No. S214679

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED

DEC 19 2013

Frank A. McGuire Clerk

Deputy

DEPARTMENT OF PUBLIC HEALTH,

Petitioner,

vs.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,

Respondent.

CENTER FOR INVESTIGATIVE REPORTING.

Real Party In Interest

After a Published Decision of the Court of Appeal, Third Appellate District, Case No. C072325 (Justice M. Kathleen Butz), Vacating a Judgment Entered by the Superior Court for the County of Sacramento, Case No. 34-2012-80001044 (Hon. Timothy M. Frawley).

REPLY OF THE CENTER FOR INVESTIGATIVE REPORTING IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeal's published decision fundamentally weakens two statutory schemes designed to protect the state's most vulnerable populations. It also injects uncertainly into statewide administrative obligations, enacted to make public information about serious breaches of patient-care standards at long-term health care facilities. It does so by subjecting long-term health care facilities and the state departments overseeing them to the specter of civil liability under the Lanterman Act for disclosing the very information that the Legislature declared must be disclosed under the Long-Term Care Act.

This is not an insular Public Records Act matter as the DPH would have this Court believe. Instead, this Petition goes well beyond CIR's statutory and constitutional rights of access to public records and raises important issues of legislative intent over the protection and security of mentally and developmentally disabled individuals residing in long-term health care facilities throughout this state. It is, as Amicus Curiae California Advocates for Nursing Home Reform ("CANHR") aptly describes, a matter affecting the most vulnerable segment of an already vulnerable population. Thus, this Petition indisputably presents an "important question of law" that must be resolved by this Court in order to ensure that individuals with mental illnesses or developmental disabilities continue to receive the protection that the Legislature intended them to have under the Long-Term Care Act's mandatory disclosure provisions and to avoid the administrative quagmire that the Court of Appeal's decision will create.

DPH's other arguments against review also should be rejected. DPH completely ignores Kizer v. County of San Mateo, 53 Cal. 3d 139 (1991), effectively conceding that the Court of Appeal's decision conflicts with this

Court's holding in that case. There, this Court rejected the very type of "two-tiered system of enforcement" under the Long-Term Care Act that the Court of Appeal has mandated here. Id. at 148. Nor would this Court's review be meaningless, as DPH claims. To the contrary, it is DPH that has misapplied the rules of statutory construction – as is demonstrated by the fact that the majority decision did not adopt DPH's arguments but instead attempted to harmonize the statutes. As the dissent recognized below, the Long-Term Care Act is the later-enacted and more specific statute. The Court of Appeal erred in abrogating the Long-Term Care Act's disclosure mandate, which is a key remedial provision adopted by the Legislature to protect individuals in long-term health care facilities.

In short, the issues raised in CIR's Petition readily meet the standard for granting review and deserve this Court's attention.

II. REPLY ARGUMENTS

A. The Petition Raises Important Legal Issues of Statewide Signficance.

DPH's attempt to cast this case as one of insular appellate error affecting CIR alone perhaps best illustrates why review by this Court is necessary. DPH is ultimately responsible for the care and protection of mentally and developmentally disabled patients residing in long-term care facilities throughout the state. Though the Court of Appeal's published decision runs roughshod over two statutory schemes designed to protect this population, DPH sees this Petition as addressing no important legal issue. Answer at 8. Rather than explain its position, DPH argues that the court correctly harmonized the Long-Term Care Act and the Lanterman Act by compromising both statutory schemes in the manner that it did – that is, by carving out of the Long-Term Care Act the obligation to make public the

citations issued for serious violations of patient care standards when those violations involve mentally and developmentally disabled patients receiving services under the Lanterman Act, while allowing disclosure of other information contained within the citations that is potentially covered under this same Act.

No coherent theory of statutory construction allows a court to selectively repeal provisions of two acts in the guise of harmonizing them. Setting aside DPH's merits arguments, however, this Petition unquestionably presents important legal issues of statewide significance.

As aptly explained by CAHNR in its letter brief in support of the Petition, this case raises profound issues of public significance far beyond a narrow reconciliation of competing statutes. It involves ill and disabled individuals completely dependent on facilities owned or overseen by the state for their daily care and whose ongoing and future welfare depends on remediation of serious violations of patient-care standards at these facilities. Secrecy over those violations for the most vulnerable of this population, those with mental and developmental disabilities, "fundamentally protects only those State hospitals or regional centers which have been found wanting by the State agency charged with investigating and exposing their serious violations of patient rights by allowing virtually all useful information about those violations to be buried," as explained by CANHR. Secrecy further serves to insulate DPH from public scrutiny of its role in investigating serious violations of patient-care standards at long-term care facilities serving developmentally and mentally disabled individuals.[1]

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[1] Because the issuance of three "AA" citations against a facility within a single year – rather than the date of the occurrence of the violations – triggers the obligation to initiate proceedings to suspend or revoke a facility's license, and because DPH completely controls the timing of the

Thus, for the agency charged with protecting long-term care residents throughout this state to say that this case raises no important legal issue is irresponsible and, perhaps, best illustrates why this case needs review.

As explained in CIR's Petition, the Court of Appeal's decision not only undermines two statutory schemes aimed at protecting vulnerable populations, it creates substantial uncertainties over the state's administrative obligations. By holding that some information contained in the citations involving mentally and developmentally disabled individuals must be protected under the Lanterman Act, the Court of Appeal's decision introduces the potential for civil liability for wrongful disclosure of confidential information under the Lanterman Act should DPH guess wrong in fulfilling its obligations to make public the citations under the Long-Term Care Act. Not only will this lead to less information being made public than expressly intended by the Legislature in enacting the Long-Term Care Act, but it exposes the state to substantial liabilities that did not previously exist. The decision also imposes statewide administrative burdens on the state to redact ill-defined categories of information from the citations, at risk of civil sanctions, which did not previously exist. And, it requires that these same ill-defined standards be applied to the long-held obligation to make public information about citations through the state's on-line consumer services system. It further sets up an untenable dichotomy of public disclosure by requiring redaction of citations requested under the Public Records Act but

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issuance of any given citation, public oversight of DPH's role is important. Health & Safety Code § 1424(c). As CIR showed below, if not for the delay in issuing a third citation against Fairview Developmental Center for violations that all occurred in 2009, that facility's license arguably should have been revoked. 2 PE 301:4-21. That DPH in issuing citations against state run developmental centers is essentially penalizing the state, is yet another reason why public oversight of DPH's role in conducting investigations and in issuing citations is particularly important.

not of those posted at a facility or otherwise requested under Section 1428 of the Health and Safety Code.

DPH does not dispute CIR's interpretation of the Court of Appeal's decision. Instead, DPH argues that the record before this Court is not ripe for review because the consequences of the decision have yet to occur. Answer at 12. Actual harm to the populations intended to be protected under the statutes at issue here or unequal application of the constitutional right of access are not prerequisites to review. The Court of Appeal's decision unquestionably raises important legal issues that will impact the populations intended to be protected under two statutory schemes, the public seeking transparency over the state's citation system, and DPH, regional centers and long-term care facilities now required to implement the Court of Appeal's decision if not corrected by this Court.

B. The Court of Appeal's Decision is Inconsistent with This Court's Authority and Opinions of The Attorney General.

As DPH points out, the Court of Appeal's decision is a matter of first impression, which now governs the disclosure of citations by DPH, DDS, regional centers and long-term health care facilities throughout this state. There has been no other published decision interpreting the Lanterman Act and Long-Term Care Act in this manner. But what DPH fails to address – and what warrants this Court's review – is that by carving out of the protections of the Long-Term Care Act facilities caring for mentally and developmentally disabled individuals, the decision sets up the very type of "two-tiered system of enforcement" under the Act that this Court rejected in Kizer, 53 Cal. 3d at 143. There, a county argued that government owned, as opposed to privately owned, long-term health care facilities should be exempt from the Long-Term Care Act's citation penalties under the

Government Tort Claim Act. In considering this argument, the Court extensively reviewed several provisions of the Long-Term Care Act, including its public posting mandates, and concluded that "the Act's provisions are designed to implement the Legislature's declared public policy objective of 'assur[ing] that long-term health care facilities provide the highest level of care possible.'" Id. at 143 (citing Health & Safety Code § 1422(a)). The Court held that "granting immunity to public entities from the penalties would be contrary to the intent of the Legislature to provide 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." Id. (citing Health & Safety Code § 1417.1). This "two-tiered system of enforcement of the Health and Safety Code provisions ... contradicts the very public policy that the Legislature sought to implement with the citation and penalty provisions of the Act." Id. at 149.

By carving out of the protections of the Act long-term health care facilities caring for mentally and developmentally disabled patients, including each of the state-owned developmental centers which were the subject of CIR's Public Records Act request, the Court of Appeal's decision uniquely insulates an entire class of facilities expressly intended to be included within the Act's mandates. See Health & Safety Code § 1418. In the process, it deprives the most vulnerable of an already vulnerable population from the protections of the Act. The Court of Appeal's carve-out cannot be reconciled with this Court's decision in Kizer, and for this additional reason review should be granted.

The decision also contradicts this Court's decision in Albertson v. Superior Court, 25 Cal. 4th 796 (2001), and opinions issued by the Attorney General finding exceptions to the Lanterman Act's confidentiality

provisions in later enacted specific statutes designed to protect vulnerable populations, such as at issue here. Petition at 21-23. DPH argues that these authorities do not apply because they address the confidentiality provisions of Section 5328 of the Welfare and Institutions Code not Section 5328.15 , which DPH argues controls because it was enacted after the Long-Term Care Act. Answer at 7. However, as found by the trial court and reiterated by the dissent below, Section 5328.15 authorizes disclosure of information to licensing personnel conducting licensing duties under separate chapters of the Health and Safety Code. Health & Safety Code § 5328.15. It neither incorporates the separately chaptered provisions of the Long-Term Care Act contained in Chapter 2.4 of Division 2 of the Code, nor repeals by implication those provisions. Tr. Ct. Order at 10; Dis. Opn. at 11. It makes sense that Section 5328.15's provisions authorizing disclosure in licensing investigations do not govern citation investigations because all of the necessary authorizations to conduct a citation investigation already were set forth in the earlier-enacted Long-Term Care Act. See, e.g., Health & Safety Code §§ 1420(a)(1); 1420(a)(2)(A-C); 1421(a); 1428(f). Thus, DPH's reliance on Section 5328.15, as purportedly the later enacted provision that controls over the Long-Term Care Act, remains misplaced. That section simply does not repeal by implication the public access mandates of the Long-Term Care Act as DPH would like this Court to believe.

In short, the Court of Appeal's decision contradicts authority of this Court and ignores case law construing the Lanterman Act's confidentiality provisions in light of later enacted specific statutes protecting vulnerable populations.

C. Review is Necessary to Correct Clear Error.

While the Court of Appeal noted the general rules of statutory construction in its opinion, it failed to apply them; and, it ignored entirely the construction mandate of the California Constitution. Instead, it held that the Long-Term Care Act's provision requiring that the citations "describe with particularity the nature of the violation" (Health & Safety Code § 1423 (a)(2)) trumps the Lanterman Act's confidentiality provision, but the Lanterman Act controls over the Long-Term Care Act's requirement that "all relevant facts" be made part of the public record. Opn. at 19-22.

Its sole explanation for this holding is contained in two lines after discussing the purpose of both acts:

> This congruence of population and purpose, and this effectuation of purpose from opposite directions, creates a complementarity of methods to effectuate the common purpose for this common population. In this way, these confidentiality and public accessibility provisions can be harmonized.

Opn. at 19. It then proceeded to selectively enforce only certain provisions of both acts in the guise of harmonizing them.

DPH does not defend the court's theory of harmonization. Instead, it argues that the Court of Appeal reached the right result because the Lanterman Act's confidentiality provision is the more specific statute that governs over the Long-Term Care Act. Answer at 9. Specifically, it claims that because the Lanterman Act pertains to a subclass of long-term patients covered under the Long-Term Care Act, the Lanterman Act controls. This theory of construction was not adopted by the Court of Appeal and it was specifically rejected by the dissent. Dis. Opn. at 9, n. 9.

Moreover, the cases on which DPH relies for this theory of construction are inapposite. As explained by the dissent, the McDonald v.

Conniff, 99 Cal. 386 (1893), case does not involve conflicting statutes or statutory construction. Dis. Opn. at 9, n. 9. Rather, that case involved a provision of the 1879 California Constitution prohibiting the Legislature from passing special or local laws regulating the practice of courts of justice. In connection with this provision, the Court explained that a statute may be considered a general law (and hence constitutional) even though it does not affect all the people of the state. Id. at 391. It was in this context that the Court explained, "[a] statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things of a class is special." Id. McDonald thus has no application to this case.

The other case relied on by DPH, In re Ward, 227 Cal. App. 2d 369 (1964), involved two sentencing statutes that conflicted when applied against a minor defendant convicted of selling marijuana. One statute (former Health and Safety Code Section 11531) provided that every person who sells marijuana shall be punished by imprisonment from five years to life and shall not be eligible for parole or release until he or she has served not less than three years. The other statute (former Penal Code section 1202b) provided that for any person who was under the age of 23 years at the time of committing a felony or felonies, the court may, notwithstanding any other provision of law fixing or affecting the penalty for the felony or felonies, specify that the minimum term of imprisonment shall be six months. The court concluded that former Penal Code Section 1202b was the more specific provision that created an exception to the general sentencing statute under Section 11531 for persons under the age of 23. This was because Section 11531 began with the "generic" phrase "[e]very person," while former Section 1202b applied only to persons under the age of 23 years and used the phrase "notwithstanding any other provisions of law

fixing or affecting the penalty for the offense." In re Ward, 227 Cal. App. 2d at 374-75; see also Dis. Opn. at 9, n. 9.

As noted by the dissent, the Lanterman Act's confidentiality provisions were not made to apply "notwithstanding any other provision of law." Rather, "these provisions have been held to be general in nature and subject to numerous exceptions, both within the Lanterman Act and outside of that enactment. (see Welf. & Inst. Code, §§ 5328, subds. (a)-(y), 5328.01 et seq.; Albertson, supra, 25 Cal.4th at p. 805.)" Dis. Opn. at 9, n. 9. The Long-Term Care Act, by contrast, is phrased in specific language mandating the disclosure of the exact administrative record at issue in this case, and thus is the specific statute that controls as found by the trial court.

Thus, DPH's novel theory of statutory construction does not support the results reached by the Court of Appeal.

Nor does DPH's reliance on a provision of the Welfare and Institutions Code, enacted in September of 2012, authorizing the disclosure of citations and other information to the state's protection and advocacy agency ("P&A") advance its position. See Welf. & Inst. Code § 5328.15(c). DPH argues that there would be no need for this provision if unredacted citation reports were authorized through the Long-Term Care Act. Answer at 10-11.

The legislative history to SB 1377 and existing law governing P&A's investigations on behalf of developmentally impaired individuals show that the bill was enacted to clarify P&A's existing rights of access to certain unredacted administrative records in carrying out abuse investigations. It was not enacted to grant a new right of access to unredacted citation reports that did not exist before. Under existing Welfare and Institutions Code Section 4903(b)(1), authorizing P&A access to records of developmentally

impaired individuals in connection with abuse and neglect investigations, P&A already had the right of access to:

> Information and records prepared or received in the course of providing intake, assessment, evaluation, education, training, or other supportive services, including but not limited to, medical records...

Welf. & Inst. Code § 4903(b)(1). Separately, P&A had the right of access to:

> Reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, injury, or death occurring at the program, facility, or service while the individual with a disability is under the care of a member of the staff of a program, facility, or service, or by or for a program, facility, or service, that describe any or all of the following ... (A) Abuse, neglect, injury, or death...

Welf. & Inst. Code § 4903(b)(2); see also Welf. & Inst. Code § 4514.3, 5328.06; Civ. Code § 1798.24b. This later section would include citations issued by DPH, among other administrative records generated by DPH in the process of conducing complaint investigations.

According to the author of SB 1377, despite this existing law, in 2009 DPH changed its policy of providing access to such reports for individuals with mental health or developmental disabilities and instead started providing heavily redacted reports. See CIR's RJN, Ex. A at 4 (Senate Bill Analysis). Under this new policy, DPH required P&A to submit "an individual written request to receive an unredacted record for the case." Id. Though there was no dispute as to P&A's right of access to the reports, and DPH would eventually provide them, this "extra layer of bureaucratic process" caused significant delays "jeopardize[ing] the well-being of the individuals involved." Id. at 5. The need for the bill, as expressed by the author, states:

> While it is arguable that existing law provisions already give the P&A agency the right to access these reports (Welf. & Inst. Code Secs. 4902(), 4903(a)-(b)), to the extent that the P&A

> agency's access to full reports is obstructed by redacting information and only providing the full, unredacted version upon specific written request, the addition of these types of unredacted records to the existing list of records in Section 4903 would arguably add necessary clarity and expedite the process in the interest of these persons with disabilities who are affected by delays in access to records.

Id. (emphasis added); see also DPH's RJN 1535-1549 (Leg. Council's Digest) ("This bill would provide that the authority to access these records includes access to an unredacted facility evaluation report form, unredacted complaint investigation report form, unredacted citation report ....") (emphasis added). Thus, far from supporting DPH's argument, the legislative history of SB 1377 shows that it was enacted to clarify existing access rights because DPH was arbitrarily thwarting those rights.

Thus, contrary to DPH's contention, review likely will not merely confirm the Court of Appeal's decision. It is necessary to correct clear error.

III. CONCLUSION

The Court of Appeal's decision threatens to undermine important protections over a class of individuals arguably the most vulnerable in California. It imposes new, onerous and uncertain obligations on the state that most certainly will lead to less information being made public than intended by the Legislature in enacting the Long-Term Care Act. And it is a dangerous step backwards into what was once described as a system shrouded in secrecy before measures were taken to shine light on the care

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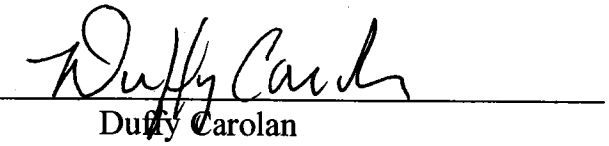
and treatment afforded individuals who reside in long-term health care facilities in this state. For these reasons, and those more fully set forth in CIR's Petition for Review, review by this Court should be granted.

Dated: December 19, 2013

DAVIS WRIGHT TREMAINE LLP

By: 

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COMPLIANCE CERTIFICATE

I certify that pursuant to Rules of Court 8.204(c) and 8.504(d), this Reply in Support of the Petition for Review is proportionately spaced, has a typeface of 13 points, and contains 3,559 words.

Dated: December 19, 2013

By: _____
Duffy Carolan

PROOF OF SERVICE

I, Janis Wooley, declare as follows:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111.

On December 19, 2013, I caused to be served the following document:

REPLY OF THE CENTER FOR INVESTIGATIVE REPORTING IN SUPPORT OF PETITION FOR REVIEW

I caused the above document to be served on the interested parties at the addresses listed below by the following means:

☒ **I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on December 19, 2013, following the ordinary business practice.**

☐ I enclosed a true and correct copy of said document in an envelope, and placed it for collection and mailing via Federal Express on _____, for guaranteed delivery on _____, following the ordinary business practice.

☐ A true and correct copy of said document was emailed on December 19, 2013.

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I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 19, 2013, at San Francisco, California.

Janis Wooley