Case No. S254938

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Conservatorship of O.B.,

T.B., et al.,

Petitioners and Respondents,

v.

O.B.,

Objector and Appellant.

SUPREME COURT
FILED

JAN 15 2020

Jorge Navarrete Clerk

Deputy

After a Decision by the Second District Court of Appeal, B290805
Santa Barbara Superior Court, 17PR00325,
Hon. James Rigali

APPLICATION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF NO PARTY, AND PROPOSED AMICUS CURIAE BRIEF BY LEGAL SERVICES FOR PRISONERS WITH CHILDREN

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Under California Rules of Court, rule 8.520(f), Legal Services for Prisoners with Children (LSPC) requests leave to file the attached amicus curiae brief.

LSPC organizes communities impacted by the criminal justice system and advocates to release incarcerated people, to restore civil and human rights to the currently and formerly incarcerated, and to reunify families and communities. We assist incarcerated persons in challenging their convictions (which must be proved beyond a reasonable doubt) and juvenile dependency orders removing children from their constructive custody or terminating their parental rights (which must be proved by clear and convincing evidence).

While the instant case involves substantial evidence review in a probate conservatorship, the Court's ruling here is likely to have ramifications in criminal and juvenile dependency law. There is currently a split in authority in juvenile dependency cases on whether to consider the clear and convincing evidence standard of proof when conducting substantial evidence review. In fact, the Court of Appeal here cited a juvenile dependency case as authority for *not* considering the standard of proof in this case. (See *Conservatorship of O.B.* (2019) 32 Cal.App.5th 626, 633-634 [citing *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881].) Although it is settled that the standard of proof *should* be considered in criminal appeals (see *Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 562, 577-578) and in certain First Amendment cases (*Anderson v. Liberty Lobby* (1986) 477 U.S. 242, 244 (*Anderson*)), the logical dissonance between *Jackson*/*Johnson*/*Anderson* and cases like *Sheila S.* threatens to undermine the vigor of substantial evidence review in appellate courts generally.

As explained in the attached declaration, we have conducted deep background research on the issue. Therefore, we can provide valuable assistance to the Court by (a) analyzing the development of the split in case law, which can be traced back to this Court's holdings in three equitable enforcement actions in the 1940s, and (b) propose a logical and consistent approach to the standard-of-review question that can be applied to any legal issue.

January 8, 2020

Legal Services for Prisoners
with Children
Rita Himes, Staff Attorney

PROPOSED AMICUS CURIAE BRIEF
OF LEGAL SERVICES FOR PRISONERS WITH CHILDREN

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INTRODUCTION

The issue under review is *not*, as Respondents suggest, whether appellate courts should review clear and convincing evidence findings for substantial evidence or engage in *de novo* factfinding under that standard of proof (SOP). Instead, the issue is whether appellate courts should take the heightened standard of proof when they conduct substantial evidence review (i.e., *SOP-conscious substantial evidence review*) or should ignore the standard of proof and conduct substantial evidence review as if the facts had to be proved by a mere preponderance of the evidence (*SOP-blind substantial evidence review*). It is settled law that appellate courts *can* competently engage in SOP-conscious review without engaging in *de novo* factfinding, and that they *must* do so in at least some contexts.

Respondents incorrectly contend that there is a longstanding, uncontested line of California precedent that holds SOP-conscious substantial evidence review is improper. In fact, cases so holding can be traced back to equitable enforcement cases from the 1940s, and in that area of the law the cases are inconsistent before or after the 1940s. While hostility toward SOP-conscious review has crept in other areas of law, the issue has been continually contested.

The Court should take this opportunity to reject SOP-blind substantial evidence in all cases as illogical and insufficiently protective of the constitutional principles or public policies that underlie heightened standards of proof. However, if the Court declines to adopt a uniform approach to the issue, it is critical that the Court insist on SOP-conscious review where a heightened standard of review derives from constitutional principles, as in this conservatorship cases and in most juvenile dependency appeals.

ARGUMENT

I. The Issue Under Review is Whether Appellate Courts Should Conduct SOP-Blind or SOP-Conscious Substantial Evidence Review, Not Whether They Should Decide Factual Issues *De Novo*.

Respondents incorrectly conflate SOP-conscious substantial evidence review with *de novo* factfinding in the appellate courts. (RB 24-33; see POB 42-43; PRB 7, 10-11, 13; ASCDC 16; Protecting 9, 11-12, 20-21; Chamber 21-22.) Citing cases describing generally-applicable principles of substantial evidence review – that appellate courts must draw reasonable inferences and resolve conflicts in the evidence in favor of the judgment; defer to factfinders' credibility determinations and their rational weighing of the evidence; and ensure supporting evidence is substantial or solid – Respondents claim the cases conflict with Petitioner's position on appeal. (RB 15-16) They do not.[1]

De novo factual finding is not at issue in this case. Instead, the question is whether appellate courts should apply *SOP-blind substantial evidence review* – i.e., decide whether *any* substantial evidence in the record supports a challenged factual finding, regardless of the standard of proof – or *SOP-conscious substantial evidence review* – i.e., decide whether a rational factfinder could make the finding by the applicable standard of proof.[2]

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[1] POB refers to Petitioner's Opening Brief; RB to Respondent's Answering Brief; PRB to Petitioner's Reply Brief; Spectrum to the Spectrum Institute, et al. amicus brief; ASCDC to the Association of Southern California Defense Counsel amicus brief; Protecting to the Protecting Our Elders amicus brief; Chamber to the Chamber of Commerce amicus brief; and Consumers to the Consumer Attorneys of California amicus brief.

[2] Even the Rutter Guide's discussion of the issue confuses these concepts. Under the heading, "Substantial evidence affected by trial court

It is settled law that appellate courts *can* engage in SOP-conscious substantial evidence review without deciding facts *de novo*, and that they *should* do so in at least some contexts. In *Jackson v. Virginia* (1979) 443 U.S. 307 (*Jackson*), the United States Supreme Court held the beyond a reasonable doubt standard of proof *must* be taken into account on review of the sufficiency of evidence for a criminal conviction. (*Id.* at p. 319.) "[A] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury." (*Id.* at p. 317.) The Court explained: "[C]ourts can and regularly do gauge the sufficiency of the evidence without intruding into any legitimate domain of the trier of fact." (*id.* at p. 321.) An appellate court does not " 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt[,]' [citation] . . . [but] whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Id.* at pp. 318-319.)

In *Anderson*, the United States Supreme Court similarly held that the clear and convincing evidence standard of proof should be taken into account on summary judgment review of an actual malice finding, which under the First Amendment must be proved by clear and convincing evidence in a defamation action against a public figure. (*Anderson, supra,* 477 U.S. at p. 244; see *New York Times v. Sullivan* (1964) 376 U.S. 254, 279-280.) The Court explained: "[T]he judge must ask himself . . .

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standard of proof?" the guide notes that some courts have applied substantial evidence review to juvenile dependency findings by clear and convincing evidence and seems to contrast those holdings to cases requiring SOP-conscious review. (See Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019) ¶¶ 8.63, 8:63.2 to 8.63.2b, pp. 8–29 to 8-31.)

whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented" by the applicable standard of proof (*id.* at p. 252 [emphasis added]; *accord id.* at p. 254). This approach "does not denigrate the role of the jury" because "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." (*Id.* at p. 255.)

II. California Appellate Courts Have Not Taken a Consistent Approach to Consideration of Heightened Standards of Proof on Substantial Evidence Review.

A. In the 1940s, this Court Adopted an SOP-Blind Approach in Equitable Enforcement Cases, But the Rule Has Not Been Consistently Followed.

1. The 1940s Cases Do Not State the Rule Clearly.

From 1943 to 1945, the California Supreme Court held in three cases that an appellate court should not consider the heightened standard of proof in cases seeking equitable enforcement actions.[3] (See *Stromerson v. Averill* (1943) 22 Cal.2d 808, 811, 813-814 (*Stromerson*) [claim that person holding absolute title to property in fact held it in trust for another]; *Beeler v. American Trust Co.* (1943) 24 Cal.2d 1, 3, 7 (*Beeler*) [claim that deed absolute in form was in fact an equitable mortgage]; *Viner v. Untrecht* (1945) 26 Cal.2d 261, 265-267 (*Viner*) [same]; accord *National Auto. & Cas. Ins. Co. v. Industrial Acc. Commission* (1949) 34 Cal.2d 20, 25 [claim that contract should be reformed to reflect parol agreement].)

Although the language in each of the three opinions is ambiguous -- e.g., *Beeler* states, " 'the appellate court . . . will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is

[3] We use "equitable enforcement action" as shorthand for an action in which a party seeks to enforce a parol agreement in contravention of or in the absence of written instrument or agreement.

substantial evidence warranting a clear and satisfactory conviction to that effect' " (*Beeler, supra,* 24 Cal.2d at p. 7 [emphasis added; quoting *Wadleigh* v. *Phelps* (1906) 149 Cal. 627, 637 (*Wadleigh*)])[4] -- the import of the opinions is made clear by the dissenting opinions by Justice Roger J. Traynor. In both *Stromerson* and *Beeler*, Justice Traynor wrote:

> While it rests primarily with the trial court to determine whether the evidence is clear and convincing, its finding is not necessarily conclusive, for in cases governed by the rule requiring such evidence 'the sufficiency of the evidence to support the finding should be considered by the appellate court *in the light of that rule*.' Sheehan v. Sullivan, 126 Cal. 189, 193; see, also, Moultrie v. Wright, 154 Cal. 520. In such cases it is the duty of the appellate court in reviewing the evidence to determine, not simply whether the trier of facts could reasonably conclude that it is more probable that the fact to be proved exists than that it does not, . . . but to determine whether the trier of facts could reasonably conclude that it is highly probable that the fact exists. When it hold [*sic*] that the trial court's finding must be governed by the same test with relation to substantial evidence as ordinarily applies in other civil cases, *the rule that the evidence must be clear and convincing becomes meaningless.* It is a contradiction that while the vitality of the rule is thus destroyed its soundness is not questioned. If, as in my opinion, the rule is sound, this court has erred in its pronouncements (see 25 Cal. Jur. 248; 2 Cal. Jur. 921) *declining to accept responsibility for its enforcement.*

(*Stromerson, supra,* 22 Cal.2d at pp. 817-818 [dis. opn., Traynor, J.; emphases added]; *Beeler, supra,* 24 Cal.2d at p. 33 [dis. opn., Traynor, J.;

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4 See also the following statements that are not inconsistent with SOP-conscious review. "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." (*Stromerson, supra,* 22 Cal.2d at p. 815; see also *Viner, supra,* 26 Cal.2d at p. 267 [quoting *Stromerson*].) "[W]hether or not the evidence offered to change the ostensible character of the instrument is clear and convincing is a question for the trial court to decide. [Citations.] In such case, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review on appeal." (*Beeler, supra,* 24 Cal.2d at p. 7.)

emphases added]; see also *Viner, supra,* 26 Cal.2d 273 [dis. opn., Traynor, J.; reaffirming position, but acknowledging battle was lost].)

In the first edition of California Procedure, published in 1954, Bernard E. Witkin cited these 1940s equitable enforcement cases as authority for a *general rule* of SOP-blind substantial evidence review: "[T]he [standard of proof] applies only in the trial court. The judge may reject a showing as not measuring up to the standard, but, if he decides in favor of the party with this heavy burden, the clear and convincing test *disappears*." (Witkin, Cal. Procedure (1954) Appeal § 84(2), pp. 2246-2247 [emphasis added].) (See Appx. to Br., Exh. A.)

In 1973, this Court reaffirmed the 1940s holdings in *Crail v. Blakeley* (1973) 8 Cal.3d 744, another equitable enforcement case. (See *id.* at pp. 746-747 [claim that parol will should be enforced].) The Court stated its holding in somewhat more explicit language than in the earlier cases: "Th[e clear and convincing evidence] standard was adopted[] . . . for the edification and guidance of the trial court, and was not intended as a standard for appellate review." (*Id.* at p. 750; accord, *In re Marriage of Saslow* (1985) 40 Cal.3d 848, 863 [claim that parol evidence rebutted statutory presumption that property acquired before marriage was separate property; quoting *Crail*].)

2. The 1940s Cases Are Not Part of a Longstanding Line of Uncriticized Precedent.

As will be explained further *post*, nearly all of the more recent cases that that apply SOP-blind review -- mostly on issues other than equitable enforcement -- can be traced back to *Crail, supra,* 8 Cal.3d 744, or to the passage in Witkin, Cal. Procedure (1954), quoted *ante* (to the extent they can be traced back to any authoritative precedent at all). That is, they can all ultimately be traced back to the 1940s equitable enforcement cases.

But the strength of the 1940s holdings, even in the equitable enforcement context, is weakened by (a) inconsistency in the Court's approach before the 1940s; and (b) ambiguity in the language of the 1940s cases, which led to inconsistent later application of the rule.

As Justice Traynor noted in his dissents, before the 1940s cases this Court had adopted SOP-conscious review in equitable enforcement actions. (See *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193 ["the sufficiency of the evidence to support the finding should be considered by the appellate court *in the light of that [clear and convincing evidence] rule*"; emphasis added]; see also *Moultrie v. Wright* (1908) 154 Cal. 520, 525 ["there is no basis for the claim that the evidence of the trust was not clear or convincing"].) The Court had also strongly so implied in *Wadleigh* -- in the language quoted in *Beeler, supra,* 24 Cal.2d at p. 7 [quoting *Wadleigh, supra,* 149 Cal. at p. 637] -- and *Stromerson* cites *Couts v. Winston* (1908) 153 Cal. 686 (*Couts*), which quotes the same language from *Wadleigh*. (*Stromerson, supra,* 22 Cal.2d at p. 815; see *Couts*, at p. 689.) Other cases cited in *Stromerson*, *Beeler*, and *Viner* describe the general substantial evidence rule without clearly indicating whether the standard of proof should be taken into account,[5] and some of those cases cite *Sheehan*, *Wadleigh*, or *Couts*, which expressly require SOP-conscious review.[6]

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[5] *Beeler, supra,* 24 Cal.2d at p. 7, cites *Mahoney v. Bostwick* (1892) 96 Cal. 53, 58; *Sherman v. Sandell* (1895) 106 Cal. 373, 375; and *Locke v. Moulton* (1901) 132 Cal. 145, 147.

Viner, supra, 26 Cal.2d at p. 267, cites *Watson v. Poore* (1941) 18 Cal.2d 302, 311.

[6] *Stromerson, supra,* 22 Cal.2d at p. 815, also cites *Steinberger v. Young* (1917) 175 Cal. 81, 84-85 (*Steinberger*) [citing *Couts, supra,* 153 Cal. 686], and *Steiner v. Amsel* (1941) 18 Cal.2d 48, 53-54 (*Steiner*) [citing *Title Ins. & Trust Co. v. Ingersoll* (1910) 158 Cal. 474, 484, which cites *Couts* and *Wadleigh, supra,* 149 Cal. 637].

Beeler, supra, 24 Cal.2d at p. 7, cites *Todd v. Todd* (1912) 164 Cal. 255, 257-258 [citing *Couts*]; *Lockhart v. J.H. McDougall Co.* (1923) 190

Pre-*Stromerson* cases cited by Respondents are also at best ambiguous on the issue. (RB 16-17.) *Hutchinson v. Ainsworth* (1887) 73 Cal. 452 seems to require the standard of proof to be taken into account: "the mistake must be established in a clear and convincing manner, and to the entire satisfaction of the court. *Viewed in this light*, we cannot say the court was unauthorized by the testimony in the conclusion it reached." (*Id.* at p. 458 [emphasis added].) *Ward v. Waterman* (1890) 85 Cal. 488 states an appellate court will not "disregard[] the finding of the court below, where there is *any* evidence to support it" (*id.* at p. 503 [emphasis added]), but also states, "[W]here the evidence . . . , if standing alone, uncontradicted, is *sufficiently clear and convincing*, we cannot reverse" (*id.* at p. 504 [emphasis added; quoting *De Jarnatt v. Cooper* (1881) 59 Cal. 703, 706].)

Meeker v. Shuster (1897) 5 Cal. Unrep. 578 and *Capelli v. Dondero* (1899) 123 Cal. 324, also cited by Respondents, use ambiguous language. (*Meeker*, at p. 582 ["whether the evidence is [clear and convincing] is a question for the trial court to determine"]; *Capelli*, at p. 328 ["the standard of proof is a "rule[] for the government of the trial court, and [is] not controlling where the findings find support in the evidence"].) Respondents also cite *Couts, supra,* 153 Cal. 686, the case supporting SOP-conscious review discussed *ante*, and both *Steinberger v. Young* (1917) 175 Cal. 81 and *Steiner v. Amsel* (1941) 18 Cal.2d 48, which can be traced back to *Couts* and *Wadleigh*.[7] (See fn. 6.)

Cal. 308, 310-311 [citing *Sheehan, supra,* 126 Cal. 189, and *Wadleigh*], overruled on other grounds by *Ellis v. Mihelis* (1963) 60 Cal.2d 206, 221; *Beckman v. Waters* (1911) 161 Cal. 581, 584-585 [citing *Couts* and *Wadleigh*].)

[7] Consumer Attorneys of California also cite *Notten v. Mensing* (1935) 3 Cal.2d 469 (Consumers at 19), but in *Notten* the Court simply held that the clear and convincing evidence standard of review applied to

Our research has identified additional pre-*Stromerson* equitable enforcement cases that require SOP-conscious review,[8] and none that clearly hold to the contrary.

Because of ambiguity in the 1940s opinions, appellate courts that cite the opinions do not clearly and consistently apply SOP-blind review. Instead, they mostly make ambiguous statements about the applicable standard of review.[9]

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enforcement of a parol will, and did so on review of an order sustaining a demurrer. (*Id.*, at pp. 470, 477.)

8 See *Fagan v. Lentz* (1909) 156 Cal. 681, 686 [quoting *Wadleigh, supra,* 149 Cal. at p. 637]; *DeKahn v. Chase* (1918) 177 Cal. 281, 283 (*DeKahn*) [in specific performance case, "where, on appeal, . . . it appears that the terms of such agreement are not clearly ascertainable, then the action of the trial court enforcing such uncertain agreement may be reversed," citing *Sheehan, supra,* 126 Cal. 189, and *Wadleigh*]; see also *Renton v. Gibson* (1906) 148 Cal. 650, 656 ["the evidence is not only not clear and convincing, but strongly preponderates against the finding"]; *Emery v. Lowe* (1903) 140 Cal. 379, 384 ["an appeal from . . . a judgment [based on clear and convincing evidence findings] sometimes presents a difficult question; but where, as in the case at bar, a trial court has declared such an instrument to be just what it purports to be [i.e., it was not proved by clear and convincing evidence to be a mortgage], an[] appellant from such a judgment cannot expect a reversal unless the evidence is almost overwhelmingly the other way"].)

9 See, e.g., *Khoury v. Barham* (1948) 85 Cal. App. 2d 202. 211 [citing *Beeler, supra,* 24 Cal.2d 1, and *Viner, supra,* 26 Cal.2d 261]; *Barthorpe v. Brown* (1950) 100 Cal. App. 2d 474, 479 [citing *Stromerson, supra,* 22 Cal.2d 808]; *Gonzalez v. Riis* (1959) 171 Cal.App.2d 473, 476-477 [citing *Stromerson* and *Viner*]; *Monell v. College of Physicians and Surgeons* (1961) 198 Cal.App.2d 38, 48 [citing *Viner*]; *Cutrera v. McClallen* (1963) 215 Cal.App.2d 604, 608 [same]; *Andreotti v. Andreotti* (1964) 224 Cal. App. 2d 533, 539 [citing *Beeler*]; *Arneson v. Webster* (1964) 226 Cal.App.2d 370, 376 [citing *Beeler*]; *Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708 [citing *Stromerson* and *Beeler*]; but see *Olcese v. Davis* (1954) 124 Cal.App.2d 58, 61 [clear and convincing evidence standard "is for the guidance of the trial court alone and does not influence the review on appeal," citing *Viner*]; *Cochran v. Board of Supervisors*

Witkin noted criticism of the 1940s holdings in his 1954 treatise. (See Witkin, Cal. Procedure (1954), *supra*, at p. 2247 ["see criticism, 32 Cal. L. Rev. 74; 17 So. Cal. L. Rev. 333; cf. 60 Harv. L. Rev. 111"].) And his 1966 California Evidence treatise seems to endorse the criticisms: "The decisions have shown that if the [clear and convincing evidence] rule is disregarded by the trial judge it *becomes a nullity*. For the nature of appellate review is the same as in other cases; i.e., the question whether the evidence of the plaintiff is clear and convincing is for the trial judge, and his determination on conflicting evidence will not be disturbed on appeal." (Witkin, Cal. Evidence (2d ed. 1966) Burden of Proof and Presumptions § 209, pp. 190-191 [citing the 1940s cases; emphasis added].) (See Appx. to Br., Exh. B.)

In sum, even as of the 1960s, before the United States Supreme Court decisions discussed *post*, there was hardly a "particular judicial view [that had] prevailed for a substantial period of time" (RB 20), and certainly not one held "unanimously and without critique" (RB 15), as Respondents contend.

B. The United States Supreme Court Requires SOP-Conscious Review Where Heightened Standards of Proof Are Compelled by Criminal Due Process and First Amendment Principles.

As explained *ante*,[10] the United States Supreme Court has required SOP-conscious review in two areas federal constitutional law. (*Jackson, supra,* 443 U.S. at pp. 319-320 [sufficiency of evidence to prove a crime beyond a reasonable doubt; rejecting prior "no evidence" rule of *Thompson v. Louisville* (1960) 362 U.S. 199, under which a mere modicum of evidence was sufficient to satisfy appellate sufficiency of the evidence

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(1978) 85 Cal.App.4th 75, 81 [clear and convincing evidence standard "applies only in the trial forum," citing *Crail, supra,* 8 Cal.3d 744]

[10] See POB 25-26, 34-35, 43-44; PRB 11-12; Protecting 17-18.

review]; *Anderson, supra,* 477 U.S.at pp. 252-253 [summary judgment of actual malice issue].[11]

This Court applied SOP-conscious standards of review in these contexts even before the United States Supreme Court so ruled (see *People v. Johnson* (1980) 26 Cal.3d 557, 577-578 (*Johnson*); *Readers' Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252), and has continued to do so thereafter (*Johnson*, at pp. 562, 578; see *McCoy v. Hearst Corp.*

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[11] The *Anderson* Court explained that a trial court's summary judgment ruling is analogous to an appellate court's substantial evidence review of factual findings because the court does not engage in its own factfinding, but instead asks whether a rational factfinder could find a fact by the applicable standard of proof, as is done on a motion for directed verdict in a civil case. (See *Anderson, supra,* 477 U.S. at pp. 252-255; see *id.* at pp. 252-253 [citing *Jackson, supra,* 443 U.S. at pp. 318-319, which states criminal sufficiency of the evidence review is analogous to a ruling on a motion for acquittal].) Applying similar reasoning, California courts have applied SOP-conscious review in punitive damages cases to a motion for nonsuit (*Stewart v. Truck Ins. Exchange* (1993) 17 Cal.App.4th 468, 482 [citing *Anderson*]); a motion for judgment notwithstanding the verdict (*Johnson & Johnson Talcum Powder Cases* (2019) [citing *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891 (*Shade Foods*), which is traceable to *Anderson* as explained in footnote 16, *post*]; and a motion for preliminary review of pleadings under Code of Civil Procedure section 425.13 (*Aquino v. Superior Court* (1993) 21 Cal.App.4th 847, 854-855 [citing *Anderson*].)

The issue has not arisen in the context of appellate review of trial-level fact finding in First Amendment defamation cases because of a related but distinct doctrine of independent review: appellate courts must conduct independent, whole-record review, rather than substantial evidence or "clearly erroneous" review (see Fed. R. Civ. Pro. 52(a)), of "constitutional fact" findings in First Amendment tort liability cases (e.g., actual malice findings). (*New York Times, supra,* 376 U.S. at p. 285; *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 514 & fn. 31; see *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 842, 845-846; see also Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (2019), *supra,* ¶8:63.5, at pp. 8-33 to 8-34 [discussing independent review rule].) This brief does not address whether such independent review should be extended to other cases.

(1991) 227 Cal.App.3d 1657, 1664). In fact, the Court seems to have adopted the SOP-conscious rule for summary judgment motions generally in *Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826, 845: "There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion *in accordance with the applicable standard of proof*." (Emphasis added.)

C. In the Juvenile Dependency Context, a Split in Authority on the Issue Is Traceable to the 1940s Equitable Enforcement and United States Supreme Court Constitutional Cases.

1. In 1981, this Court Mandated SOP-Conscious Review in Termination of Parental Rights Cases, Where Clear and Convincing Evidence is Required by Due Process.

"Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." (*Santosky v. Kramer* (1982) 455 U.S. 745, 753, 769-770; see *In re Angelia P.* (1981) 28 Cal.3d 908, 918-919 (*Angelia P.*) [requiring clear and convincing evidence to support termination of parental rights in light of prior U.S. Supreme Court due process decisions].)

In *Angelia P.*, this Court required SOP-conscious review of such findings. (*Angelia P., supra,* 28 Cal.3d at p. 924.) The Court simply "appl[ied], with appropriate modifications," the recent holdings of *Jackson, supra,* 443 U.S. 307, and *Johnson, supra,* 26 Cal.3d 557, and concluded: " '[T]he (appellate) court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence that is, evidence which is reasonable, credible, and of solid value such that a reasonable trier of fact could find (that termination

of parental rights is appropriate based on clear and convincing evidence).' " (*In re Angelia P.*, at p. 924; see *also In re Jasmon O.* (1994) 8 Cal.4th 398, 423-424.) (See POB 30-31, 34-35, 41-42; PRB 11.)

Although *Angelia P., supra,* 28 Cal.3d 908, addressed a termination of parental rights under a former statutory scheme, the holding logically extends to the current scheme as well. The current scheme requires clear and convincing evidence to support *pre*-termination decisions such as removal of children from their parents' custody, a bypass or termination of services designed to promote family reunification, and a finding of adoptability that frees children for adoption, but only requires a preponderance of evidence to finally terminate parental rights. (See *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 246-250 (*Cynthia D*).) However, this Court held in *Cynthia D.* that the heightened standards of proof for these *pre*-termination findings satisfy the constitutional requirements of *Angelia P.* and *Santosky, supra,* 455 U.S. at pp. 753, 769-770. (*Id.* at pp. 253-256.)

2. *Sheila S.* and Other Cases Nevertheless Apply SOP-Blind Substantial Evidence Review, Citing Authority That is Traceable to the 1940s Cases.

Despite the clear holding of *Angelia P., supra,* 28 Cal.3d at p. 924, there is a split in authority on whether substantial evidence review should be SOP-conscious in juvenile dependency appeals, as the First District recently observed. (See *In re T.J.* (2018) 21 Cal.App.5th 1229, 1238-1239 (*T.J.*).) Some of these cases cannot be traced back to original authoritative precedent.[12] Of those that can, however, the cases that apply SOP-

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[12] A long line of cases holding the standard of proof should be taken into account when reviewing adoptability findings is not traceable to any original authority so holding. See *In re Baby Boy L.* (1994) 24 Cal.App.4th

conscious review are almost all traceable to *Angelia P., supra,* 28 Cal.3d 908,[13] and the cases that apply SOP-blind review to *Crail, supra,* 8 Cal.3d 744 and thus ultimately to the 1940s equitable enforcement cases.[14]

596, 610 [citing *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214, which cites *In re Bernadette C.* (1982) 127 Cal.App.3d 618, 627, which cites no authority]; *In re Monica C.* (1995) 31 Cal.App.4th 296, 306 [citing no authority]; *In re Christiano S.* (1997) 58 Cal.App.4th 1424, 1431 [citing *Baby Boy L.*]; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154 [same]; *In re Brian P.* (2002) 99 Cal.App.4th 616, 623-624 [citing *Lukas B.*]; *In re Erik P.* (2002) 104 Cal.App.4th 395, 400 [same]; *In re Asia L.* (2003) 107 Cal.App.4th 498, 509-510 [same]; *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1561-1562 [citing *Erik P.*]; *In re Marina S.* (2005) 132 Cal.App.4th 158, 165 [citing *Baby Boy L.*]; *In re B.D.* (2008) 159 Cal.App.4th 1218, 1232 [citing *Gregory A.*]; *In re Valerie W.* (2008) 162 Cal.App.4th 1, 13 [same]; *In re I.I.* (2008) 168 Cal.App.4th 857, 869 [same]; *In re R.C.* (2008) 169 Cal.App.4th 486, 491 [citing *Marina S.*]; *In re Michael G.* (2012) 203 Cal.App.4th 580, 589 [citing *Gregory A.*]; *In re J.W.* (2018) 26 Cal.App.5th 263, 267 [citing *Gregory A.*].

See also the following cases reviewing findings other than adoptability: *In re Jeanette S.* (1979) 94 Cal.App.3d 52, 60 [citing no authority]; *In re James T.* (1987) 190 Cal.App.3d 58, 64-65 [citing *Jeanette S.*]; *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426 [citing *Lukas B.*]; *In re Isayah C.* (2004) 118 Cal.App.4th 684, 694-695 [citing *Luke M.*]; *In re John M.* (2006) 141 Cal.App.4th 1564, 1569 [same]; *Tyrone R. v. Superior Court* (2007) 151 Cal.App.4th 839, 852 [same]; *In re Mariah T.* (2008) 159 Cal.App.4th 428, 441 [citing *Isayah C.*]; *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1415 [citing *Mariah T.*]; and *In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1262 [citing *Luke M.*].)

[13] See *In re Robert J.* (1982) 129 Cal.App.3d 894, 901 [citing *Angelia P., supra,* 28 Cal.3d 908]; *In re R.S.* (1985) 167 Cal.App.3d 946, 963 [same]; *In re Amie M.* (1986) 180 Cal.App.3d 668, 674 [same]; *In re Terry E.* (1986) 180 Cal.App.3d 932, 949 [same]; *In re Victoria M.* (1989) 207 Cal.App.3d 1317, 1326 [same]; *In re Andrea G.* (1990) 221 Cal.App.3d 547, 552 [same]; *In re Christina L.* (1992) 3 Cal.App.4th 404, 414 [citing *Victoria M.*]; *In re Jasmon O., supra,* 8 Cal.4th at p. 423 [citing *Victoria M.*]; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1645 [citing *Angelia P.*]; *Curtis F. v. Superior Court* (2000) 80 Cal.App.4th 470, 474 [citing *Victoria M.*]; *In re Alvin R.* (2003) 108 Cal.App.4th 962, 971 [citing *Kristin H.*]; *In re Harmony B.* (2005) 125 Cal.App.4th 831, 839-840 [citing *Curtis F.*]; *In re Alexis S.* (2012) 205 Cal.App.4th 48, 54 [citing *Kristin H.*], disapproved

The case cited by the Court of Appeal in this case, *Sheila S., supra,* 84 Cal.App.4th at pp. 880-88 (see fn. 14), is in the latter group traceable to the equitable enforcement cases. (See *Conservatorship of O.B.* (2019) 32 Cal.App.5th 626, 633-634 [stating SOP-blind rule]; cf. *Maxon v. Superior Court* (1982) 135 Cal.App.3d 626, 634 [appearing to apply SOP-conscious review in conservatorship appeal].) *Angelia P.*, however, is clearly the more apt precedent.

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on other grounds by *In re I.J.* (2013) 56 Cal.4th 766, 780-781; *In re Hailey T.* (2012) 212 Cal.App.4th 139, 146 [same]; *In re Noe F.* (2013) 213 Cal.App.4th 358, 367 [same]; *In re Ashly F.* (2014) 225 Cal.App.4th 803, 809 [citing *Noe F.*]; *In re A.E.* (2014) 228 Cal.App.4th 820, 826 [citing *Kristin H.*]; *In re Madison S.* (2017) 15 Cal.App.5th 308, 325 [citing *A.E.*]; *T.J., supra,* 21 Cal.App.5th at p. 1239 [citing *Angelia P.*]; *In re M.F.* (2019) 32 Cal.App.5th 1, 14 [citing *T.J.*].

[14] See *In re Heidi T.* (1978) 87 Cal.App.3d 864, 871 [citing *Crail, supra,* 8 Cal.3d 744]; *In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1211 [citing *Heidi T.*]; *In re Marcel N.* (1991) 235 Cal.App.3d 1007, 1013 [citing *B.J.B.*]; *In re Walter E.* (1992) 13 Cal.App.4th 125, 139 [citing *Crail*]; *Sheila S. v. Superior Court* (2001) 84 Cal.App.4th 872, 880-881 (*Sheila S.*) [same]; *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581 & fn. 5 [citing *Sheila S.*]; *In re J.I.* (2003) 108 Cal.App.4th 903, 911 [citing *Crail*]; *In re Angelique C.* (2003) 113 Cal.App.4th 509, 519 [same]; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1525-1526 [same]; *In re E.B.* (2010) 184 Cal.App.4th 568, 578 [same]; *In re Levi H.* (2011) 197 Cal.App.4th 1279, 1291 [citing *Mark L.*]; *In re K.A.* (2011) 201 Cal.App.4th 905, 909 [citing *Sheila S.*]; *In re A.S.* (2011) 202 Cal.App.4th 237, 247 [citing *Mark L.*]; *In re Marriage of E. and Stephen P.* (2013) 213 Cal.App.4th 983, 989 [citing *Crail*]; *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216, fn 4 [same]; *In re J.S.* (2014) 228 Cal.App.4th 1483, 1493 [citing *J.I.*]; *In re A.R.* (2015) 235 Cal.App.4th 1102, 1115-1116 [citing *Crail*]; *In re F.S.* (2016) 243 Cal.App.4th 799, 812 [citing *Sheila S.*]; *In re Z.G.* (2016) 5 Cal.App.5th 705, 720 [citing *J.I.*]; *In re Alexzander C.* (2017) 18 Cal.App.5th 438, 451 [citing *Sheila S.*]; see also *Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010 [termination of parental rights under Fam. Code, § 7822, citing *B.J.B.*].

D. Punitive Damages Cases on the Issue are Similarly Traceable to the 1940s or the Constitutional Cases.

By statute, the Legislature requires plaintiffs to prove entitlement to punitive damages by clear and convincing evidence. (Civ. Code, § 3294.) There is a split in authority about whether appellate courts should apply SOP-blind or SOP-conscious substantial evidence review to such findings.[15] Cases supporting the SOP-conscious approach can mostly be traced back to *Jackson, supra,* 443 U.S. 307, or *Anderson, supra,* 477 U.S. 242,[16] and cases supporting the SOP-blind approach to *Crail, supra,* 8 Cal.3d 744 and thus ultimately to the 1940s equitable enforcement

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[15] See Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (2019), *supra*, ¶ 8.63.3, at pp. 8-31 to 8-33.

[16] See *Stewart, supra,* 17 Cal.App.4th at pp. 481-482 [citing *Anderson, supra,* 477 U.S. 242]; *Aquino, supra,* 21 Cal.App.4th at p. 855 & fn. 4 [same]; *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 59-61 [citing *Jackson, supra,* 443 U.S. 307, and *Anderson*]; *Shade Foods, supra,* 78 Cal.App.4th at pp. 891-892 [citing *Stewart*]; *Basich v. Allstate Ins. Co.* (2001) 87 Cal.App.4th 1112, 1118 [citing *Stewart*]; *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1049 [citing *Anderson* and *Stewart*]; *Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [citing *Stewart*]; *Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 712, 714 [citing *Hoch*]; *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1080 [citing *Stewart*]; *Food Pro Internat., Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976, 994 [citing *Stewart* and *Anderson*]; *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1053 [citing *American Airlines*]; *Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156, 175 [citing *Hoch*]; *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 34 [citing *Shade Foods*], disapproved on other grounds by *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 188; *Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 762 [citing *Hoch*]; *Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1125 [citing *Shade Foods*]; *Pacific Gas and Electric Co. v. Superior Court* (2018) 24 Cal.App.5th 1150, 1159 [citing *American Airlines*]; *Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292, 333 [citing *Hoch*].

decisions.[17] The clear weight of authority favors the SOP-conscious approach. (See fns. 16-17.)

E. The Same Pattern Emerges in Other Areas of Law, Resulting in Hopeless Confusion.

The same pattern emerges in the few cases that address the issue in other areas of the law. In *Ian J. v. Peter M.* (2013) 213 Cal.App.4th 189, the court applied SOP-blind review to a family court order for grandparent visitation over a parent's objections, which was challenged on constitutional grounds. (*Id.* at p. 208; see *Troxel v. Granville* (2000) 530 U.S. 57, 67–72.) The holding is traceable to the 1940s equitable enforcement decisions. (*Ibid.* [citing *Murray, supra,* 101 Cal.App.4th at p. 604]; see fn. 17, *ante.*) *In re Baby Girl M.* (2006) 135 Cal.App.4th 1528, on the other hand, applies SOP-conscious review to an order terminating parental rights under Family Code section 7825 and is traceable to *Jackson* and *Johnson* via *Angelia P.* (*Id.* at p. 1536.)

The state of the law is so confused that one court of appeal, in successive appeals on the same underlying facts, adopted two different approaches to substantial evidence review: in the first appeal, it stated review should be SOP-blind, citing *Crail, supra,* 8 Cal.3d 744 (see *In re Phillip B.* (1979) 92 Cal.App.3d 796, 802 [reviewing order dismissing juvenile dependency petition under purported clear and convincing evidence standard]), and in the second that review should be SOP-conscious, citing *Angelia P.* (see *Guardianship of Phillip B.* (1983) 139

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[17] See *Patrick v. Maryland Casualty Co.* (1990) 217 Cal.App.3d 1566, 1576 [citing *Crail, supra,* 8 Cal.3d 744]; *In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 601-02 (*Murray*) [citing *Patrick*]; *Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 67, fn. 46 [citing *Crail*]; *Morgan v. Davidson* (2018) 29 Cal.App.5th 540, 548 [citing *Crail*]; *Mazik v. Geico General Ins. Co.* (2019) 35 Cal.App.5th 455, 462-463 [citing *Crail*].

Cal.App.3d 407, 419 [reviewing appointment of nonparent as child's guardian over parent's objections pursuant to Prob. Code, § 1514, subd. (a)]).

In an opinion currently under review in this Court (*In re White* (2018) 21 Cal.App.5th 18, 30, rev. granted May 23, 2018, S248125), the court of appeal cited both lines of authority in a single paragraph, again hopelessly confusing the issue:

> While the trial court must be satisfied that the evidence supporting its finding is clear and convincing, we do not make the same determination. "That standard was adopted ... for the edification and guidance of the trial court, and was not intended as a standard for appellate review. 'The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.' " (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750; see *In re Mark L.* (2001) 94 Cal.App.4th 573, 580–581.) The ultimate question for a reviewing court is whether any reasonable trier of fact could have made the challenged finding by clear and convincing evidence. (See [*People v.*] *Zaragoza*[(2016) 1 Cal.5th [21,] 45.)

(*Id.* at p. 30.) *Zaragoza* states the *Jackson*/*Johnson* rule that a criminal conviction will be upheld if any rational factfinder could have found the defendant guilty beyond a reasonable doubt. (*Zaragoza, supra,* 1 Cal.5th at p. 45.)

III. This Court Should Adopt SOP-Conscious Substantial Evidence Review in All Cases

The most logical and consistent holding in this case is to require SOP-conscious substantial evidence review in all cases, whether the standard of proof is the preponderance of the evidence or a heightened standard imposed by statute, case law, or constitutional principle. In other words, the court should declare that, on substantial evidence review, the appellate court must determine whether a reasonable trier of fact could have

found the fact proved by the applicable standard of proof. (See *Johnson, supra,* 26 Cal.3d at p. 576.) This is the position implicitly taken by Petitioner and four other amici, the Spectrum Institute, et al., Protecting Our Elders, the ASCDC, and the Chamber of Commerce.

Although this would require the Court to overrule the equitable enforcement holdings, *stare decisis* principles do not bar that result in light of the historic inconsistency in case law on the subject, contrary to Respondents' contention. (See RB 20.)

IV. In the Alternative, the Court Should Distinguish Between Heightened Standards of Proof that Derive from Constitutional Principles and Those that Do Not.

If the Court opts not to adopt a uniform approach to substantial evidence review, LSPC urges the court to draw a distinction between heightened standards of proof that derive from constitutional principles and those that do not, and require SOP-conscious review for the former.

A. Equitable Enforcement Actions

For reasons of *stare decisis* or otherwise, the Court may want to adhere to the holdings of the 1940s equitable enforcement actions, including where the standard of proof has been codified by statute in this area of law. (See, e.g., Evid. Code, § 662 [presumption that owner of legal title to property has full beneficial title may be rebutted only by clear and convincing proof]; *In re Marriage of Ruelas* (2007) 154 Cal.App.4th 339, 345 [on review of rebuttal finding under Evid. Code, § 662, heightened standard of proof is irrelevant, citing Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2006) ¶ 8:63, p. 8–25 (rev.# 1,

2006)[18]]; Prob. Code, § 6110, subd. (c)(2) [clear and convincing evidence required to prove testator's intent if will is not signed by two witnesses as required by statute]; *Estate of Ben-Ali* (2013) 216 Cal.app.4th 1026, 1033 [where trial court failed to make the required finding, determining whether there was substantial evidence to prove intent by clear and convincing evidence in order to determine prejudicial error].) The Legislature arguably could be presumed to have anticipated SOP-blind substantial evidence review in light of precedent. LSPC takes no position on which standard of review should apply in equitable enforcement actions, assuming the Court declines to adopt a uniform approach across different areas of law.

B. Common Law Standards of Proof

The Court is similarly free to adopt SOP-blind substantial evidence review in other areas of the common law. It is beyond the scope of this brief to analyze the merits and drawbacks of doing so, and again LSPC takes no position on the issue.

C. Statutory Standards of Proof: Not Constitutionally-Derived

When the Legislature adopts a heightened standard of review for public policy reasons that are not derived from constitutional principles, the Court should presume that the Legislature anticipated and intended for the standard of proof to be taken into account on substantial evidence review in the absence of clear statements to the contrary. This presumption is reasonable because enforcement of the standard of proof on appeal logically serves the same policy interests as adoption of the standard in the

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[18] See Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (2019), *supra,* ¶ 8:63, p. 8–29 [citing *Crail, supra,* 8 Cal.3d 744, and *Ruelas, supra,* 154 Cal.App.4th 339].)

trial court, and because -- as demonstrated *ante* -- the weight of authority has been in favor of SOP-conscious review.

D. Standards of Proof: Constitutionally Derived

Critically, LSPC urges the Court to insist on SOP-conscious substantial evidence review whenever a heightened standard of proof derives from federal or state constitutional principles, whether declared in a court decision or enacted by the Legislature, and whether announced as a constitutional mandate or adopted to avoid possible unconstitutionality.

This is such a case. In *Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611, the court held that clear and convincing evidence was required to impose a conservatorship under Probate Code former section 1751 (*id.*, at p. 620), predecessor to current Probate Code section 1801 (compare *id.* at pp. 618-619 [quoting former Prob. Code, § 1751] with Prob. Code § 1801, subds. (a)-(c).) In reaching this conclusion, the court discussed two constitutional cases. (*Id.* at pp. 619-621; see *People v. Burnick* (1975) 14 Cal.3d 306, 310 state and federal due process require proof beyond a reasonable doubt for civil commitment of a mentally disordered sexual offender]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 222-223 [due process requires proof beyond a reasonable doubt to impose a conservatorship under Welf. & Instit. Code, § 5350, which could lead to involuntary civil commitment; "The logic of *Burnick* is equally applicable here"].) Although *Sanderson* does not directly hold that due process requires the heightened standard in the conservatorship context, the case is reasonably construed as so holding. Accordingly, SOP-conscious substantial evidence review should be required on appeal.

A similar analysis applies to appeals of juvenile dependency removal, bypass, adoptability, and other findings that must be proved by clear and convincing evidence. As explained *ante*, these pre-termination

findings satisfy constitutional due process requirements. (*Cynthia D., supra,* 5 Cal.4th at pp. 253-256; see *In re Henry V.* (2004) 119 Cal.App.4th 522, 525 ["The high standard of proof by which [a removal] finding must be made is an essential aspect of the presumptive, constitutional right of parents to care for their children"].) Accordingly, SOP-conscious substantial evidence review should be required as to those findings.

The same rule should apply when the Legislature adopts a heightened standard of review against the background of and under the influence of constitutional rulings, even if the specific enactment is not dictated by precedent. (See, e.g., *Nora v. Kaddo* (2004) 116 Cal.App.4th 1026, 1028 [characterizing the clear and convincing evidence standard of proof adopted by the Legislature in Code of Civ. Proc., § 527.6, a civil harassment restraining order law, as an "important due process standard[]"]. But see *Parisi v. Mazzaferro* (2016) 5 Cal.App.5th 1219, 1227, fn. 11 [applying SOP-blind substantial evidence review to such a restraining order, citing *Sheila S., supra,* 84 Cal.App.4th 872; *Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1111, fn. 2 [same, citing 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 283, pp. 294–295, which cites the 1940s cases].) (See Appx. to Br., Exh. C.)

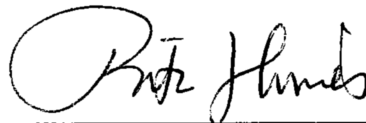
Finally, whenever courts require heightened standards of proof in light of constitutional principles -- whether the court so holds directly, so implies, or adopts the standard under the doctrine of constitutional avoidance (see, e.g., *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548 [construing Probate Code§ 2355 to require clear and convincing evidence to withdraw conservatee's artificial nutrition and hydration to avoid possible unconstitutionality]) -- SOP-conscious substantial evidence review should always be required.

CONCLUSION

It is settled law that appellate courts *can* competently engage in SOP-conscious review without engaging in *de novo* factfinding, and that they *must* do so in at least some contexts. It is *not* true, as Respondents argue, that there is a longstanding, uncontested line of California precedent requiring SOP-conscious substantial evidence review. The issue has been contested for decades. The Court should resolve the matter once and for all and reject SOP-blind substantial evidence as illogical and insufficiently protective of the constitutional principles or public policies that underlie heightened standards of proof. However, if the Court declines to adopt a uniform approach to the issue, it is critical that the Court insist on SOP-conscious review where a heightened standard of review derives from constitutional principles, as in this conservatorship cases and in most juvenile dependency appeals.

LSPC urges the court reverse the Court of Appeal because it improperly applied substantial evidence review without considering the heightened standard of proof, and remand for reconsideration.

Dated: January 8, 2020



Rita Himes
Counsel for Legal Services for
Prisoners with Children

CERTIFICATION OF WORD COUNT

I, Rita Himes, counsel for Proposed Amicus Curiae Legal Services for Prisoners with Children, certify that the word count for this document, including footnotes, is 9,920 words, excluding the cover, tables, this certification, and attachments permitted by rule 8.520(h). I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and based on my personal knowledge.

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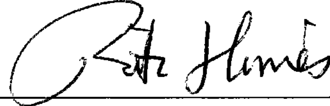

Rita Himes
Counsel for Legal Services for Prisoners with Children

CERTIFICATION PURSUANT TO RULE 8.520(f)(4)

I, Rita Himes, counsel for Proposed Amicus Curiae Legal Services for Prisoners with Children, certify that no party or counsel for a party in this case authored the proposed amicus brief in whole or part or made a monetary contribution intended to fund preparation or submission of the brief. Nor has any person or entity made a monetary contribution intended to fund preparation or submission of the brief other than LSPC, its members, or its counsel. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and based on my personal knowledge.

Dated: January 8, 2020

Rita Himes
Counsel for Legal Services for Prisoners with Children

APPENDIX TO THE BRIEF

EXHIBIT A

Witkin, Cal. Procedure (1954) Appeal § 84(2)

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CALIFORNIA PROCEDURE

By
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VOLUME 3

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ford v. Southern Pac. Co. (1935) 3 C.2d 427, 429, 45 P.2d 183, is typical: "In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." And the rule is identical where the trial is by the court: "[I]n examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding." (*Bancroft-Whitney Co. v. McHugh* (1913) 166 C. 140, 142, 134 P. 1157.) (Cf. Fed. Rule 52; 2 B. & H. 807, 831; 2 Stanf. L. Rev. 784.)

This fundamental doctrine is stated and applied in hundreds of cases, of which the following are recent examples: *Estate of Bristol* (1943) 23 C.2d 221, 223, 143 P.2d 689; *Estate of Teel* (1944) 25 C.2d 520, 527, 154 P.2d 384; *Ventimiglia v. Hodgen* (1952) 112 C.A.2d 658, 247 P.2d 123; *Mastrofini v. Swanson* (1952) 114 C.A.2d Supp. 848, 850, 250 P.2d 764; *Maslow v. Maslow* (1953) 117 C.A.2d 237, 243, 255 P.2d 65; *Hodges v. Porikos* (1948) 88 C.A.2d 238, 198 P.2d 577; *Buckhantz v. Hamilton & Co.* (1945) 71 C.A.2d 777, 163 P.2d 756; *Kruckow v. Lesser* (1952) 111 C.A.2d 198, 244 P.2d 19; *Burnett v. Reyes* (1953) 118 C.A.2d Supp. 878, 256 P.2d 91. (See 36 Cal. L. Rev. 116.)

That this virtual abandonment of appellate review of facts does not wholly satisfy the bar appears from occasional irritated reminders in opinions: "With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. No one seems to listen." (*Overton v. Vita-Food Corp.* (1949) 94 C.A.2d 367, 370, 210 P.2d 757; see also *Buckhantz v. Hamilton & Co.*, supra, 71 C.A.2d 779.)

(2) *Where "Clear and Convincing Evidence" Required.* In a few

situations the law requires that a party produce more than an ordinary preponderance; he must establish a fact by "clear and convincing evidence." (See *Summary, Evidence,* §4.) But the requirement applies only in the trial court. The judge may reject a showing as not measuring up to the standard, but, if he decides in favor of the party with this heavy burden, the clear and convincing test disappears. On appeal, the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong. (*Beeler v. American Trust Co.* (1944) 24 C.2d 1, 7, 147 P.2d 583; *Stromerson v. Averill* (1943) 22 C.2d 808, 815, 141 P.2d 418; *Viner v. Untrecht* (1945) 26 C.2d 261, 267, 158 P.2d 3; *Baines v. Zuieback* (1948) 84 C.A.2d 483, 488, 191 P.2d 67; *Estate of Moramarco* (1948) 86 C.A.2d 326, 333, 194 P.2d 740; see criticism, 32 Cal. L. Rev. 74; 17 So. Cal. L. Rev. 333; cf. 60 Harv. L. Rev. 111.)

(3) *Excessive or Inadequate Recovery.* Where the appellant contends that the recovery is either excessive or inadequate he is almost invariably attacking the sufficiency of the evidence, and the rule of conflicting evidence applies. In connection with damages, however, it is phrased differently: The judgment will be reversed on appeal only if the award "is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury." This is another way of saying that the verdict will be set aside only if it lacks any substantial evidence in its support. (See *Bond v. United Railroads* (1911) 159 C. 270, 286, 113 P. 366; *Brown v. Boehm* (1947) 78 C.A.2d 595, 178 P.2d 49; on distinction between scope of appellate review and review by trial judge on motion for new trial, see *Attack on Judgment in Trial Court,* §15.)

(4) *Appeal on Judgment Roll or Other Partial Record.* The rule of conflicting evidence necessarily precludes any successful appeal on insufficiency of evidence unless an adequate record is brought up. If the appeal is on the judgment roll alone (see infra, §145), the evidence is conclusively presumed to support the judgment. (*Kompf v. Morrison* (1946) 73 C.A.2d 284, 286, 166 P.2d 350 ["on a clerk's transcript appeal the appellate court must conclusively presume that the evidence is ample to sustain the findings, and that the only questions presented are as to the sufficiency of the pleadings and whether the findings support the judgment"]; *Gin Chow v. Santa Barbara* (1933) 217 C. 673, 680, 22 P.2d 5; *Sacre v. Imperial Water Co.* (1928) 206 C. 13, 272 P. 1044; *Semple v. Andrews* (1938) 27 C.A.2d 228, 231, 235, 81 P.2d 203; *Hunt v. Plavsa* (1951) 103 C.A.2d 222, 224, 229 P.2d 482.)

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EXHIBIT B

Witkin, Cal. Evidence (2d ed. 1966)
Burden of Proof and Presumptions § 209

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CALIFORNIA EVIDENCE

Second Edition

by B. E. WITKIN

of the San Francisco Bar

BANCROFT-WHITNEY
San Francisco, 1966

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Wirz v. Wirz (1950) 96 C.A.2d 171, 175, 214 P.2d 839 [divorce for incurable insanity, all doctors testified that defendant would get progressively worse "in the realm of reasonable probability"]; *Spolter v. Four-Wheel Brake Serv. Co.* (1950) 99 C.A.2d 690, 693, 222 P.2d 307; *People v. One 1952 Chevrolet* (1954) 128 C.A.2d 414, 418, 275 P.2d 509; 32 Cal. L. Rev. 242, 260; 2 U.C.L.A. L. Rev. 16; McCormick, p. 676; 9 Wigmore, §2498; 1954 A.S. 805; 93 A.L.R. 155.)

Even where the theory of the case involves the accusation of a crime, the burden of proving the crime (supra, §199) is met by a *preponderance of the evidence;* i.e., the high degree of proof demanded in criminal cases is not required in civil cases even on the *issue of crime.* (*Cooper v. Spring Valley Water Co.* (1911) 16 C.A. 17, 21, 116 P. 298; *Estate of Nelson* (1923) 191 C. 280, 286, 216 P. 368; see McCormick, p. 684; 124 A.L.R. 1378.)

(b) Clear and Convincing Evidence.

(1) [§209] Nature of Requirement.

(a) *Preponderance Distinguished.* In a few situations, for reasons of policy of the substantive law, the ordinary "preponderance of the evidence" is not considered sufficient to establish the fact in issue, and instead the party must prove it by "clear and convincing evidence." In such cases, of course, the jury or trial judge should not be satisfied with a slight preponderance in favor of the plaintiff. (See *Sheehan v. Sullivan* (1899) 126 C. 189, 193, 58 P. 543; *In re Jost* (1953) 117 C.A.2d 379, 383, 256 P.2d 71; McCormick, p. 679; 9 Wigmore, §2498; 23 A.L.R. 1500; 49 A.L.R. 975; 105 A.L.R. 984; 148 A.L.R. 400.)

The phrase has been defined as "clear, explicit and unequivocal," "so clear as to leave no substantial doubt," and "sufficiently strong to command the unhesitating assent of every reasonable mind." (*In re Jost,* supra.) Otherwise stated, a preponderance calls for probability, while clear and convincing proof demands a *high probability.* (See 32 Cal. L. Rev. 262; 2 U.C.L.A. L. Rev. 17; cf. Ev.C. 115, 502, supra, §207, recognizing the distinction but not defining the terms.)

(b) *Effect of Trial Judge's Determination.* The decisions have shown that if the rule is disregarded by the trial judge it becomes a nullity. For the nature of the appellate review is the same as in other cases; i.e., the question whether the evidence of the plaintiff is clear and convincing is for the judge, and *his determination on conflicting evidence* will not be disturbed on appeal. (*Beeler v. American Trust*

Co. (1944) 24 C.2d 1, 7, 147 P.2d 583; *Stromerson v. Averill* (1943) 22 C.2d 808, 815, 141 P.2d 418; *Viner v. Untrecht* (1945) 26 C.2d 261, 267, 158 P.2d 3; *Hansen v. Bear Film Co.* (1946) 28 C.2d 154, 173, 168 P.2d 946 [action to establish a trust, proof by circumstantial evidence held sufficient]; *Thomasset v. Thomasset* (1953) 122 C.A.2d 116, 123, 264 P.2d 625 [sufficiency of evidence to overcome presumption of community property]; *Fahrney v. Wilson* (1960) 180 C.A.2d 694, 697, 4 C.R. 670; *Marshall v. Marshall* (1965) 232 C.A.2d 232, 246, 42 C.R. 682, citing the text; see criticism, 32 Cal. L. Rev. 74; 17 So. Cal. L. Rev. 333.)

(2) [§210] Issues Requiring Such Proof.

The principal situations in which the courts have laid down the requirement of this higher degree of proof in civil cases are as follows:

(a) Deed absolute in form is actually a mortgage. (See *Wehle v. Price* (1927) 202 C. 394, 397, 260 P. 878; *Beeler v. American Trust Co.* (1944) 24 C.2d 1, 7, 147 P.2d 583; 1 *Summary, Security Transactions in Real Property,* §5; infra, §241.)

(b) Deed absolute in form is actually a conveyance subject to a trust. (See *Sheehan v. Sullivan* (1899) 126 C. 189, 193, 58 P. 543; *Spaulding v. Jones* (1953) 117 C.A.2d 541, 545, 256 P.2d 637; infra, §241.)

(c) Oral agreement to make a will. (See *Lynch v. Lichtenthaler* (1948) 85 C.A.2d 437, 441, 193 P.2d 77; 4 *Summary, Equity,* §22; 69 A.L.R. 101, 167; 169 A.L.R. 65.)

(d) Property acquired after marriage is nevertheless separate property (overcoming the strong presumption in favor of community property). (See *Estate of Nickson* (1921) 187 C. 603, 605, 203 P. 106; 4 *Summary, Community Property,* §25.)

(e) Proof of impotency or non-intercourse to overcome disputable presumption of legitimacy of child. (See *Estate of Walker* (1919) 180 C. 478, 492, 181 P. 792 ["clear and satisfactory" evidence]; 3 *Summary, Parent and Child,* §98; 57 A.L.R.2d 740, 742; infra, §240.)

(f) Alien applicant for naturalization without oath to bear arms (conscientious objector) must show "by clear and convincing evidence . . . to the satisfaction of the naturalization court" that his opposition is based solely on religious training and belief. (*In re Jost* (1953) 117 C.A.2d 379, 383, 256 P.2d 71.)

(g) Government's burden in denaturalization proceeding. (See *Chaunt v. United States* (1960) 364 U.S. 350, 81 S.Ct. 147, 149, 5 L.Ed.2d 120.)

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EXHIBIT C

9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 283

CALIFORNIA PROCEDURE

Third Edition

VOLUME NINE

Chapter XIII

APPEAL

INTRODUCTION

A. Nature of Appeal and Appellate Jurisdiction.
- 1. [§1] In General.
- 2. [§2] Appellate Jurisdiction Statutory.
- 3. [§3] Retroactive Legislation.
- 4. Appellate Practice.
  - (a) [§4] In General.
  - (b) [§5] California Practice.

B. Effect of Taking Appeal.
- 1. [§6] Jurisdiction Vested in Appellate Court.
- 2. Jurisdiction Retained by Trial Court.
  - (a) [§7] Jurisdiction Over Collateral Matters.
  - (b) Jurisdiction Over Merits.
    - (1) [§8] In General.
    - (2) [§9] Spousal Support.
  - (c) [§10] Vacation or Correction of Judgment.

C. Appeal From Superior Court.
- 1. [§11] Early Law.
- 2. New Rules on Appeal.
  - (a) [§12] Adoption and Subsequent Amendments.
  - (b) [§13] Objectives and Accomplishments.
  - (c) [§14] Scope: Practice and Procedure.

The test, however, is not whether there is substantial conflict, but rather whether there is *substantial evidence in favor of the respondent.* If this "substantial" evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed. In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing.* "Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." (*Estate of Teel* (1944) 25 C.2d 520, 527, 154 P.2d 384; see also *Buckhantz v. Hamilton & Co.* (1945) 71 C.A.2d 777, 780, 163 P.2d 756 ["this court will not extend its inquiry for the purpose of determining whether appellant's evidence was as 'overwhelming' as he claims in his brief"]; *Crogan v. Metz* (1956) 47 C.2d 398, 404, 303 P.2d 1029 [citing *Teel* case and quoting the text]; *Walton v. Bank of Calif.* (1963) 218 C.A.2d 527, 540, 32 C.R. 856, quoting the text; *Tangora v. Matanky* (1964) 231 C.A.2d 468, 471, 42 C.R. 348, quoting the text; *Dunlap v. Marine* (1966) 242 C.A.2d 162, 165, 51 C.R. 158; *Estate of Nigro* (1966) 243 C.A.2d 152, 160, 52 C.R. 128; *Guardianship of Mosier* (1966) 246 C.A.2d 164, 169, 54 C.R. 447, quoting the text; *Nestle v. Santa Monica* (1972) 6 C.3d 920, 925, 101 C.R. 568, 496 P.2d 480, quoting the text; *Campbell v. Southern Pac. Co.* (1978) 22 C.3d 51, 60, 148 C.R. 596, 583 P.2d 121, quoting the text; *Chodos v. Insurance Co. of North America* (1981) 126 C.A.3d 86, 97, 178 C.R. 831, citing the text; *Skyway Aviation v. Troyer* (1983) 147 C.A.3d 604, 609, 195 C.R. 281, citing the text; *Horn v. Oh* (1983) 147 C.A.3d 1094, 1099, 195 C.R. 720; *Long Beach Police Officer Assn. v. Long Beach* (1984) 156 C.A.3d 996, 1001, 203 C.R. 494, citing the text; *Tillery v. Richland* (1984) 158 C.A.3d 957, 963, 205 C.R. 191.)

(3) [§283] Where "Clear and Convincing Evidence" Required.

In a few situations, the law requires that a party produce more than an ordinary preponderance; he must establish a fact by "clear and convincing evidence." (See *Cal. Evidence,* 2d, §§209, 210.) But the requirement applies only in the trial court. The judge may reject a showing as not measuring up to the standard, but, if he decides in favor of the party with this heavy burden, the clear and

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convincing test disappears. On appeal, the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong. (*Beeler v. American Trust Co.* (1944) 24 C.2d 1, 7, 147 P.2d 583; *Stromerson v. Averill* (1943) 22 C.2d 808, 815, 141 P.2d 418; *Viner v. Untrecht* (1945) 26 C.2d 261, 267, 158 P.2d 3; *Baines v. Zuieback* (1948) 84 C.A.2d 483, 488, 191 P.2d 67; *Estate of Moramarco* (1948) 86 C.A.2d 326, 333, 194 P.2d 740; *Fahrney v. Wilson* (1960) 180 C.A.2d 694, 697, 4 C.R. 670, citing the text; *Marshall v. Marshall* (1965) 232 C.A.2d 232, 246, 42 C.R. 682, citing the text; *United Professional Planning v. Superior Court* (1970) 9 C.A.3d 377, 387, 88 C.R. 551, citing the text; *Crail v. Blakely* (1973) 8 C.3d 744, 750, 106 C.R. 187, 505 P.2d 1027; *Cal. Evidence*, 2d, §209; see criticism, 32 Cal. L. Rev. 74; 17 So. Cal. L. Rev. 333; cf. 60 Harv. L. Rev. 111.)

(4) [§284] Evidence Attacked as Inherently Improbable.

The rule that a court may reject uncontradicted testimony as "inherently improbable" is, like the "clear and convincing evidence rule" (supra, §283), one for the *trial judge*. If he believes and decides in accordance with the testimony, an appellate court will not make its own evaluation of that testimony as a basis for reversal. (See *Cal. Evidence*, 2d, §1112.)

Thus, in *Evje v. City Title Ins. Co.* (1953) 120 C.A.2d 488, 261 P.2d 279, appellant argued that the testimony of respondent's witness was shown to be false by circumstances, his admissions and documentary evidence. The appellate court candidly observed that "Respondent does not try to explain any of these peculiar circumstances," but took the position that the conflict was resolved by the trial judge in its favor. (120 C.A.2d 491.) And the court added: "There are expressions—nearly all dicta—in one form or another to the effect that an appellate court will reject testimony inherently improbable or impossible of belief in some 40 civil cases collected in 2 McKinney's Digest. . . . However, only in one of these cases did the appellate court actually reject as unbelievable testimony believed by the trier of facts." This is because testimony can be rejected only when "wholly unacceptable to reasonable minds" or "unbelievable *per se*," and the appellate court will not substitute its own evaluation of credibility of the witnesses even though to some triers of fact the evidence "would have seemed so improbable,

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PROOF OF SERVICE

Supreme Court of the State of California

CASE NAME: Conservatorship of Estate of O.B.

T.B., et al., Petitioners and Respondents,

vs.

O.B., Objector and Appellant.

Cal. Supreme Court Case Number: S254938

Court of Appeal Case Number: B290805

Santa Barbara Superior Court Case No.: 17PR00325

I am over the age of 18 and not a party to this legal action. My business address is: 4400 Market Street, Oakland, CA 94608.

On date below I mailed a copy of the documents listed below as follows: I enclosed a copy of the documents identified in envelopes and placed the envelopes for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the US Postal Service, in sealed envelopes with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

DOCUMENTS SERVED:

APPLICATION FOR RELIEF FROM DEFAULT TO FILE A LATE AMICUS CURIAE BRIEF
IN SUPPORT OF O.B., OBJECTOR AND APPELLANT, BY LEGAL SERVICES FOR PRISONERS WITH CHILDREN

APPLICATION TO FILE AMICUS CURIAE BRIEF, AND PROPOSED AMICUS CURIAE BRIEF, IN SUPPORT OF O.B., PETITIONER, BY LEGAL SERVICES FOR PRISONERS WITH CHILDREN

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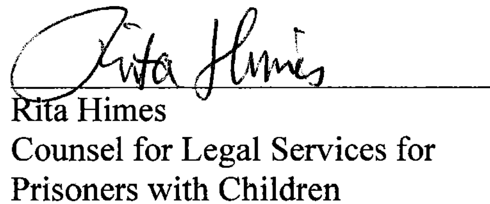
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and based on my personal knowledge.

Dated: January 8, 2020



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