in treatment and in care of personal needs.").

9. See Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal. Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (alluding to a police report and the possibility of criminal charges for the gross violation of the elderly man's dignity on top of the \$2,000 fine).

10. See CAL. HEALTH & SAFETY CODE § 1599 (West 2022) ("It is the intent of the Legislature in enacting this chapter to expressly set forth fundamental human rights which all patients shall be entitled to."); CAL. HEALTH & SAFETY CODE § 1599.1 (West 2022) (detailing the statutory version of the Patient's Bill of Rights); see also CAL. CODE REGS. tit. 22, § 72527 (West 2022) (detailing the regulatory version of the Patient's Bill of Rights); *Residents' Rights*, CAL. ADVOCS. FOR NURSING HOME REFORM, http://canhr.org/factsheets/resrights_fs/html/fs_resrights.htm (last modified May 11, 2021) (on file with the

and physical abuse” and the right “to be free from discrimination.”¹¹ The California Legislature enacted legislation in 1982 that enabled private enforcement of the Patient’s Bill of Rights.¹² That statute allows for monetary damages up to \$500 and a possible injunction against the nursing home for future violations.¹³ Prior to the 1982 legislation, the existing regulatory scheme inadequately enforced residents’ rights, leaving residents unprotected and vulnerable to abuse.¹⁴

Despite this new avenue for enforcement, very few nursing home residents recover damages under the statute.¹⁵ Nursing home residents are likely unsuccessful because the statute fails to specify whether the \$500 damages cap applies to the whole lawsuit or to each violation.¹⁶ However, a recent California Supreme Court case—*Jarman v. HCR ManorCare, Inc.*—resolved the ambiguity by interpreting the statute to cap the damages at \$500 per lawsuit.¹⁷ In short, the Court’s decision allows nursing homes to commit numerous violations against a nursing home resident and incur only a \$500 penalty for the whole lawsuit.¹⁸

The California Supreme Court did not effectuate the will of the Legislature—protect nursing home residents’ rights—in *Jarman v. HCR ManorCare, Inc.*¹⁹ The Court’s interpretation restricts the monetary remedy available to nursing home residents and effectively immunizes nursing homes from significant liability.²⁰ The California Legislature should override the Court’s perversion of the statute by amending the law to permit a “penalty per violation” approach.²¹

University of the Pacific Law Review) (explaining that the Patient’s Bill of Rights guarantees nursing home residents’ certain rights under state and federal law); see generally *infra* Section II.C (explaining the Patient’s Bill of Rights in detail).

11. CAL. CODE REGS. tit. 22, § 72527 (West 2022).

12. CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022).

13. CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022).

14. See Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of 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 in Support of Plaintiff/Appellant at 11, *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375 (2020) (No. S241431) (explaining the need for the statute).

15. CALIFORNIA ADVOCATES FOR NURSING HOME REFORM, MUCH ADO ABOUT NOTHING: DEBUNKING THE MYTH OF FREQUENT AND FRIVOLOUS ELDER ABUSE LAWSUITS AGAINST CALIFORNIA’S NURSING HOMES 8 (2003), http://www.canhr.org/reports/2003/CANHR_Litigation_Report.pdf (on file with the *University of the Pacific Law Review*).

16. *Id.*; see also *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 379 (2020) (addressing the question of “whether the monetary cap of \$500 is the limit in each action or instead applies to each violation committed”).

17. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 379 (2020).

18. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 379 (2020).

19. See *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 379 (2020) (interpreting the statute according to an incorrect purpose); Maura Dolan, *California’s Top Court Caps Penalties on Nursing Homes to \$500 for Certain Lawsuits*, L.A. TIMES (Aug. 17, 2020, 5:40 PM), <https://www.latimes.com/california/story/2020-08-17/nursing-homes-suits-damages-cap> (on file with the *University of the Pacific Law Review*) (explaining that the intended goal of the statute was to deter and vindicate violations of nursing home residents’ rights).

20. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 379 (2020).

21. See Dolan, *supra* note 19 (explaining how the California Advocates for Nursing Home Reform plan to urge the Legislature to rewrite the law, especially in light on the coronavirus pandemic).

Amending the statute would not only provide clarity, but it would open the door to a long-overdue discussion regarding the protections for California's growing elderly population.²² Part II of this Comment provides a general overview of the evolution of nursing home reform and the specific rights and remedies available to residents.²³ Part III discusses the limited case law relating exclusively to the damages cap, including *Jarman*.²⁴ Part IV considers the need to clarify the statute.²⁵ Part V proposes two viable statutory amendments.²⁶

II. THE LAWS GOVERNING NURSING HOMES

Nursing homes have a long and complicated history in the United States.²⁷ State and federal legislatures passed the laws that govern nursing homes several decades ago.²⁸ Today, nursing home advocates—such as California Advocates for Nursing Home Reform—lobby for nursing home residents' rights.²⁹ Section A explores the evolution of nursing homes and their quality of care in the United States and more specifically, in California.³⁰ Section B explores California nursing homes today and the looming Silver Tsunami.³¹ Section C outlines the Long-Term Care Act and how it aids with nursing home violations.³² Section D details the Patient's Bill of Rights action.³³ Section E explains California Health and Safety Code section 1430(b) for enacting it.³⁴

22. See *id.* (explaining how nursing home residents need more protection now than ever before).

23. See *infra* Part II.

24. See *infra* Part III.

25. See *infra* Part IV.

26. See *infra* Part V.

27. See David A. Bohm, *Striving for Quality Care in America's Nursing Homes: Tracing the History of Nursing Homes and Noting the Effect of Recent Federal Government Initiatives to Ensure Quality Care in the Nursing Home Setting*, 4 DEPAUL J. HEALTH CARE L. 317, 324–35 (2001) (describing the history of nursing homes from the eighteenth century to modern day).

28. Sari Harrar, et al., *10 Steps to Reform and Improve Nursing Homes*, AARP (Jan. 13, 2021), <https://www.aarp.org/caregiving/health/info-2021/steps-to-improve-nursing-homes.html> (on file with the *University of the Pacific Law Review*).

29. See *About CANHR*, CANHR, <http://www.canhr.org/about/index.html> (last updated Sept. 20, 2019) (on file with the *University of the Pacific Law Review*) (“Since 1983, California Advocates for Nursing Home Reform (CANHR), a statewide nonprofit 501(c)(3) advocacy organization, has been dedicated to improving the choices, care and quality of life for California's long term care consumers.”).

30. See *infra* Section II.A.

31. See *infra* Section II.C.

32. See *infra* Section II.C.

33. See *infra* Section II.D.

34. See CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (authorizing a private right of action for Patient's Bill of Rights violations); see *infra* Section II.E.

A. Evolution of Nursing Homes and the Search for Good Quality of Care

The nursing home and long-term care industry uses terminology that can easily confuse people who are not familiar with the industry or the healthcare landscape.³⁵ For example, people often use the terms “skilled nursing facility,” “rehabilitation center,” and “convalescent hospital” interchangeably with “nursing home.”³⁶ However, California’s Health and Safety Code defines and subcategorizes the various “health facilities” available to those persons in need of medical care.³⁷ California statutory law specifically defines the common nursing home as a “skilled nursing facility.”³⁸ Typically, a skilled nursing facility provides 24-hour care, which includes: skilled nursing; physician care; and dietary, pharmaceutical, and activity services.³⁹

California nursing homes are highly regulated facilities, subject to both state and federal mandates.⁴⁰ These mandates govern all aspects of nursing home care and facility operations.⁴¹ The California Department of Public Health’s Licensing and Certification Division conducts yearly inspections of all licensed nursing homes in California.⁴² Additionally, Medi-Cal and Medicare-certified facilities must meet more stringent requirements.⁴³

Before the highly regulated, modern nursing home existed, families cared for their elderly family members; if someone did not have a family, the community shared caring responsibilities.⁴⁴ It was not until the early nineteenth century that the United States implemented social policies creating the first institutionalized centers for the poor, called “almshouses” or “poor houses.”⁴⁵ Originally, these institutionalized centers housed only the poor, but by the late nineteenth century, they mainly housed elderly individuals.⁴⁶ Even though elderly individuals now had

35. See *Facts and Statistics*, CAL. ASS’N OF HEALTH FACILITIES, (last updated Mar. 2021), <https://www.cahf.org/About/Consumer-Help/Facts-and-Statistics> (on file with the *University of the Pacific Law Review*) (explaining the terminology associated with nursing homes).

36. *Id.*

37. See CAL. HEALTH & SAFETY CODE § 1250 (West 2022) (defining a “health facility” as “a facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer”).

38. See *id.* (defining a “skilled nursing facility” as “a health facility that provides skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis”).

39. Chen, *supra* note 7, at 220.

40. *Facts and Statistics*, *supra* note 35.

41. *Id.*

42. *Id.*

43. *Id.*

44. See Bohm, *supra* note 27, at 324–25 (explaining the history of nursing homes, specifically the transformation from the original “poor relief centers” to the modern “highly sophisticated business industry”).

45. *Id.* at 325–26.

46. *Id.* at 327–28.

an institutionalized center to live—with little government intervention—the quality of care in these facilities was undesirable.⁴⁷

The Social Security Act changed the landscape of nursing homes and unintentionally created the modern nursing home.⁴⁸ The original legislators disliked the terrible living conditions in public institutions; therefore, the Social Security Act prohibited payments to residents living in public homes.⁴⁹ In turn, private nursing homes thrived while their quality of care remained poor.⁵⁰ Shortly thereafter, the United States Congress created Medicare and Medicaid programs and made additional changes to the statutory scheme in hopes of regulating the nursing home industry.⁵¹ Despite these changes, no clear federal guidelines for quality of care in nursing homes existed.⁵²

Soon the public became aware of the insufficient nursing home care, forcing the federal government to become more involved in regulating nursing homes.⁵³ In response to the growing public concern, the United States Congress passed the Omnibus Reconciliation Act of 1987 (“OBRA 87”).⁵⁴ The law transformed the nursing home industry by reforming standards for nursing homes that received funding from Medicare and Medicaid programs.⁵⁵ OBRA 87 also encouraged facilities to comply with the new standards by rebuilding the enforcement mechanisms for sanctions to include new civil monetary penalties.⁵⁶ Almost simultaneously, states attempted to devise statutory schemes to increase the quality of care in nursing homes.⁵⁷ California’s Legislature significantly increased the quality of care in nursing homes by enacting new legislation.⁵⁸

47. *Id.* at 328–29.

48. See COMMITTEE ON NURSING HOME REG. – INST. OF MED., IMPROVING THE QUALITY OF CARE IN NURSING HOMES 238 (National Academies Press 1986) (explaining how the Social Security Act of 1935 prohibited the payment of federal funds to residents living in public institutions “[b]ecause the drafters of the legislation opposed the use of the public poorhouse to care for the poor elderly”); *id.* at 329.

49. See Bohm, *supra* note 27, at 329 (“Quality care did not persist in these newly emerging alternatives to public nursing institutions and almshouses.”).

50. See COMMITTEE ON NURSING HOME REG., *supra* note 48 (explaining how the act prohibited payments to public nursing homes and only private institutions received funds).

51. See *id.* (“The 1950 legislation also required that participating states establish programs for licensing nursing homes, but it did not specify what the standards or enforcement procedures should be.”); Bohm, *supra* note 27, at 330–31.

52. Bohm, *supra* note 27, at 331.

53. *Id.*

54. *Id.*

55. *Id.*

56. See *id.* at 332 (explaining how legislators thought the civil penalties would serve as a financial incentive to stay compliant; however, “nursing homes began a ‘yo-yo pattern of compliance’ whereby facilities would avoid the penalties if the violations were corrected within a designated time period.”).

57. See, e.g., Long Term Care, Health, Safety, and Security Act of 1973 (Long Term Care Act), CAL. HEALTH & SAFETY CODE §§ 1417–1439.8 (West 2022) (detailing the statutory scheme known as the Long Term Care Act).

58. See, e.g., CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (authorizing a private right of action for Patient’s Bill of Rights violations); see Bohm, *supra* note 27, at 329 (describing the “rise of the modern nursing home”).

B. California Nursing Homes Today

Today, there are approximately 1,230 licensed nursing homes in California that care for more than 400,000 Californians yearly.⁵⁹ As the last generation of baby boomers ages into retirement, experts project the number of nursing home residents will increase.⁶⁰ Experts coined this substantial elderly population growth the “Silver Tsunami,” which affects every state in the country.⁶¹

Nevertheless, California faces the most substantial elderly population growth.⁶² Experts project that “by 2030 more than 9 million Californians will be over the age of 65”, which is 3 million more than today.⁶³ For comparison, 20% of Californians will be elderly—a higher percentage than currently living in the “retirement state” of Florida.⁶⁴

As the elderly population continues to expand, California’s need for nursing home care will increase.⁶⁵ Unfortunately, California is ill-prepared for the Silver Tsunami.⁶⁶ The biggest problems facing California are: physician shortages in primary, geriatrics, and palliative care; need for family caregivers; and fragmentation of long-term care services.⁶⁷ Experts state California needs approximately 9,000 additional primary care physicians to meet demand caused by the Silver Tsunami.⁶⁸ Additionally, state agencies—specializing in long-term care support and services—need more funding to organize the fragmented long-term care industry.⁶⁹

59. *Facts and Statistics*, *supra* note 35.

60. Matt Levin, *For Aging California, Is the Future Florida?*, CAL. MATTERS (updated June 23, 2020), <https://calmatters.org/economy/2019/04/aging-california-future-is-florida/> (on file with the *University of the Pacific Law Review*).

61. *Id.*; see Alissa Sauer, *The Silver Tsunami and Senior Living*, SENIOR LIVING BLOG (Dec. 26, 2018, 5:59 AM), <https://www.leisurecare.com/resources/silver-tsunami-senior-living/print/> (on file with the *University of the Pacific Law Review*) (“The Silver Tsunami” is a metaphor used to describe the expected increase in the senior population.”).

62. See CAL. WELF. & INST. CODE § 15610.27 (West 2022) (defining elder as “any person residing in this state, 65 years of age or older”); Chen, *supra* note 7, at 217.

63. Levin, *supra* note 60.

64. *Id.*

65. Chen, *supra* note 7, at 217–18.

66. See Levin, *supra* note 60 (citing Nancy McPherson, head of the California chapter of the American Association of Retired Persons, who believes California is not prepared for the Silver Tsunami); see also Mila Jasper & Phillio Reese, *A Silver Wave? California Braces for Elderly Boom that Could Overburden State*, SACRAMENTO BEE (June 14, 2019), <https://www.sacbee.com/news/california/article231449458.html#storylink=cpy> (on file with the *University of the Pacific Law Review*) (“The gap between the supply of seniors and the demand for services is likely to widen as the state’s population grows and ages, and historically vulnerable populations—rural, inner city and low-income people—will be hit the hardest.”)

67. See Jasper & Reese, *supra* note 66 (explaining palliative care as long-term hospice care for persons with severe health problems, which a care team manages for extended periods).

68. *Id.*

69. *Id.*

In 2019, California Governor Gavin Newsom issued an Executive Order—a “Master Plan for Aging”—affirming the need for elder care reform.⁷⁰ California lawmakers released the “Master Plan” in early 2021; however, lawmakers must do more than plan for the future of California’s aging population.⁷¹ The Legislature must continue its work and take action to properly care for California’s aging population, specifically nursing home residents.⁷²

C. The Long Term Care Act

The Long Term Care, Health, Safety, and Security Act of 1973 (“Long Term Care Act”) is a comprehensive statutory scheme regulating the standard of care in skilled nursing homes.⁷³ Similar to OBRA 87, the Long Term Care Act established a citation system, an inspection and reporting system, and a provisional licensing mechanism.⁷⁴ It charged the California Department of Public Health with administering and supervising these services.⁷⁵ By enacting the Long Term Care Act, the Legislature declared that ensuring “that long-term health care facilities provide the highest level of care possible” is a public policy objective.⁷⁶ The Legislature found that conducting inspections—carried out through a state-based compliance survey—was the most effective method of furthering the intended public policy objective.⁷⁷ During these compliance surveys, officials from the California Department of Public Health visit the nursing home to inspect the building and investigate complaints.⁷⁸

70. Cal. Exec. Order No. N-14-19, <https://www.gov.ca.gov/wp-content/uploads/2019/06/6.10.19-Master-Plan-for-Aging-EO.pdf> (June 10, 2019) (on file with the *University of the Pacific Law Review*).

71. CAL. DEP’T OF AGING, CALIFORNIA’S MASTER PLAN FOR AGING (Jan. 2021), <https://www.aging.ca.gov/download.ashx?IE0rcNUV0zZe1bBmXluFyg%3d%3d> (on file with the *University of the Pacific Law Review*); *Jasper & Reese*, *supra* note 66 (“With the aging boom already here, elected officials in California have started to address the problem. For many, the question is whether it will be enough.”).

72. *See Levin*, *supra* note 60 (explaining how California’s “current patchwork of programs to provide senior services—especially long term health care—is routinely criticized as underfunded, fragmented, and difficult to navigate”).

73. Long Term Care, Health, Safety, and Security Act of 1973 (Long Term Care Act), CAL. HEALTH & SAFETY CODE §§ 1417–1439.8 (West 2022); *Kizer v. County of San Mateo*, 53 Cal. 3d 139, 143 (1991).

74. *See* CAL. HEALTH & SAFETY CODE § 1417.1 (West 2022):

It is the intent of the Legislature in enacting this chapter to establish (1) a citation system for the imposition of prompt and effective civil sanctions against long-term health care facilities in violation of the laws and regulations of this state, and the federal laws and regulations as applicable to nursing facilities as defined in subdivision (k) of Section 1250, relating to patient care; (2) an inspection and reporting system to ensure that long-term health care facilities are in compliance with state statutes and regulations pertaining to patient care; and (3) a provisional licensing mechanism to ensure that full-term licenses are issued only to those long-term health care facilities that meet state standards relating to patient care.

75. *Id.* §§ 1421, 1423; *Kizer v. County of San Mateo*, 53 Cal. 3d 139, 142 (1991).

76. *Id.* § 1422(a).

77. *Id.*

78. *See Health Facilities Inspection Division*, CNTY. OF L.A. PUB. HEALTH, <http://publichealth.lacounty.gov/hfd/> (last visited Jan. 5, 2020) (on file with the *University of the Pacific Law Review*) (discussing the licensing and survey process for skilled nursing facilities and other health facilities).

Upon issuing a citation, the California Department of Public Health classifies the type of citation “according to the nature of the violation” and issues civil penalties accordingly.⁷⁹ Class “A” violations present an imminent danger or substantial probability for “death or serious physical harm to patients or residents of the long-term health care facility.”⁸⁰ These violations become Class “AA” violations when the action is the “direct proximate cause” of a patient’s death.⁸¹ Actions that “have a direct or immediate relationship to the health, safety, or security of long-term health care facility patients or residents” are Class “B” violations.⁸² Class “C” violations relate to skilled nursing facility operation and maintenance, which contain “only a minimal relationship to the health, safety, and security” of the residents.⁸³

The survey inspection and citation process outlined in the Long Term Care Act operates “to encourage compliance with state mandated standards for patient care and to deter conduct that may endanger the well-being of patients.”⁸⁴ Essentially, the process punishes nursing homes by “naming and shaming” violating facilities.⁸⁵ Although fines and shame serve as deterrents for some facilities, the Long Term Care Act is “nonetheless remedial and its central focus is ‘preventive.’”⁸⁶

D. Patient’s Bill of Rights

In addition to the Long Term Care Act, the Patient’s Bill of Rights entitles nursing home residents to basic “fundamental human rights.”⁸⁷ Amongst these rights are the rights “[t]o be free from discrimination . . . and mental and physical abuse.”⁸⁸ A resident also retains the right to all information regarding their stay at the facility.⁸⁹ This information includes the facility’s rules governing patient conduct, any additional services provided at the facility, and his or her health status.⁹⁰ Additionally, nursing home residents have the right to refuse—or consent—to any medical treatment prescribed to them.⁹¹

79. CAL. HEALTH & SAFETY CODE § 1424 (West 2022).

80. *Id.* § 1424(d).

81. *Id.* § 1424(c).

82. *Id.* § 1424(e).

83. CAL. CODE REGS. tit. 22, § 72701(a)(4) (West 2022).

84. *Kizer v. County of San Mateo*, 53 Cal. 3d 139, 150 (1991).

85. *State Dept. of Pub. Health v. Superior Ct.*, 60 Cal. 4th 940, 950 (2015).

86. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 383 (2020).

87. *See* CAL. HEALTH & SAFETY CODE § 1599 (West 2022) (“It is the intent of the Legislature in enacting this chapter to expressly set forth fundamental human rights which all patients shall be entitled to”); CAL. HEALTH & SAFETY CODE § 1599.1 (West 2022) (detailing the statutory version of the Patient’s Bill of Rights); *see also* CAL. CODE REGS. tit. 22, § 72527 (West 2022) (detailing the regulatory version of the Patient’s Bill of Rights).

88. CAL. CODE REGS. tit. 22, §§ 72527(a)(8), (10) (West 2022).

89. *Id.* §§ 72527(a)(1)–(3).

90. *Id.* §§ 72527(a)(1)–(3).

91. *Id.* §§ 72527(a)(4)–(5).

The Patient's Bill of Rights extends to other basic rights, such as the right to "receive personal mail unopened" and "reasonable access" to telephones.⁹² Nursing home residents also retain the right to have visitors and meet with other residents for social, religious, or community activities.⁹³ The rights mentioned are not exhaustive; in fact, the Patient's Bill of Rights guarantees many more basic human rights to nursing home residents.⁹⁴ Together these rights protect nursing home residents—a highly vulnerable group—from physical, mental, and emotional abuse.⁹⁵

When the Legislature originally enacted the Patient's Bill of Rights, the law lacked a method for private enforcement.⁹⁶ Because nursing home residents lacked a method for private enforcement, residents had to rely on state surveyors or private tort actions to vindicate their rights.⁹⁷ The private right of action authorizes a private plaintiff—rather than the government or a public agency—to bring an action against a defendant for specifically violating the statute.⁹⁸ By asserting a private right of action, a nursing home resident may recover damages not available to them through government enforcement or in a private tort claim.⁹⁹ Fortunately in 1982, the Legislature enacted legislation to combat this enforcement issue.¹⁰⁰

E. Health and Safety Code § 1430(b)

In response to the growing concern that nursing home residents' rights were not sufficiently protected by existing mechanisms, the California Legislature enacted section 1430(b).¹⁰¹ This legislation equipped nursing home residents with

92. CAL. CODE REGS. tit. 22, §§ 72527(a)(14), (22) (West 2022).

93. *Id.* § 72527(a)(15) (West 2022).

94. *See* CAL. HEALTH & SAFETY CODE § 1599 (West 2022) ("It is the intent of the Legislature in enacting this chapter to expressly set forth fundamental human rights which all patients shall be entitled to.").

95. *See id.* § 1599.1 (explaining that the Patient's Bill of Rights are written policies that nursing home staff shall make available to all residents to ensure the rights are obeyed).

96. Cal. Ass'n of Health Facilities v. Dept. of Health Servs., 16 Cal. 4th 284, 302 (1997).

97. *See id.* (explaining the difference between a private right of action and the administrative enforcement conducted through the state compliance survey and citation procedure); *see also* Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14, at 11, ("The need for section 1430(b) arose because the mechanisms that then existed to ensure that residents actually received the protections in the Patient's Bill of Rights, enforcement by State regulators and private tort litigation, were insufficient to protect these rights.").

98. Ira S. Slavit, *Establishing a Private Right of Action in Personal Injury Cases*, N.Y. L.J. (Apr. 2, 2020, 11:30 AM), <https://www.law.com/newyorklawjournal/2020/04/07/establishing-a-private-right-of-action-in-personal-injury-cases/> (on file with the *University of the Pacific Law Review*).

99. *Id.*

100. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (authorizing private enforcement of the Patient's Bill of Rights); *see* Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14, at 11 (explaining the need for Health and Safety Code § 1430(b)).

101. CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022); *see also* Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14, at 11 (explaining that the existing mechanisms for enforcement of the Patient's Bill of Rights "were insufficient to protect" nursing home residents' rights).

a private right of action to enforce the Patient's Bill of Rights.¹⁰² Because of this statute, nursing home residents no longer needed to rely on the state's slow regulatory process to enforce their basic rights.¹⁰³ Even the California Supreme Court noted that a private lawsuit under the statute "bears more than a passing resemblance" to a private lawsuit for a civil rights violation.¹⁰⁴ Although residents' rights are not constitutional rights per se, the California Supreme Court's words illustrate the gravity of the private right of action and importance of residents' rights.¹⁰⁵

III. JUDICIAL REVIEW

The statute states that the "licensee shall be liable for up to five hundred dollars (\$500), and for costs and attorney fees, and may be enjoined from permitting the violation to continue."¹⁰⁶ However, the Legislature did not specify whether the \$500 damages award applies to each right violated or the cause of action as a whole.¹⁰⁷ To illustrate, imagine a scenario where a nursing home violated a resident's rights 382 times.¹⁰⁸ The resident would receive up to \$191,000 if a court interpreted the statute to impose a \$500 penalty for each violation rather than \$500 for the whole lawsuit.¹⁰⁹

In 2004, the Legislature broadened the statute to include private enforcement for violations of any state or federal law.¹¹⁰ This amendment did little to clarify the statute's damages provision or solve the conundrum when applying the statute.¹¹¹

The recent California Supreme Court case—*Jarman v. HCR ManorCare, Inc*—reconciled the ambiguity by interpreting the statute to cap the damages at

102. CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022).

103. See Cal. Ass'n of Health Facilities v. Dept. of Health Servs., 16 Cal. 4th 284, 302 (1997) (explaining the difference between a private right of action and the administrative enforcement conducted through the state compliance survey and citation procedure); see also Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14, at 11 ("The need for section 1430(b) arose because the mechanisms that then existed to ensure that residents actually received the protections in the Patient's Bill of Rights, enforcement by State regulators and private tort litigation, were insufficient to protect these rights.").

104. See Cal. Ass'n of Health Facilities v. Dept. of Health Servs., 16 Cal. 4th 284, 302 (1997) (explaining the resemblance between a lawsuit under section 1430(b) versus a civil rights lawsuit under the federal Civil Rights Act of 1871).

105. *Id.*

106. CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022).

107. *Id.* § 1430(b).

108. See *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 380 (2020) (explaining the facts of the case, including the 382 violations).

109. See *id.* ("On June 15, 2011, the jury awarded Jarman \$100,000 in damages and \$95,500 in statutory damages, i.e., \$250 for each of the 382 violations.").

110. See CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (amended 2004) (adding the phrase "any other right provided for by federal or state law or regulation").

111. See CAL. ADVOCS. FOR NURSING HOME REFORM, CALIFORNIA'S BROKEN LONG TERM CARE SYSTEM 9 (2018), http://canhr.org/publications/newsletters/Advocate/FrontArticle/adv_2018Q4.htm (on file with the *University of the Pacific Law Review*) (highlighting the small amount of lawsuits that have been filed since the California Legislature enacted the statute).

\$500 per lawsuit.¹¹² However, the California Supreme Court failed to effectuate the enacting Legislature's intent when interpreting the statute.¹¹³ Section A explains how courts generally interpret statutes when the statutory language is ambiguous.¹¹⁴ Section B compares and contrasts the lower court case law regarding the statute's \$500 damages provision.¹¹⁵ Section C provides an overview of the California Supreme Court's decision in *Jarman*.¹¹⁶ Section D analyses the California Supreme Court's interpretation in light of the statute's purpose.¹¹⁷

A. How Courts Interpret Statutes Generally

Courts must resolve questions of statutory interpretation when there are at least two competing interpretations.¹¹⁸ To ascertain what a statute means and how to apply it, judges scrutinize the statute utilizing established principles of statutory construction.¹¹⁹

First, courts examine the ordinary, plain, or commonsense meaning of the statute.¹²⁰ Courts start with the ordinary meaning because judges presume the Legislature uses words according to their common meaning.¹²¹ Judges generally use dictionary definitions to decipher the common meaning of the word at issue in the statute.¹²² If a statute is clear and unambiguous, courts generally must defer to its ordinary meaning unless doing so would result in absurd consequences.¹²³ On the other hand, if the statute is ambiguous—meaning the language permits more than one interpretation—courts may consider other aids.¹²⁴ These aids include the statute's purpose, legislative history, and public policy.¹²⁵

112. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 379 (2020).

113. *See id.* (interpreting the statute according to an incorrect purpose); Dolan, *supra* note 19 (explaining that the intended goal of the statute was to deter and vindicate violations of nursing home residents' rights).

114. *See infra* Section III.A.

115. *See infra* Section III.B.

116. *See infra* Section III.C.

117. *See infra* Section III.D.

118. Application to Submit Amicus Curiae Brief and Amicus Curiae Brief of California Advocates for Nursing Home Reform, Inc. (CANHR) in Support of Appellant Janice Jarman at 7, *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375 (2020) (No. S241431).

119. *See* Coal. of Concerned Cmty's., Inc. v. City of Los Angeles, 34 Cal. 4th 733, 737 (2004) (explaining the fundamentals rules of statutory construction); *see also* Chris Micheli, *Statutory Construction Guidelines for Bill Drafting in California*, 52 U. PAC. L. REV. 457, 461 (2021) ("The canons, or principles, of statutory interpretation are presumptions used by American judges to assist them when interpreting statutes.").

120. Coal. of Concerned Cmty's., Inc. v. City of Los Angeles, 34 Cal. 4th 733, 737 (2004).

121. Micheli, *supra* note 119, at 462.

122. *Id.*

123. *See* Coal. of Concerned Cmty's., Inc. v. City of Los Angeles, 34 Cal. 4th 733, 737 (2004) ("If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.").

124. *Id.*

125. *Id.*

Prior to the *Jarman* decision, there were two competing interpretations of section 1430(b).¹²⁶ The first interpretation allowed nursing home residents to recover \$500 for each resident rights violation.¹²⁷ While the second only allowed nursing home residents to recover \$500 per lawsuit.¹²⁸ Although every court interpreting section 1430(b) used the same principles of statutory construction, courts' decisions were inconsistent until the California Supreme Court weighed in.¹²⁹

B. Case Law Leading Up to the California Supreme Court's Decision in *Jarman*

In 2010, nursing home resident advocates achieved a monumental victory when Humboldt County released an order upholding a jury verdict assessing damages at \$500 per violation.¹³⁰ The trial court judge found that the matter involved "important rights" and the "litigation conferred significant benefits" upon the plaintiffs.¹³¹ However, the excitement was short-lived when California's Second District Court of Appeal released two verdicts holding that the penalty for resident rights violations was \$500 per lawsuit.¹³²

In the first case, *Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC*, the Court of Appeal reversed a trial court's decision awarding damages of \$500 per violation.¹³³ While living in a nursing home, a seventy-nine-year-old resident fell nine times, the last of which resulted in brain surgery for a subdural hematoma.¹³⁴ The jury established that inadequate staffing led to nursing home staff's negligent supervision of the resident.¹³⁵ The jury then found 14 statutory violations and the trial court judge awarded \$500 per violation for a total of \$7,000.¹³⁶

126. See *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 379 (2020) ("The question we address is whether the monetary cap of \$500 is the limit in each action or instead applies to each violation committed.")

127. See, e.g., *Jarman v. HCR ManorCare, Inc.*, 9 Cal. App. 5th 807, 827 (2017) (holding that *Jarman* may recover up to \$500 per cause of action); Order on Motion for Award of Attorneys' Fees, Costs and Service Payments, *Lavender v. Skilled Healthcare Group, Inc.*, (No. DR060264) (Humboldt Co. Sup. Ct 2010) (holding for a penalty per violation approach).

128. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 379 (2020).

129. See *id.*, 393 (reversing the Court of Appeal's judgment finding that section 1430(b) allows for a \$500 penalty per violation).

130. Order on Motion for Award of Attorneys' Fees, Costs and Service Payments, *Lavender v. Skilled Healthcare Group, Inc.*, (No. DR060264) (Humboldt Co. Sup. Ct 2010).

131. *Id.*; see Jury Verdict Form, *Lavender v. Skilled Healthcare Group, Inc.* (No. DR060264) (Humboldt Co. Sup. Ct 2010) (detailing the jury's verdict and assessment of damages).

132. See *Nevarrez v. San Marino Skilled Nursing and Wellness Centre*, 221 Cal. App. 4th 102, 137 (Cal. Ct. App. 2013) (holding that the penalty is \$500 per lawsuit regardless of the number of residents' right violations); see also *Lemaire v. Covenant Care Cal., LLC*, 234 Cal. App. 4th 860, 868 (2015) ("Consequently, where the statutory damage award exceeds the \$500 limit, as here, the damage award must be reversed.").

133. *Nevarrez v. San Marino Skilled Nursing and Wellness Centre*, 221 Cal. App. 4th 102, 110 (2013).

134. See *id.* at 110–11 (explaining that after brain surgery, the nursing home readmitted the elderly man and he fell two more times).

135. *Id.* at 111.

136. *Id.*

On appeal, the Second District Court held that the statute's \$500 damages provision applied per lawsuit.¹³⁷ The court looked to the statute's language, statutory scheme, legislative history, and purpose.¹³⁸ First, the court reasoned with statute's plain language and would not assume the Legislature intended to include the absent phrase "per violation."¹³⁹ Next, the court analyzed the statutory scheme and established that—when the Legislature enacted the statute—administrative penalties included the phrase "for each and every violation."¹⁴⁰ The court inferred that the absence of the phrase in the statute means the Legislature intentionally omitted the phrase.¹⁴¹

Although both parties submitted legislative materials, the court found the materials unhelpful and devoid of any clear intent to apply the "per violation" approach.¹⁴² The resident then argued that the statute's literal construction leads to an absurd result, frustrating the Long Term Care Act's purpose—to protect residents' health and safety.¹⁴³ Rather, the court found the statute's purpose was to "encourage regulatory compliance" of the Long Term Care Act and to "prevent injury from occurring."¹⁴⁴ The court reasoned that not all rights included in the Patient's Bill of Rights assure the health and safety of nursing home residents.¹⁴⁵

Finally, the court mentioned that the statute includes an injunctive remedy for wide-spread violations.¹⁴⁶ The injunctive remedy also entitles the prevailing party to attorney fees.¹⁴⁷ The court specifically stated that the attorney fees provision may generate substantial awards for residents, irrespective of the amount the resident actually recovers.¹⁴⁸ The Second District Court of Appeal concluded that the \$500 damages provision applied per lawsuit, not per violation.¹⁴⁹

Two years later, the Second District Court of Appeal reversed yet another trial court decision, *Lemaire v. Covenant Care California, LLC*, which substantively

137. *Id.* at 137.

138. *Id.* at 128–37.

139. *See Nevarrez*, 221 Cal. App. 4th at 130 (citing the "general rule" of statutory construction does not permit the court "to conform to an assumed intention which does not appear from its language.").

140. *Id.* at 132.

141. *Id.*

142. *Id.* at 132–33.

143. *Id.* at 135.

144. *Id.*

145. *Nevarrez*, 221 Cal. App. 4th at 135

146. *Id.*

147. *See id.* (highlighting that "the prevailing party is entitled to attorney fees, which, depending on the case, may far exceed the amount paid to the plaintiff.").

148. *Id.*

149. *Id.* at 137 (2013).

relied on *Nevarrez*.¹⁵⁰ The court once again held that the damages provision applied per lawsuit, not per violation.¹⁵¹

Despite the outcomes in *Nevarrez* and *Lemaire*, advocates were still hopeful that the California Supreme Court would uphold the Fourth District Court of Appeal's decision in *Jarman*.¹⁵² The case involved a 91-year-old man who entered a skilled nursing facility for rehabilitation following hip surgery.¹⁵³ During the elderly man's stay, nursing staff left him in soiled diapers, ignored call lights, and caused him other severe forms of neglect.¹⁵⁴ Nursing home staff violated the resident's rights a total of 382 times.¹⁵⁵ The most severe and lasting ailments were significant skin excoriation and bedsores that took over a year to heal.¹⁵⁶

Following the trial court's judgment against the nursing home for \$500 per violation, the nursing home appealed to the Fourth District Court.¹⁵⁷ The nursing home argued that the statute allows only one award of statutory damages not to exceed \$500 for the whole lawsuit.¹⁵⁸ The Fourth District Court rejected the nursing home's argument and affirmed the trial court's judgment of \$500 per violation.¹⁵⁹

First, the court explained that *Nevarrez* is inconsistent with the statute's goal—protecting nursing home residents—because the holding fails to provide residents with a meaningful remedy.¹⁶⁰ *Nevarraz* reasoned that the injunctive remedy provides residents with the ability to earn substantial attorney fees.¹⁶¹ The Fourth District Court rejected the argument in *Nevarraz* by arguing that an injunction

150. See *Lemaire v. Covenant Care Cal., LLC*, 234 Cal. App. 4th 860, 866–69 (2015) (quoting *Nevarrez v. San Marino Skilled Nursing and Wellness Centre*, 221 Cal. App. 4th 102, 135 (2013)) (“But *Nevarrez* said, ‘[T]he 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.’”).

151. See *id.* at 868 (2015) (“Consequently, where the statutory damage award exceeds the \$500 limit, as here, the damage award must be reversed.”).

152. See Dolan, *supra* note 19 (citing staff attorney for California Advocates for Nursing Home Reform, Anthony M. Chicotel, who called the decision “extremely disappointing”).

153. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 379 (2020).

154. *Id.*

155. *Id.*

156. *Id.* at 380; see Julia Benedetti, *Description of Skin Lesions*, MERCK MANUAL (Feb. 2019), <https://www.merckmanuals.com/professional/dermatologic-disorders/approach-to-the-dermatologic-patient/description-of-skin-lesions> (“An excoriation is a linear erosion caused by scratching, rubbing, or picking.”).

157. See *Jarman v. HCR ManorCare, Inc.*, 9 Cal. App. 5th 807, 810–11 (2017) (explaining that both parties appealed the trial court's judgment on different grounds).

158. *Id.* at 810–11.

159. *Id.* at 831–32.

160. See *id.* at 823 (“A statute which offers the opportunity to file a lawsuit for a maximum recovery of \$500—no matter how many wrongs are proved—would be a remedy suitable only for those who like litigating far more than they like money.”).

161. *Jarman v. HCR ManorCare, Inc.*, 9 Cal. App. 5th 807, 823 (2017); see also *Nevarrez v. San Marino Skilled Nursing and Wellness Centre*, 221 Cal. App. 4th 102, 135 (2013) (discussing how the injunctive remedy provides the prevailing party with attorney fees).

requires a resident to prove likelihood of future harm.¹⁶² This requirement forces residents to remain in the facility that harmed them in the first place.¹⁶³

Next, the court highlighted that a third option exists beyond the existing “per violation” or “per lawsuit” approaches—a “per cause of action” approach.¹⁶⁴ The court discussed *Miller v. Collectors Universe, Inc.*, which involved a statute similar to the statute at issue in *Jarman*.¹⁶⁵ The statute in *Miller* provides plaintiffs with a private right of action when a person knowingly misappropriates the plaintiff’s “name, voice, signature, photograph, or likeness” without consent.¹⁶⁶ The statute authorizes an award of up to \$750.¹⁶⁷ In *Miller*, the plaintiff proved that the defendant used his signature 14,060 times, and argued that the 14,060 unauthorized signatures required statutory damages for each use.¹⁶⁸ The court in *Miller*, held that the primary rights theory entitled the plaintiff to only one award of statutory damages.¹⁶⁹ The primary rights theory essentially determines and consolidates identical causes of action.¹⁷⁰

The court in *Nevarrez* briefly discussed the primary rights theory.¹⁷¹ However, the court rejected the theory because the statute in *Jarman* only supplements government enforcement and does not convey a substantive right.¹⁷² The Fourth District Court of Appeal then used the primary rights theory to debunk the

162. *Jarman v. HCR ManorCare, Inc.*, 9 Cal. App. 5th 807, 823 (2017).

163. *Id.*

164. *Id.* at 824.

165. CAL. CIV. CODE § 3344(a) (West 2022); *Miller v. Collectors Universe, Inc.*, 159 Cal. App. 4th 988, 991 (2008); *Jarman v. HCR ManorCare, Inc.*, 9 Cal. App. 5th 807, 824 (2017).

166. *See* CAL. CIV. CODE § 3344(a) (West 2022):

Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. BIn addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney’s fees and costs.

Miller v. Collectors Universe, Inc., 159 Cal. App. 4th 988, 991 (2008); *Jarman v. HCR ManorCare, Inc.*, 9 Cal. App. 5th 807, 824 (2017).

167. CAL. CIV. CODE § 3344(a) (West 2022).

168. *Miller v. Collectors Universe, Inc.*, 159 Cal. App. 4th 988, 991 (2008).

169. *Id.* at 1008.

170. *Id.* at 1005.

171. *Jarman v. HCR ManorCare, Inc.*, 9 Cal. App. 5th 807, 827 (2017).

172. *Id.*

remaining arguments in the *Nevarrez* opinion.¹⁷³ Finally, the court held that the statute applies “per cause of action” and the 382 violations may establish 382 separate causes of action.¹⁷⁴

Although the primary rights theory may provide an alternative to the “per violation” and “per lawsuit” approaches, this Comment does not explore the theory.¹⁷⁵ Rather, this Comment argues that the California Supreme Court incorrectly interpreted the statute’s purpose.¹⁷⁶

C. The California Supreme Court Ends the Confusion

In August 2020, the California Supreme Court put an end to the split of authority regarding the statute by interpreting the law to limit the \$500 damages provision to each lawsuit.¹⁷⁷ The Court examined the statutory scheme, legislative history, and various policy arguments.¹⁷⁸

Similar to *Nevarrez*, the Court determined that the Legislature enacted the statute as an enforcement mechanism for violations “not directly related to patient health and safety.”¹⁷⁹ The Court’s interpretation supports the idea that the statute supplements government enforcement for Long Term Care Act violations.¹⁸⁰

The Court then compared the section at issue—1430(b)—with section 1430(a), which specifically authorized a civil penalty “on account of the violation or violations.”¹⁸¹ Section 1430(b) does not include a measurement like the

173. *Id.* at 826–27.

174. *See id.* at 827–28 (quoting *Denham v. Super. Ct.*, 2 Cal.3d 557, 564 (1970) (“But here again, Manor Care has offered no analysis of the facts underlying the violations found by the jury and has made no arguments as to how many primary rights were affected. Instead, it simply acknowledged that ‘none’ of the violations found by the jury ‘was identified in the special verdict.’ For all we know, the 382 violations found by the jury reflect circumstances establishing 382 separate causes of action; and in the absence of an affirmative showing to the contrary, we are obligated to presume they do.”).

175. *See id.* at 827–28 (2017) (providing an argument for the primary rights theory).

176. *See infra* Section III.D (arguing that the California Supreme Court’s interpretation of the statute does not portray the will of the Legislature).

177. *See Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 393 (2020) (reversing the Court of Appeal’s judgment finding that section 1430(b) allows for a \$500 penalty per violation); Dolan, *supra* note 19.

178. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 385–392 (2020).

179. *Id.* at 385; *see also Nevarrez v. San Marino Skilled Nursing and Wellness Centre*, 221 Cal. App. 4th 102, 135 (2013) (“But to the extent respondent and the AARP amici curiae proceed on the assumption that section 1430, subdivision (b) aims solely or largely to protect the health and safety of nursing home residents, they are incorrect since, as we explained, some patients’ rights violations are not related to health and safety.”).

180. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 385 (2020); *see supra* Section II.B. (discussing governmental enforcement of the Long Term Care Act through class violations and fines).

181. *See CAL. HEALTH & SAFETY CODE* § 1430(a) (West 2022) (“(a) Except where the state department has taken action and the violations have been corrected to its satisfaction, a licensee who commits a class ‘A’ or ‘B’ violation may be enjoined from permitting the violation to continue or may be sued for civil damages within a court of competent jurisdiction. 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. The amount of civil damages that may be recovered in an action brought pursuant to this section may not exceed the maximum amount of civil penalties that could be

preceding section.¹⁸² Like *Nevarrez*, the Court inferred that the difference in language suggests the Legislature did not wish to administer damages per violation.¹⁸³ Moreover, the Court explained that many of the rights protected by the statute overlap.¹⁸⁴ According to the Court, this overlap makes it difficult for judges to determine what is a “separate and distinct” violation for calculating damages.¹⁸⁵

Next, the court addressed the statute’s legislative history by discussing previous drafts.¹⁸⁶ The court highlighted that the Legislature reviewed three drafts of the bill before settling on the statute’s current language.¹⁸⁷ After reviewing the previous drafts, the supreme court concluded that the Legislature likely did not intend a per violation approach.¹⁸⁸ The court also mentioned that the Legislature failed to clarify the language in its 2004 amendment, and therefore, likely did not wish to award \$500 per violation.¹⁸⁹

Finally, the California Supreme Court reviewed various public policy arguments.¹⁹⁰ The nursing home resident argued that an interpretation limiting damages to \$500 per lawsuit renders the statute “toothless.”¹⁹¹ However, the Court rejected that argument and reasoned that the law provides other reasons for nursing homes to refrain from violating residents’ rights.¹⁹² The Court stated that the statute deters nursing homes from violating resident’s rights by providing the resident with the ability to pursue an injunction, attorney fees, and costs.¹⁹³ Further, the Court concluded that the Legislature did not intend for the statute to serve as an “exclusive or primary” enforcement mechanism for nursing home residents.¹⁹⁴ The court mentioned that tort law provides remedies to individuals seeking monetary compensation for wrongdoing.¹⁹⁵

The California Supreme Court reversed the Fourth District Court of Appeal’s judgment by interpreting the statute to award only \$500 in damages per lawsuit.¹⁹⁶

assessed on account of the violation or violations.”); *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 385 (2020).

182. *Id.* § 1430(b); *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 385 (2020).

183. *See Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 387 (2020) (citing the rule of statutory construction, which states “[w]hen one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning.”)

184. *Id.* at 386–87.

185. *Id.*

186. *Id.* at 387–89.

187. *Id.* at 387–88.

188. *Id.*

189. *Jarman*, 9 Cal. App. 5th at 389–90.

190. *Id.* at 390.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Jarman*, 9 Cal. App. 5th at 391.

196. *Id.* at 392–93.

This long-awaited decision disappointed nursing home residents and their advocates, yet pleased for-profit nursing homes.¹⁹⁷ The Court concluded by highlighting that nursing home residents “comprise a particularly vulnerable segment of our population” deserving the highest protections against abuse and substandard care.¹⁹⁸ However, the Court declined to interpret the statute to provide nursing home residents with necessary protections against abuse and substandard care.¹⁹⁹

D. The California Supreme Court Interpreted the Statute Incorrectly

According to ordinary principles of statutory construction, a court must interpret a statute in light of the Legislature’s intent and purpose when enacting the statute.²⁰⁰ The purpose of section 1430(b) was to protect nursing home residents’ rights by creating a private enforcement mechanism.²⁰¹ When enacting the law, the Legislature intended the statute to function primarily as a deterrent to increased instances of substandard care in nursing homes.²⁰²

However, the California Supreme Court—along with the Second District Court of Appeal—did not articulate the statute’s purpose in this manner.²⁰³ California’s highest court found that the Legislature enacted the statute as an “enforcement mechanism for violations that were not directly related to patient health and safety” as covered by the Long Term Care Act.²⁰⁴ Although this iteration correctly places the statute as a supplement to the classification process of the Long Term Care Act, it fails to recognize the provision’s primary purpose.²⁰⁵

The statute’s purpose was to deter violations of the Patient’s Bill of Rights and other provisions of the Long Term Care Act—both intended to protect nursing home residents.²⁰⁶ Any other reading of the statute’s purpose deprives nursing home residents from properly vindicating their rights.²⁰⁷ Moreover, California legislators specifically stated the original bill’s primary purpose was “to protect

197. Dolan, *supra* note 19.

198. Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 392 (2020).

199. *Id.*

200. See Coal. of Concerned Cmty., Inc. v. City of Los Angeles, 34 Cal. 4th 733, 737 (2004) (“Our fundamental task in interpreting a statute is to determine the Legislature’s intent so as to effectuate the law’s purpose.”).

201. Dolan, *supra* note 19.

202. Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 407–08 (2020) (Cuéllar, J., dissenting).

203. *Id.* at 385; Nevarrez v. San Marino Skilled Nursing and Wellness Centre, 221 Cal. App. 4th 102, 135 (2013).

204. Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 385 (2020).

205. SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF SB 1930, at 2 (Apr. 26, 1982); Dolan, *supra* note 19.

206. CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022); SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF SB 1930, at 2 (Apr. 26, 1982).

207. See CAL. ADVOCS. FOR NURSING HOME REFORM, *supra* note 15, at 8 (explaining how the “limited remedies for residents’ rights violations leave most nursing home residents with no legal recourse at all.”).

and ensure the rights of people residing in nursing homes.”²⁰⁸ This iteration of the statute’s purpose contradicts the California Supreme Court’s interpretation.²⁰⁹

Respectfully, the California Supreme Court did not accurately portray the statute’s intended purpose in its opinion.²¹⁰ It is true that the statute supplements the classification process of the Long Term Care Act; however, the Long Term Care Act only allows the California Department of Public Health to collect fines.²¹¹ These fines do not protect nursing home residents, nor do the fines adequately compensate a resident when a nursing home violates their rights.²¹² The dissent properly interpreted the statute’s intended purpose and stated that the legal system recognizes that “the threat of monetary penalties or damages can prevent wrongdoing.”²¹³

Penalizing nursing homes only \$500 for any number of violations does not serve the intended goal of the statute.²¹⁴ Interpreting the statute as \$500 per lawsuit immunizes nursing homes and encourages more reprehensible conduct.²¹⁵ Rather, a per-violation approach to damages preserves the statute’s purpose, guarantees victims’ rights, and deters nursing homes from improper conduct.²¹⁶

Additionally, limiting damages to \$500 per lawsuit is impractical when the cost to file a lawsuit in California is \$450.²¹⁷ It requires time, money, and effort to file a lawsuit, and some lawsuits take years to dispose of.²¹⁸ For instance, the original jury released its verdict in *Jarman* on June 15, 2011—over 9 years before the case reached the California Supreme Court.²¹⁹ It seems counterintuitive to file a lawsuit for \$450 and then after 9 years receive only \$500 in damages.²²⁰

208. SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF SB 1930, at 2 (Apr. 26, 1982).

209. *Compare Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 385 (2020) (stating that the Legislature enacted the statute as “enforcement mechanism for violations that were not directly related to patient health and safety”), with SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF SB 1930, at 2 (Apr. 26, 1982) (“The purpose of this bill is to protect and ensure the rights of people residing in nursing homes.”).

210. *Compare Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 385 (2020) (stating that the Legislature enacted the statute as “enforcement mechanism for violations that were not directly related to patient health and safety”), with SENATE COMMITTEE ON THE JUDICIARY, *supra* note 209, at 2 (Apr. 26, 1982) (“The purpose of this bill is to protect and ensure the rights of people residing in nursing homes.”).

211. *See* CAL. HEALTH & SAFETY CODE § 1417.2 (West 2022) (“moneys collected as a result of state and federal civil penalties imposed under this chapter or federal law shall be deposited into accounts that are hereby established in the Special Deposit Fund”).

212. *See id.* § 1417.2 (discussing how the government uses the fine monies collect, none of which provide direct monetary relief to victims).

213. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 400 (2020) (Cuéllar, J., dissenting).

214. Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14, at 10.

215. *Id.* at 13, *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375 (2020) (No. S241431).

216. Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14, at 13–14, *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375 (2020) (No. S241431).

217. Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14, at 18.

218. *Id.*

219. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 380 (2020).

220. Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14,

The dissent in *Jarman* stated that the decision renders the law “toothless” or ineffectual.²²¹ However, the majority argued that nursing home residents have other remedies available to them, such as an injunction against future conduct.²²² The California Supreme Court’s argument belittles and further alienates an already vulnerable population by limiting the remedies available to nursing home residents to vindicate their rights.²²³

When nursing home residents file a lawsuit, they are already at a disadvantage because they live in the facility they wish to sue.²²⁴ Although there are laws against retaliation, many residents fear that filing a lawsuit may lead to eviction and possible homelessness.²²⁵ Most nursing home residents have very little money and few possessions, and many individuals do not have families.²²⁶ For individuals without families or friends to advocate for them, their resident rights serve as a safeguard against nursing home abuse.²²⁷

Moreover, injunctions only stop further violations and do not provide any monetary relief for prior violations.²²⁸ The Legislature intended the statute to function with both remedies, not just the injunction.²²⁹

IV. THE NEED FOR AN AMENDMENT

The decision in *Jarman* does not mean defeat.²³⁰ The California Supreme Court insinuated that advocates for nursing home residents should lobby the legislature to amend the statute to align with the intent of the legislature.²³¹ This means advocates for nursing home residents must lobby a different branch of the

at 18, *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375 (2020) (No. S241431).

221. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 400–01 (2020) (Cuéllar, J., dissenting); see *Toothless*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/toothless> (last visited March 5, 2021) (on file with the *University of the Pacific Law Review*) (defining “toothless” as “lacking in means of enforcement or coercion: ineffectual”).

222. *Id.* at 390.

223. See *id.* at 400–01 (Cuéllar, J., dissenting) (“It makes little difference that the majority leaves a few teeth awkwardly hanging in the mouth after pulling most of them out, as availability of injunctive relief and attorney fees are plainly insufficient to fulfill the statute’s purpose to deter and remedy violations of nursing home patients’ rights.”).

224. CAL. ADVOCS. *supra* note 111.

225. See *id.* (“residents who are illegally evicted, denied phone calls or visitors or subjected to humiliation by being paraded naked through the facility, are denied any relief.”).

226. *Id.*; Jasper & Reese, *supra* note 66

227. See CAL. ADVOCS. *supra* note 111 (discussing how limiting damage will not stop abuse and neglect in nursing homes); Jasper & Reese, *supra* note 66.

228. CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022).

229. *Id.*

230. See *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 392 (2020) (explaining the court’s decision to the legislature).

231. See *id.* (“Undoubtedly, nursing care patients comprise a particularly vulnerable segment of our population and deserve the highest protections against any abuse and substandard care. That said, we cannot and must not legislate by grafting onto section 1430(b) a remedy that the Legislature has chosen not to include.”).

government—the California Legislature—for relief.²³² Section A explains how judicial precedent only allows the California Legislature to amend the statute.²³³ Section B explores how public policy supports amending the statute.²³⁴

A. Why Lobbying the Legislature is the Only Way to Change the Law

When a court interprets a statute—such as in *Jarman*—that interpretation becomes “precedent” to which all lower courts must follow.²³⁵ Courts strictly adhere to the doctrine of “stare decisis,” a Latin term stating that later courts should not overrule judicial precedent.²³⁶ The doctrine creates consistency within the court system and provides society with a guideline on how courts interpret and apply a particular law.²³⁷

It is often difficult to overrule judicial precedent because the doctrine of stare decisis requires some special “overriding consideration” before a court overrules a previous decision.²³⁸ Therefore, courts frequently rely on Congress to amend a statute when it disagrees with the court’s interpretation.²³⁹ For these reasons, both the majority and the dissent in *Jarman*—either directly or impliedly—suggested that the California Legislature should amend the statute.²⁴⁰

B. Public Policy Supports an Amendment

Good public policy supports amending the statute to serve the nursing home population.²⁴¹ The current statute only serves the nursing home industry and does

232. See *id.* (explaining how the courts only job is to interpret law, while the legislature’s job is to create the law).

233. See *infra* Section IV.A.

234. See *infra* Section IV.B.

235. Micheli, *supra* note 119, at 461.

236. Micheli, *supra* note 119, at 466.

237. Micheli, *supra* note 119, at 466.

238. See *Neal v. United States*, 516 U.S. 284, 295 (1996) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173) (explaining one overriding consideration “when the intervening development of the law has ‘removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.’”); Micheli, *supra* note 119, at 466.

239. See *Neal v. United States*, 516 U.S. 284, 295 (1996) (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736) (“One reason that we give great weight to stare decisis in the area of statutory construction is that ‘Congress is free to change this Court’s interpretation of its legislation.’”).

240. See *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 392 (2020) (“Undoubtedly, nursing care patients comprise a particularly vulnerable segment of our population and deserve the highest protections against any abuse and substandard care. That said, we cannot and must not legislate by grafting onto section 1430(b) a remedy that the Legislature has chosen not to include.”); see also *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 408 (2020) (Cuéllar, J., dissenting) (“That the majority has chosen to reject this reading may prompt the Legislature to repair the scheme and restore its more robust deterrent effect—along with, perhaps, greater clarity about defining violations when certain rights appear to overlap.”).

241. See CAL. ADVOCS. FOR NURSING HOME REFORM, *supra* note 15, at 27 (recommending that the Legislature increase the damages provision to help residents “who are illegally evicted, denied phone calls or visitors or subject to humiliation by being paraded naked through the facility”).

little to protect the individuals who nursing homes care for.²⁴² Subsection 1 explores how the *Jarman* decision may lead to poorer quality of care in nursing homes.²⁴³ Subsection 2 quickly addresses how the penalty per lawsuit approach decreases judicial efficiency.²⁴⁴

1. The Jarman Decision Leads to Poorer Quality of Care

Following the decision in *Nevarrez*, the amount of resident rights complaints spiked because the case's holding essentially condoned substandard care.²⁴⁵ Additionally, nursing homes started making \$500 settlement offers.²⁴⁶ By extending these offers, nursing homes used section 1430(b)—a statute supposedly protecting nursing home residents' rights—as a weapon when residents sued to enforce their rights.²⁴⁷ This conduct is contrary to the statute's purpose and sweeps substandard care under the rug.²⁴⁸ The intended goal of the statute was to increase quality of care and accountability for nursing homes, not immunize nursing homes from liability and worsen quality of care.²⁴⁹

In recent years, the for-profit nursing home industry and its lobbyists pushed to decrease liability or create immunity for inadequate care.²⁵⁰ Although there are laws protecting nursing home residents, many facilities choose to pay fines instead of fixing the problem—substandard care—because paying is more cost effective.²⁵¹ As the trend toward immunizing nursing homes progresses, it is important to remember why the law regulates nursing homes—to protect a highly vulnerable population against abuse and neglect.²⁵²

The majority of nursing homes that are party to elder abuse lawsuits often dispense significantly poorer care.²⁵³ For example, residents file roughly half of elder abuse lawsuits against only 10% of skilled nursing facilities.²⁵⁴ Many facilities within the 10% have extreme histories of abuse and neglect violations

242. See CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (stating residents in either skilled nursing facilities or intermediate care facilities can bring a lawsuit).

243. *Infra* Subsection IV.B.1.

244. *Infra* Subsection IV.B.2.

245. See Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14, at 13 (“The total number of complaints rose 54% from just four years ago.”).

246. *Id.*

247. *Id.*

248. Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14, at 13–14.

249. *Id.*

250. Samuel Brooks, et al., *States Move to Shield LTC Facilities from Civil Liability*, ABA, https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-41/vol-41—issue-no-6—july-august-2020-/states-move-to-shield-ltc-facilities-from-liability/ (last visited Jan. 5, 2021) (on file with the *University of the Pacific Law Review*).

251. *Id.*

252. *Id.*

253. CAL. ADVOCS. FOR NURSING HOME REFORM, *supra* note 15, at 18.

254. *Id.* at 19.

and receive almost 200% more resident complaints.²⁵⁵ The Patient's Bill of Rights protects nursing home residents against elder abuse, neglect, and other reprehensible conduct.²⁵⁶ Therefore, elder abuse statistics provide insight into the quality of care in nursing homes.²⁵⁷ Based upon these statistics, fines and other deterrence mechanisms—such as the \$500 penalty per lawsuit—do not effectively prevent nursing homes from violating residents' rights.²⁵⁸ To successfully deter nursing homes from such violations requires the law to hit them where it hurts—their pocketbooks.²⁵⁹

2. The Jarman Decision Decreases Judicial Efficiency

The *Jarman* decision held that the \$500 damages provision applied per lawsuit; however, this approach is problematic for the judicial system as a whole.²⁶⁰ Residents with multiple claims must choose between consolidating their claims into one lawsuit for judicial efficiency and receive only \$500 in damages, or file multiple lawsuits.²⁶¹ This outcome not only discourages residents from filing lawsuits, it incentivizes lawyers to file separate lawsuits to receive the maximum amount in damages for their clients.²⁶² If lawyers utilize this practice to achieve justice for their clients, judicial efficiency decreases and court costs rise.²⁶³

It is true that claim and issue preclusion—along with other procedural methods—may block lawyers' attempts to file multiple separate lawsuits.²⁶⁴ However, a court must still hold a judicial proceeding to determine whether to

255. *Id.*

256. See CAL. HEALTH & SAFETY CODE § 1599.1 (West 2022) (detailing the statutory version of the Patient's Bill of Rights); see also CAL. CODE REGS. tit. 22, § 72527 (West 2022) (detailing the regulatory version of the Patient's Bill of Rights).

257. See CAL. HEALTH & SAFETY CODE § 1599 (West 2022) (“It is the intent of the Legislature in enacting this chapter to expressly set forth fundamental human rights which all patients shall be entitled to”); CAL. HEALTH & SAFETY CODE § 1599.1 (West 2021) (detailing the statutory version of the Patient's Bill of Rights); see also CAL. CODE REGS. tit. 22, § 72527 (West 2022) (detailing the regulatory version of the Patient's Bill of Rights); *Residents' Rights*, *supra* note 10 (explaining that the Patient's Bill of Rights guarantees nursing home residents' certain rights under state and federal law). See generally *supra* Section II.C (explaining the Patient's Bill of Rights in detail).

258. CAL. ADVOCS. FOR NURSING HOME REFORM, MUCH ADO ABOUT NOTHING: DEBUNKING THE MYTH OF FREQUENT AND FRIVOLOUS ELDER ABUSE LAWSUITS AGAINST CALIFORNIA'S NURSING HOMES 19 (2003), http://www.canhr.org/reports/2003/CANHR_Litigation_Report.pdf (on file with the *University of the Pacific Law Review*).

259. See CAL. ADVOCS. FOR NURSING HOME REFORM, MUCH ADO ABOUT NOTHING: DEBUNKING THE MYTH OF FREQUENT AND FRIVOLOUS ELDER ABUSE LAWSUITS AGAINST CALIFORNIA'S NURSING HOMES 18 (2003), http://www.canhr.org/reports/2003/CANHR_Litigation_Report.pdf (on file with the *University of the Pacific Law Review*) (citing statistics where nursing homes receive fines yet continue to dispense poor quality of care).

260. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 379 (2020).

261. *Id.* at 392.

262. *Id.* at 407 (Cuéllar, J., dissenting).

263. *Id.* at 399 (Cuéllar, J., dissenting).

264. *Id.* at 407 (Cuéllar, J., dissenting).

dismiss the separate lawsuits.²⁶⁵ Those decisions also take time and court resources.²⁶⁶

V. WHAT THE CALIFORNIA LEGISLATURE SHOULD DO

The California Legislature should amend section 1430(b) to properly execute the statute's intended goal—to protect nursing home residents' basic human rights.²⁶⁷ For example, the Legislature could simply add the language “per violation” to the current statute.²⁶⁸ Alternatively, the Legislature could completely amend the statute to further protect nursing home residents' rights in light of the recent trend toward limiting nursing home liability.²⁶⁹

One such example, discussed by the dissent in *Jarman*, is to tie the statutory penalty to the “number” of violations or “severity” of a violation.²⁷⁰ Although this proposed method requires the Legislature to develop yet another statutory scheme, it would properly effectuate the enacting Legislature's purpose.²⁷¹ Amendments like this one are not unprecedented; the Legislature added similar statutory penalties to other enforcement schemes like the unfair competition law and the false advertising law.²⁷²

To illustrate how an amendment would work in practice, imagine that the elderly nursing home resident mentioned in the introduction sued the nursing home using the statute.²⁷³ The California Department of Health issued a Class “B” violation because the actions had a “direct or immediate relationship to the health, safety, or security” of the resident.²⁷⁴ The California Department of Public Health

265. *Id.* (Cuéllar, J., dissenting).

266. *Jarman*, 9 Cal. App. 5th at 399 (Cuéllar, J., dissenting).

267. *See Dolan*, *supra* note 19. (explaining how the California Advocates for Nursing Home Reform plan to urge the Legislature to rewrite the law, especially in light of the coronavirus pandemic).

268. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (adding the language “per violation” would properly effectuate the statute's goal).

269. *See Brooks, et al.*, *supra* note 250 (speaking to the need for lawmakers to reject the trend towards limiting liability of nursing homes).

270. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 401 (2020) (Cuéllar, J., dissenting).

271. *See id.* (Cuéllar, J., dissenting) (“Given the purpose of this statute to allow vulnerable nursing home residents to better protect their own rights, the natural conclusion is that the Legislature intended the \$500 penalty to serve as an additional deterrent to wrongdoing.”).

272. *See id.* (Cuéllar, J., dissenting) (“The Legislature has similarly added statutory penalties to other enforcement schemes like the false advertising law and unfair competition law where it finds that ‘the injunctive remedy was . . . an ineffective deterrent against violations.’”).

273. *See Monterey Palms Operating Co., LP*, Citation No. 25-2945-0014196-S (Cal Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (citing Monterey Palms Health Care Center for various violations relating to a nursing home resident's right to be free from abuse, neglect, and exploitation); *see supra* Part I (explaining the scenario where nursing home staff sexually exploited the elderly nursing home resident via Snapchat video).

274. CAL. HEALTH & SAFETY CODE § 1424(e) (West 2022); *see Monterey Palms Operating Co., LP*, Citation No. 25-2945-0014196-S (Cal Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (citing Monterey Palms Health Care Center for a Class B violation); *see generally supra* Part II.B (discussing the Long Term Care Act and class violations).

fined the nursing home \$2,000 for the violation payable to California, not the resident.²⁷⁵ The citation did not specify how many times the nursing home violated the elderly resident's rights, but assume the nursing home violated at least three of the resident's rights.²⁷⁶

Under the current statute, the resident would only receive \$500 for the whole lawsuit, including all three resident rights violations.²⁷⁷ This would leave the elderly resident likely worse off than before they filed the lawsuit due to litigation costs and attorney fees.²⁷⁸ Although the resident could file a claim for damages, they would still need to convince an attorney to take his case and pay costs out-of-pocket.²⁷⁹ Many nursing home residents do not have the ability to pay attorney fees and costs, let alone possess the means to find an attorney to litigate their claims.²⁸⁰

If the Legislature amended the statute to issue a penalty per violation, the elderly resident would receive at least \$1,500 for the lawsuit.²⁸¹ The resident could receive more if the Legislature enacted an approach that assesses the number and severity of each violation.²⁸² For example, when a court finds the injunctive remedy ineffective as a deterrent against violations, the false advertising law allows civil penalties up to \$2,500 for each violation.²⁸³ The false advertising law assesses the amount of the civil penalty by considering the relevant circumstances, including the nature and seriousness, the number of violations, and willfulness.²⁸⁴ If the Legislature amends section 1430(b) to permit an approach that assesses the relevant circumstances of each violation, it could use the false advertising law as

275. CAL. HEALTH & SAFETY CODE § 1417.2 (West 2022); Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*).

276. See Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (omitting the number of times the nursing home committed violations).

277. CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022); Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 392 (2020).

278. See Jarman v. HCR ManorCare, Inc., 9 Cal. App. 5th 807, 823 (2017) (“A statute which offers the opportunity to file a lawsuit for a maximum recovery of \$500—no matter how many wrongs are proved—would be a remedy suitable only for those who like litigating far more than they like money.”)

279. Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 391 (2020) (explaining the tort law remedy); *Finding a Lawyer*, CAL. CTS., <https://www.courts.ca.gov/selfhelp-findlawyer.htm?rdeLocaleAttr=en> (last visited Jan. 30, 2022) (on file with the *University of the Pacific Law Review*).

280. See CAL. ADVOCS. FOR NURSING HOME REFORM, *supra* note 15, at 27 (explaining how residents who are illegally evicted, denied phone calls, and visitors are denied relief because they cannot find counsel).

281. See Jarman v. HCR ManorCare, Inc., 9 Cal. App. 5th 807, 827 (2017) (holding that the statute's damages provision applied per cause of action).

282. Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 401 (2020) (Cuéllar, J., dissenting).

283. CAL. BUS. & PROF. CODE § 17536 (West 2022); People v. Superior Ct. (Olson) 96 Cal. App. 3d 181, 191 (1979) (citing University of the Pacific; McGeorge School of Law, *Consumer Protection Review of Selected 1972 California Legislation*, 4 PAC. L. J. 335, 342 (1973)).

284. See CAL. BUS. & PROF. CODE § 17536 (West 2022) (explaining the relevant circumstances the court may consider, including “the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.”).

a guide.²⁸⁵ An approach that considers the relevant circumstances allows the court to tailor the amount of damages fairly and appropriately.²⁸⁶

For the elderly resident in the introduction, a court—applying an amended statute—would likely consider how the employee not only videotaped the resident but shared it with friends.²⁸⁷ That gross invasion may convince a court to increase the damages allotted to the resident.²⁸⁸ The court may also consider that the elderly resident suffered from various ailments, including dementia and an anxiety disorder, as opposed to an individual recovering from shoulder surgery.²⁸⁹ Ultimately, the court has discretion over the monetary damages in an approach that considers the relevant circumstances.²⁹⁰

Now, the California Legislature must amend the law to reflect an approach that provides nursing home residents with a meaningful remedy.²⁹¹

VI. CONCLUSION

Before *Jarman*, there were two competing interpretations of the damages provision in section 1430(b).²⁹² The first interpretation authorized nursing home residents to recover \$500 for each resident rights violation.²⁹³ While the second only granted residents \$500 per lawsuit.²⁹⁴ Only one interpretation of the law serves nursing home residents' justice by punishing and discouraging improper behavior and properly compensating the victim.²⁹⁵ The accuracy of this

285. See *id.* § 17536 (West 2022) (explaining how to assess damages for each violation according to the relevant circumstances).

286. Compare CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (allowing a \$500 penalty per law suit), with *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 401 (2020) (Cuéllar, J., dissenting) (discussing a possible amendment which assess the number and severity of the violations).

287. See *Monterey Palms Operating Co., LP*, Citation No. 25-2945-0014196-S (Cal. Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (describing how a CNA shared a video of a resident over Snapchat).

288. *Id.*

289. See *id.* (explaining that the nursing home resident “was admitted to the facility on January 25, 2017, with diagnoses that included dementia (memory loss), diabetes mellitus (high blood sugar), hypertension (elevated blood pressure), and anxiety disorder”).

290. See CAL. BUS. & PROF. CODE § 17536 (West 2022) (explaining how to the court shall consider various relevant circumstances to determine the damages award).

291. Compare CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (allowing a \$500 penalty per violation), with *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 401 (2020) (Cuéllar, J., dissenting) (discussing a possible amendment which assess the number and severity of the violations).

292. See, e.g., *Jarman v. HCR ManorCare, Inc.*, 9 Cal. App. 5th 807, 827 (2017) (holding for the \$500 per cause of action approach); Order on Motion for Award of Attorneys' Fees, Costs and Service Payments, *Lavender v. Skilled Healthcare Group, Inc.* (No. DR060264) (Humboldt Co. Sup. Ct 2010) (holding for a penalty per violation approach).

293. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 379 (2020).

294. *Id.*

295. See *id.* at 392 (concluding that the court cannot provide a remedy that the Legislature did not include, and the current remedy under section 1430(b) is that a facility is liable for up to \$500).

interpretation was ever-present in the case involving nursing staff who videotaped an elderly resident's nude body and posted it to Snapchat.²⁹⁶

When the California Supreme Court issued its opinion in *Jarman*, it resolved the statutory ambiguity by interpreting the law to cap damages at \$500 per lawsuit.²⁹⁷ However, the California Supreme Court's interpretation undermines the statute's purpose.²⁹⁸ Furthermore, the decision allows nursing homes to commit countless violations and pay only \$500 in damages.²⁹⁹ This precedent limits the monetary remedies available to residents and immunizes nursing homes from significant liability under the statute.³⁰⁰

The only option available to properly effectuate the statute's purpose is to amend the statute.³⁰¹ The Legislature may amend the statute by simply clarifying the language or completely reforming the private enforcement mechanism.³⁰² In light of the growing trend toward immunizing nursing homes and the looming Silver Tsunami, there is no better time for the California Legislature to amend the statute.³⁰³ By amending the statute, the California Legislature will not only restore the enacting legislature's intent but reaffirm its commitment to the aging population.³⁰⁴

296. See *Monterey Palms Operating Co., LP*, Citation No. 25-2945-0014196-S (Cal. Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (citing Monterey Palms Health Care Center for various violations relating to a nursing home resident's right to be free from abuse, neglect, and exploitation); see *supra* Part I (explaining the scenario where nursing home staff sexually exploited the elderly nursing home resident via Snapchat video); see also *supra* Part V (analyzing how the case would have been decided under the current and a proposed amended statute).

297. *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 379 (2020).

298. See *id.* (interpreting the statute according to an incorrect purpose); Dolan, *supra* note 19 (explaining that the intended goal of the statute was to deter and vindicate violations of nursing home residents' rights).

299. See *Jarman v. HCR ManorCare, Inc.*, 10 Cal. 5th 375, 379 (2020) (interpreting the statute according to ordinary principles of statutory construction).

300. See *id.* (holding that "the monetary cap of \$500 under the Long-Term Care Act applied to each action, rather than each violation committed").

301. Dolan, *supra* note 19.

302. See generally *supra* Part V (discussing the possible methods available to amend the statute).

303. See Brooks, et al., *supra* note 250 (discussing the trend toward immunizing for-profit nursing homes); Levin, *supra* note 60 (explaining the effect the Silver Tsunami will likely have on California).

304. See Cal. Exec. Order No. N-14-19, <https://www.gov.ca.gov/wp-content/uploads/2019/06/6.10.19-Master-Plan-for-Aging-EO.pdf> (June 10, 2019) (on file with the *University of the Pacific Law Review*) (explaining California's commitment to aid the growing Silver Tsunami); see also CAL. DEP'T OF AGING, *supra* note 71 (discussing California's plan to help the aging population); Jasper & Reese, *supra* note 66 (questioning whether California's "Master Plan for Aging" will be enough to help the aging population).

