

S261812

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

PUBLIC GUARDIAN OF CONTRA COSTA COUNTY,
Petitioner-Respondent,

v.

E.B.,
Objector-Appellant

Appeal from the Court of Appeal, First Appellate District, Division
Five
Case No. A157280

Superior Court of California, County of Contra Costa
Case No. P18-01826
Honorable Susanne M. Fenstermacher, Judge

**APPLICATION OF DISABILITY RIGHTS CALIFORNIA,
CALIFORNIA ASSOCIATION OF MENTAL HEALTH
PATIENTS' RIGHTS ADVOCATES, CALIFORNIA PUBLIC
DEFENDERS ASSOCIATION, AMERICAN CIVIL LIBERTIES
UNION, AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA, DISABILITY RIGHTS
EDUCATION AND DEFENSE FUND, LAW FOUNDATION OF
SILICON VALLEY, AND MENTAL HEALTH ADVOCACY
SERVICES
FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN
SUPPORT OF OBJECTOR-APPELLANT E.B.;**

PROPOSED BRIEF OF *AMICUS CURIAE*

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF OBJECTOR-APPELLANT E.B.

Pursuant to California Rules of Court, rule 8.520(f), *amici curiae* respectfully request leave to file the accompanying brief. The brief expands upon Objector-Appellant E.B.’s (“E.B.”) arguments about why people subject to Lanterman-Petris-Short (“LPS”) Act conservatorship proceedings¹ are similarly situated to people subject to not guilty by reason of insanity (“NGI”) extension proceedings² for the purpose of compelled testimony at trial. *Amici* will assist the Court in resolving this case by illustrating how the practical effects of LPS conservatorships are the same as the practical effects of NGI extensions.

INTERESTS OF AMICI CURIAE

Amici Disability Rights California, California Association of Mental Health Patients’ Rights Advocates, California Public Defenders Association, American Civil Liberties Union, American Civil Liberties Union of Northern California, Disability Rights Education & Defense Fund, Law Foundation of Silicon Valley, and Mental Health Advocacy Services are disability rights advocates and

¹ Welfare and Institutions Code section 5300, *et seq.*

² Penal Code section 1026.5.

public defenders who have extensive experience working with people subject to LPS conservatorships and NGI extensions. Based on their advocacy, *amici* deeply understand how LPS conservatorships deprive Californians living with mental health disabilities of their liberty interests. In addition, *amici* are interested in advocating for equal application of procedural protections to all Californians subject to civil commitment proceedings.

Disability Rights California (“DRC”) is California’s federally-mandated Protection and Advocacy agency. In this capacity, DRC defends, advances, and strengthens the rights and opportunities of Californians living with disabilities. DRC has extensive experience in advocating for people subject to LPS conservatorships and other types of civil commitments, including NGI extensions. DRC staff have visited numerous statewide sites that house people conserved under the LPS Act, including acute psychiatric hospitals, “Institutions for Mental Diseases” (such as Mental Health Rehabilitation Centers and Skilled Nursing Facilities with Special Treatment Programs), county jails, and state hospitals. From these visits, DRC knows that the actual consequences of many LPS conservatorships are prolonged detentions in highly-restrictive settings. Additionally, DRC is seen as a statewide expert on civil

commitment. For example, the California State Auditor solicited input from DRC during its recent process of auditing the implementation of the LPS Act in California.

Founded in 1985, the **California Association of Mental Health Patients' Rights Advocates ("CAMHPRA")** is a statewide, non-profit organization principally composed of county patients' rights advocates ("PRAs") mandated by Welfare and Institutions Code section 5520. CAMHPRA is dedicated to providing client-centered and expressed interest advocacy, promoting consumer empowerment, and protecting and advancing the legal and treatment interests of people living with mental health disabilities.

PRAs are the local experts on civil commitment and the first-line client resource for consultation and advice regarding legal rights under LPS conservatorship. PRAs represent mental health clients in administrative review hearings related to short-term, involuntary civil commitments and the right to refuse psychiatric medications. PRAs also frequently visit long-term, subacute facilities (Mental Health Rehabilitation Centers and Skilled Nursing Facilities with Special Treatment Programs) where county residents subject to LPS conservatorship are confined for treatment. During

the course of fulfilling their duties and responsibilities, PRAs come into daily contact with clients detained across the spectrum of civil commitment detentions from 72-hour holds under Welfare and Institutions code section 5150 to permanent LPS conservatorships under section 5350. In this capacity, PRAs receive frequent questions related clients' due process right to object to a conservatorship legal proceeding, the right to the least restrictive placement, and the potential duration of confinement.

With nearly four thousand members, the **California Public Defenders Association (“CPDA”)** is the state’s largest nonprofit organization of criminal defense practitioners. CPDA is uniquely situated to assist this Court in matters involving criminal justice and mental health. Public Defender Offices operate Conservatorship/Mental Health units to represent clients who are held on civil commitments due to mental illness or developmental disability. In this capacity, Public Defenders advocate for mental health clients who wish to contest their involuntary treatment under the various provisions of the LPS Act.

Since this Court’s opinion in *Conservatorship of Roulet* (1979) 23 Cal.3d 219, public defenders have been at the forefront of litigation to determine and to protect the due process rights of those

facing civil commitment. In that case, the Public Defender of Santa Barbara convinced the Court that the Due Process Clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous verdict be applied to conservatorship proceedings for persons with grave disability, as set forth in the LPS Act. Over forty years later, CPDA and the public defender network remain vigilant in protecting the due process rights of people living with mental illness and developmental disabilities. California courts have granted CPDA leave to appear as *amicus curiae* in nearly seventy cases.

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. With more than three million members, activists, and supporters, the ACLU fights tirelessly in all fifty states, Puerto Rico, and Washington, D.C. for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

The ACLU's Disability Rights Program envisions a society in which discrimination against people with disabilities no longer exists, and in which people understand that disability is a normal part of life. This means a country in which people with disabilities are valued, integrated members of the community, where people with disabilities have jobs, homes, education, healthcare, and families, and where people with disabilities are not needlessly segregated into institutions such as nursing homes and psychiatric hospitals.

The American Civil Liberties Union of Northern California (“ACLU-NC”) is a regional affiliate of the American Civil Liberties Union (ACLU), a nationwide, nonprofit, nonpartisan organization with approximately two million members dedicated to the defense and promotion of the guarantees of individual liberty secured by the state and federal Constitutions. Since its founding in 1920, a primary focus of the ACLU has been to protect and preserve the system of free expression that is at the core of our constitutional democracy. The ACLU also strives to create a society free of discrimination against people with disabilities, including mental illness. In particular, the ACLU-NC affiliate is committed to

ensuring that people with disabilities are no longer overrepresented in jails, prisons, and in the criminal justice system more generally.

The **Disability Rights Education & Defense Fund** (“**DREDF**”) is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF pursues its mission through education, advocacy and law reform efforts. DREDF is nationally recognized for its expertise in the interpretation of federal and California disability civil rights laws. For over three decades, DREDF has received funding from the California Legal Services Trust Fund (IOLTA) Program as a Support Center providing consultation, information, training and representation services to legal services offices throughout the state as to disability civil rights law issues.

Founded over forty years ago in Santa Clara County, the **Law Foundation of Silicon Valley**, a nonprofit, nonpartisan legal services and social justice organization. The Law Foundation is dedicated to advancing the rights of historically excluded and marginalized individuals and families across Santa Clara County

and beyond through legal services, strategic advocacy, and educational outreach.

The Law Foundation's Health program has an abiding interest in ensuring due process and the promotion of the guaranteed rights of residents of Santa Clara County and California. Since its inception, the Health program has protected the civil rights of people in inpatient mental health facilities by representing them in due process and medication capacity hearings as the designated county PRA office. In this capacity, the Law Foundation also investigates allegations of abuse and neglect and denial of rights in mental health facilities and assists many clients who are or were on LPS conservatorships. In addition to assisting clients in inpatient mental health units, the Law Foundation has long provided holistic legal services to people with mental health disabilities living in the community, including eviction defense and public benefits appeals.

Mental Health Advocacy Services (“MHAS”) was founded in 1977 as a joint project of the Los Angeles County Bar Association and the Beverly Hills Bar Association. MHAS protects and advances the legal rights of low-income adults and children with mental health disabilities and empowers them to assert those rights in order to maximize their autonomy, achieve equity, and secure the

resources they need to thrive. Through its staff's deep-seated knowledge and experience across a broad range of mental health legal issues, MHAS has secured a unique position and ability not only to serve these clients but also to be a highly sought-after technical assistance provider. MHAS annually trains hundreds of attorneys, mental health professionals, consumer and family member groups, and other advocates in mental health law and rights.

STATEMENT OF AUTHORSHIP AND MONETARY CONTRIBUTION

No party or party's counsel authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. (Cal. Rules of Court, rule 8.520(f)(4)(A).) Other than *amici*, their members, or their counsel, no person or entity made a monetary contribution intended to fund the preparation or submission of this brief. (Cal. Rules of Court, rule 8.520(f)(4)(B).)

Respectfully Submitted,

March 10, 2021

DISABILITY RIGHTS CALIFORNIA

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PROPOSED BRIEF OF *AMICUS CURIAE*

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about whether equal protection requires two groups of people civilly committed under California law to have the same right to refuse testimony at trial. The first group—people subject to extensions of not guilty by reason of insanity (“NGI”) commitments³—already have this right. The second group—people conserved under the Lanterman-Petris-Short (“LPS”) Act,⁴ including Objector-Appellant E.B. (“E.B.”)—should also have this right because the practical effects of their commitments are the same as NGI extensions.

Amici submit this brief in support of the arguments presented in E.B.’s Answer Brief (“Answer Brief”) to show that there is no reason to distinguish between people subject to these two types of commitment proceedings. The practical effects of each of these civil commitments is the same; both groups face serious threats to their liberty interests following commitment. Contrary to the theoretical arguments about the civil nature of LPS proceedings and the goals of the LPS Act set forth by the Petitioner-Respondent Public

³ Penal Code section 1026.5.

⁴ Welfare and Institutions Code section 5300, *et seq.*

Guardian of Contra Costa County (“Public Guardian”), *amici* know first-hand that, in practice, LPS conservatorships and NGI extensions both involve severe deprivations of liberty that warrant enhanced procedural protections.

In this brief, *amici* make three additional points. First, when assessing what procedural protections should apply to LPS commitment proceedings, this Court should focus on the practical effects of civil commitment rather than the theoretical nature of the proceedings. (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 225 (citations omitted).) Such an analysis accords with what this Court and the Court of Appeals have done when extending criminal procedure protections to people facing LPS conservatorship. (See, e.g., *Id.*; *Conservatorship of David L.*, (2008) 164 Cal.App.4th 701; *Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378.)

Second, *amici* use publicly-available data and first-hand experience to show the fallacy of the Public Guardian’s arguments that LPS conservatorships are not restrictive, and therefore not similarly situated to NGI extensions. In real life, LPS conservatorships generally last far longer than the one-year period contemplated by the statute. Additionally, people conserved under the LPS Act are frequently held in comparable (and often identical)

conditions of confinement to those of people civilly committed on NGI extensions, including being confined to locked facilities that closely resemble correctional facilities. Consequently, the resulting deprivations of personal liberty that flow from commitment under each of these schemes is substantially similar.

Finally, *amici* urge this Court to consider “Murphy” conservatorships under Welfare and Institutions Code section 5350, subdivision (b)(2) when determining the outcome of this appeal. Treating these LPS conservatees differently than people like E.B., who are conserved under section 5350, subdivision (b)(1), would produce detrimental and inconsistent results for similarly situated people conserved under the LPS Act.

Because the practical effects of LPS and NGI civil commitments are the same, *amici* urge this Court to affirm the decision of Division Five of the First District Court of Appeals: “LPS Conservatees are similarly situated with NGIs and with individuals subject to other involuntary civil commitments for the purposes of the right against compelled testimony.” (*Conservatorship of E.B* (2020) 45 Cal.App.5th 986, 988.)

ARGUMENT

I. Because of the Practical Effects of Conservatorship, this Court Should Extend the Right to Refuse Testimony, a Procedural Protection Rooted in Criminal Procedure, to LPS Proceedings.

The Public Guardian asserts that LPS conservatees are not similarly situated to NGIs with respect to the right to be free from compelled testimony for multiple theoretical reasons. These reasons include “[t]he absence of a connection with the criminal justice system” for LPS conservatees (Public Guardian’s Opening Brief (“Opening Brief”) at 9), different underlying goals behind the two commitment types (*Id.* at 13),⁵ and protections written into the LPS Act (*Id.* at 19.). The Public Guardian is wrong.

Because “[c]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards,” this Court and appellate courts have repeatedly focused on the *practical effects* of conservatorship and looked to criminal procedure to establish

⁵ Contrary to the Public Guardian’s claim that E.B.’s equal protection claim fails “[b]ecause of the stark difference in the goals of the two statutory schemes” (Opening Brief at 8), appellate courts have recognized that, in fact, “NGI[] and LPS proceedings have the same underlying goal—protecting the public and treating severely mentally ill persons.” (*Heather W.*, *supra*, 245 Cal.App.4th 378, 383.)

important rights for people subject to LPS proceedings. (*Roulet, supra*, 23 Cal.3d 219, 225, citing *In re Winship* (1970) 397 U.S. 358, 365-366.) In *Roulet*, this Court extended the rights of proof beyond a reasonable doubt and a unanimous jury verdict to LPS conservatorship proceedings. (*Id.* at 230-231.) To justify the extension of these rights, this Court emphasized that, in practice, civil commitment threatens “a person’s liberty and dignity on as massive a scale as that normally associated with criminal prosecutions.” (*Id.* at 222, citing *People v. Burnick* (1975) 14 Cal.3d 306, 319-322.)

Following *Roulet*, the California Court of Appeals has extended other criminal procedure safeguards to people facing LPS conservatorship because of the practical effects of commitment. For example, the Court of Appeals applied *Marsden*⁶ rights in LPS proceedings because of the substantial liberty interests at stake in conservatorship proceedings and the lack of meaningful distinction between criminal and LPS proceedings when analyzing the right to effective assistance of counsel. (*David L., supra*, 164 Cal.App.4th

⁶ In *Marsden*, this Court held that a trial court must provide a defendant in a criminal proceeding who seeks substitution of counsel an opportunity to state the reasons for the request. (*People v. Marsden* (1970) 2 Cal.3d 118, 123-124.)

701, 711.) In addition, the Court of Appeals applied the requirement of personal waiver of the right to a jury trial in LPS proceedings because the destruction of personal freedoms is similar to confinement in a penitentiary. (*Heather W.*, *supra*, 245 Cal.App.4th 378, 383.)

Accordingly, just as in *Roulet, David L.*, and *Heather W.*, this Court should resolve the constitutional considerations at issue here “by focusing not on the theoretical nature of the proceedings but rather on the actual consequences of commitment to the individual.” (*Roulet, supra*, 23 Cal.3d 219, 225, citing *People v. Thomas* (1977) 19 Cal.3d 630, 638 (*en banc*).) *Amici’s* first-hand experience with people subject to LPS conservatorships demonstrates that the actual consequences of commitment are similar to NGI extensions.

II. Despite Safeguards in the LPS Act, People Subject to LPS Conservatorship Experience Lengthy Deprivations of Physical Liberty in Highly-Restrictive Settings Similar to Those on NGI Extensions.

Although the California Legislature enacted the LPS Act with the intent of ending “the inappropriate, indefinite, and involuntary commitment of person[s] with mental health disorders” (Welf. & Inst. Code § 5001, subd. (a)), *amici’s* experience working with people

subject to civil commitments demonstrates that—contrary to the Public Guardian’s assertions—the actual consequences for people conserved under the LPS Act are often extended commitments in restrictive settings, just like individuals on NGI extensions.

A. LPS Conservatorships Often Last for Periods of Several Years.

Here, E.B. argues that an LPS conservatorship is similar to an NGI extension because it can result in an “unbroken and indefinite period of state-sanctioned confinement.” (Answer Brief at 39, citing *Roulet, supra*, 23 Cal.3d 219, 224.) The Public Guardian counters that the LPS Act includes safeguards to prevent lengthy confinement in restrictive settings, at least on paper. (Opening Brief at 19-24.) Official public reports, including data published by the California State Auditor⁷ and the San Francisco Budget and Legislative Analyst,⁸ as well as *amici*’s first-hand experience,

⁷ California State Auditor, *Lanterman Petris Short Act: California Has Not Ensured that Individuals with Serious Mental Illnesses Receive Adequate Ongoing Care* (July 2020) (“LPS Audit”) (See Request for Judicial Notice, Exhibit A.)

⁸ City and County of San Francisco Budget Legislative Office, *Policy Analysis Report: Review of Lanterman-Petris-Short Act (LPS) Conservatorship in San Francisco*, November 12, 2019 (“San Francisco Report”) (See Request for Judicial Notice, Exhibit B.)

contradict the Public Guardian’s claim that LPS conservatorships last for short durations.

1. The State Auditor Found That LPS Conservatorships Last an Average of Three Years

In July 2020, the California State Auditor published an audit of the implementation of the LPS Act in three counties: Los Angeles, San Francisco, and Shasta. The State Auditor found that the average LPS conservatorship lasted approximately three years. (LPS Audit at 75, Table C.5.) This is longer than the one-year conservatorship period touted by the Public Guardian and longer than the two-year NGI extension contemplated by Penal Code section 1026.5.

2. San Francisco Found That More Than One-Third of LPS Conservatorships Last More Than A Decade.

In November 2019, San Francisco’s Budget and Legislative Analyst published detailed local data about LPS conservatorships. The San Francisco Report provides illuminating information about the duration of conservatorships under the LPS Act. As of November 2018, 213 people (37% of the total caseload) had been conserved under the LPS Act for greater than ten years. (San Francisco Report at A-9, Exhibit 10.) One hundred and thirty people (23% of the total caseload) had been conserved for five to ten years. (*Id.*) Therefore,

taken together, 60% of the people conserved under the LPS Act in San Francisco were conserved for five years or more.

3. *Amici's* Experience Corroborates Publicly Available Data about the Duration of LPS Conservatorships.

The publicly available data cited above is consistent with *amici's* first-hand knowledge about the duration of LPS conservatorships. *Amici* DRC, CAMHPRA, CDDA and Law Foundation of Silicon Valley have represented numerous clients who remain conserved under the LPS Act for periods of many years. For example, a current client of a CDDA member has been conserved under the LPS Act and committed to institutional placements for over thirty-five years. Another current client of a CDDA member client has been conserved in the state hospital since 2006. Although these individuals exercise their right to challenge their conservatorships, they remain confined in the most restrictive environments *many, many* years after initial conservatorship. These examples show that, regardless of the circumstances leading a person to be civilly committed, the end result is serious and potentially lengthy curtailment of a person's liberty.

**B. Similar to People Committed on NGI Extensions,
People Conserved Under the LPS Act are Typically
Held in Locked Facilities.**

The Public Guardian contends that the prospect of unduly restrictive LPS commitments is mitigated by the protections provided by the LPS Act, including that “LPS conservatees have a right to the least restrictive placement.” (Opening Brief at 20). In contrast, the Public Guardian states that “NGI committees are often initially placed at the California Department of State Hospitals.” (*Id.*)

Based on publicly available documents and first-hand experience, *amici* know that, although individuals conserved under the LPS Act have the right to placement in the least restrictive setting under Welfare and Institutions Code section 5358, few people conserved under the LPS Act are allowed to reside in their personal homes or with family.

- In 2011, *amicus* DRC published a report finding that more than half the counties in California lacked a written policy to provide services to people on LPS

conservatorships in the least restrictive, most integrated setting.⁹

- In 2015, the Contra Costa County Grand Jury found that the “Contra Costa County Public Guardian has no policy concerning keeping a conservatee in his or her personal residence.”¹⁰
- Similarly, San Francisco reported that it placed only 43 persons conserved under the LPS Act (7.3%) in personal homes, whether independently or with family members. (San Francisco Report at A-11, Exhibit 12.)

In reality, most LPS Conservatees are placed in locked institutions, just like individuals committed on NGI extensions.

⁹ Notably, this report found that more than half the counties in California lacked a written policy to provide services to people on LPS conservatorships in the least restrictive, most integrated setting. Disability Rights California, *Home & Community-Based Services for Individuals Subject to Temporary LPS Conservatorship – An Unfulfilled Promise?* November 2011, available at <https://www.disabilityrightsca.org/publications/home-community-based-services-for-individuals-subject-to-temporary-lps-conservatorship> at 14 (“DRC Report”).

¹⁰ 2014-2015 Contra Costa County Grand Jury, *Report 1506 – Office of the Public Guardian: Caring for Those Who Can No Longer Care for Themselves*, May 26, 2015 at 11. (See Request for Judicial Notice, Exhibit D.)

Indeed, “one of the principal powers which the court may grant a conservator is the right to place a conservator in an institution.”

(Roulet, supra, 23 Cal.3d 219, 223.)

1. Hundreds of People Conserved Under the LPS Act are Held in Department of State Hospitals Facilities, in the Same Prison-Like Conditions as People on NGI Extensions.

Official data shows that people on LPS conservatorships are frequently held in the *exact same* highly restrictive facilities as people committed on NGI extensions and other forensic commitments. For example, as of November 2019, counties across the state committed approximately 720 individuals on LPS conservatorships to Department of State Hospitals (“DSH”) facilities, California’s most restrictive settings for psychiatric treatment. (LPS Audit at 25). LPS conservatees comprise approximately 11% of the entire DSH population, and are held alongside people committed on NGI extensions and others committed based on involvement with the criminal system.¹¹

¹¹ In addition to people on LPS conservatorships, DSH patients include people committed under the following schemes, all of which are related to involvement in the criminal justice system: Not Guilty by Reason of Insanity, Incompetent to Stand Trial, Offenders with Mental Health Disorders (formerly “Mentally Disordered

Moreover, the State Auditor found that demand for DSH beds for individuals on LPS conservatorships far outpaces their availability. (LPS Audit at 22-23.) As of August 2019, over 200 people on LPS holds had been waiting an average of 345 days to be admitted to a DSH facility. (*Id.* at 23, Figure 6.)¹²

The conditions of confinement that persons conserved under the LPS Act experience in DSH facilities more closely resemble correctional institutions than therapeutic hospital environments. *Amici* can attest that, regardless of commitment type, all DSH patients reside in congregate, locked units where they have little

Offenders”), CDCR Patient-Inmates, and individuals committed under California’s “Sexually Violent Predator” law. *See* California Department of State Hospitals, *Strategic Plan 2018-2023* at 13, *available at: [https://dsh.ca.gov/About_Us/docs/Strategic Plan 2018-2023.pdf](https://dsh.ca.gov/About_Us/docs/Strategic_Plan_2018-2023.pdf)*.

¹² The State Auditor’s review also found that the majority of LPS patients from Los Angeles County awaiting a DSH bed did not wait in community settings. (LPS Audit at 24). Rather, they waited in general acute care hospitals or similar treatment facilities. (*Id.*) Even worse, for individuals conserved under Welfare and Institutions Code section 5350, subdivision (b)(2), (*see* Section III, *infra*), placement delays result in extended confinement in jail. (*See, e.g.,* Appellant’s Opening Brief, *Conservatorship of Lavar B.*, No. A160462 (First Appellate District, Division One) (conservatee spent a full year in county jail following the court determination of conservatorship).)

control over their daily routines and little contact with the outside world. This Court has “soberly recognized the resemblance in reality” of a state hospital facility and a conventional prison. (*Roulet, supra*, 23 Cal.3d 219, 226, citing *Burnick, supra*, 14 Cal.3d 306, 319-320.)

First-hand accounts of DSH facilities describe their prison-like quality. For example, Napa State Hospital has a barbed-wire security fence, tight security at the main gate, multiple locked gates and doors, and metal detectors.¹³ Similarly, Patton State Hospital has locking compounds surrounded by 20-foot high razor-wire fences, and it looks more like a custodial facility than a hospital.¹⁴ Furthermore, DSH has its own law enforcement agency comprised of approximately 700 officers, plus dispatchers and investigators,

¹³ Scott Shafer, *Deep Dive into California’s Mental Hospitals Reveals More Questions than Answers*, KQED News, October 24, 2015, available at: <https://www.kqed.org/stateofhealth/96393/deep-dive-into-californias-mental-hospitals-reveals-more-questions-than-answers>.

¹⁴ Victoria Pelham and Brett Kelman, *At Patton, Prison Problems Plague Hospital Patients*, Desert Sun, May 18, 2015, available at: <https://www.desertsun.com/story/news/health/2015/05/18/patton-hospital-prison-problems/27530949/>.

deployed across the five different state hospital facilities.¹⁵ Taken together, the characteristics of DSH facilities show that they are more akin to correctional institutions than less-restrictive community placements.

Therefore, as this Court has already recognized and as publicly available data shows, LPS conservatees committed to restrictive DSH facilities “do often find themselves confined in the same place as those convicted of crimes.” (*Roulet, supra*, 23 Cal.3d 219, 226.)

2. Most LPS Conservatees Not Committed to DSH Facilities Are Held in Other Types of Restrictive Settings.

Public reports and *amici’s* experiences also show that most people conserved under the LPS Act who are not committed to DSH facilities are placed in other types of locked, highly-controlled settings known as “Institutions for Mental Diseases” (“IMDs”), rather than residing in personal homes or with family.

¹⁵ California Department of State Hospitals, *Law Enforcement*, available at: https://dsh.ca.gov/Law_Enforcement/index.html (last accessed: March 8, 2021).

IMDs “are essentially state-licensed nursing homes for psychiatric patients, less restrictive than acute-care hospitals but more so than unlocked group homes. Patients are confined inside but are able to move about the facilities and sometimes are allowed out on passes.”¹⁶ They include Mental Health Rehabilitation Centers (“MHRCs”) and Skilled Nursing Facilities with Special Treatment Programs (“SNF/STPs”).¹⁷

- San Francisco County recently reported that it placed 63.1% of its patients conserved under the LPS Act in locked settings. (San Francisco Report at A-11, Exhibit 12.) This includes not only DSH facilities, but also acute care hospital beds, locked facilities in County jails, MHRCs, SNF/STPs, and Regional Center placements for people with developmental disabilities. (*Id.*)

¹⁶ Charles Ornstein, *2 Psychiatric Facilities Criticized*, Los Angeles Times, March 7, 2003, *available at*: <https://www.latimes.com/archives/la-xpm-2003-mar-07-me-mental7-story.html>.

¹⁷ California Healthcare Foundation, *A Complex Case: Public Mental Health Delivery and Financing in California*, July 2013 at 27, note 109, *available at*: <https://www.chcf.org/wp-content/uploads/2017/12/PDF-ComplexCaseMentalHealth.pdf>.

- In 2020, the Civil Grand Jury of Santa Clara County found that the Public Guardian there typically placed people conserved under the LPS Act in locked psychiatric hospitals.¹⁸
- As of 2011, Orange and San Bernardino Counties only placed persons subject to LPS conservatorship in mental health facilities. (DRC Report at 17.)

In addition to people conserved under the LPS Act, some of these facilities also hold individuals under forensic commitments including people found not guilty by reason of insanity.¹⁹

The conditions of confinement in these mental health facilities are incredibly restrictive. As *amici* can attest, locked psychiatric facilities, such as MHRCs and SNF/STPs, tend to be large institutional placements. As with patients in DSH facilities, patients in these facilities have little access to the outside world and reside in

¹⁸ 2019-2020 Civil Grand Jury of Santa Clara County, *Conservatorships Revisited*, September 17, 2020 at 7. (See Request for Judicial Notice, Exhibit C.)

¹⁹ See, e.g. California Psychiatric Transitions (98-bed locked MHRC holds people on LPS holds and Penal Code section 1026 commitments), <https://cptmhrc.com/admissions/> (last accessed: March 8, 2021).

dense, congregate settings where all aspects of their lives are strictly regimented.

3. Public Defenders who Represent People Conserved Under the LPS Act Corroborate the Prevalence of Restrictive Placements.

The collective experience of Public Defenders who represent people conserved under the LPS Act corroborates publicly-available information about restrictive placements. Thirteen Public Defender offices, all members of *amicus* CPDA, provided declarations that support the conclusion that people placed on LPS Conservatorships following trial are generally placed in restrictive settings. (*See* Request for Judicial Notice, Exhibit E.)

- Eleven of the thirteen Public Defenders—from Alameda, Contra Costa, Marin, Riverside, San Diego, San Francisco, Santa Barbara, Santa Clara, Solano, Sonoma, and Stanislaus Counties—attest that *not a single case* that proceeded to trial where a conservatorship was established resulted in a non-institutional placement. (*Id.*)
- Two of the eleven Public Defenders— from Los Angeles and Ventura Counties—attested that they each had *one*

case that proceeded to trial and resulted in a conservatorship with placement in a non-institutional setting. (*Id.*)

These declarations show the anomalous nature of non-institutional placements for people conserved under the LPS Act. As such, this Court should not accept the Public Guardian's position that the results of an LPS conservatorship are different than those of an NGI extension.

III. This Court Should Not Ignore Murphy Conservatorships under Welfare and Institutions Code section 5350, subdivision (b)(2).

Amici encourage this Court to consider the right to refuse to testify for people found gravely disabled under any definition in the LPS Act. In its decision below, the First District acknowledged that the LPS Act includes a second definition of "grave disability." (*See E.B., supra*, 45 Cal.App.5th 986, 994.) Along with the definition of "grave disability" that applied to E.B. (Welf. & Inst. Code § 5008, subd. (h)(1)(A)), the LPS Act also contains a definition of grave disability that flows from a person being found mentally incompetent to stand trial for criminal charges under Penal Code section 1370 (Welf. & Inst. Code § 5008, subd. (h)(1)(B)). This second definition of "grave disability" leads to the establishment of a

“Murphy” conservatorship under Welfare and Institutions Code section 5350, subdivision (b)(2).²⁰

The Public Guardian incorrectly argues that “Murphy” conservatorships are not relevant to the outcome of this appeal, even though they are LPS conservatorships. (*See* Public Guardian’s Reply Brief at 27-33.) The Public Guardian notes that “Murphy” conservatorships follow a criminal charge and explicitly consider dangerousness, similar to NGI extensions. (*Id.* at 30-31.) Following the Public Guardian’s line of argument, LPS conservatorships under the definition of grave disability in section 5008, subdivision (h)(1)(B) would be similarly situated to NGI extensions because of the origin and purpose of commitment, but LPS Conservatorships under the definition in section 5008, subdivision (h)(1)(A) would not. Such a result would be irreconcilable with this Court’s prior decision that equal protection must be applied when looking at rights conferred to individuals committed for treatment under different sections of the LPS Act. (*Roulet, supra*, 23 Cal.3d 219, 231 (finding that equal protection applied between people conserved for grave

²⁰ E.B. was conserved under Welfare and Institutions Code section 5350, subdivision (b)(1).

disability under section 5350 and people committed as “imminently dangerous” under section 5303 of the Act.)

Amici urge this Court to consider both types of LPS conservatorships because all LPS conservatees face similar extended periods of confinement in high security facilities. Further, creating a system in which people facing LPS conservatorships have one set of rights under section 5350, subdivision (b)(1) and a different set of rights under section 5350, subdivision (b)(2) would lead to inconsistent and unfair results.

CONCLUSION

Division Five of the First District accurately concluded that, “[i]t 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.” (*E.B.*, *supra*, 45 Cal.App.5th 988, 996.) As illustrated above, the extended durations and restrictive nature of placements have the same practical effects, whether a person is conserved under the LPS Act or committed on an NGI extension.

The same serious restrictions of liberty flow from both types of civil commitments. Thus, both groups are similarly situated for the purpose of the right to refuse testimony. It is impossible to reach any conclusion other than that of the court below: that people conserved under the LPS Act are entitled to equal protection and the same right to refuse testimony as is afforded to people subject to NGI extensions. Therefore, *amici* urge this Court to affirm the decision below.

Respectfully Submitted,

March 10, 2021

DISABILITY RIGHTS CALIFORNIA

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CERTIFICATE OF WORD COUNT

Counsel for *amici* hereby certifies that this brief consists of 6,154 words (excluding cover page, tables, proof of service, signature blocks, and this certificate), according to the word count of the computer word-processing program used to generate it.

March 10, 2021

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