IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Conservatorship of O.B.,	)	
	)	
	)	S254938
	)	
	)	
T.B. et al.,	)	
	)	
Petitioners and Respondents,	)	
	)	
v.	)	
	)	
O.B..,	)	
	)	
Objector and Appellant.	)	

Santa Barbara Superior Court, Case Number 17PR00325
Hon. James Rigali, Judge
Second Appellate District, Division Six, Case Number B290805

Application to File Amicus Curiae Brief and Amicus Curiae Brief of Protecting Our Elders Supporting Appellant O.B.

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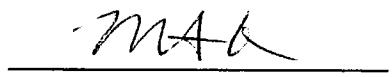
Application to File Amicus Curiae Brief of Protecting Our Elders Supporting Appellant O.B.

To the Honorable Tani Cantil-Sakauye, Chief Justice,
and the Honorable Associate Justices of the Supreme Court:

Protecting Our Elders, a California-based organization promoting elder rights and justice through education, prevention, and prosecution of predators, hereby applies for permission to file a brief as amicus curiae supporting appellant O.B., pursuant to Rule of Court, rule 8.520, subdivision (f).

Protecting Our Elders seeks to ensure elders can make their own decisions, and works to prevent unscrupulous parties from taking advantage of senior citizens, who deserve to live their golden years in peace. Protecting Our Elders supports efforts to strengthen public awareness of the problem and enforcement of laws protecting elders from elder financial abuse, fraud and undue influence. Protecting Our Elders has a vital interest in the outcome of this case, which will decide whether the heightened burden of proof protecting elders against conservatorship "disappears" or applies throughout the appellate process.



Mitchell Keiter
Counsel for Amicus Curiae
Protecting Our Elders

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Issue Presented

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?

Introduction

The Court of Appeal decided the heightened "clear and convincing" standard "disappears" on appellate review. (*Conservatorship of O.B.* (2019) 32 Cal.App.5th 626, 633.) Though the appellate court does not determine for itself whether the evidence satisfies that heightened standard of proof, the clear and convincing standard does not "disappear"; it is incorporated into the deferential standard governing appellate review. The correct standard for this case on appellate review is not "clear and convincing evidence" or "substantial evidence" — but both.

The case cited by the Court of Appeal, and other precedents cited by respondent, treat "clear and convincing evidence" and "substantial evidence" as *alternative* options, by mistakenly conflating two categories of legal standards. The first concerns the **standard of proof,** which describes the certainty required to prove a fact, and the other concerns the **standard of review,** which describes the deference shown to that determination.

The required level of certainty varies according to the issue's importance and the gravity of the consequences attaching to an erroneous determination. (*People v. Arriaga* (2014) 58 Cal.4th 950, 961-963.) Criminal convictions require proof beyond a reasonable doubt, whereas most monetary disputes require only a showing by a preponderance of the evidence. (*Ibid.*) In the middle lie cases involving issues more important that money, such as deportation and loss of parental rights. (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487.)

Courts give deference to more qualified factfinders. Although appellate courts are equally capable of construing the law, and thus independently review legal questions, they lack trial courts' capacity to evaluate facts, and thus review those findings deferentially. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712.) This deference leads courts to affirm trial court conclusions so long as they are reasonable, even if the opposite conclusion would have been equally or more reasonable. (*Sierra Club v. County of Fresno* (2018) 6 Cal.4th 502, 515.)

The standards of proof and review combine, so appellate courts determine whether "substantial evidence supports the conclusion of the trier of fact." (*People v. Johnson* (1979) 26 Cal.3d 557, 576 [internal citation omitted].) Where that conclusion is that the defendant is guilty of a crime (beyond a reasonable doubt), review thus determines "whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*Ibid.*) Where the trial court makes its finding under a less demanding standard, it is that standard that governs the appeal. (*In re R.V.* (2015) 61 Cal.4th 181, 202-203; see *Lake v. Reed* (1997) 16 Cal.4th 448, 468: record provided "substantial evidence to support the hearing officer's conclusion the DMV had proved by a preponderance of the evidence that Lake was driving [while intoxicated].")

The standard of proof and the standard of review thus combine to determine the requisite showing.

TYPE OF PROCEEDING

TYPE OF CASE	Trial	Appeal
Ordinary Civil	**The trier of fact itself finds** the disputed issue **by a preponderance of the evidence**	**A reasonable trier of fact could have found** the disputed issue **by a preponderance of the evidence**
Criminal	**The trier of fact itself finds** the disputed issue **beyond a reasonable doubt**	**A reasonable trier of fact could have found** the disputed issue **beyond a reasonable doubt**
(Some) Conservatorship/ Dependency/ Deportation	**The trier of fact itself finds** the disputed issue **by clear and convincing evidence**	?

This case will determine what will fill the missing box. Appellant presents the logical answer: Evidence from which a reasonable trier of fact could have found the disputed issue by clear and convincing evidence. (AOB 31, citing *In re Jasmon O.* (1994) 8 Cal.4th 398, 423: "a reasonable trier of fact could find [the disputed issue] based on clear and convincing evidence." This conforms to not just the rest of the chart but the United States Supreme Court's rule that the same standard governing trial must shape the determination of whether a particular finding is reasonable. (*Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 254-255.) Because "it makes no sense to say that a jury could reasonably find for [a] party without [reference to] the applicable evidentiary standards," those standards do not "disappear" when courts assess the evidence's viability. (*Id.* at pp. 254-255.)

Respondents instead urge just the deferential standard of "substantial evidence," which fills only the top of each box. (RB 15, 63.) Substantial evidence of what? If the answer is substantial evidence from which a trier of fact could have found the disputed issue by a *preponderance of the evidence*, it would diverge from the precedents of this Court and the United States Supreme Court, undermine the heightened protection provided by the clear and convincing evidence standard, and disrupt the entire framework of appellate review.

Statement of the Case

Amicus curiae Protecting Our Elders relies on the statement of the case provided by appellant.

Statement of Facts

Amicus curiae Protecting Our Elders relies on the statement of facts provided by appellant.

Certification of Nonassistance

No party or counsel for a party assisted in writing this brief or made a monetary contribution to facilitate its submission.

Argument

Appellate courts must incorporate the trial standard of proof into the appellate standard of review.

Appellant's proposed standard properly implements the principles underlying both the applicable standard of proof (clear and convincing) and standard of review (substantial evidence), and conforms to the overall framework shown in the Introduction's chart. (AOB 30-31, citing *In re Jasmon O.* (1994) 8 Cal.4th 398, 423, and *In re Angelia P.* (1981) 28 Cal.3d 908, 924.) Respondent agrees with the standard of review but denies the standard of proof should play any role in the appeal. Respondent thus seeks an anomalous rule, which unhinges clear and convincing appeals from the overall framework of California — and federal — appellate review.

A. Appeals must incorporate the clear and convincing standard to protect potential conservatees from erroneous determinations.

The operative standard of proof reflects the significance of the determination, and allocates the risk of error accordingly. (*People v. Arriega* (2014) 58 Cal.4th 950, 961.) The reasonable doubt standard imposes almost all the risk on society, as the harm created by convicting the innocent vastly exceeds that created by acquitting the guilty. (*Ibid.*; *In re Winship* (1970) 397 U.S. 358, 372 (conc. opn. of Harlan J.).) The lesser societal interest in civil cases like private monetary disputes warrants an almost equal allocation of the risk of error, so the plaintiff need prove its case by only a preponderance of the evidence. (*Addington v. Texas* (1979)

441 U.S. 418, 423.) It is more important to prevent erroneous findings against criminal defendants than against civil defendants, so the law provides greater protections for the former both at trial and on appeal.

Civil cases involving consequences beyond mere loss of money often apply a heightened standard, which requires proof by clear and convincing evidence. This standard governs cases involving the termination of parental rights (*Santosky v. Kramer* (1982) 455 U.S. 745, 766), deportation (*Woodby v. INS* (1966) 385 U.S. 276, 285-286), withholding medical care (*Conseravtorship of Wendland* (2001) 26 Cal.4th 519, 546-547), and, as pertinent here, probate conservatorship. (Prob. Code., § 1801, subd. (e).)

The standard may vary even among cases involving the same subject. Courts may take dependency jurisdiction over a child if a preponderance of the evidence supports that outcome, but the more severe event of removing the child from parental custody must meet the clear and convincing standard. (*In re I.C.* (2018) 4 Cal.5th 869, 876.) And unlike a probate conservator; a conservator acting under the Lanterman-Petris-Short (LPS) Act may place the conservatee in a locked facility. (*In re Karriker* (2007) 149 Cal.App.4th 763, 779-780.) The lesser stigma and deprivation of liberty attached to a probate conservatorship thus permit its creation upon a showing of clear and convincing evidence, whereas LPS conservatorships require proof beyond a reasonable doubt. (*Ibid.*) The law expresses special solicitude for defendants, like those whose well-being and security is Protecting Our Elders' priority, by enhancing the standard of proof.

An appellate court must consider the heightened clear and convincing standard in reviewing trials where that burden of proof governs, to ensure consistency with both the trial evaluation and the overall structure of appellate review. (See *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1239: "incorporating the standard of proof into the standard of review . . . comports with the usual way we assess the sufficiency of the evidence in criminal cases, where a heightened standard of proof is required.") The *T.J.* court noted how the careful hierarchy of interests determining trial burdens of proof would collapse if those standards "disappeared" on appeal.

> If the clear and convincing evidence standard "disappears" on appellate review, that means the distinction between the preponderance standard and the clear and convincing standard imposed by statute is utterly lost on appeal, an outcome we believe undermines the legislative intent as well as the integrity of the review process.

(*Ibid.*)

T.J. correctly observed that the "force" of an enhanced burden of proof operates not only during trial, where the factfinder must initially find the evidence meets that standard, but also on appeal, where the reviewing court must consider whether that finding was reasonable. (*Ibid.*)

The law provides a heightened standard of proof at trial to protect individuals from the consequences of an erroneous trial determination. This heightened standard of proof must govern appellate review as well for the appellate process to meaningfully detect and correct such error.

B. The United States Supreme Court demands courts consider the trial standard of proof in evaluating a finding's reasonableness.

An appeal cannot test the validity of the trial outcome if its governing standard "disappears" on review. The U.S. Supreme Court in *Jackson v. Virgina* (1979) 443 U.S. 307, established that "beyond a reasonable doubt" describes not only the factfinder's state of mind but also the quantum of proof needed for conviction, which may be tested through motions for directed verdict and appeals. (*Id.* at p. 317-318, fns. 10-11.) The imperative of preventing wrongful convictions does not end at trial; there must be meaningful appellate testing to protect against misapplications of the reasonable doubt standard. (*Id.* at p. 320.) Though respondents here advocate the same standard of appellate review for civil judgments (which rest on a preponderance of the evidence) and conservatorships (which rest on clear and convincing evidence), *Jackson* barred the same standard for appellate review of civil judgments and criminal convictions. (*Id.* at p. 318, fn. 11.) Unless the reviewing court incorporated the exacting reasonable doubt standard of proof into its analysis, it would fail to fulfill its obligation of ensuring the trial outcome was valid. (*Id.* at p. 318, fn. 11.) The maximal protection provided by the reasonable doubt standard does not "disappear" on appeal.

Nor does the heightened protection provided by the clear and convincing standard. As the Constitution mandates the reasonable doubt standard for criminal convictions, it mandates a clear and convincing

standard for libel of a public official. (*New York Times v. Sullivan* (1964) 376 U.S. 254, 279-280.) Because a jury must find libel by clear and convincing evidence, that same heightened standard applies when the court considers a motion for summary judgment or directed verdict. (*Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 252: "[A] motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.") *Anderson* cited *Jackson v. Virginia*, *supra*, 443 U.S. 307, for its holding that the continued application of the reasonable doubt standard (rather than its disappearance) was essential to protect the defendant's interest. (*Anderson*, *supra*, 477 U.S. at p. 452.) "It makes no sense to say that a jury could reasonably find for [a] party without [reference to] the applicable evidentiary standards." (*Id.* at pp. 254-255.) Courts, whether on appeal or summary judgment/directed verdict motions, can assess the reasonableness of a determination only by considering the standard under which it was or will be made, not a diluted version of it.

Respondents inadvertently concede the standard on appeal must relate to the trial court finding when they describe the question as whether "substantial evidence exists to support *the decision below*." (AOB 15, emphasis added.) "The decision below" was not that a preponderance of the evidence warranted conservatorship but that clear and convincing evidence did. If the court had found a preponderance of the evidence but not clear and convincing evidence warranted conservatorship, appellant

would not have had to bring this appeal at all.

Appellate review requires consideration of the quantum of proof demanded at trial so the reviewing court can determine whether the trial finding was reasonable. As reviewing courts must apply the reasonable doubt standard of proof in conjunction with the deferential standard of review to meaningfully test criminal convictions, reviewing courts must likewise consider the clear and convincing standard (deferentially) on appeal to meaningfully test findings made under that heightened standard.

C. Respondents' counterarguments are unpersuasive.

Respondents offer several unpersuasive arguments against reviewing appeals with the trial standard of proof in mind. In arguing appellate courts are incapable of determining whether a trier of fact reasonably could find clear and convincing evidence from the record, respondents conflate the standard of review with the standard of proof. (RB 24-35.) They contend (correctly) that the deferential standard of substantial evidence should apply but contend (incorrectly) that reviewing courts must abandon any effort to enforce the heightened standard of certainty.

> [T]rial courts can decide the relative strength of admitted evidence . . . . Trial courts can weigh evidence. By contrast, appellate tribunals can do *none* of these things.

(RB 24.)

Both *Jackson*, *supra*, 443 U.S. 407, and *People v. Johnson* (1979) 26 Cal.3d 557, 576, preclude this contention. If appellate courts can review the record to determine whether a reasonable factfinder could have found the evidence satisfied the higher "beyond a reasonable doubt" standard of proof, and the lower "preponderance of the evidence" standard, they can also review for the intermediate level of clear and convincing evidence.

Though *Jackson* and *Johnson* compel *combining* the standard of proof and the standard of review, respondents seek to distinguish these precedents by observing they involved the more severe consequence of criminal incarceration, they involved the reasonable doubt standard, and the burden of proof was compelled by the Constitution rather than declared by statute.

(RB 47.) The first two grounds essentially explain each other; criminal conviction (whether or not it results in incarceration) is more severe than conservatorship (or deportation or termination of parental rights), so there is a reasonable doubt standard rather than a clear and convincing one. The third ground does not distinguish *Jackson* and *Johnson* because the clear and convincing standard may also derive from constitutional concerns. (See e.g. *Santosky v. Kramer*, *supra*, 455 U.S. 745, 768; *Addington v. Texas* (1979) 441 U.S. 418, 427.)[1]

Respondents further appear to claim that appellant's *Jasmon O.*, *supra*, 8 Cal.4th 398, rule is *too* robust, and will lead appellate courts to reverse conservatorships that should be granted. (RB 41-42.) This objection does not refute appellant's position, that appellate review should incorporate the trial standard of proof, but challenges the heightened trial standard itself.

Finally, respondents challenge appellant to present cases where the "existing standard of review" has produced an affirmance of a "manifestly unjust decision." (RB 23.) Appellate courts rarely broadcast they are affirming a "manifestly unjust decision," and the same argument could be

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If respondents propose to unhinge the clear and convincing standard from appellate review in cases where it derives from statute but not where it is compelled constitutionally, it would require litigation to determine if the standard was constitutionally required, which would violate the principle of avoiding constitutional determinations if possible. (*People v. Miracle* (2018) 6 Cal.5th 318, 339.)

made against *Jackson*'s rule enhancing the rigor of appellate review. Yet there is no question that combining the substantial evidence standard with the clear and convincing standard would occasionally produce a reversal even though combining it with the preponderance standard would not — which is why respondents are so eager to eliminate the enhanced standard. (See *Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059, 1082 (Conc. opn. of Brown, J.):

> I believe there was substantial evidence to support the trial court's findings under a preponderance of the evidence standard, [but]would reach a different conclusion under a more stringent standard of proof. If, as the amici curiae contend, the trial court should have applied a clear and convincing evidence standard, I would have affirmed the court of appeal's judgment without hesitation.

(*Ibid.*)

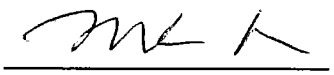
The appellate standard matters, and this Court should select the one implementing the heightened protection provided by the clear and convincing standard.

Conclusion

Respondent cites myriad cases predating *Jackson, supra*, 443 U.S. 307, by almost a century, but cannot answer the salient question: Why is this appeal different from all other appeals? All other appeals incorporate the standard of proof into the standard of review, thereby honoring the relative importance of the case and the imperative of avoiding an unjust outcome for the defendant. (*T.J., supra*, 21 Cal.App.5th 1229, 1239.) Just as reviewing courts deferentially apply the reasonable doubt standard when they test the reasonableness of criminal convictions on appeal, they must also consider the clear and convincing standard when reviewing the reasonableness of findings made according to it. (*Anderson, supra*, 477 U.S. 242, 252.)

Dated: September 11, 2019

Respectfully submitted,



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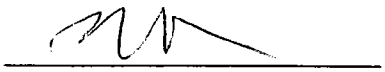
Certification of Word Count
(Cal. Rules of Court, rule 8.360(b).)

I, Mitchell Keiter, counsel for Appellant, certify pursuant to the California Rules of Court, that the word count for this document is 2,945 words, excluding tables, this certificate, and any attachment permitted under rule 8.360(b). This document was prepared in WordPerfect version X3 word-processing program, using 13-point Goudy Old Style, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 11, 2019



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Proof of Service

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. On September 11, 2019, I served the foregoing document described as **AMICUS CURIAE BRIEF** in case number **S254938** on the interested parties in this action through TrueFiling / electronic service:

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Mitchell Keiter