Case No. S248125

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Christopher Lee White,

Petitioner,

On Habeas Corpus.

After a Decision by the Fourth District Court of Appeal, D073054
San Diego Superior Court, SCN376029,
Hon. Robert J. Kearney

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 brie on the second issue on which the Court granted review: "What standard of review applies to review of the denial of bail?"

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 supported by findings proved beyond a reasonable doubt) and juvenile dependency orders removing children from their constructive custody or terminating their parental rights (which must be supported by findings proved by clear and convincing evidence).

On January 8, 2020, LSPC filed an application to file a late amicus brief in *In re Conservatorship of O.B.* (S254938), which presents the issue: "On appellate review in a conservatorship proceeding of a trial court order that must be based on clear and convincing evidence, is the reviewing court simply required to find substantial evidence to support the trial court's order or must it find substantial evidence from which the trial court could have made the necessary findings based on clear and convincing evidence?" We argued that, when an appellate court conducts substantial evidence review of a finding made by clear and convincing evidence, the court should take the heightened standard of proof into account, especially when the standard of proof derives from constitutional principles.

In this case, the Court will determine the appropriate standard of review for findings underlying a denial of bail pursuant to the California Constitution, article I, section 12, subdivision (b) (section 12(b)).

First, the trial court must find "the facts are evident or the presumption great." (§ 12(b).) Courts have interpreted this language to mean the court must find there is sufficient evidence to support a conviction on the charged offenses, as a court does when ruling on a motion for acquittal. The *trial court and court of appeal apply the same standard* of review on this question: whether the evidence presented at the bail hearing was sufficient to persuade a rational factfinder the essential elements of the charged offenses *beyond a reasonable doubt.*

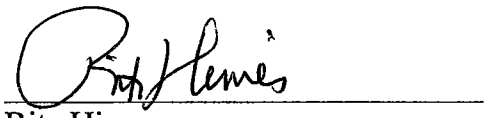
Second, in order to deny bail a trial court must find by clear and convincing evidence that "there is a substantial likelihood the person's release would result in great bodily harm to others." (§ 12(b).) We agree with Petitioner and amici American Civil Liberties Union organizations (ACLU) that this determination should be independently reviewed in the same manner as appellate courts review a ruling on suppression of evidence under the Fourth Amendment. (POB 37-41; ACLU 9, 12-16, 21-30.) That is, findings of "precursor facts" (ACLU 13, 21) should be reviewed for substantial evidence, and the application of legal standards to those facts reviewed independently.

However, we urge the Court to clarify that precursor facts be reviewed for substantial evidence *with the clear and convincing evidence standard of proof in mind.* Similarly, if the Court rejects independent review and adopts substantial evidence review for the second finding in its entirety, it should specify that the clear and convincing evidence standard must be taken into account.

There is currently a split in authority on whether heightened standards of proof are relevant under substantial evidence review generally. Our brief will assist 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) proposing a logical and

consistent approach to the standard-of-review question that can be applied to any area of the law. Moreover, consideration of our amicus briefs in both this case and *Conservatorship of O.B.* will assist the Court in rendering consistent decisions.

Dated: January 13, 2020



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PROPOSED AMICUS CURIAE BRIEF
OF LEGAL SERVICES FOR PRISONERS WITH CHILDREN

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INTRODUCTION

On January 8, 2020, LSPC filed an application to file a late amicus brief in *In re Conservatorship of O.B.* (S254938), which presents the following issue: "On appellate review in a conservatorship proceeding of a trial court order that must be based on clear and convincing evidence, is the reviewing court simply required to find substantial evidence to support the trial court's order or must it find substantial evidence from which the trial court could have made the necessary findings based on clear and convincing evidence?" We argued that, when an appellate court conducts substantial evidence review of a finding made by clear and convincing evidence, the court should take the heightened standard of proof (SOP) into account (i.e., apply SOP-conscious rather than SOP-blind substantial evidence review), especially when the standard of proof derives from constitutional principles. We urge the Court to take the same approach in this case.

Here, the Court will determine the appropriate standard of review for two separate findings that are required by California Constitution, article I, section § 12, subdivision (b) (section 12(b)) before a trial court can deny bail for a person charged with felony offenses involving acts of violence on another person or felony sexual assault offenses on another person.

First, the trial court must find "the facts are evident or the presumption great." (§ 12(b).) Courts have interpreted this language to mean the court must find there is sufficient evidence to support a conviction on the charged offenses, as a court does when ruling on a motion for acquittal. It is critical that this Court clarify that the *both the trial court and the court of appeal must take the beyond a reasonable doubt standard of proof into account* when assessing the sufficiency of the evidence, as has long been required by United States Supreme Court and California

Supreme Court precedent. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 & fns. 12-13; *People v. Johnson* (1980) 26 Cal.3d 557, 577-578 (*Johnson*).)

Second, in order to deny bail a trial court must find by clear and convincing evidence that "there is a substantial likelihood the person's release would result in great bodily harm to others." (§ 12(b).) We agree with Petitioner and amici American Civil Liberties Union organizations (ACLU) that this determination should be independently reviewed in the same manner as appellate courts review a ruling on suppression of evidence under the Fourth Amendment. (POB 37-41; ACLU 9, 12-16, 21-30.)[1] That is, findings of "precursor facts" (ACLU 13, 21) should be reviewed for substantial evidence, and the application of legal standards to those facts reviewed independently.

However, we urge the Court to clarify that precursor facts must be reviewed for substantial evidence *with the clear and convincing evidence standard of proof in mind* (i.e., SOP-conscious substantial evidence review). Similarly, if the Court rejects independent review and adopts substantial evidence review for the second finding in its entirety, it should specify that the clear and convincing evidence standard must be taken into account.

There is currently a split in authority about whether heightened standards of proof are relevant under substantial evidence review generally (i.e., whether substantial evidence review should be SOP-conscious or SOP-blind). In the final two sections of this brief (which largely duplicate our proposed amicus brief in *Conservatorship of O.B.* (S254938)), we analyze the development of the split in case law, which can be traced back

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[1] POB refers to Petitioner's Opening Brief; RB to Respondents' Brief; PRB to Petitioner's Reply Brief; and ACLU to the ACLU organizations' amicus curiae brief.

to this Court's holdings in three equitable enforcement actions in the 1940s, and propose a logical and consistent approach to the standard-of-review question that can be applied to any area of the law. Consideration of the issue in both this case and *Conservatorship of O.B.* will assist the Court in rendering consistent opinions.

There is no 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 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 case.

ARGUMENT

I. In Choosing the Proper Standard of Review in this Case, the Court Should Separately Consider the Two Findings Required Under California Constitution, Article I, Section 12(b).

Respondents discuss the standard of review as if it would apply to a single determination made by the trial court under section 12(b) by clear and convincing evidence. (RB 21-30.) But section 12(b) requires two findings: (1) that "the facts are evident or the presumption great"; and (2) that "there is a substantial likelihood the person's release would result in great bodily harm to others." The clear and convincing evidence standard expressly applies only to the latter. (§ 12(b).)

Petitioner argues the substantial evidence standard applies to the first finding that "the facts are evident or the presumption great." (POB 35.) However, he fails to clarify that (a) the *trial court* applies the substantial evidence standard (i.e., assesses whether there is sufficient evidence to support a conviction) and the *court of appeal* independently applies the same standard on appeal; and (b) in doing so, both the trial court and the court of appeal must determine whether there is sufficient evidence to prove the crime *beyond a reasonable doubt.*

Petitioner and ACLU argue the second finding should be subject to independent review similar to review of a ruling on the suppression of evidence under the Fourth Amendment. (POB 37-41; ACLU 9, 12-16, 21-30.) That is, "precursor facts" (ACLU 13, 21) are reviewed for substantial evidence and the application of legal standards to those facts is decided *de novo*. We agree for the reasons stated in their briefs. However, we urge the Court to clarify that "the precursor facts" be reviewed for substantial evidence *with the clear and convincing evidence standard of proof in mind* (i.e., appellate courts should apply SOP-conscious substantial evidence review). Similarly, if the Court rejects independent review and adopts substantial evidence review for the second finding in its entirety, it should also require SOP-conscious review.

II. In Reviewing a Finding that "The Facts Are Evident or the Presumption Great," *Both the Trial Court and the Appellate Court* Must Determine Whether There is Sufficient Evidence to Prove the Charged Offenses *Beyond a Reasonable Doubt.*

Here, the Court of Appeal held, and Petitioner concedes (POB 35), that finding "the facts are evident and the presumption great" requires an assessment of the sufficiency of the prosecution's evidence to prove charged offenses. (See *In re White* (2018) 21 Cal.App.5th 18, 25 (*White*) [citing *In re Application of Weinberg* (1918) 177 Cal. 781, 782; *Ex parte Curtis* (1891) 92 Cal. 188, 189]; see *Weinberg*, at p. 782 ["[B]ail should be refused . . . when the evidence is such that a verdict of guilty based upon it would be sustained by a court"].)

This standard is similar to the standard the trial court applies to a motion for acquittal. (*White*, at p. 25, fn. 3 [citing *People v. Houston* (2014) 54 Cal.4th 1186, 1215 (*Houston*); *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200 (*Whisenhunt*)].)

It is settled that, in making such sufficiency-of-evidence rulings, *a court is constitutionally required to take the beyond a reasonable doubt standard of proof into account*: "the relevant question is 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.*" (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [second emphasis added; review of conviction]; see *id.* at p. 319, fn. 12 [citing cases applying same standard to motions for acquittal]; *Anderson v. Liberty Lobby* (1986) 477 U.S. 242, 252 [holding same standard applies to motion for acquittal]; *People v. Zaragoza* (2016) 1 Cal.5th 21, 44 [review of conviction]; *Houston, supra,* 54 Cal.4th at p. 1215 [motion for acquittal]; *Whisenhunt, supra,* 44 Cal.4th at p. 200

[motion for acquittal]; see also *White, supra,* 21 Cal.App.5th at p. 25 [denial of bail; analogizing to motion for acquittal].)

On appeal of such a ruling, the appellate court makes the same inquiry as the trial court and owes no deference to the ruling below. (*People v. Dalton* (2019) 7 Cal.5th 166, 249 [review of denial of motion for acquittal; "The question is one of law, subject to independent review"]; see *White, supra,* 21 Cal.App.5th at p. 25, fn. 3.) That is, the appellate court makes its own independent determination of whether there is sufficient evidence in the record to persuade a rational factfinder the essential elements of the charged offenses have been proven beyond a reasonable doubt.

III. On Substantial Evidence Review of Precursor Facts Relevant to a "Substantial Likelihood the Person's Release Would Result in Great Bodily Harm to Others," Appellate Courts Must Take the *Clear and Convincing Evidence* Standard of Proof Into Account.

We agree with Petitioner and the ACLU that the second finding under section 12(b) should be independently reviewed in the manner appellate courts review rulings on suppression of evidence for Fourth Amendment violations: "We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362; see *People v. Duff* (2014) 58 Cal.4th 527, 551 [similar standard of review for ruling on suppression of statements for violation of *Miranda v. Arizona* (1966) 384 U.S. 436]; *People v. Cromer* (2001) 24 Cal.4th 889, 900-901 [similar standard in reviewing finding of due diligence to locate missing witness before admitting prior testimony despite Confrontation Clause]; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 842, 845-846 (*McCoy*) [similar standard on review of First Amendment-required actual malice finding in defamation action against public figure].) (See POB 37-38, 41; PRB 13-14; ACLU 13-16.)

We disagree with Respondent that substantial evidence review of the precursor factual findings should be conducted without regard to the clear and convincing evidence standard of proof. (See RB 21-23, 31.) Respondent relies on this Court's holdings in 1940s equitable enforcement actions – *Stromerson v. Averill* (1943) 22 Cal.2d 808, 811, 813-814 (*Stromerson*); *Beeler v. American Trust Co.* (1943) 24 Cal.2d 1, 3, 7 (*Beeler*); and *Viner v. Untrecht* (1945) 26 Cal.2d 261, 265-267 (*Viner*) – as well as cases and a treatise that cite or are traceable to those 1940s cases

(*Crail v. Blakeley* (1973) 8 Cal.3d 744, 750 (*Crail*); *In re Angelique C.* (2003) 113 Cal.App.4th 509, 519 (*Angelique C.*); *In re Mark L.* (2001) 94 Cal.App.4th 573, 580–581 (*Mark L.*); 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 371, pp. 428–429).

As explained in the next two sections (which largely duplicate our amicus brief in *Conservatorship of O.B.* (S254938)), the authorities cited by Respondent do not support the adoption of SOP-blind substantial evidence review in this case, regardless of whether substantial evidence review is adopted for precursor findings only or for the entire "substantial likelihood" determination under section 12(b).[2] SOP-blind review is especially inappropriate when constitutional rights are at stake. Here, the California Constitution *expressly* requires the "substantial likelihood" determination be made by clear and convincing evidence (§ 12(b)), and fundamental liberty interests under both the California and United States Constitutions are implicated (*United States v. Salerno* (1987) 481 U.S. 739, 750; *Van Atta v. Scott* (1980) 27 Cal.3d 424, 435, superseded by constitutional amendment on other grounds as stated in *In re York* (1995) 9 Cal.4th 1133, 1134, fn. 7).

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[2] SOP-conscious review should also be required under the recently enacted nonmonetary bail statutory scheme, Penal Code section 1320.20, subdivision (d)(1), as the clear and convincing evidence standard of proof clearly derives from the constitutional requirement of section 12(b).

IV. A Close Reading of Case Law Shows that Cases Applying SOP-Blind Substantial Evidence Review are Traceable to Weak Precedent in the Equitable Enforcement Context.

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 equitable enforcement actions that an appellate court should not consider the heightened standard of proof in conducting substantial evidence review.[3] (See *Stromerson, supra,* 22 Cal.2d at pp. 811, 813-814 [claim that person holding absolute title to property in fact held it in trust for another]; *Beeler, supra,* 24 Cal.2d at pp. 3, 7 [claim that deed absolute in form was in fact an equitable mortgage]; *Viner, supra,* 26 Cal.2d at pp. 265-267 [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].)

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 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] – but the import

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[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.

[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

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.; 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:

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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.)

"[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*, another equitable enforcement case. (*Crail, supra,* 8 Cal.3d 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]

Pre-*Stromerson* cases are 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

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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 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*].)

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 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"].) Both *Steinberger v. Young* (1917) 175 Cal. 81 and *Steiner v. Amsel* (1941) 18 Cal.2d 48 can be traced back to *Couts* and *Wadleigh*. (See fn. 6.)

Our research has identified additional pre-*Stromerson* equitable enforcement cases that require SOP-conscious review,[7] and none that clearly hold to the contrary.

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[7] 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

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.[8]

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.)

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such a judgment cannot expect a reversal unless the evidence is almost overwhelmingly the other way"].)

[8] 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* (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]

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*, 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 review]; *Anderson, supra,* 477 U.S.at pp. 252-253 [summary judgment of actual malice issue].[9]

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[9] 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) 37 Cal.App.5th 292, 333 [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 14, *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 the related but distinct doctrine of independent review, discussed *ante*: 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 v. Sullivan* (1964) 376 U.S. 254, 285; *Bose Corp. v. Consumers Union of U.S., Inc.*

This Court applied SOP-conscious standards of review in these contexts even before the United States Supreme Court so ruled (see *Johnson, supra,* 26 Cal.3d at pp. 577-578; *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.* (1991) 227 Cal.App.3d 1657, 1664). In fact, the Court 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.) To rationalize the law, the Court should require SOP-conscious review in all similar contexts, including on substantial evidence review.

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

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(1984) 466 U.S. 485, 514 & fn. 31; see *McCoy, supra,* 42 Cal.3d at pp. 842, 845-846; see also Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019) ¶8:63.5, at pp. 8-33 to 8-34 [discussing independent review rule].)

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.)

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.[10] Of those that can, however, the cases that apply SOP-

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[10] 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 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.*].)

conscious review are almost all traceable to *Angelia P., supra,* 28 Cal.3d 908,[11] and the cases that apply SOP-blind review to *Crail, supra,* 8 Cal.3d 744 and thus ultimately to the 1940s equitable enforcement cases.[12]

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[11] 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 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.*].

[12] 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*]; *Angelique C., supra,* 113 Cal.App.4th at p. 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

The case cited by the Court of Appeal in *Conservatorship of O.B. – Sheila S., supra,* 84 Cal.App.4th at pp. 880-88 – is in the latter group traceable to the equitable enforcement cases. (See fn. 12; *Conservatorship of O.B.* (2019) 32 Cal.App.5th 626, 633-634 [stating SOP-blind rule], rev. granted May 1, 2019, S254938; 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.

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.[13] 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,[14] and cases supporting the SOP-blind approach to *Crail, supra,* 8

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.*].

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

[14] 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.*

Cal.3d 744 and thus ultimately to the 1940s equitable enforcement decisions.[15] The clear weight of authority favors the SOP-conscious approach. (See fns. 14-15.)

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. 15, *ante*.) *In re Baby Girl M.* (2006) 135 Cal.App.4th 1528, on the other hand, applies SOP-conscious review to an order terminating

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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, supra,* 37 Cal.App.5th at p. 333 [citing *Hoch*].

[15] 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*].

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

The court of appeal decision in this case 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 *Zaragoza, supra,* [1 Cal.5th] at p. 45.)

(*White, supra,* 21 Cal.App.5th at p. 30 [emphasis added].) *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*, at p. 45.)

V. 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.)

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, intervening changes in federal constitutional law, and the interest of the community at large in properly defining a standard of review that is regularly applied in the appellate courts. (See *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296-297.)

VI. 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)[16]]; 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.

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[16] See Eisenberg, 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].)

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 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. The California Constitution *expressly* requires the "substantial likelihood" determination be made by clear and convincing evidence (§ 12(b)), and fundamental liberty interests under both the California and United States Constitutions are implicated (*Salerno, supra,* 481 U.S. at p. 750; *Van Atta, supra,* 27 Cal.3d at p. 435).

Conservatorship of O.B. is another such 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 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 denial-of-bail case.

With respect to the first finding required under section 12(b), the Court should clearly state that both the trial court and the court of appeal

must determine whether there is sufficient evidence to prove the charged offenses beyond a reasonable doubt. With respect to the second, the Court should apply independent review and clarify that substantial evidence review of precursor facts must take the clear and convincing evidence standard of proof into account.

Dated: January 13, 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 10,903 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.

Dated: January 13, 2020

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 13, 2020

Rita Himes
Counsel for Legal Services for
Prisoners with Children

APPENDIX TO THE BRIEF

EXHIBIT A

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

CALIFORNIA PROCEDURE

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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."[2] 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

CALIFORNIA EVIDENCE

Second Edition

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BANCROFT-WHITNEY
San Francisco, 1966

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

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

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:	In re White
Cal. Supreme Court Case Number:	S248125
Court of Appeal Case Number:	D073054
San Diego Superior Court Case No.:	SCN376029

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 to the Persons/Entities Served by Mail 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 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.

On the date below I electronically served the Persons/Entities Served by Email the documents listed below from my electronic service address of rita@prisonerswithchildren.org.

DOCUMENTS SERVED:

APPLICATION FOR RELIEF FROM DEFAULT TO FILE A LATE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER BY LEGAL SERVICES FOR PRISONERS WITH CHILDREN

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

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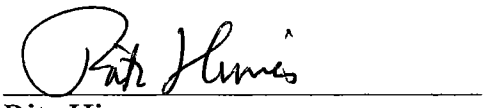
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and based on my personal knowledge.

Dated: January 14, 2020



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