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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Conservatorship of E.B.

PUBLIC GUARDIAN OF CONTRA COSTA COUNTY,

Petitioner and Respondent,

v.

E.B.,

Objector and Appellant.

S261812

First District
Court of Appeal
No. A157280

Contra Costa County
Superior Court
No. P18-01826

ANSWER BRIEF ON THE MERITS

On Review from the Decision of the Court of Appeal,
First Appellate District, Division Five

Appeal from the Judgment of the Superior Court
of the State of California for Contra Costa County,
Honorable Susanne M. Fenstermacher, Judge

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Executive Director

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Conservatorship of E.B.	**S261812**
PUBLIC GUARDIAN OF CONTRA COSTA COUNTY, **Petitioner and Respondent,** **v.** **E.B.,** **Objector and Appellant.**	First District Court of Appeal No. A157280 Contra Costa County Superior Court No. P18-01826

ANSWER BRIEF ON THE MERITS

ISSUE PRESENTED

Does equal protection require that persons subject to a conservatorship under the Lanterman-Petris-Short (LPS) Act (Welf. & Inst. Code, § 5350) have the same right to invoke the statutory privilege not to testify as persons subject to involuntary commitments under Penal Code section 1026.5 after a finding of not guilty by reason of insanity?[1]

[1] All future statutory references are to the Welfare and Institutions Codes unless otherwise indicated.

SUMMARY OF ARGUMENT

"[T]he constitutional foundation underlying the [Fifth Amendment privilege against self-incrimination] is the respect a government – state or federal – must accord to the dignity and integrity of its citizens." (*Miranda v. Arizona* (1966) 384 U.S. 436, 460 (*Miranda*).) When the privilege is viewed through this lens, its relevance to civil commitment proceedings is self-evident, as "civil commitment to a mental hospital, despite its civil label, threatens a person's liberty and dignity on as massive a scale as that traditionally associated with criminal prosecutions." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 223 (*Roulet*).) Indeed, this Court recently recognized that "[t]he right not to testify in a proceeding where one is a defendant is a right that *could* meaningfully apply in any type of adversarial proceeding, though only in criminal cases is it constitutionally guaranteed." (*Hudec v. Superior Court* (2015) 60 Cal.4th 815, 832 (*Hudec*), emphasis in original.)

Our Legislature granted the right to refuse to testify to individuals found not guilty by reason of insanity facing extended civil commitment proceedings (NGIs) by virtue of Penal Code section 1026.5, subdivision (b)(7), which expressly incorporates all constitutional rights afforded criminal defendants into the extended insanity commitment scheme. (*Id*. at p. 832.) Since this Court in *Hudec* so construed Penal Code section 1026.5, subdivision (b)(7), appellate courts throughout the state have held that persons facing sexually violent predator (SVP) and

mentally disordered offender (MDO)[2] civil commitment proceedings are similarly situated to NGIs with respect to compelled testimony and therefore may have an equal protection right to refuse to testify as well. (See *People v. Flint* (2018) 22 Cal.App.5th 983, 990-991 (*Flint*).)

The LPS Act, which functions as "California's general civil commitment statute" (*In re Smith* (2008) 42 Cal.4th 1251, 1267 (*Smith*)), provides for the establishment of renewable one-year conservatorships for people unable to provide for their own basic needs for food, clothing, or shelter due to a mental disorder (§§ 5350 et seq.). The Legislature did not grant proposed LPS conservatees the right to refuse to testify. This case thus presents the question whether equal protection principles prohibit the agency prosecuting an LPS conservatorship petition from forcing the person named in the petition to testify as part of the government's case-in-chief. In other words, this Court must decide whether individuals facing LPS conservatorship proceedings are similarly situated to NGIs when it comes to the right not to be compelled to testify. If so, this Court must then determine whether the Public Guardian has met its burden under the strict scrutiny standard of establishing the state has a compelling interest that justifies this disparate treatment and that forced testimony is necessary to accomplish the purposes of the LPS Act. (See *Flint*, *supra*, 22 Cal.App.5th at pp. 989-990.)

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[2] The Legislature recently replaced the term "mentally disordered offender" with "offender with a mental health disorder" (OMHD). (See Pen. Code, § 2962, subd. (d)(3); Stats.2019, ch. 9 (A.B.46), § 7.) MDOs will thus be referred to as OMHDs.

This Court's decision will resolve a split of authority on this issue. In *Conservatorship of Bryan S.* (2019) 42 Cal.App.5th 190, 198 (*Bryan S.*), Division One of the First District Court of Appeal held that proposed LPS conservatees do not have an equal protection right to refuse to testify because they are not similarly situated to NGIs for this purpose. In this case, Division Five of the First District Court of Appeal disagreed with *Bryan S.* and concluded the two groups are similarly situated with respect to compelled testimony and the government has yet to justify the differential treatment accorded them by the Legislature. (*Conservatorship of E.B.* (2020) 45 Cal.App.5th 986, 988, 997-998 (*E.B.*).) Division Two of the First District Court of Appeal joined *E.B.*'s reasoning and holding in *Conservatorship of J.Y.* (2020) 49 Cal.App.5th 220, 223 (*J.Y.*), review granted August 19, 2020, S263044.

The Public Guardian asks this Court to follow *Bryan S.*, maintaining that "[t]he absence of a connection with the criminal justice system, among other dissimilarities, compels the conclusion that LPS conservatees and NGIs are not similarly situated with respect to the right to be free from compelled testimony." (Opening Brief on the Merits (OBM) 8-9.) "Even if they were," the Public Guardian continues, "there are compelling reasons to allow the State to compel a potential LPS conservatee to testify at conservatorship proceedings." (OBM 9.) The Public Guardian then cites the "'compelling need for truth'" in LPS conservatorship proceedings. (OBM 26, quoting *Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 550 (*Baber*).)

This Court should reject *Bryan S.* and the Public Guardian's arguments, which are grounded in too narrow an interpretation of the respective purposes behind LPS conservatorship and NGI proceedings without devoting sufficient attention to their parallel intents and effects. While LPS conservatorships are primarily intended to protect the well-being of the committed person (*Michael E.L. v. County of San Diego* (1986) 183 Cal.App.3d 515, 525 (*Michael E.L.*)) and NGI proceedings are primarily aimed at public protection (*People v. Lara* (2010) 48 Cal.4th 216, 228, fn. 18 (*Lara*)), both civil commitment schemes are mechanisms for providing involuntary treatment to individuals with mental disorders and may "assure in many cases an unbroken and indefinite period of state-sanctioned confinement." (*Roulet*, *supra*, 23 Cal.3d at p. 224; see also *People v. McIntyre* (1989) 209 Cal.App.3d 548, 553 (*McIntyre*).)

Bryan S. quoted this Court's decision in *Cramer v. Tyars* (1979) 23 Cal.3d 131, 137-138 (*Cramer*), for the proposition that "'[t]he extension of the privilege [not to testify] to an area outside the criminal justice system . . . would contravene both the language and purpose of the privilege.'" (*Bryan S., supra,* 42 Cal.App.5th at 197.) But this statement from *Cramer* cannot be reconciled with this Court's more recent pronouncements in *Hudec* that "[t]he right to not be compelled to testify against oneself is clearly and relevantly implicated when a person is called by the state to testify in a proceeding to recommit him or her" and "the right not to testify does *not* take its very meaning

from the criminal context[.]" (*Hudec*, *supra*, 60 Cal.5th at p. 830, quotation marks omitted and emphasis added.)

The appellate courts in this case and in *J.Y.* both understood that denying a proposed civil committee of any kind the right to refuse to testify implicates similar concerns of liberty, procedural fairness, and personal dignity. As the Court of Appeal below pointed out: "LPS conservatees may have a different criminal history than NGI's, [OMHDs], and SVP's, but at root, like those groups, they are committed against their will for mental health treatment – possibly for the rest of their lives." (*E.B.*, *supra*, 45 Cal.App.5th at p. 997.) Therefore, the Court of Appeal reasoned, "before they are asked to be agents of their own incarceration, the state should be required to justify its decision to treat LPS conservatees differently with respect to compelled testimony." (*Ibid.*, internal quotation marks omitted.)

The "compelling need for truth in conservatorship proceedings" identified by the Public Guardian (OBM 26) does not justify the unequal treatment afforded proposed LPS conservatees with respect to compelled testimony. As the Court of Appeal below explained: "This interest in an accurate verdict exists in all involuntary commitment schemes – indeed, it might be argued that the interest is even greater when the mental illness results in the person being a danger to others." (*E.B.*, *supra*, 45 Cal.App.5th at p. 996.)

"The proposed establishment of a conservatorship under the grave disability provisions of the LPS Act threatens a massive curtailment of liberty." (*Conservatorship of Ivey* (1986)

186 Cal.App.3d 1559, 1565.) In addition, the "'right to dignity'" is a core value protected by the LPS Act. (*Riese v. St. Mary's Hospital & Medical Center* (1987) 209 Cal.App.3d 1303, 1314 (*Riese*), quoting § 5325.1, subd. (b).) The LPS Act must also be read "to safeguard against the loss of . . . fundamental right[s] . . . whether by inadvertence, neglect, or paternalism." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1039.) Subjecting a person to involuntary inpatient treatment based on their compelled testimony over their express objection is paternalistic and a near total rejection of their dignity and personal autonomy. It is difficult to reconcile this coercive practice with the avowed aims of the LPS Act.

While the Legislature did not grant proposed LPS conservatees the right to be free from compelled testimony, the state has extended this right to NGIs. Given the state's unambiguous intention to protect the dignity and liberty interests of proposed LPS conservatees, equal protection principles cannot be construed to tolerate extending the right to refuse to testify to NGIs but not to proposed LPS conservatees. Whatever differences there may be between these two groups, they are similarly situated with respect to compelled testimony.

Accordingly, this Court should affirm the Court of Appeal's holding that (1) proposed LPS conservatees are similarly situated to NGIs with respect to the right not to be compelled to testify and (2) the Public Guardian has yet to justify this disparate treatment under the strict scrutiny standard.

STATEMENT OF THE CASE

On November 14, 2018, the Public Guardian filed a petition seeking appointment as the LPS conservator of E.B.'s person and estate (§§ 5350, 5352), alleging that he was gravely disabled in that he was unable to provide for his own basic needs for food, clothing, or shelter as a result of a mental health disorder (§ 5008, subd. (h)(1)(A)). (Clerk's Transcript (CT) 4-12.) The petition further sought imposition of special disabilities (§ 5357). (CT 5, 9-10.)

On May 8, 2019, E.B. filed a written motion objecting on equal protection and due process grounds to the Public Guardian calling him to testify as a witness against himself. (CT 49-50.) E.B.'s trial counsel orally argued this motion, and the trial court denied it. (Reporter's Transcript (RT) 11-12.)

The Public Guardian called three witnesses – including E.B. – that same day. (CT 58-59.) E.B. called no witnesses. (CT 60.) On May 9, 2019, the jury found that E.B. was gravely disabled. (CT 61-62.) The court imposed special disabilities depriving E.B. of the right to refuse or consent to treatment related to his grave disability and depriving him of the right to possess or own firearms (§ 5357). (CT 62; RT 155-156.) The court designated E.B.'s current placement – in a secure mental health rehabilitation center – as the least restrictive and most appropriate placement (§ 5358, subd. (c)). (Supplemental Clerk's Transcript (SCT) 5; CT 62; RT 156.) E.B. appealed from the conservatorship order. (CT 110.)

On February 27, 2020, the Court of Appeal issued a published decision affirming the judgment. (*E.B.*, *supra*, 45 Cal.App.5th 986.) The lead opinion held that "LPS conservatees are similarly situated with NGI's and with individuals subject to other involuntary civil commitments for purposes of the right against compelled testimony." (*Id*. at p. 988.) "Turning to the second prong of the equal protection analysis," the lead opinion further concluded that "the public guardian made no showing that [E.B.'s] compelled testimony was any more necessary in the proceeding to declare [E.B.] an LPS conservatee than it would have been in other types of civil commitment proceedings." (*Id*. at pp. 997-998.) Nevertheless, the Court of Appeal found the error harmless and affirmed the judgment. (*Id*. at pp. 998-999.)[3]

On June 24, 2020, this Court granted the Public Guardian's petition for review.

[3] Justice Burns filed a concurring opinion in which he fully joined the lead opinion's conclusion that "proposed LPS conservatees are similarly situated [to NGIs] for equal protection purposes" but wrote separately "to highlight relevant differences between the groups[.]" (*E.B.*, *supra*, 45 Cal.App.5th at p. 999 (conc. opn. of Burns, J.).)

STATEMENT OF FACTS

I. The Public Guardian's Case-in-Chief

A. Dr. Michael Levin

Dr. Michael Levin, a psychiatrist, testified as an expert for the Public Guardian. (RT 58, 63.) He met with E.B. one time a few days before his testimony, reviewed psychiatric records from E.B.'s current and past placements, and spoke to E.B.'s mother, temporary conservator, and treating psychiatrist. (RT 63-64.)

Dr. Levin diagnosed E.B. with schizophrenia. (RT 66-67, 79-80.) Psychiatric records Dr. Levin reviewed supported his diagnosis. (RT 69-70.)

E.B. was being treated with both antipsychotic drugs and a mood stabilizer. (RT 71-72.) Dr. Levin believed E.B. had "minimal" insight into his mental illness. (RT 72.) He noted that patients with limited insight tend to have difficulty cooperating with treatment. (RT 73.)

Dr. Levin opined that E.B. was gravely disabled because, as a result of his psychiatric illness, he did not have a viable housing plan. (RT 74-75, 78.) It was not clear to Dr. Levin whether E.B. would keep taking his medications. (RT 75.) In the past when E.B. was not in a treatment facility and not medication compliant he decompensated. (RT 77.)

B. E.B.

E.B. denied suffering from a mental illness other than a history of attention deficit disorder and a learning disability. (RT 90.) He took his medications when he needed them but did not want to take them when he did not believe he needed them. (RT

90.) E.B. testified he would remain medication compliant if not under a conservatorship and would get his medications from a pharmacy. (RT 94.)

E.B. was uncertain how he would find a place to live without a conservatorship. (RT 92-94.) He asked if he could "skip" or "pass" on questions about prior living arrangements. (RT 88.) He would look for a more "lenient" treatment program less prone to placing people in mental health facilities. (RT 94.) He planned to get a job to pay for his food and clothing. (RT 95.) E.B. last worked on and off from 2007 until 2011 at his father's automotive shop. (RT 95.) When E.B. lived in his apartment in Antioch, he was receiving Supplemental Security Income (SSI) disability benefit payments, which helped him meet his everyday expenses, including food, clothing, and shelter. (RT 100.)

C. James Grey

James Grey, a licensed therapist and deputy conservator, testified for the Public Guardian. (RT 102.) From February of 2016 through December of 2017, before Mr. Grey assumed his current position, he worked as E.B.'s case manager through the Concord Adult Mental Health Clinic. (RT 104.) In that prior role, Mr. Grey assisted E.B.'s effort to hold on to his supportive housing. (RT 104-105.) Mr. Grey set up psychiatric treatment appointments for E.B. and helped him with "the activities of daily living." (RT 105-106.) He also helped E.B. obtain SSI benefits. (RT 109.)

At that time, E.B. was "inconsistent" with his cooperation and medication compliance. (RT 106.) He often resisted

attending his mental health treatment appointments. (RT 107.) Consistent with his schizophrenia diagnosis, E.B. was "very paranoid, very guarded, easily agitated." (RT 106.) The county served as E.B.'s representative payee during this time period, and on multiple occasions E.B. did not cash the "personal needs checks" the county sent him out of his SSI money. (RT 109-110.) Mr. Grey once accompanied E.B. to the bank, and E.B. refused to cash his check because he believed the teller was judging him based on the check's origin. (RT 111.)

Mr. Grey acknowledged "there were times" E.B. was able to provide for his own food, clothing, and shelter, but, overall, E.B. was "very inconsistent" in this regard, and "more often than not" he required the assistance of a case manager to accomplish these ends. (RT 117.) The county provided E.B. with assistive services for housing and other basic needs, and he was eligible for county mental health services without a conservatorship. (118-120.)

Mr. Grey opined that E.B. took his medications "reluctantly" at his current placement. (RT 115.) He believed E.B. had "[n]o plans" if released from the board and care facility. (RT 115.)

ARGUMENT

I. Permitting the Public Guardian to Call E.B. as a Witness Against Himself over His Objection Violated His State and Federal Constitutional Equal Protection Rights

A. Introduction

Before trial, E.B. filed a written motion seeking an order from the trial court "prohibit[ing] [the Public Guardian] from calling him as a witness." (CT 49.) E.B. maintained he "would not testify unless compelled to do so" and objected "to being called as a witness by [the Public Guardian] as a violation of his Due Process and Equal Protection rights." (CT 49.) Citing *Hudec*, *supra*, 60 Cal.4th 815, in which this Court held that NGIs have a statutory right not to testify, E.B. argued that LPS conservatees were similarly situated to NGIs for the purposes of whether the government could compel a proposed civil committee's testimony during its case-in-chief. (CT 49.) He further contended that his equal protection claim found support in *People v. Curlee* (2015) 237 Cal.App.4th 709, 720-723 (*Curlee*), in which Division Four of the First District Court of Appeal found that persons facing SVP commitment proceedings were similarly situated to NGIs with respect to compelled testimony. (CT 50.) The trial court denied E.B.'s motion, reasoning an LPS conservatorship proceeding is civil in nature, and, therefore, "a proposed conservatee does not have a Fifth Amendment right to refuse to testify." (RT 11.)

While the trial court correctly cited *Baber*, *supra*, 153 Cal.App.3d at p. 550 in ruling the Fifth Amendment did not prohibit the Public Guardian from calling E.B. as a witness

against himself, E.B.'s equal protection objection was well-taken, and the trial court erred in denying it. Since *Hudec*, appellate courts throughout the state have uniformly held that individuals facing civil commitment proceedings under different frameworks that do not provide a statutory right to refuse to testify are similarly situated to NGIs and therefore may have an equal protection right not to testify as well. (See, e.g., *Curlee*, *supra*, 237 Cal.App.4th at pp. 720-723 [SVP]; *People v. Landau* (2016) 246 Cal.App.4th 850, 864-865 [SVP]; *People v. Field* (2016) 1 Cal.App.5th 174, 196-197 (*Field*) [SVP]; *Flint*, *supra*, 22 Cal.App.5th at pp. 992-993 [SVP]; *People v. Dunley* (2016) 247 Cal.App.4th 1438, 1450, 1453-1454, fn. 14 [OMHD]; *People v. Alsafar* (2017) 8 Cal.App.5th 880, 887-888 [OMHD].) No appellate court has reached a contrary conclusion in the SVP or OMHD context.

E.B. asks this Court to follow the lead of the above-cited cases and hold that LPS conservatees – like SVPs and OMHDs – are similarly situated to NGIs for the purpose of determining whether the government may compel the testimony of a person it seeks to civilly commit. This Court should endorse the reasoning of the Court of Appeal below – and of *J.Y.*, *supra*, 49 Cal.App.5th 220 – and disapprove of *Bryan S., supra*, 42 Cal.App.5th 190.

As this Court recently observed in the NGI context: "'The right to not be compelled to testify against oneself is clearly and relevantly implicated when a person is called by the state to testify in a proceeding to recommit him or her even if what is said on the witness stand is not per se incriminating.'" (*Hudec*, *supra*,

60 Cal.5th at p. 830, quoting *People v. Haynie* (2004) 116 Cal.App.4th 1224, 1203 (*Haynie*).) There is no principled basis for concluding this statement does not apply with equal force to LPS conservatorship proceedings. Both LPS and NGI proceedings generally result in "civil commitment to a mental hospital," which, "despite its civil label, threatens a person's liberty and dignity on as massive a scale as that traditionally associated with criminal prosecutions." (*Roulet*, *supra*, 23 Cal.3d 219 at p. 223.) The two groups, therefore, are similarly situated with respect to compelled testimony.

This Court should further find that the Public Guardian has yet to justify this disparate treatment under the strict scrutiny test that applies to E.B.'s equal protection claim. (See, e.g., *People v. McKee* (2010) 47 Cal.4th 1172, 1209-1211 (*McKee I*.) Therefore, unless and until the Public Guardian – or another governmental agency in another case – demonstrates that compelled testimony is necessary to accomplish the purposes of the LPS Act, this practice must come to an end statewide.

B. Overview of LPS Conservatorships

The LPS Act, which serves as the state's "general civil commitment statute" (*Smith*, *supra*, 42 Cal.4th at p. 1267), "provides for the prompt evaluation and treatment of mentally disordered persons, developmentally disabled persons and persons impaired by chronic alcoholism, while protecting public safety and safeguarding individual rights through judicial review" (*In re Qawi* (2004) 32 Cal.4th 1, 16). Hailed as a "Magna Carta for the Mentally Ill that established the most progressive

. . . commitment procedures in the country" (*id.* at p. 17, internal quotation marks omitted), "[t]he LPS Act must be construed to promote the intent of the Legislature, among other things, to end the inappropriate, indefinite and involuntary commitment of mentally disordered persons, to provide prompt evaluation and treatment and to protect mentally disordered persons (§ 5001)." (*Michael E.L.*, *supra*, 183 Cal.App.3d at p. 525.) One of the most fundamental rights granted LPS conservatees is the "'right to dignity.'" (*Riese*, *supra*, 209 Cal.App.3d at p. 1314, quoting § 5325.1, subd. (b).)

With these principles in mind, "[b]efore a person may be found to be gravely disabled and subject to a year-long confinement, the LPS Act provides for a carefully calibrated series of temporary detentions for evaluation and treatment." (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 541 (*Ben C.*).) When the county exhausts the temporary detention options and seeks to establish a renewable one-year conservatorship of the person, the petition must allege that the person "is gravely disabled as a result of a mental health disorder." (§ 5350.) As pertinent to this case, the LPS Act defines "gravely disabled" as "a condition in which a person, as a result of a mental health disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter." (§ 5008, subd. (h)(1)(A).)[4]

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[4] As will be discussed later in this brief, a person may also be deemed "gravely disabled" if, after having been found incompetent to stand trial on certain felony charges, it is determined he or she represents a substantial danger of physical

"Because of the important liberty interests at stake, correspondingly powerful safeguards protect against erroneous findings. The proposed conservatee is entitled to demand a jury trial on the issue of his or her grave disability, and has a right to counsel at trial, appointed if necessary. (§§ 5350, 5365.) The party seeking imposition of the conservatorship must prove the proposed conservatee's grave disability beyond a reasonable doubt and the verdict must be issued by a unanimous jury." (*Ben C.*, *supra*, 40 Cal.4th at p. 541, quoting *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1009 (*Susan T.*), internal quotation marks omitted.) "If a person is found gravely disabled and a conservatorship is established, . . . [t]he court must separately determine the duties and powers of the conservator, the disabilities imposed on the conservatee, and the level of placement appropriate for the conservatee." (*Conservatorship of Christopher A.* (2006) 139 Cal.App.4th 604, 612.)

C. Governing Equal Protection Principles

The equal protection clauses of the federal and state constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a)) provide that all persons similarly situated should generally be treated alike. (See, e.g., *In re Eric J.* (1979) 25 Cal.3d 522, 531.) "The scope and effect of the two clauses is the same." (*In re Evans* (1996) 49 Cal.App.4th 1263, 1270, citing *Brown v. Merlo* (1973) 8 Cal.3d 855, 861.)

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harm to others as a result of a mental disorder. (§§ 5008, subd. (h)(1)(B), 5350, subd. (b)(2).)

An equal protection analysis must begin with a determination whether two groups subject to disparate treatment are similarly situated to one another. (*In re Lemanuel C.* (2007) 41 Cal.4th 33, 47.) "This initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (*People v. Brown* (2012) 54 Cal.4th 314, 328, internal quotation marks omitted.) "In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws." (*McKee I*, *supra*, 47 Cal.4th at p. 1202.)

The next question is whether the state has adopted a classification that impermissibly affects similarly situated groups in an unequal manner. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." (*Baxtrom v. Herold* (1966) 383 U.S. 107, 111.) "When the disparity implicates a suspect class or a fundamental right, strict scrutiny applies." (*Flint*, *supra*, 22 Cal.App.5th at p. 990.) "Under the strict scrutiny test, the state has the burden of establishing it has a compelling interest that justifies the law and that the distinctions, or disparate treatment, made by that law are necessary to further its purpose." (*Field*, *supra*, 1 Cal.App.5th at p. 197.)

"On appeal, the conclusion of a trial court on a pure question of law is subject to independent review[.]" (*People v. Mickey* (1991) 54 Cal.3d 612, 649; see also *Shoemaker v. Harris* (2013) 214 Cal.App.4th 1210, 1223 [applying the de novo standard of review to an equal protection challenge].)

D. NGIs Have a Statutory Right Not to Testify

"In a *criminal* matter a defendant has an absolute right not to be called as a witness and not to testify." (*Cramer*, *supra*, 23 Cal.3d at p. 137, emphasis in original.) "The right not to testify in a proceeding where one is a defendant is a right that *could* meaningfully apply in any type of adversarial proceeding, though only in criminal cases is it constitutionally guaranteed." (*Hudec*, *supra*, 60 Cal.4th at p. 830, emphasis in original.) A finding that the Fifth Amendment right not to testify does not apply to civil commitment proceedings does not end the inquiry into whether that right might attach to some or all civil commitment proceedings on statutory or other constitutional grounds.

In *Hudec*, this Court held that individuals found not guilty by reason of insanity have a statutory right to refuse to testify at extended commitment proceedings conducted pursuant to Penal Code section 1026.5, subdivision (b). (*Hudec*, *supra*, 60 Cal.4th at p. 818.) *Hudec* reached this conclusion by interpreting subdivision (b)(7) of Penal Code section 1026.5, which provides, in pertinent part: "'The person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees.'" (*Id*. at p. 826, quoting

Pen. Code, § 1026.5, subd. (b)(7).) "By its terms," this Court reasoned, Penal Code "section 1026.5(b)(7) provides that NGI committees facing a commitment extension hearing enjoy the trial rights constitutionally guaranteed to criminal defendants, which include the right to refuse to testify in the People's case-in-chief. Recognizing the application of that right in the commitment extension context does not result in any absurd consequence, nor have we found any other sufficient ground to depart from the statutory language in applying the right not to testify to hearings under [Penal Code] section 1026.5." (*Hudec*, *supra*, 60 Cal.4th at p. 832.) Moreover, *Hudec* reached this result even though "trial accuracy considerations arguably support compelling a committee's testimony[.]" (*Id*. at p. 830.)

E. Pending Further Justification, SVPs and OMHDs Have an Equal Protection Right Not to Testify

Not long after this Court decided *Hudec*, Division Four of the First District Court of Appeal held that individuals facing SVP commitment proceedings – pursuant to a framework that does not provide a statutory right to refuse to testify – are similarly situated to NGIs and therefore may have an equal protection right not to testify as well. (*Curlee*, *supra*, 237 Cal.App.4th at pp. 720-723.) At that time, case law held that the Fifth Amendment right to refuse to testify did not apply to SVP commitment proceedings due to their civil nature. (*Id*. at p. 713, citing *People v. Leonard* (2000) 78 Cal.App.4th 776, 789-793 (*Leonard*).) The SVP in *Curlee* did not challenge this aspect of *Leonard*'s holding. Rather, he argued that SVPs were similarly

situated to NGIs such that "a regime under which NGI's may refuse to testify at their commitment hearings but SVP's may not would . . . raise equal protection problems." (*Id*. at p. 713.) The Court of Appeal agreed, substantially relying on *McKee I*, an SVP appeal in which this Court found NGIs and SVPs similarly situated for the purpose of determining whether subjecting only the latter to indeterminate commitments in all cases amounted to an equal protection violation. (*Id*. at pp. 717-720.)

In *McKee I*, this Court found the two groups similarly situated because both populations involved individuals who "'have been civilly committed rather than criminally penalized because of their severe mental disorder[.]'" (*Id*. at p. 718, quoting *McKee I*, *supra*, 47 Cal.4th at p. 1207.) *Curlee* rejected the Attorney General's contention that "SVP's are not similarly situated to NGI's for purposes of whether they may be called as witnesses for the prosecution because an SVP is initially evaluated while in the custody of the Department of Corrections and Rehabilitation (6601, subd. (a)), while the NGI has been committed to the State Department of State Hospitals for treatment since having been found insane at the time of the offense (Pen. Code, §§ 1026, subd. (a), 1026.5, subd. (a)(1))." (*Curlee*, *supra*, 237 Cal.App.4th at p. 720.) The Attorney General insisted this distinction was significant because, unlike in the case of SVPs, "the state hospital has 'a wealth of information' on an NGI and is in a good position to determine whether the person needs further treatment, without the need for the NGI's testimony at trial." (*Ibid*.) *Curlee* found no support for this

contention on the record before it, noting that it was "impossible . . . to determine whether the People in fact are likely to have more information on an NGI's mental state than on that of an SVP." (*Id*. at p. 721.)

Having found NGIs and SVPs similarly situated when it comes to the right to refuse to testify, *Curlee* next examined whether the state could justify the two groups' disparate treatment. (*Id*. at pp. 721-722.) Initially, *Curlee* once again found there was an insufficient basis to establish that "hospital records are more available in an NGI extension hearing than in an SVP commitment proceeding[.]" (*Id*. at p. 721.) *Curlee* then rejected the state's reliance on a number of factors that ultimately justified imposition of a mandatory indeterminate commitment for SVPs (and not all NGIs), including: "evidence SVP's were more likely to commit new sexual offenses when released than other civil committees; victims of sex offenses suffered unique and, in general, greater trauma, than victims of other offenses; and SVP's were less likely to participate in treatment and more likely to be deceptive and manipulative than other groups." (*Ibid*., discussing *People v. McKee* (2012) 207 Cal.App.4th 1325, 1340-1346 (*McKee II*).) These considerations, *Curlee* concluded, failed to "show that that an SVP's *testimony* is more necessary than that of NGI's." (*Curlee*, *supra*, 237 Cal.App.4th at p. 721, emphasis in original.) *Curlee* did not "conclude the People cannot meet their burden to show the testimony of an NGI is less necessary than that of an SVP." (*Id* at p. 722.) Instead, the Court of Appeal "merely conclude[d] that

they have not yet done so." (*Ibid.*) Therefore, *Curlee* determined "the proper remedy [was] to remand the matter to the trial court to conduct an evidentiary hearing to allow the People to make an appropriate showing." (*Ibid.*)

Curlee is not an outlier. Since then, every published decision analyzing whether SVPs and OMHDs should have an equal protection right not to testify at commitment proceedings has held that such individuals are similarly situated to NGIs with respect to this right and that the state has yet to justify the disparate treatment afforded them. (See *Flint*, *supra*, 22 Cal.App.5th at pp. 990-991 [identifying these cases].)

Although *Curlee* did not specify that it was applying the strict scrutiny standard of review to the equal protection claim before it, in *Flint*, the same Court of Appeal that had decided *Curlee* subsequently clarified that strict scrutiny was the proper test because "'an SVP's testimony could have a direct impact on the SVP's liberty interest, namely the prosecution could use the testimony to prove that he or she should remain committed.'" (*Flint*, *supra*, 22 Cal.App.5th at pp. 992-993, quoting *Field*, *supra*, 1 Cal.App.5th at p. 196.)

F. LPS Conservatees Are Similarly Situated to NGIs for the Purpose of Determining Whether the Government May Compel the Testimony of a Person It Seeks to Civilly Commit

1. The Absence of an Absolute Fifth Amendment Right to Refuse to Testify Does Not Defeat E.B.'s Equal Protection Claim

No provision of the LPS Act grants a prospective conservatee the absolute right to refuse to testify, nor does the constitutional right not to testify that applies to criminal proceedings apply to conservatorship trials by virtue of the Due Process Clause. (*Baber*, *supra*, 153 Cal.App.3d at p. 550.)[5] E.B. does not assert that *Baber* was wrongly decided. Even so, *Baber* does not preclude this Court from finding prospective LPS conservatees have an equal protection right shielding them from compelled testimony. As this Court has noted: "Due process and equal protection protect different constitutional interests: due process affords individuals a baseline of substantive and procedural rights, whereas equal protection safeguards against the arbitrary denial of benefits to a certain defined class of individuals, even when the due process clause does not require that such benefits be offered." (*McKee I*, *supra*, 47 Cal.4th at p. 1207.) The fact that *Leonard* held prospective SVPs do not have an independent constitutional right to refuse to testify did not stop *Curlee* and its progeny from finding an equal protection right

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[5] "This holding does not, in any way, intimate that a prospective conservatee will be compelled to answer questions which may incriminate him in a criminal matter." (*Baber*, *supra*, 153 Cal.App.3d at p. 550.)

not to testify in light of *Hudec*. *Baber* is merely the *Leonard* of E.B.'s equal protection argument.

Proposed LPS conservatees and NGIs are similarly situated with respect to the right not to testify because: (1) LPS conservatorships and extended insanity commitments are both premised on the need for involuntary mental health treatment; (2) LPS conservatees and NGIs both face the prospect of lifetime commitments; (3) neither an LPS conservatorship nor an extended insanity commitment is predicated on a prior criminal conviction; (4) LPS conservatees and NGIs generally suffer from the same mental disorders; (5) the government's interest in ascertaining the true state of a proposed LPS conservatee's disability does not meaningfully distinguish LPS conservatorship proceedings from NGI proceedings; and (6) the right not to testify protects more than self-incrimination and is equally relevant to both LPS conservatorship and NGI proceedings.

2. LPS Conservatorships and Extended Insanity Commitments Are Both Premised on the Need for Involuntary Mental Health Treatment

To establish prospective LPS conservatees have an equal protection right not to testify, E.B. must first demonstrate that LPS conservatees and NGIs are similarly situated for this particular purpose. He need not establish they are similarly situated for all purposes. (See, e.g., *People v. Brown*, *supra*, 54 Cal.4th at p. 328.) E.B. concedes that LPS conservatees and NGIs are not similarly situated for certain purposes. For example, given that "[t]he primary purpose of confining a person

[under an insanity commitment] is public protection" (*Lara*, *supra*, 48 Cal.4th at p. 228, fn. 18) and the primary purpose of confining someone under an LPS Act conservatorship is the well-being of the individual (*Michael E.L.*, *supra*, 183 Cal.App.3d at p. 525), there is no equal protection violation to be found in the disparate treatment accorded them in terms of the initial length of confinement. (See *McKee I*, *supra*, 47 Cal.4th at p. 1209, fn. 11 [proposed LPS conservatees and SVPs are not similarly situated in terms of confinement length and procedures for release].)[6]

However, when it comes to the right not to be forced to testify as a witness against one's self on behalf of the government agency seeking to subject the person to a potentially lifetime commitment and involuntary treatment as a result of an underlying mental disorder, this right implicates similar concerns of liberty, procedural fairness, and personal dignity in both contexts. In this regard, LPS conservatees and NGIs are indeed similarly situated. Finding two groups similarly situated in one respect but not in another would break no new ground. (See, e.g., *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1156, 1163 [finding that OMHDs and SVPs are similarly situated for one purpose (mental disorder definition) but not for another (treatment)].)

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[6] While all LPS conservatorships are initially for one year in duration (§ 5361), the length of an initial insanity commitment is determined by reference to the maximum term of imprisonment that could have been imposed had the person been found guilty (Pen. Code, § 1026.5, subd. (a)), which in a felony case will always exceed one year and can amount to a life commitment from the outset.

Moreover, while the primary purpose of an extended insanity commitment is protection of the public, this Court has also made it clear that NGI commitments are "for purposes of *treatment*, not punishment." (*In re Moye* (1978) 22 Cal.3d 457, 466, emphasis in original; accord *People v. Martinez* (2016) 246 Cal.App.4th 1226, 1238 (*Martinez*) ["The petition to extend an NGI's commitment is civil in nature and directed toward treating the NGI, not punishing him or her"]; see also Pen. Code, § 1026.5, subd. (b)(11) ["Any commitment under this subdivision places an affirmative obligation on the treatment facility to provide treatment for the underlying causes of the person's mental disorder"].) At the same time, the LPS Act was partially enacted to "guarantee and protect public safety." (§ 5001, subd. (c).) Thus, as Division Six of the Second District Court of Appeal observed when evaluating whether proposed LPS conservatees should be afforded the same jury trial right protections granted to individuals facing OMHD and NGI extended commitment proceedings, "[OMHD], NGI, and LPS proceedings have the same underlying goal – protecting the public and treating severely mentally ill persons." (*Conservatorship of Heather W. (*2016) 245 Cal.App.4th 378, 383.) The key point of similarity among proposed LPS conservatees in terms of legislative intent is that both forms of civil commitment are motivated by the need for involuntary treatment.

3. LPS Conservatees and NGIs Both Face the Prospect of Lifetime Commitments

As pertinent to this case, the LPS Act defines "gravely disabled" as "a condition in which a person, as a result of a

mental health disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter." (§ 5008, subd. (h)(1)(A).) Under the LPS Act, "the person who is found to be gravely disabled can be involuntarily confined in a mental hospital for up to a year by his or her conservator, with the possibility of additional year-long extensions." (*Roulet*, *supra*, 23 Cal.3d at p. 224.) "In effect, these statutes assure in many cases an unbroken and indefinite period of state-sanctioned confinement." (*Ibid*.; see, e.g., *J.Y.*, *supra*, 49 Cal.App.5th at pp. 223-224 [where the Public Guardian was reappointed annually as J.Y.'s conservator from 2005 through 2019].) Even where commitment is sought for the person's "own good" under a statute like the LPS Act, "'the fact remains that it is incarceration. The rehabilitative goals of the system are admirable, but they do not change the drastic nature of the action taken.'" (*Roulet*, *supra*, 23 Cal.3d. at p. 225, quoting *Breed v. Jones* (1975) 421 U.S. 519, 530, fn. 12, some internal quotation marks omitted.) Furthermore, "[t]he gravely disabled person for whom a conservatorship has been established faces the loss of many other liberties in addition to the loss of his or her freedom from physical restraint." (*Roulet*, *supra*, 23 Cal.3d at p. 227 [enumerating limitations on the right to engage in common societal transactions]; see also § 5357 [listing the special disabilities that may be imposed].)

An individual found not guilty by reason of insanity of a felony may not be committed to a state hospital for a period of time any greater than "the longest term of imprisonment which could have been imposed for the offense or offenses for which the

person was convicted." (Pen. Code, § 1026.5, subd. (a)(1).) However, such a person's commitment may be extended by two years if he or she "by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others." (Pen. Code, § 1026.5, subds. (b)(1) & (b)(8).) Because of the possibility of renewable two-year extensions, a person subject to an NGI commitment, like an LPS conservatee, may undergo "an unbroken and indefinite period of state-sanctioned confinement." (*Roulet*, *supra*, 23 Cal.3d at p. 224; see also *People v. Lomboy* (1981) 116 Cal.App.3d 67 and *McIntyre*, *supra*, 209 Cal.App.3d 548 [both finding error in the trial court's failure to inform a person entering an insanity plea of the prospect of a lifetime commitment due to the renewable two-year extensions authorized by statute].)

The foregoing principles establish that LPS conservatees and NGIs are both subject to involuntary confinement due to their mental disorders and that such confinement can be extended indefinitely if the state proves the existence of dangers to self or others as a result of their mental disorders.

4. Neither an LPS Conservatorship nor an Extended Insanity Commitment is Predicated on a Prior Criminal Conviction

Although an extended insanity commitment can invariably be traced back to the filing of criminal charges, the commitment scheme is not predicated on a criminal conviction. To the contrary, a person found not guilty by reason of insanity is acquitted of the offense or offenses of which he or she is accused.

(*Estate of Ladd* (1979) 91 Cal.App.3d 219, 225-226 [insanity finding constitutes an "acquittal"]; see also *People v. Morrison* (1984) 162 Cal.App.3d 995, 998 ["not guilty by reason of insanity . . . finding is not a conviction"].) Thus, when the state files an extended insanity commitment petition, the person does not come before the trial court as a convicted felon, nor must the state prove any elements of a criminal offense to obtain an extended insanity commitment. In this regard, NGIs and proposed LPS conservatees are similarly situated, too.

5. LPS Conservatees and NGIs Generally Suffer from the Same Mental Disorders

LPS conservatees and NGIs generally suffer from the same types of mental disorders. The LPS Act does not define the types of mental disorders that qualify a person for a conservatorship, but case law establishes that only those conditions listed by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders can form the basis for a grave disability finding. (*People v. Karriker* (2007) 149 Cal.App.4th 763, 775, fn. 4 (*Karriker*).) According to the "Mental Health (LPS) Conservatorships" section of the "Conservatorship" page on the official California Courts website:

> The most common mental illnesses [for which LPS conservatorships are established] are serious, biological brain disorders, like:
>
> - Schizophrenia,
> - Bipolar disorder (manic depression),
> - Schizo-affective disorder,
> - Clinical depression, and
> - Obsessive-compulsive disorder.

> LPS conservatorships are not for people with organic brain disorders, brain trauma, developmental disability, alcohol or drug addiction, or dementia, unless they also have one of the serious mental illnesses listed in the DSM.

(https://www.courts.ca.gov/selfhelp-conservatorship.htm [last retrieved on December 4, 2020].)

Similarly, although the Penal Code statutes setting forth the insanity defense and the extended insanity commitment scheme do not define the mental disorders that qualify individuals for insanity commitments, California Department of Mental Health "statistics from 2005 through 2010 show that about . . . 90 percent of NGI's have major mental illnesses, such as schizophrenia, bipolar disorder, major depression, or another psychosis." (*McKee II*, *supra*, 207 Cal.App.4th at p. 1344.) Additionally, an initial insanity commitment may not be premised "solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances." (Pen. Code, § 29.8.)

Thus, LPS conservatees and NGIs share the most common qualifying mental disorders and, by definition, do not suffer from some of the same conditions either.

6. The Government's Interest in Ascertaining the True State of a Proposed LPS Conservatee's Disability Does Not Meaningfully Distinguish LPS Conservatorship Proceedings from NGI Proceedings

In denying E.B.'s motion seeking an order prohibiting the Public Guardian from compelling him to testify, the trial court

explained that, pursuant to *Baber*, "the proposed conservatee's relevant physical and mental characteristics are significant and must be something that the trier of fact considers, particularly in view of the fact of the public-interest concerns and the liberty issues at stake for the proposed conservatee." (RT 11-12.) Consistent with the trial court's ruling, *Baber* cited the "compelling need for truth in conservatorship proceedings" to reach its "conclusion that a proposed conservatee cannot refuse to testify at his own conservatorship trial." (*Baber*, *supra*, 153 Cal.App.3d at p. 550.)

"[T]he importance of ascertaining the true state of [the person's] disability in conservatorship proceedings" (*id*. at p. 549) by subjecting the proposed conservatee to adversarial questioning does not meaningfully distinguish proposed LPS conservatees from individuals subject to civil commitment under other statutory frameworks. Certainly, extended insanity commitment proceedings aimed at protecting society from dangerous individuals must be equally, if not more, attuned to identifying the true state of the committed person's mental disability before subjecting the person to involuntary confinement. In fact, our judicial system "assumes that adversarial testing will ultimately advance the public interest in truth and fairness." (*Polk County v. Dodson* (1981) 454 U.S. 312, 318.) And, yet, dedication to the pursuit of truth did not stop the Legislature from granting NGIs the right not to testify or this Court in *Hudec* from finding this right applicable to extended insanity commitment proceedings. (See *Hudec*, *supra*, 60 Cal.4th at p. 830 ["Granting that trial

accuracy considerations arguably support compelling a committee's testimony, other considerations could be viewed as militating against such compulsion"].) Nor did the importance of discerning the true state of the person's mind keep *Curlee* and its progeny from finding the right not to testify applicable to individuals facing SVP and OMHD commitment proceedings via the same equal protection principles E.B. has invoked in this case. As the Court of Appeal below observed: "This interest in an accurate verdict exists in all involuntary commitment schemes – indeed, it might be argued that the interest is even greater when the mental illness results in the person being a danger to others." (*E.B.*, *supra*, 45 Cal.App.5th at p. 996.)

7. The Right Not to Testify Protects More than Self-Incrimination and Is Equally Relevant to Both LPS Conservatorship and NGI Proceedings

To resolve the instant equal protection claim, it is critical to look at the purpose underlying the right not to testify under compulsion. In *Hudec*, this Court noted that by extending rights applicable to criminal proceedings to NGIs, including the right not to testify, the Legislature must have been motivated by an "effort to prescribe procedures fair to both the [NGI] and the People." (*Hudec*, *supra*, 60 Cal.4th at p. 830.) *Hudec* highlighted one such consideration of fairness in particular: "'our sense of fair play which dictates "a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load."'" (*Ibid.*, quoting *Murphy v. Waterfront Comm'n.* (1964) 378 U.S. 52, 55.) Furthermore, although this Court

acknowledged that granting NGIs the right to refuse to testify "will deprive the prosecution in some cases of desired evidence," doing so "will not as a general matter preclude [Penal Code] section 1026.5 extensions." (*Hudec*, *supra*, 60 Cal.4th at p.829.)

Hudec also emphasized that "'[t]he right to not be compelled to testify against oneself is clearly and relevantly implicated when a person is called by the state to testify in a proceeding to recommit him or her even if what is said on the witness stand is not per se incriminating.'" (*Id*. at p. 830, quoting *Haynie*, *supra*, 116 Cal.App.4th at p. 1230.) In fact, the United States Supreme Court has identified important concerns underlying the right not to testify above and beyond forbidding forced incrimination. For example, "'[e]xcessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass [a defendant] to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.'" (*Griffin v. California* (1965) 380 U.S. 609, 613 (*Griffin*), quoting *Wilson v. United States* (1893) 149 U.S. 60, 66 (*Wilson*).)[7] Importantly, "the constitutional foundation underlying the privilege is the respect a government – state or federal – must accord to the dignity and integrity of its citizens." (*Miranda*, *supra*, 384 U.S. at p. 460.)

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[7] Although *Wilson* involved a statutory right not to testify, *Griffin* left no doubt that "the spirit of the Self-Incrimination Clause is reflected" in *Wilson*'s observations.

Proposed LPS conservatees and NGIs are similarly situated with respect to the purpose behind the right to refuse to testify because: (1) both are entitled to fair procedures; (2) requiring the government to justify a commitment by carrying the entire evidentiary load would strike a fair state-individual balance; (3) banning compelled testimony would not as a general matter preclude commitments under either framework; (4) the right is clearly and relevantly implicated in both contexts irrespective of whether the person's testimony would be incriminating; and (5) disallowing the practice of compelled testimony in both settings would prevent undue embarrassment or discomfort, thereby safeguarding the dignity interests of the individuals subject to involuntary commitment, who should not be made unwilling agents of their own incarceration. (*Hudec*, *supra*, 60 Cal.4th at pp. 829-830; *Griffin*, *supra*, 380 U.S. at p. 613; *Miranda*, *supra*, 384 U.S. at p. 460.)

8. *Bryan S.* Was Wrongly Decided

In *Bryan S.*, Division One of the First District Court of Appeal rejected the equal protection argument E.B. advances here by finding proposed LPS conservatees are not similarly situated to NGIs, SVPs, and OMHDs with respect to the right not to testify. (*Bryan S.*, *supra*, 42 Cal.App.5th at pp. 196-198.) For the reasons that follow, *Bryan S.* was wrongly decided.

After acknowledging that LPS conservatorships are similar to these other types of civil commitment in that they all involve involuntary commitment as a result of an individual's mental health, *Bryan S.* emphasized:

> But LPS Act conservatees, unlike those facing NGI, SVP, or [OMHD] commitment proceedings, need not have been found to have committed a crime or be a danger to others. ([Citation omitted.]) As a result, there are far more placement options for conservatees, and these options include noninstitutional settings. Courts must determine the least restrictive and most appropriate placement for conservatees, which includes placing them with family or friends. (§ 5358, subds. (a)(1)(A), (c)(1).)

(*Bryan S.*, *supra*, 42 Cal.App.5th at pp. 196-197.)

Although no statute in the NGI commitment scheme uses the phrase "least restrictive and most appropriate placement," NGIs, too, must be so placed and may reside in a noninstitutional setting if appropriate. First, in defining the committing court's placement options following an insanity finding, Penal Code section 1026, subdivision (a), provides:

> If the verdict or finding is that the defendant was insane at the time the offense was committed, the court, unless it appears to the court that the sanity of the defendant has been recovered fully, shall direct that the defendant be committed to the State Department of State Hospitals for the care and treatment of the mentally disordered or any other appropriate public or private treatment facility approved by the community program director, or the court may order the defendant placed on outpatient status pursuant to Title 15 (commencing with Section 1600) of Part 2.

(Pen. Code, § 1026, subd. (a).) Thus, from the outset, the law contemplates no inpatient placement at all for NGIs who have recovered their sanity or who are eligible for outpatient status and authorizes placement at a treatment facility less restrictive than the state hospital if "appropriate."

Second, if an NGI is placed at the state hospital or another less restrictive, appropriate treatment facility, he or she must be conditionally released for supervised outpatient treatment if the person proves he or she "will not be a danger to the health and safety of others, due to mental defect, disease, or disorder, while under supervision and treatment in the community[.]" (Pen. Code, § 1026.2, subd. (e).) The right to outpatient treatment applies not only to insanity acquittees serving their initial commitments but also to NGIs serving extended commitments. (See Pen. Code, § 1026.5, subd. (b)(9).)

In addition, Penal Code section 1026.2, subdivision (h), reads, in pertinent part:

> During the one year of supervision and treatment, if the community program director is of the opinion that the person is no longer a danger to the health and safety of others due to a mental defect, disease, or disorder, the community program director *shall* submit a report of his or her opinion and recommendations to the committing court, the prosecuting attorney, and the attorney for the person. The court *shall* then set and hold a trial to determine whether restoration of sanity and unconditional release should be granted.

(Pen. Code, § 1026.2, subd. (h), emphasis added.) Under this provision, the court must hold a hearing and must release the person unconditionally if it – or a jury – agrees with the conditional release program's assessment that even outpatient treatment is no longer necessary. (*Ibid*.) "[O]nce an insanity acquittee demonstrates he or she is no longer mentally ill *or* dangerous, the patient is entitled to release." (*People v.*

McDonough (2011) 196 Cal.App.4th 1472, 1493, emphasis in original.)

Thus, when the foregoing statutes are read in concert, it is clear that NGIs – like LPS conservatees – have a right to placement in the least restrictive and most appropriate placement. In finding otherwise, *Bryan S.* erred.

E.B. concedes that the LPS conservatee is unique among persons subject to civil commitment in that he or she, as *Bryan S.* points out, may be placed with family or friends. (*Bryan S.*, *supra*, 42 Cal.App.5th at pp. 196-197.) However, this distinction is not enough to render individuals facing commitment under the two frameworks not similarly situated with respect to compelled testimony. The LPS Act still authorizes inpatient placements just as restrictive as NGI commitments, namely in the state hospital and other psychiatric facilities. (See § 5358, subd. (a)(2).) As this Court has observed, even where commitment is sought for the person's "own good" under a statute like the LPS Act, "the fact remains that it is incarceration." (*Roulet*, *supra*, 23 Cal.3d at p. 225, internal quotation marks omitted.) When analyzing the similarly situated prong of an equal protection claim, courts do not, as *Bryan S.* did, compare two groups by weighing the least restrictive potential consequence one group faces (home confinement for LPS conservatees) against the most restrictive consequence the other group faces (confinement to a state mental hospital for NGIs). Here, both groups are subject to the same potential maximum consequence – a state hospital

commitment – if civilly committed.[8] That shared risk of a lifetime commitment to a psychiatric facility is enough to satisfy the similarly situated requirement.

Bryan S. also found great significance in the fact that LPS conservatorship proceedings bear "'no similarity'" to "'the aims and objectives . . . of the criminal law.'" (*Bryan S.*, *supra*, 42 Cal.App.5th at p. 197, quoting *Susan T.*, *supra*, 8 Cal.4th at p. 1015.) The Court of Appeal identified further support for the relevance of this distinction by citing *Ben C.* for the proposition that, "because criminal defendants and LPS Act conservatees are not similarly situated, [there is] no constitutional right to independent review in [an] appeal from imposition of LPS Act conservatorship where appointed counsel finds no arguable issues[.]" (*Bryan S., supra,* 42 Cal.App.5th at p. 197, citing *Ben C.*, *supra*, 40 Cal.4th at p. 543.)

But the issue here is not whether LPS conservatees are similarly situated to criminal defendants when it comes to the right to refuse to testify; it is whether they are similarly situated to NGIs for this purpose. The fact that LPS conservatees are not entitled to *Wende*[9] review provides no support for concluding proposed LPS conservatees and NGIs are not similarly situated to one another in this regard. In fact, in the years since this Court decided *Ben C.*, appellate courts throughout the state have all found that because NGI, OMHD, and SVP civil commitment

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[8] An LPS conservatorship can actually be more restrictive than an insanity commitment if a conservatee is committed to the state hospital and an NGI is granted outpatient status.

[9] *People v. Wende* (1979) 25 Cal.3d 436.

proceedings are more like LPS conservatorship proceedings than criminal proceedings, there is no right to *Wende* review in appeals from those commitments either. (See *Martinez*, *supra*, 246 Cal.App.4th at p. 1238 [NGIs have no right to independent review, in part, because a "petition to extend an NGI's commitment is civil in nature and directed toward treating the NGI, not punishing him or her"]; *People v. Kisling* (2015) 239 Cal.App.4th 288, 291 [rejecting the argument that SVP proceedings "are sufficiently similar to criminal proceedings to warrant" independent review]; *People v. Taylor* (2008) 160 Cal.App.4th 304, 312 [OMHDs have no right to independent review, in part, because "[t]he purpose of the [Act] is to provide treatment for those suffering from mental illness, not to punish them for their past crimes"].) In this context, NGIs, SVPs, and OMHDs are more like LPS conservatees than criminal defendants. While NGI proceedings may bear more similarities to criminal proceedings than LPS conservatorship proceedings do, in denying NGIs the right to *Wende* review, *Martinez* recognized that NGI proceedings are more similar in purpose and procedure to LPS conservatorship proceedings than they are to criminal proceedings. (See *Martinez*, *supra*, 246 Cal.App.4th at p. 1239.)

Bryan S. cited the "connection" between NGI, SVP, and OMHD proceedings and "the criminal justice system" as "directly relevant" to the equal protection question under review. But this connection has little bearing on whether proposed LPS conservatees are similarly situated to NGIs, SVPs, and OMHDs

for the purpose of compelled testimony. As this Court recently reiterated in an OMHD case, "a civil commitment proceeding is not a criminal proceeding, even though it is often collateral to a criminal trial." (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1119.) Like LPS conservatorship proceedings, these other forms of commitment are civil and serve purposes that are not directly governed by criminal law at all, even though they follow completed criminal proceedings. (See, e.g., *People v. Allen* (2008) 44 Cal.4th 843, 860-861 [because SVP proceedings are non-punitive civil proceedings, prospective SVPs do not have constitutional rights to self-representation and confrontation under the Sixth Amendment, and extended detention beyond an SVP's completed criminal sentence violates neither ex post facto nor double jeopardy protections]; accord *People v. Nelson* (2012) 209 Cal.App.4th 698, 712 [no Sixth Amendment confrontation right in OMHD proceedings]; accord *People v. Robinson* (1998) 63 Cal.App.4th 348, 350 [no ex post facto violation in the retroactive application of the OMHD laws because they comprise a civil, non-punitive framework].) *Bryan S.* also failed to recognize that while LPS conservatorship proceedings do not share the same purpose as criminal proceedings, when it comes to *effect*, "civil commitment to a mental hospital," including an LPS Act conservatorship, "despite its civil label, threatens a person's liberty and dignity on as massive a scale as that traditionally associated with criminal prosecutions." (*Roulet*, *supra*, 23 Cal.3d at p. 223.)

Bryan S. cited this Court's decision in *Cramer* for the proposition that "'[t]he extension of the privilege [not to testify] to an area outside the criminal justice system . . . would contravene both the language and purpose of the privilege.'" (*Bryan S., supra,* 42 Cal.App.5th at 197, quoting *Cramer*, *supra*, 23 Cal.3d at pp. 137-138.) But this statement from *Cramer* cannot be reconciled with more recent pronouncements from this Court in *Hudec*, which left no doubt that "[t]he right to not be compelled to testify against oneself is clearly and relevantly implicated when a person is called by the state to testify in a proceeding to recommit him or her[.]" (*Hudec*, *supra*, 60 Cal.5th at p. 830, quotation marks omitted.) *Hudec* continued: "The right not to testify in a proceeding where one is a defendant is a right that *could* meaningfully apply in any type of adversarial proceeding, though only in criminal cases is it constitutionally guaranteed." (*Ibid*., emphasis in original.) In addition, *Hudec* unequivocally declared that "the right not to testify does not take its very meaning from the criminal context, nor does applying it when the prosecution seeks to compel the respondent's testimony in an NGI commitment extension hearing present any logical difficulty." (*Ibid*.) For these reasons, extending the right not to testify outside the criminal justice system would not contravene the purpose behind the right.

9. The Court of Appeal Below Correctly Found LPS Conservatees and NGIs Similarly Situated with Respect to Compelled Testimony

In urging this Court to find that proposed LPS conservatees are not similarly situated to NGIs when it comes to compelled testimony, the Public Guardian, echoing *Bryan S.*, highlights the following distinctions between the two groups: (1) LPS conservatorships are intended to benefit the individual subject to commitment, while NGIs are committed to protect society from their dangerous behavior (OBM 13-17); (2) an NGI commitment is more closely related to criminal proceedings than an LPS conservatorship (OBM 17-19); and (3) proposed LPS conservatees are afforded more procedural protections than NGIs to safeguard against unduly restrictive or prolonged commitments (OBM 19-25). In explaining why *Bryan S.* was wrongly decided, E.B. has addressed each of these objections to the ruling of the Court of Appeal below. Here, E.B. will explain why the Court of Appeal correctly dismissed these objections.

First, while the primary purposes of the two commitment schemes are not the same, both are designed to provide involuntary treatment to people with mental illnesses. That similarity of purpose is sufficient for E.B.'s equal protection claim to survive the initial inquiry. It is true, as the Public Guardian points out, that previous cases relied on the relationship between SVPs and OMHDs and their underlying criminal conduct to find them similarly situated to NGIs with respect to the right to refuse to testify. (OBM 16-18.) But this connection simply made

it easier for those courts to find the groups similarly situated. Those decisions do not stand for the proposition that individuals subject to civil commitment under other frameworks can only be found similarly situated to NGIs (or SVPs, for example) if the basis for the commitment is a finding of past criminal conduct and a risk of future dangerousness attributable to a mental disorder. There is no inherent relationship between making a dangerousness determination and the applicability of the right not to testify.

After acknowledging many of the differences the Public Guardian has identified between criminal proceedings and LPS conservatorship proceedings – as well as the differences between LPS and NGI proceedings – the Court of Appeal below emphasized that they are "not dispositive in determining whether the groups are similarly situated *for purposes of the testimonial privilege*." (*E.B.*, *supra*, 45 Cal.App.5th at pp. 995-996, emphasis in original.) To the contrary:

> It is not a reasonable distinction to say that individuals who have not engaged in criminal conduct can be required to testify against themselves in a trial to determine whether they might be committed against their will when a person whose commitment is linked to his criminal conduct can elect to remain silent. At least, the nature of the commitment requires a finding that the groups are similarly situated for purposes of requiring the state to justify this disparate treatment.

(*Id*. at p. 996.)

Rather than focus too myopically on the differences between LPS and NGI proceedings, the Court of Appeal below gave due consideration to their relevant similarities, especially

"the nature of the confinement under [the LPS Act's] provisions and the resulting deprivation of liberty." (*Id*. at p. 993.) Because the "'theoretical maximum period of detention [under the LPS Act] is life as successive petitions may be filed,'" the Court of Appeal below recognized that "[a]n LPS conservatee thus faces an involuntary commitment similar to NGI's (and [OMHDs] and SVP's) even if the reason behind that commitment is more benevolent." (*Id*. at p. 994, quoting *Roulet*, *supra*. 23 Cal.2d at pp. 223-224.)

The Court of Appeal also acknowledged that "many of the same procedural protections apply in a trial to declare someone an LPS conservatee as apply in other proceedings to establish involuntary commitments." (*E.B.*, *supra*, 45 Cal.App.5th. at p. 994 [citing the government's burden of proof beyond a reasonable doubt, the right to a jury trial, and the right to a unanimous verdict].) In this regard, the Court of Appeal is not without company. In finding that NGIs were more like LPS conservatees than criminal defendants with respect to the right to *Wende* review, *Martinez* explained: "Just as there are protections in place in conservatorship proceedings to guard against an erroneous conclusion ([citation omitted]), so too are there procedures in place to protect one committed to a state hospital pursuant to section 1026.5." (*Martinez*, *supra*, 246 Cal.App.4th at p. 1239; see also *People v. Tilbury* (1991) 54 Cal.3d 56, 69.)

E.B. does not deny that, when compared to NGI proceedings, there are more procedural hurdles for the government to jump over in an LPS proceeding in order for a

person to find himself or herself facing the prospect of a renewable one-year conservatorship. (See OBM 21.) But the question before this Court now is whether the right not to testify must be extended to proposed LPS conservatees when they have reached the LPS Act's most serious form of commitment. Proposed LPS conservatees are no less similarly situated to NGIs because the government exhausted other options not available in the NGI context before arriving at the LPS Act's longest commitment of last resort.

The Public Guardian also points to procedural protections in place for LPS conservatees after a conservatorship has been established, such as the right to petition for rehearing (OBM 23) and the trial court's "ongoing supervision focused on the LPS conservatee's current needs, condition, and progress" (OBM 20). There are similar – though not identical – statutory safeguards in place for NGIs. As noted above, NGIs can file conditional and then unconditional release petitions per Penal Code section 1026.2 as they progress through their treatment at the state hospital. Moreover, the right to petition for rehearing in LPS conservatorship proceedings – while a valuable backstop against over-institutionalization – places the burden of proof on the conservatee. (*Conservatorship of John L.* (2010) 48 Cal.4th 131, 152.) It can hardly be said that denying proposed LPS conservatees the right to refuse to testify against themselves at the initial appointment stage when the state carries the burden of proof beyond a reasonable doubt is justified by later permitting

conservatees to seek release at a hearing where the burden will be on them to prove they are no longer gravely disabled.

Additionally, trial courts presiding over NGI proceedings – as in LPS conservatorship proceedings and unlike in criminal proceedings – have continuing jurisdiction over an insanity acquittee's conditions of confinement, extending, for example, to whether a hospital patient should be afforded "grounds privileges" deemed a necessary prerequisite to progressing through the institution's treatment program toward restoration to sanity and eventual release. (*In re Cirino* (1972) 28 Cal.App.3d 1009, 1012-1016; see also *People v. Michael W.* (1995) 32 Cal.App.4th 1111, 1119 [discussing a trial court's authority in the NGI context "to approve transfers of defendants to or between treatment facilities"]; see also *Martinez*, *supra*, 246 Cal.App.4th at p. 1239 ["During the NGI's confinement, the medical director of the state hospital in which the NGI is confined must file written reports with the court"].)

Justice Burns' concurring opinion below acknowledged most of the same specific procedural safeguards respondent alleges are unique to LPS conservatorship proceedings (*E.B.*, *supra*, 45 Cal.App.5th at p. 1004 (conc. opn. of Burns, J.)) but nevertheless still found LPS conservatees similarly situated to persons subject to other forms of civil commitment who have a statutory or equal protection right (pending further justification) not to be compelled to testify as witnesses against themselves (*id.* at p. 1005 (conc. opn. of Burns, J.). This Court should hold the same.

The Court of Appeal below properly factored in the serious deprivation of liberty at work in conservatorship proceedings in finding proposed LPS conservatees similarly situated to NGIs when it comes to compelled testimony. After noting that "the state has determined to extend the privilege against self-incrimination to persons subject to an NGI extension proceeding" and that "SVP's and [OMHDs] have been deemed by the courts to be similarly situated," the Court of Appeal emphasized just how intrusive an LPS conservatorship can be:

> "[OMHD], NGI, and LPS proceedings have the same underlying goal – protecting the public and treating severely mentally ill persons. [Citations.] In the LPS context, [t]he destruction of an individual's personal freedoms effected by civil commitment is scarcely less total than that effected by confinement in a penitentiary. [Citation.] [T]he gravely disabled person for whom a conservatorship has been established faces the loss of many other liberties in addition to the loss of his or her freedom from physical restraint. [Citation.] Indeed, a conservatee may be subjected to greater control of his or her life than one convicted of a crime."

(*E.B.*, *supra*, 45 Cal.App.5th at pp. 996-997, quoting *Heather W.*, *supra*, 245 Cal.App.4th at p. 383, internal quotation marks omitted.)

It is this massive curtailment of liberty at issue in both LPS conservatorship and NGI proceedings that renders the two groups similarly situated for the limited purpose of the right to refuse to testify. The Public Guardian has identified many ways in which the Legislature has drawn reasonable distinctions between proposed LPS conservatees and NGIs. But none of these differences undermines the Court of Appeal's determination that

people facing commitment proceedings under these frameworks are similarly situated with respect to compelled testimony.

G. The Public Guardian Has Yet to Justify the Disparate Treatment Afforded LPS Conservatees and NGIs Under the Strict Scrutiny Standard

Having established above that LPS conservatees and NGIs are similarly situated for the purpose of affording them the right to refuse to testify, the second and final question is whether the government can justify the disparate treatment they currently receive. "When the disparity implicates a suspect class or a fundamental right, strict scrutiny applies." (*Flint*, *supra*, 22 Cal.App.5th at p. 990.) "Under the strict scrutiny test, the state has the burden of establishing it has a compelling interest that justifies the law and that the distinctions, or disparate treatment, made by that law are necessary to further its purpose." (*Field*, *supra*, 1 Cal.App.5th at p. 197.) This Court has held that "[u]nder California law, [s]trict scrutiny is the appropriate standard against which to measure [equal protection] claims of disparate treatment in civil commitment." (*Smith*, *supra*, 42 Cal.4th at p. 1263, internal quotation marks omitted.)

There is no principled reason not to apply that rigorous standard to E.B.'s equal protection claim. In *Flint*, the appellate court found the strict scrutiny standard applicable because, "'[c]onsidering the potential impact of an SVP testifying at his or her commitment hearing, it logically follows that an SVP's testimony could have a direct impact on the SVP's liberty interest, namely the prosecution could use the testimony to prove

that he or she should remain committed.'" (*Flint*, *supra*, 22 Cal.App.5th at p. 993, quoting *Field*, *supra*, 1 Cal.App.5th at p. 196.) The same can be said of LPS conservatees. (See *J.Y.*, *supra*, 49 Cal.App.5th at p. 232.)

E.B. can conceive of no compelling state interest that would justify denying LPS conservatees the right not to testify when that right is granted to other individuals subject to civil commitment in California. For example, nothing in the record establishes that hospital records are more available in NGI commitment proceedings than in LPS conservatorship proceedings, which would render an LPS conservatee's testimony more necessary than that of an NGI. (See, e.g., *Curlee*, *supra*, 237 Cal.App.4th at p. 721.)

Nor does the "compelling need for truth in conservatorship proceedings" (*Baber*, *supra*, 153 Cal.App.3d at p. 550) – including the needs to establish whether the proposed conservatee will accept mental health treatment, to probe the proposed conservatee's insight into his or her mental health, or to examine his or her plan to provide for food, clothing, and shelter – require compelled testimony. (See OBM 26-30.) In fact, the substantial documentary evidence admitted at E.B.'s conservatorship trial suggests there is no issue with availability of psychiatric records at LPS conservatorship trials. (See RT 83-84 [where the trial court admitted redacted psychiatric record exhibits offered by the Public Guardian]; see also CT 69; see also *Conservatorship of S.A.* (2018) 25 Cal.App.5th 438, 447-448 [authorizing the admission of

detailed psychiatric records under the business records exception to the hearsay rule in LPS conservatorship proceedings].)

Ascertaining the truth is of vital importance in all commitment proceedings, including ones for which the right to refuse to testify has been recognized (either by statute or by virtue of equal protection principles). Surely, at extended insanity commitment proceedings, where public protection is the primary concern, one might argue it would be essential to ask the committed person directly whether he or she would accept treatment if unconditionally released in the community, to probe his or her insight into his or her mental health, and to inquire about past, present, and future indicators of dangerousness. And, yet, the Legislature has granted such individuals the right to refuse to testify. Similarly, at SVP commitment proceedings, where once again public protection is the primary concern, one might argue it would be essential to ask the committed person directly whether he or she would accept treatment if unconditionally released in the community, to probe his or her insight into his or her mental health, and to inquire about past, present, and future indicators of the likelihood of the person engaging in predatory acts of sexual violence. And, yet, *Curlee* and its progeny applied established equal protection principles to guarantee such individuals the right not to testify pending further justification. As the Court of Appeal below observed: "This interest in an accurate verdict exists in all involuntary commitment schemes – indeed, it might be argued that the interest is even greater when the mental illness results in the

person being a danger to others." (*E.B.*, *supra*, 45 Cal.App.5th at p. 996.)

The Public Guardian notes that, in previously rejecting a constitutional right not to testify in commitment proceedings, "this Court found that the testimony of a person whose mental condition was at issue in a commitment hearing 'may in fact be the most reliable and probative indicator of the person's present mental condition.'" (OBM 28, citing *Cramer*, *supra*, 23 Cal.3d. at p. 139.) This observation is no doubt true, but, more recently, after considering the same aspect of *Cramer*, this Court in *Hudec* "[g]rant[ed] that trial accuracy considerations arguably support compelling a committee's testimony" but then noted that "other considerations could be viewed as militating against such compulsion[.]" (*Hudec*, *supra*, 60 Cal.4th at p. 830.) Application of the right to refuse to testify may impact trial accuracy, but, as in the NGI context, "its recognition will not tend to prevent [an LPS conservatorship] proceeding from going forward. The [Public Guardian] in [a conservatorship] hearing does not typically depend solely on the respondent's testimony; before [a conservatorship] petition can even come to hearing, the [Public Guardian] must submit affidavits providing a factual basis to support the findings required for extension." (*Id*. at p. 829.) Borrowing once more from *Hudec*, if proposed LPS conservatees refuse to testify, the Public Guardian will in some cases lose desired evidence, but granting this right will not as a general matter preclude the establishment of LPS conservatorships. (See *ibid*.)

E.B.'s case supports this contention. The Court of Appeal's finding that the trial court's error in allowing the Public Guardian to call E.B. as a witness in its case-in-chief was nonprejudicial – whether analyzed under the federal harmless beyond a reasonable doubt standard or the less stringent standard used for assessing state law errors – demonstrates that compelled testimony is not necessary to accomplish the purposes of the LPS Act. (*Id*. at pp. 998-999.) In deeming the error harmless, the Court of Appeal necessarily determined the Public Guardian did not need E.B.'s testimony to prove its case.

Unless and until the government can justify the disparate treatment inherent in depriving LPS conservatees the right not to testify, failing to grant them the statutory privilege extended to NGIs violates their equal protection rights.

H. Adopting E.B.'s Position Would Avoid a Potential Intra-LPS Act Equal Protection Violation

E.B.'s conservatorship was predicated on the more common of two definitions of grave disability found in the LPS Act: the inability to provide for one's own food, clothing, or shelter. (§ 5008, subd. (h)(1)(A).) But, as noted above, there is a second definition of grave disability in this context, a Murphy conservatorship.[10] Pursuant to section 5350, subdivision (b)(2), "a so-called Murphy conservatorship may be established under

[10] The term "Murphy conservatorship" takes its name "after the legislator who sponsored the amendment that added the [second] definition [of grave disability] to the [LPS] Act in 1974." (*Karriker*, *supra*, 149 Cal.App.4th at p. 775.)

the LPS Act when a person currently charged with 'a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person,' and for which probable cause has been found, has been found mentally incompetent but represents a substantial danger of physical harm to others by reason of the mental disease, defect or disorder." (*E.B.*, *supra*, 45 Cal.App.5th at p. 994, quoting § 5008, subd. (h)(1)(B); see also *Karriker*, *supra*, 149 Cal.App.4th at p. 775.) The twin purposes of a Murphy conservatorship are "protection of the public and treatment of the conservatee." (§ 5350, subd. (b)(2).)

The Public Guardian does not argue that *Curlee* and the cases that followed it in the SVP and OMHD contexts were wrongly decided. Nor did *Bryan S.* suggest those cases should be overturned. Both the Public Guardian and *Bryan S.* appear to have no trouble with the notion that a person facing a civil commitment petition alleging he or she is dangerous as a result of a mental disorder under a scheme aimed at public protection is similarly situated to NGIs with respect to compelled testimony. (See *Bryan S.*, *supra*, 42 Cal.App.5th at p. 197; see also OBM 15-16.)

Under this reasoning, individuals alleged to be gravely disabled within the meaning of a Murphy conservatorship must be similarly situated to NGIs with respect to the right to refuse to testify. A Murphy conservatorship is subject to the same procedures found in section 5350 et seq. on which the Public Guardian so strongly relies. (See *Karriker*, *supra*, 149 Cal.App.4th at pp. 777-778 [demonstrating that the process for

conducting a Murphy conservatorship investigation, the filing of a petition, and supervision post-appointment mirrors the statutory procedures for an LPS conservatorship rooted in the person's inability to provide for food, clothing, or shelter].) As with an LPS conservatorship based on the traditional definition of grave disability, a Murphy conservatorship may be renewed annually per section 5361. (*Karriker*, *supra*, 149 Cal.App.4th at p. 778.)

Therefore, should this Court be inclined to conclude that a person facing an LPS conservatorship under the traditional definition of grave disability does not have an equal protection right to avoid compelled testimony, a potential new equal protection violation would arise, as proposed LPS conservatees alleged to fall under the Murphy conservatorship definition of grave disability would have the right to refuse to testify against themselves, while proposed LPS conservatees alleged to fall under the traditional definition of grave disability would not.

This Court should adhere to its practice of construing statutory schemes to avoid difficult constitutional questions – including reading them in a manner that does not result in a potential equal protection violation – and find all proposed LPS conservatees are similarly situated to NGIs when it comes to compelled testimony in order to avoid creating an intra-LPS Act equal protection violation between Murphy and traditional LPS conservatorships. (See, e.g., *Smith*, *supra*, 42 Cal.4th at pp. 1269-1270 [where this Court construed section 6601, subdivision

(a)(2), to avoid an equal protection violation involving SVP commitments and LPS conservatorships].)

CONCLUSION

"'[A] prospective conservatee is . . . , in many cases, a person in dire need of the state's assistance.'" (*Bryan S.*, *supra*, 42 Cal.App.5th at p. 197, quoting *Baber*, *supra*, 153 Cal.App.3d at p. 550.) But, as one appellate court recently cautioned: "The benefits of conservatorship can never be considered without also taking into account the magnitude of the deprivation of liberty it imposes. As our Supreme Court has astutely observed, '[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.'" (*Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453, 466, quoting *Conservatorship of Early* (1983) 35 Cal.3d 244, 253, some internal quotation marks omitted.)

Bryan S. failed to heed this reminder and minimized the substantial liberty interests at risk for proposed LPS conservatees when it found them not similarly situated to NGIs with respect to compelled testimony.

For the reasons set forth above, this Court should affirm the Court of Appeal's holding that (1) proposed LPS conservatees are similarly situated to NGIs with respect to the right not to be compelled to testify and (2) the Public Guardian has yet to justify this disparate treatment under the strict scrutiny standard. Unless and until the Public Guardian – or another governmental agency in another case – demonstrates that compelled testimony

is necessary to accomplish the purposes of the LPS Act, this practice must come to an end statewide.

Dated: December 4, 2020

Respectfully submitted,

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Attorneys for E.B.

CERTIFICATE OF WORD COUNT

Counsel for E.B. hereby certifies that this brief consists of **13,986** words (excluding cover page information, tables, proof of service, signature blocks, and this certificate), according to the word count of the computer word-processing program. (Cal. Rules of Court, rule 8.520(c)(1).)

Dated: December 4, 2020

/s/ Jeremy Price
JEREMY PRICE
Staff Attorney

DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE BY TRUEFILING

Re: *Conservatorship of E.B.* Case No.: S261812

We, the undersigned, declare that we are over 18 years of age and not a party to the within cause. We are employed in the County of Alameda, State of California. Our business address is 475 Fourteenth Street, Suite 650, Oakland, CA, 94612. Our electronic service address is eservice@fdap.org. On December 4, 2020, we served a true copy of the **Answer Brief on the Merits** attached on each of the following, by placing same in an envelope(s) addressed as follows:

Hon. Susanne M. Fenstermacher
Contra Costa County Superior Court
725 Court Street
Martinez, CA 94553

E.B.
(Appellant)

Each said envelope was sealed and the postage thereon fully prepaid. We are familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in Oakland, California, on that same day in the ordinary course of business.

On December 4, 2020, we transmitted a PDF version of this document by TrueFiling to the following:

Patrick Hurley
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California Court of Appeal,
First Appellate District

We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 4, 2020, at Oakland and El Cerrito, California.

/s/ Elizabeth Wilkie
Elizabeth Wilkie
Declarant for Postal Delivery

/s/ BL Palmer
BL Palmer
Declarant for TrueFiling

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Supreme Court of California

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Supreme Court of California

Case Name: **B. (E.), CONSERVATORSHIP OF**
Case Number: **S261812**
Lower Court Case Number: **A157280**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

12/4/2020

Date

/s/Bonnie Palmer

Signature

Price, Jeremy (238299)

Last Name, First Name (PNum)

First District Appellate Project

Law Firm