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S261812

IN THE SUPREME COURT OF CALIFORNIA

PUBLIC GUARDIAN OF CONTRA COSTA COUNTY,
Petitioner,

v.

E.B.,
Respondent.

AFTER A DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION FIVE, CASE NO. A157280
CONTRA COSTA SUPERIOR COURT, CASE NO. P18-01826
HONORABLE SUSANNE M. FENSTERMACHER, JUDGE • PHONE: (925) 608-1115

REPLY BRIEF ON THE MERITS

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PUBLIC GUARDIAN OF CONTRA COSTA COUNTY

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REPLY BRIEF ON THE MERITS

INTRODUCTION

In the Answer Brief on the Merits ("ABM"), Respondent E.B. minimizes the differences between conservatorship proceedings under the Lanterman-Petris-Short Act ("LPS Act") and commitment extension hearings for Not Guilty by Reason of Insanity ("NGI") acquitees pursuant to Penal Code section 1026.5 while artificially highlighting the similarities between the two. However, it is precisely those differences that support the conclusion that potential LPS conservatees are not similarly situated with

NGIs for purposes of the right against compelled testimony at commitment proceedings.

E.B.'s basic position is that all persons facing possible involuntary civil commitment, regardless of the origin of the commitment proceedings or the underlying reasons for the proceedings, have an equal protection right to refuse to testify at the commitment hearings. (ABM 26.) This argument is flawed because it fails to recognize that the mere prospect of civil commitment is not sufficient to support a conclusion that potential LPS Act conservatees defined by Welfare & Institutions Code section 5008, subdivision (h)(1)(A) and NGIs are similarly situated with respect to the right to refuse to testify at conservatorship proceedings.

The arguments in the ABM do not support the conclusion sought by E.B. As found by the court in *Conservatorship of Bryan S.* (2019) 42 Cal.App.5th 190 [255 Cal.Rptr.3d 195], the fact that LPS Act conservatees and NGIs might both be subject to involuntary civil commitment due to a mental disorder does make them similarly situated because LPS Act conservatees "need not have been found to have committed a crime or be a danger to others." (*Id.* at p. 196.) Moreover, the purposes underlying the two statutory schemes are sufficiently different that this Court should find that LPS Act conservatees and NGIs are not similarly situated, reject E.B.'s equal protection argument, and reverse the lower court's holding to the

contrary.[1]

LEGAL ARGUMENT

I. LPS ACT CONSERVATEES ARE NOT SIMILARLY SITUATED WITH NGIs MERELY BECAUSE BOTH GROUPS ARE SUBJECT TO POSSIBLE INVOLUNTARY CIVIL COMMITMENT

1. The Fact that NGIs and LPS Act Conservatees Both Face the Prospect of Involuntary Commitment Does Not Make Them Similarly Situated

In the ABM, E.B. takes the position that, because NGIs are subject to a possible extension of their commitment pursuant to Penal Code section 1026.5 and LPS Act conservatees are subject to possible civil commitment if a conservatorship is ordered pursuant to section 5350, those two groups are similarly situated for the purposes of an NGI's statutory right against compelled testimony. (ABM 13.) But the prospect of involuntary commitment is not sufficient to find the groups to be similarly situated in light of the differences between them.

E.B. relies heavily on the holdings in various cases finding that Sexual Violent Predators ("SVPs") and Offenders with a Mental Health Disorder ("OMHDs") have an equal protection right not to be compelled to

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[1] The conservatorship of E.B. was dismissed by the trial court on June 16, 2020. The Public Guardian submits that it is still appropriate for the Court to consider this case because it raises important legal issues that are likely to reoccur "'while evading appellate review.'" (*People v. Dunley* (2016) 247 Cal.App.4th 1438, 1445 [203 Cal.Rptr.3d 335].)

testify at their relevant commitment hearings because SVPs and OMHDs are similarly situated to NGIs for the purposes of the right against compelled testimony.[2] (ABM 25.) Based on those decisions, E.B. concludes that any person facing a civil commitment hearing must be similarly situated. In reaching that conclusion, E.B. failed to consider the reasons why those courts reached the conclusion that NGIs and SVPs and OMHDs were similarly situated. It was not merely because of the prospect of an involuntary commitment but, instead, it was for reasons that support the Public Guardian's position that LPS Act conservatees as defined by section 5008(h)(1)(A) and NGIs are not similarly situated, namely their dangerousness to others and connections to the criminal justice system.

For instance, in *People v. McKee* (2010) 47 Cal.4th 1172 [104 Cal.Rptr.3d 427, 223 P.3d 566] [*McKee I*], the Court found that SVPs and OMHDs were similarly situated as it related to indefinite commitments because both groups:

> have been found, beyond a reasonable doubt, to suffer from mental disorders that render them dangerous to others. . . . Both have been convicted of a serious or violent felony. At the end of their prison terms, both have been civilly committed to the Department of Mental Health for treatment of their disorders. Furthermore, the purpose of the MDO Act

[2] The Public Guardian adopts E.B.'s description of persons formerly described as "mentally disordered offenders" by the description of "offenders with a mental health disorder." (See ABM 14, n.2.)

> and the SVPA is the same: to protect the public from dangerous felony offenders with mental disorders and to provide mental health treatment for their disorders.

(*Id.* at p. 1203, *quoting In re Calhoun* (2004) 121 Cal.App.4th 1315, 1352 [18 Cal.Rptr.3d 315] (finding SVPs and OMHDs similarly situated for purposes of the law concerning the right to refuse anti-psychotic medication).)

Similarly, in *People v. Curlee* (2015) 237 Cal.App.4th 709 [188 Cal. Rptr.3d 421], the court found NGIs and SVPs to be similarly situated for the purposes of right against compelled testimony at commitment hearings because (1) "[b]oth groups have committed a criminal act and have been found to suffer from a mental condition that might present a danger to others," (2) both groups can be committed to the state hospital after their initial term of commitment if "the district attorney proves in a jury trial beyond a reasonable doubt that the person presents a danger to others as a result of a mental disease, defect, or disorder," and (3) the "purpose of the commitment is the same: To protect the public from those who have committed criminal acts and have mental disorders and to provide mental health treatment for the disorders." (*Id.* at p. 720; *see also People v. Buffington* (1999) 74 Cal.App.4th 1149, 1156 [88 Cal.Rptr.2d 696] [finding SVPs similarly situated to NGIs and OMHDs because they are "subject to commitment because they are currently suffering from a mental disorder

that renders them dangerous.”])

The other cases cited by E.B. simply relied on *McKee I* and/or *Curlee* to reach the same conclusions. (ABM 25, citing *People v. Landau* (2016) 246 Cal.App.4th 850, 864 [201 Cal.Rptr.3d 684] [relied on *Curlee* to find SVPs and NGIs similarly situated]; *People v. Flint* (2018) 22 Cal.App.5th 983, 991 [231 Cal.Rptr.3d 910] [same]; *People v. Field* (2016) 1 Cal.App.5th 174, 190, [204 Cal.Rptr.3d 548] [relied on *McKee I*]; *Dunley, supra*, 247 Cal.App.4th at p. 1450 [relied on *Curlee* and *McKee I*]; *People v. Alsafar* (2017) 8 Cal.App.5th 880, 887 [214 Cal.Rptr.3d 186] [relied on *Landau*, *Curlee*, and *Dunley*].)

LPS Act conservatees as defined by section 5008(h)(1)(A) are not similarly situated with NGIs because, unlike NGIs, they have not been found to have committed criminal acts, have not “been found, beyond a reasonable doubt, to suffer from mental disorders that render them dangerous to others,” are not subject to civil commitment after an initial term of commitment if “the district attorney proves in a jury trial beyond a reasonable doubt that [they present] a danger to others as a result of a mental disease, defect, or disorder,” and the purpose of the LPS Act in regards to conservatees is not “to protect the public from those who have committed criminal acts and have mental disorders and to provide mental health treatment for the disorders.” (*McKee I*, 47 Cal.4th at p. 1203;

Curlee, 237 Cal.App.4th at p. 720.)

"These differences are fatal to [E.B.'s] equal protection claim." (*Conservatorship of Bryan S.*, *supra*, 42 Cal.App.5th at p. 197; *see also People v. McCain* (1995) 36 Cal.App.4th 817, 819 [42 Cal.Rptr. 2d 779] ["[t]here is . . . no requirement that persons in different circumstances must be treated as if their situations were similar."]; *Buffington*, *supra*, 74 Cal.App.4th at p. 1158 ["this is not to say that persons committed under California's various civil commitment statutes are similarly situated in all respects."].)

In none of the cases cited by E.B. did the court conclude, as E.B. urges the Court to do here, that two groups facing possible civil commitment were similarly situated merely based on the possibility of involuntary commitment. In others words, while E.B. does not suggest that NGIs and LPS Act conservatees share any of the similarities that led nearly every court that has considered the issue to conclude that NGIs were similarly situated to SVPs and OMHDs, he relies on those decisions to advance the argument that the differences between LPS Act conservatees and NGIs are not dispositive as to the similarly situated issue. The Court should reject E.B.'s attempt to marginalize the factors that support the holdings of the cases on which he relies.

While the court below found LPS conservatees and NGIs similarly

situated, the First District previously had "no difficulty in differentiating the circumstances of insanity acquittees and civilly committed persons." (*People v. Beck* (1996) 47 Cal.App.4th 1676, 1686 [55 Cal.Rptr.2d 340].) The NGI in *Beck* argued that the one-year program of outpatient treatment required by Penal Code section 1026.2 violated equal protection because a similar procedure was not required "by statutes governing civil commitment and the parole of mentally disordered offenders." (*Id.* at p. 1686.) The court found that NGIs were not similarly situated to OMHDs and other civilly committed persons in part because NGIs have "demonstrated dangerousness by committing a criminal offense. . . . [T]here has been an adjudication that [they] committed a criminal act and [were] legally insane when [they] did so." (*Id.* at p. 1686, *quoting People v. Wilder* (1995) 33 Cal.App.4th 90, 105 [39 Cal.Rptr.2d 247]); *see also Taylor v. San Diego Cty.* (9th Cir. 2015) 800 F.3d 1164, 1169 [SVPs and LPS Act conservatees not similarly situated with respect to length of commitments].)

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Moreover, this Court previously recognized that, while "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. . . . due process does not call for the same procedures in every situation. Instead, '[d]ue process is flexible and calls

for such procedural protections as the particular situation demands.'" (*People v. Tilbury* (1991) 54 Cal.3d 56, 68 [284 Cal.Rptr.288, 813 P.2d 1318], *quoting Jones v. United States* (1983) 463 U.S. 354, 367 [103 S.Ct. 3043].) "[A]n equal protection violation does not occur merely because different statutory procedures have been included in different civil commitment schemes." (*People v. Barrett* (2012) 54 Cal.4th 1081, 1110 [144 Cal.Rptr.3d 661, 281 P.3d 753]; *see also People v. Sweeney* (2009) 175 Cal.App.4th 210, 219 [95 Cal.Rptr.3d 557].)

"The concept [of equal protection] recognizes that persons similarly situated with respect to the legitimate purpose of the law receive like treatment, but it does not, however, require absolute equality." (*In re Strick* (1983) 148 Cal.App.3d 906, 912 [196 Cal.Rptr. 293].) NGIs and LPS Act conservatees as defined by section 5008(h)(1)(A) both face involuntary commitment because of a mental illness, but they are not similarly situated with the respect to the purpose behind the statutory right provided to NGIs to refuse to be called to testify at a commitment extension hearing. Those two groups are different in terms of how they reached the commitment hearing, the reasons for their commitments, the goals supporting their possible commitments, and the circumstances of the commitments. As such, NGIs and LPS Act conservatees are not similarly situated with respect to the right against compelled testimony.

2. *E.B. Artificially Highlights Claimed Similarities Between NGIs and LPS Act Conservatees*

E.B. raises several arguments in an attempt to artificially highlight similarities between NGIs and LPS Act conservatees. For instance, E.B. argues that NGIs and LPS Act conservatees are similarly situated because they generally suffer from the same types of mental disorders. (ABM 41.) This argument is not persuasive in light of the fact that an LPS Act conservatorship can be based on any of the conditions listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. (*People v. Karriker* (2007) 149 Cal.App.4th 763, 775, n.4 [57 Cal.Rptr.3d 412].)

The mere fact that the same common mental illnesses might result in someone being gravely disabled under the LPS Act and constitute a mental disease, defect, or disorder under Penal Code section 1026.5 is not sufficient to establish that NGIs and LPS Act conservatees are similarly

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situated for the purposes of the right against compelled testimony at conservatorship proceedings.

While E.B. notes that NGIs and LPS Act conservatees both often suffer from schizophrenia, bipolar disorder, major depression, or other

psychosis (ABM 42), E.B. essentially just lists common mental illnesses.[3] Moreover, unlike an LPS Act conservatee, an NGI can be subjected to a civil commitment based on a diagnosis of antisocial personality disorder if the diagnosis is based on other criteria in addition to repeated criminal or antisocial behavior. (*People v. Superior Court (Blakely)* (1997) 60 Cal.App.4th 202, 212 [70 Cal.Rptr.2d 388].)

E.B. also argues that NGI commitment extension hearings and LPS Act conservatorship trials are similar because neither is "predicated on a prior criminal conviction." (ABM 40.) While technically true, this argument ignores an important difference between NGIs and LPS Act conservatees. As noted by the *Curlee* court, there has been a determination that a person committed as an NGI has committed a criminal act and has a mental disorder that makes them a danger to the public. (*Curlee*, *supra*, 237 Cal.App.4th at p. 720; *see also Beck*, *supra*, 47 Cal.App. 4th at p. 1684 ["an acquittal by reason of insanity entails a finding that the defendant in fact committed a criminal offense."].)

The fact that NGIs (and SVPs and OMHDs) have been found to have committed crimes is an important distinction. "For certain purposes

[3] (See https://www.who.int/news-room/fact-sheets/detail/mental-disorders; https://www.nami.org/learn-more/mental-health-conditions [both last accessed on February 5, 2021].)

[California laws] properly classify, separately, those mentally ill persons against whom a judicial determination of criminal conduct has been made since such persons, at least initially, have demonstrated particular danger." (*Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 172 [167 Cal.Rptr. 854, 616 P.2d 836].) By contrast, the only issue for an LPS conservatorship proceeding like E.B.'s is whether the person is unable to provide for his food, clothing, and shelter due to a mental health disorder. (Welf. & Inst. Code, § 5008(h)(1)(A).)

The legislature chose to make the rights guaranteed for criminal defendants expressly applicable to NGIs. There is no similar provision in the LPS Act. This Court has recognized that "the Legislature may make reasonable distinctions between its civil commitment statutes based on a showing that the persons are not similarly situated, meaning that those who are reasonably determined to represent a greater danger may be treated differently from the general population. . . ." (*In re Smith* (2008) 42 Cal.4th 1251, 1266 [73 Cal.Rptr.3d 469, 178 P.3d 446].) The lack of a "prior criminal conviction" by NGIs and LPS Act conservatorships is an artificial similarity in light of the undisputed fact that an NGI must have been found to have committed a felony to be the subject of a commitment extension hearing under Penal Code section 1026.5.

3. *LPS Act Proceedings are Designed to Avoid*

Involuntary Commitments While NGI Commitment Extension Hearings are Not

E.B.'s position, and a focus of the lower court, is that NGIs and LPS Act conservatees are similar because they are both potentially subject to "an unbroken and indefinite period of state-sanctioned confinement." (ABM 40, *quoting Conservatorship of Roulet* (1979) 23 Cal.3d 219, 224 [152 Cal.Rptr. 425, 590 P.2d 1]; *Conservatorship of E.B*. (2020) 45 Cal.App.5th 986, 994 [259 Cal.Rptr.3d 281].)

This argument ignores a key difference between the statutory schemes for NGI commitment extension hearings and LPS Act conservatorship proceedings. LPS Act conservatorship proceedings are guided by an important overarching consideration -- "imposition of a conservatorship should be made only in situations where it is truly necessary." (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [197 Cal. Rptr. 539, 673 P.2d 209].) In the Opening Brief, the Public Guardian cited

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some of the ways in which that goal is accomplished and we will not repeat them here. (See OBM 19-25.)

E.B. attempts to analogize the NGI commitment extension scheme to the LPS Act by pointing out that NGIs may also be placed in less restrictive settings under certain circumstances. (ABM 47-48.) However, E.B.

over-states the right of an NGI to be placed in a less restrictive setting.

First, it is important to consider the nature of the two proceedings being compared. For an NGI, the issue is whether someone who has been committed following the commission of a criminal act should be civilly committed for up to two years following an initial period of commitment. In that proceeding, the district attorney is seeking to establish that an NGI should continue to be committed because she presents a substantial danger to others due to a mental disorder. While there may be options for the court to place the NGI following that proceeding, it is essentially a binary question -- the NGI will either be released or subjected to a two-year civil commitment. In fact, if the NGI is being held in a state hospital at the time of the commitment extension hearing, she is automatically returned to that facility for the commitment extension period. (Pen. Code, § 1026.5(b)(8.)

An LPS Act conservatorship proceeding is not the same. While involuntary commitment of the conservatee is a possibility, even if a conservatorship is ordered, it can take forms more varied than the outcome of a Penal Code section 1026.5 hearing. Unlike NGIs, LPS conservatees as defined by section 5008(h)(1)(A) may avoid commitment through the assistance of third parties such as family, friends or others. (Welf. & Inst. Code, § 5350(e).) The county-designated LPS conservatorship investigator must investigate all available alternatives to conservatorship. (Welf. & Inst.

Code, § 5354; *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1010 [36 Cal.Rptr.2d 40, 884 P.2d 988].) The LPS conservatorship process also prioritizes non-state actors, such as family or other eligible persons, to be appointed as conservator before the Public Guardian will be appointed. (Welf. & Inst. Code, § 5350(b)(1); Prob. Code, §§ 1812, 2920.)

While NGIs may be placed in a less restrictive setting, if the underlying charge is a felony, the NGI must remain in a state hospital or other treatment facility for at least six months before the trial court could consider a discharge to outpatient status. (Pen. Code, § 1601(a).) In addition, once a person has been deemed to be an NGI, he or she is evaluated by the community program director who submits a recommendation for placement to the trial court. The trial court is not required to follow that recommendation. Similarly, once an NGI is committed to a state hospital, the court "may" transfer him upon receiving the written recommendation of the medical director of the state hospital. (Pen. Code, § 1026(b), (c).) None of these permissive provisions establish a right on the part of an NGI to the least restrictive placement nor does an NGI have the ability to avoid commitment with the help of third parties.

E.B.'s equal protection argument focuses on the prospect of involuntary commitment but ignores the fact that the duties of a conservator are broader than simply the decision of whether to place someone with a

grave disability in a facility for housing and treatment and, therefore, so is a proceeding to determine whether a conservatorship should ordered. A conservator is appointed to arrange for the conservatee's "care and protection." A conservator may be called upon to make arrangements for a conservatee about his or her meals, transportation, health care, clothing and shelter, none of which involve or relate to the involuntary commitment of the LPS Act conservatee. (https://www.courts.ca.gov/selfhelp-conservatorship.htm [last retrieved on January 22, 2021]; see also Prob. Code, § 1800 [goals of conservatorship].)

By contrast, NGI, SVP, and OMHD committees are not appointed a conservator who has a fiduciary duty to meet their ongoing needs for treatment, or to manage their care and finances in their best interests and accommodating their wishes if possible. (Welf. & Inst. Code, § 5350; Prob. Code, § 2101, 2113.) This is another important difference between the LPS Act and Penal Code section 1026.5 hearings.

4. *The Goals and Purposes Behind the Two Statutory Schemes Are Different*

While E.B. recognizes that the primary purpose of an extended insanity commitment is protection of the public, he minimizes the primary goals of the NGI statutory scheme and LPS Act while highlighting secondary goals as a basis to find the two groups are similarly situated. But

the goals of the two proceedings are sufficiently different to conclude that NGIs and LPS Act conservatees are not similarly situated with respect to the law at issue.

E.B. relies on a statement in *Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 383 [199 Cal.Rptr.3d 689] that "[OMHD], NGI, and LPS proceedings have the same underlying goal -- protecting the public and treating severely mentally ill persons." (ABM 38.) However, the cases relied on by *Heather W*. do not support the conclusion. For instance, in *Conservatorship of John L.* (2010) 48 Cal.4th 131, 150 [105 Cal.Rptr.3d 424, 225 P.3d 554], the Court simply referred to the goals of the LPS Act as stated in Welfare & Institutions Code section 5001, one of which is "guaranteeing and protecting public safety." Moreover, the LPS Act "also serves to protect the mentally ill from criminal victimization (§ 5001, subd. (g)) and from the myriad forms of suffering endured by those unable to care for themselves." (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 540 [53 Cal.Rptr.3d 856, 150 P.3d 738].)

Protecting public safety is one of the stated goals of the LPS Act, but that statement by the Legislature is not enough to support the conclusion that LPS Act conservatees are similarly situated with NGIs for the purposes of the right against compelled testimony. (*See Conservatorship of Bryan S.*, *supra*, 42 Cal.App.5th at p. 197 [while "one objective of the LPS Act is to

‘guarantee and protect public safety’ . . . the Act was also enacted to protect persons with mental health disorders “from criminal acts.”) A more relevant guidepost for determining whether the two groups are similarly situated is to consider the primary goals of those two proceedings.

The primary goal of the LPS Act is protection of mentally ill persons, while the primary goal of the NGI statutes is protection of the public. Courts have consistently described the goal of the LPS Act as seeking to protect mentally ill persons who cannot care for themselves. This Court previously noted that “the primary purpose of the LPS Act is to protect the mentally disordered person. . . .” (*Conservatorship of Early*, *supra*, 35 Cal.3d at p. 253.) “The legislative focus of the LPS Act is on protecting the nondangerous gravely disabled person and allowing that person to live safely in freedom or the least restrictive alternative if he or she can do so, with or without the aid of appropriate others. . . .” (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 326 [177 Cal. Rptr. 369].)

And then this Court in *Conservatorship of Roulet*, *supra*, 23 Cal.3d 219 agreed, noting that the “state’s purpose is solely one of remedial treatment; it seeks neither retribution nor protection of society - the government's primary interests in criminal prosecutions. The Act serves to protect the person from the consequences of his own infirmity rather than to

protect society from the person. . . ." (*Id.* at p. 237-38.)

By contrast, courts considering the goals of the NGI commitment statues have concluded that the purpose of "civil commitments for NGI's, SVP's, and MDO's is to protect the public from people who have been found to be dangerous to others and who need treatment for a mental disorder." (*Conservatorship of Bryan S.*, *supra*, 42 Cal.App.5th at p. 197; *see also Curlee*, 237 Cal. App.4th at p. 720.) The goals of the two proceedings, even while sharing the similarity of providing for the treatment of the mentally ill, are sufficiently different to preclude a finding that the two groups are similarly situated.\

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5. *The Preservation of a Gravely Disabled Person's Right to Dignity is Not Advanced By Precluding the Presentation of Relevant Evidence at an LPS Act Conservatorship Trial*

E.B. argued that being forced to testify at a conservatorship trial violates a potential conservatee's right to personal dignity and furthers a paternalistic attitude toward those who may be subject to LPS Act conservatorship proceedings. (ABM 18.)

There is nothing dignified about someone who is gravely disabled and cannot provide for their own food, clothing, or shelter being prevented

from receiving necessary help because of an inability of the trier-of-fact to obtain important evidence regarding the person's current mental state. For instance, in *Conservatorship of Carol K.* (2010) 188 Cal.App.4th 123 [115 Cal.Rptr.3d 343], a conservatorship was sought after Carol K. "lay on the floor for almost 24 hours, refusing to get up. She refused food and drink and urinated on herself several times, and would not allow staff to help her." (*Id.* at p. 127; *see also Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 908 [232 Cal.Rptr. 277] [quoting The Dilemma of Mental Commitments in California report indicating that the LPS Act was designed to help "the young man who becomes uncommunicative, does not leave his room, refuses to eat, perhaps even soils himself"].)

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It is difficult to see the dignity interests that would be advanced if persons like those described in *Carol K.* and *Smith* did not obtain the help they desperately need because they refused to testify at a court proceeding designed to determine whether they are gravely disabled. Allowing the Public Guardian to require the testimony of a potential LPS Act conservatee puts the best evidence of the person's mental state before the jury while preserving the witness' right to refuse to answer any potentially incriminating questions.

E.B. cites to *Miranda v. Arizona* (1966) 384 U.S. 436, 460 [86 S.Ct.

1602], for the proposition that being called as a witness in a civil commitment hearing implicates the dignity and integrity of a state's citizens. (ABM 45.) However, in *Miranda*, the Court was concerned with the privilege against self-incrimination, not testimony, finding that "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." (*Id.* at p. 460.) The Public Guardian is not seeking to punish potential LPS conservatees by calling them as witnesses; the goal is simply to provide aid if needed. That pursuit involves no assault on the dignity of the potential LPS conservatee. Moreover, conservatorship proceedings are presumptively non-public. (*Sorenson v. Superior Court* (2013) 219 Cal.App.4th 409, 450 [161 Cal.Rptr.3d 794].) The confidential nature of the proceedings reduces any stigma or embarrassment caused by a potential conservatee being called to testify at the conservatorship hearing.

II. WHETHER A PERSON POTENTIALLY SUBJECT TO A MURPHY CONSERVATORSHIP IS SIMILARLY SITUATED TO AN NGI IS NOT BEFORE THE COURT AND THOSE CONSERVATORSHIPS ARE DIFFERENT FROM E.B.'S.

E.B.'s final attempt to show that he is similarly situated to NGIs facing an extension of their commitment is to argue that persons who may be subject to a Murphy conservatorship are similarly situated to NGIs and,

therefore, so are all LPS Act conservatees. (ABM 64-66.)

E.B., however, was not subject to a Murphy conservatorship and, therefore, the issue of whether persons who may be subject to such a conservatorship are similarly situated with NGIs for the purposes of the right against compelled testimony is not the issue before the Court. As a general rule, appellate courts "cannot render opinions '. . . upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 10 [244 Cal.Rptr. 581], *quoting Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863 [167 P.2d 725].)

E.B. argues that this Court should rely on Murphy conservatorships in order to follow its practice of construing statutes "when reasonable, to avoid difficult constitutional questions." (ABM 66, citing *In re Smith*, *supra*, 42 Cal.4th at p. 1269.) The citation to *Smith* is inapposite because E.B. is not challenging the constitutionality of a statute nor does this case involve issues of statutory construction. Instead, the issue is whether LPS Act conservatees as defined by subdivision (h)(1)(A) of section 5008 have an equal protection right to refuse to testify at conservatorship proceedings. E.B. has cited no authority for the proposition that this Court could not limit any decision to the issue of whether LPS conservatorship proceedings for

people who may be gravely disabled under section 5008(h)(1)(A) are similarly situated to NGIs for the purposes of the right to refuse to testify.

Allowing E.B. to rely on Murphy conservatorships to establish that all LPS Act conservatorship proceedings are similarly situated to NGI commitment extension proceedings would be a classic example of the tail wagging the dog. This is especially true where Murphy conservatorships appear to be relatively rare compared to E.B.'s type of conservatorship. In 2014, out of 6,000 beds available in the state hospital, there were only approximately 69 committed under the Murphy conservatorship. (*When Restoration Fails: One State's Answer to the Dilemma of Permanent Incompetence* at p. 176, J Am Acad Psychiatry Law 44:171–79, 2016.)[4] Thus, the number of patients committed to a state hospital under a Murphy conservatorship is "extremely small." (*Id.*) By contrast, in 2014, 4,389 persons were placed into new or renewed LPS conservatorships in Los Angeles County alone. (http://auditor.ca.gov/reports/2019-119/appendices.html [last accessed Feb. 4, 2021].)

A Murphy conservatorship is markedly different from the LPS Act conservatorship at issue here and persons subject to a Murphy conservatorship are not similarly situated to persons like E.B. The Murphy

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[4] (http://jaapl.org/content/44/2/171#xref-ref-17-1 [last accessed Feb. 5, 2021].)

conservatorship definition of “gravely disabled” was added to the LPS Act in 1974 “to address the difficult problem of integrating and resolving the conflicting concerns of protecting society from dangerous individuals who are not subject to criminal prosecution, preserving a libertarian policy regarding the indefinite commitment of mentally incompetent individuals who have yet to be convicted of criminal conduct, and safeguarding the freedom of incompetent criminal defendants who present no threat to the public.” (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 456 [280 Cal.Rptr. 175].)

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Unlike the conservatorship proceedings applicable in this case, Murphy conservatorships are initiated by a court order pursuant to Penal Code 1370, subdivision (c)(2). Also, unlike a conservatee like E.B., to be eligible for a Murphy conservatorship, (a) a person must have been found to be mentally incompetent under Penal Code section 1370, (b) the criminal complaint against the person must include a felony charge involving death, great bodily harm, or a serious threat to the physical well-being of another, (c) the criminal complaint must have not been dismissed, (d) as result of a mental disorder, the person must be unable to understand the nature and purpose of the proceeding taken against him and to assist counsel in the conduct of his defense in a rational manner, and (e) the person must

represent a substantial danger of physical harm to others by reason of a mental disease, defect, or disorder. (Welf. & Inst. Code § 5008(h)(1)(B).)

While E.B. is correct that most of the procedural protections that apply to LPS Act conservatorship proceedings also apply to Murphy conservatorship proceedings, not all of them do. For instance, the provision of section 5350(e) relating to a potential conservatee's ability to avoid a conservatorship with the help from family and friends does not apply to a Murphy conservatorship. (Welf. & Inst. Code, § 5350(e)(4).)

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Murphy conservatees are also not entitled to the least restrictive placement like other LPS Act conservatees. Instead, for a Murphy conservatorship, the trial court, not the conservator, determines the appropriate placement and it must be somewhere that "achieves the purposes of treatment of the conservatee and protection of the public." (Welf. & Inst. Code, § 5358(a)(1)(B).)

For regular LPS Act conservatees, the conservator may move the conservatee to a less restrictive placement without court approval or even notification. A conservator may not transfer a Murphy conservatee "without providing written notice of the proposed change of placement and the reason therefor to the court" and other interested parties. (Welf. & Inst. Code, § 5358(d)(1)(B).) These differences counsel against relying on

Murphy conservatorships to determine whether persons like E.B. are similarly situated to NGIs.

This Court has previously compared LPS Act conservatorship proceedings with other civil commitment statutes for the purposes of equal protection without relying on Murphy conservatorships. (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538 [53 Cal.Rptr.3d 856, 150 P.3d 738] [finding LPS Act conservatees and criminal defendants not similarly situated without reliance on or reference to Murphy conservatorships].)

To the extent the Court has considered the impact of a Murphy conservatorship on the equal protection analysis, it has noted differences between that conservatorship and other civil commitment schemes. (*See McKee I*, 47 Cal.4th at p. 1209 n.11 [NGIs, SVPs and OMHDs are different because "[a]lthough some committed under the LPS Act have been found incompetent to stand trial on criminal charges (see § 5008, subd. (h)), they have not been definitively determined to have committed serious felonies. . . ."].) The Court in *McKee I* further noted that "SVP's, MDO's, and NGI's more closely resemble one another than they do those persons committed under the LPS Act. . . ." (*Id.*)

The fact that this case does not involve a Murphy conservatorship, and the differences between LPS Act conservatorships under section 5008(h)(1)(A) and Murphy conservatorships, support the conclusion that

the Court should decline E.B.'s invitation to ignore LPS Act conservatorships like his and decide this case based on whether Murphy conservatorships are similarly situated with NGIs with respect to the right against compelled testimony.

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III. E.B. HAS FAILED TO REFUTE THE STATE'S COMPELLING INTEREST SUPPORTING DIFFERENTIAL TREATMENT

E.B. argues that the Public Guardian has failed to justify the disparate treatment of NGIs and LPS Act conservatees in terms of the right against compelled testimony because (a) other evidence of a person's disability is available to the Public Guardian and (b) the need for accurate results is the same in both LPS Act conservatorship proceedings and NGI commitment hearings. (ABM 62-63.)

E.B.'s argument that evidence of his mental condition was available through other sources does not change the fact that the rule he proposes would serve to remove "the best evidence" of the potential conservatee's mental health status from the trier-of-fact's consideration which would raise the risk of less accurate results in trials where the conservatee's health and safety is at issue. While the Public Guardian can and does submit testimony

from mental health professionals in support of petitions for conservatorships, this Court has noted that "the divergence of expert views . . . [renders] the possibility of mistake significantly greater [in the diagnosis of mental illness] than in diagnosis of physical illness." (*In re Roger S.* (1977) 19 Cal.3d 921, 929 [141 Cal.Rptr. 298, 569 P.2d 1286].) Against this background of expert fallibility, "the consequences of an erroneous judgment finding a person gravely disabled are substantial, the consequences of an erroneous judgment finding a person not to be gravely disabled may well be more severe. In the latter case, an individual may quite literally be left to languish in the streets." (*Conservatorship of Roulet*, *supra*, 23 Cal.3d at p. 230.)

LPS Act proceedings are designed to ascertain "the true state of respondent's disability." (*Conservatorship of Baber*, *supra*, 153 Cal.App.3d. at p. 549.) "A conservatorship proceeding is not a prosecution for a particular act, but an attempt to determine a condition which is subject to change." (*Id.* at p. 550.) For a jury to be able to accurately assess that condition in a potential LPS Act conservatee, the State has a compelling interest in introducing not only relevant evidence but "the most reliable and probative indicator of the person's present mental condition" and "the most relevant evidence of that disability" which is "derived primarily from the patient." (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 139 [151 Cal.Rptr. 653,

588 P.2d 793]; *Conservatorship of Susan T.*, *supra*, 8 Cal.4th at 1019.)

While the ascertainment of the truth may be important in all proceedings, including those where the commitment of a potentially violent person is at issue, that goal is especially important in LPS Act conservatorship proceedings which are designed to care for persons who may be unable to care for themselves. Unlike NGI commitment extension proceedings, an LPS Act conservatee defined by section 5008(h)(1)(A) has not been accused of any wrongdoing, her potential dangerousness (i.e., possible future criminal activity) is not relevant at the hearing, and the potential conservatorship is for the benefit of the conservatee and not primarily for the protection of society. For these reasons, the balance between the need for an accurate result and the protection of the individual's right to choose whether to testify should tip in favor of allowing an LPS Act conservatee to be called as a witness.

If this Court concludes that LPS Act conservatees and NGIs facing commitment extension proceedings are similarly situated, it should find that the Public Guardian has established that the state interest in ensuring that seriously disabled persons who are incapable of providing themselves with the basic necessities of food, clothing, and shelter are given the help they need is sufficient to justify any differential treatment between NGIs facing commitment extension hearings and LPS Act conservatorship proceedings.

CONCLUSION

The Court should adopt the holding in *Conservatorship of Bryan S.* and find that NGIs and LPS Act conservatees defined by section 5008(h)(1)(A) are not similarly situated for the purposes of the testimonial privilege. The primary goal of the NGI commitment extension proceedings is to protect the public from dangerous persons with mental disorders. The primary goal of an LPS Act conservatorship is to protect gravely disabled persons and ensure they receive the appropriate, and least restrictive, care for their disability. NGIs have been adjudged to have committed criminal acts. No such finding is necessary for an LPS Act conservatorship. Based on these differences, this Court should find that NGIs and LPS Act conservatees are not similarly situated for the purposes of equal protection and reverse the decision of the lower court. In the alternative, the Court should find that there are compelling reasons supporting the differential treatment.

February 8, 2021

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/S/

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CERTIFICATE REGARDING LENGTH OF BRIEF
(Cal. Rules of Court, rules 8.204(c)(1), 8.520(b)(1).)

I, Patrick L. Hurley, Deputy County Counsel, certify under penalty of perjury that, according to the computer program on which this brief was produced, it contains approximately 7,327 words.

Executed this 8th day of February, 2021 at Martinez, California.

/s/

Patrick L. Hurley
Deputy County Counsel

PROOF OF SERVICE BY MAIL

(**Code Civ. Proc.** §§ 1012, 1013a, 2015.5; **F R Civ P** 5(b))

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Supreme Court of California

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