S254938

IN THE SUPREME COURT OF CALIFORNIA

CONSERVATORSHIP OF THE PERSON OF O.B.

T.B. et al., as Coconservators, etc.,
Petitioners and Respondents,
v.

O.B.
Objector and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX
CASE NO. B290805

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF NEITHER PARTY

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Under California Rules of Court, rule 8.520(f), the Chamber of Commerce of the United States of America (the Chamber) requests leave to file the attached amicus curiae brief.[1]

The Chamber is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million

[1] The Chamber certifies that no person or entity other than the Chamber and its counsel authored this proposed brief in whole or in part and that no person or entity other than the Chamber, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

businesses and professional organizations of every size and sector, and in every geographic region of the country. In particular, the Chamber has many members in California or who conduct substantial business in California. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. The Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases implicating issues of concern to the nation's business community. In fulfilling that role, the Chamber has appeared many times before the California Courts of Appeal and the California Supreme Court.

This Court has granted review on 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?

While the issue presented for review arises in the context of a conservatorship proceeding, the same issue often arises in numerous other contexts, including some cases involving contracts, property rights, defamation, or punitive damages, as well as in criminal prosecutions where guilt must be established beyond a reasonable doubt. The Chamber expects that the Court's decision will govern appeals involving a wide range of issues and wants to ensure that this Court has complete briefing on this important question.

The Chamber provides this brief to explain why appellate courts should consider the clear and convincing evidence standard on appeal when determining whether substantial evidence supports a finding governed by that standard. First, the collective wisdom of courts in other jurisdictions shows that, when that standard applies, it has generally been applied both in the trial court and on appeal. Second, legislative history suggests that the Legislature expected the clear and convincing standard to apply on appeal. The Chamber takes no position, however, on which party should prevail when that standard is applied to the unique facts of this case.

October 10, 2019

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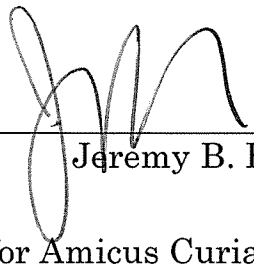
By: 
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AMICUS CURIAE BRIEF

INTRODUCTION

T.B. and C.B. argue that the Legislature did not intend the clear and convincing evidence standard to apply on appeal because of "150 years of precedent" from California courts consistently holding that the clear and convincing evidence standard disappears on appeal. T.B. and C.B. further argue that appellate courts, unlike trial courts, are not qualified to apply the clear and convincing evidence standard. T.B. and C.B. are wrong.

First, for over 100 years, California courts, including this Court, have issued conflicting decisions on whether the clear and convincing evidence standard applies when reviewing a trial court judgment for substantial evidence. Because the law conflicted when the Legislature adopted the clear and convincing evidence standard at different times in different statutes, the Legislature could not presume from existing law that the clear and convincing evidence standard would apply only in the trial court and would somehow disappear on appeal.

Second, federal courts and nearly every state court in the country take the clear and convincing evidence test into account on appeal. Indeed, the fact that so many appellate courts, including many in California, have had no difficulty in applying the clear and convincing evidence test as part of routine appellate review shows that they are competent to do so.

T.B. and C.B. acknowledge that appellate courts, including this Court, routinely take higher standards of proof into account

on appeal in the context of criminal law. (See ABOM 44-47.) In criminal appeals, a conviction can be affirmed only if the appellate court determines that a reasonable jury could have found the prosecution proved its case beyond a reasonable doubt. (*Ibid.*) It is similarly well-settled that, in defamation cases, appellate review for clear and convincing evidence is constitutionally required. There is no reason why the same courts are not equally capable of considering the standard of review on appeal in other civil cases.

Finally, the legislative history of the conservatorship and punitive damages statutes, which we provide along with this brief, shows that the Legislature intended for the clear and convincing evidence test to be rigorously applied. Without meaningful appellate review, i.e., review that takes the higher burden of proof into account, the Legislature's intent is thwarted.

LEGAL ARGUMENT

I. California courts have long applied the clear and convincing evidence standard on appeal.

A. The clear and convincing evidence test applies in many important areas of law to require greater certainty in making factual findings.

"The function of a standard of proof is to instruct the fact finder concerning the degree of confidence our society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the

ultimate decision. [Citations.] Thus, 'the standard of proof may depend upon the "gravity of the consequences that would result from an erroneous determination of the issue involved." ' [Citations.] The default standard of proof in civil cases is the preponderance of the evidence. [Citation.] Nevertheless, courts have applied the clear and convincing evidence standard when necessary to protect important rights." (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 546, fn. omitted (*Wendland*).)

"The clear and convincing standard of proof is an exacting standard. When there is sharply conflicting evidence . . . it is very difficult for a party to meet this high standard." (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 490; see *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 890 (*Shade Foods*) ["a distinct and far more stringent standard"].) As this Court has explained, the standard requires that the evidence be " ' "so clear as to leave no substantial doubt" ' " and " ' "sufficiently strong to command the unhesitating assent of every reasonable mind." ' " (*In re Angelia P.* (1981) 28 Cal.3d 908, 919 (*Angelia P.*), superseded by statute on other grounds as stated in *In re Cody W.* (1994) 31 Cal.App.4th 221.)

By contrast, " '[a] party required to prove something by a preponderance of the evidence "need prove only that it is more likely to be true than not true." [Citation.] Preponderance of the evidence means " 'that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, *not necessarily in number of witnesses or quantity*, but in its effect on those to whom it is addressed.' (Italics added.)" [Citation.] In

other words, the term refers to "evidence that has more convincing force than that opposed to it." ' " (*Environmental Law Foundation v. Beech-Nut Nutrition Corp.* (2015) 235 Cal.App.4th 307, 322; see *Conservatorship of Maria B.* (2013) 218 Cal.App.4th 514, 526 (*Maria B.*) ["Under the preponderance of the evidence standard, the parties share the risk of an erroneous factual determination ' "in roughly equal fashion" ' " whereas the clear and convincing standard "increases the burden on the party seeking relief and thereby reduces the risk of error to the opposing party"].)

The clear and convincing evidence test is applied in many circumstances where either the courts or legislature have determined that the underlying decision is important enough to warrant a more rigorous approach to finding facts. (See, e.g., *Addington v. Texas* (1979) 441 U.S. 418, 431 [99 S.Ct. 1804, 60 L.Ed.2d 323] [civil commitment proceedings of incompetent persons]; *Woodby v. Immigration Service* (1966) 385 U.S. 276, 277 [87 S.Ct. 483, 17 L.Ed.2d 362] [facts supporting deportation]; *Chaunt v. United States* (1960) 364 U.S. 350, 353 [81 S.Ct. 147, 5 L.Ed.2d 120] [setting aside naturalization decrees]; *Wendland, supra*, 26 Cal.4th at p. 524 [withholding food from an incompetent conservatee]; *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [judicial discipline]; *In re Manuel L.* (1994) 7 Cal.4th 229, 232 [Penal Code section 602 petition for trespassing]; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 860 (*McCoy*) [actual malice in defamation]; *Angelia P., supra*, 28 Cal.3d at p. 913 [terminating parental rights]; *Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 446 [evidence to contradict plain

language of a deed]; *Notten v. Mensing* (1935) 3 Cal.2d 469, 477 [oral will]; *Estate of Nickson* (1921) 187 Cal. 603, 605 [claim that presumed community property was actually acquired by separate funds]; *Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1158 [punitive damages]; *In re Emma B.* (2015) 240 Cal.App.4th 998, 1003 [rebutting presumptions of paternity]; *Maria B., supra,* 218 Cal.App.4th at p. 527 [actions seeking authorization to sterilize a developmentally disabled conservatee]; *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 59, 61 [waiver of a known right under a commercial contract]; *In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 485 [rebutting presumption that the owner of the legal title to property owns the full beneficial title]; *Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 323 [to support order where conservatee lacks the capacity to consent to or refuse electroconvulsive therapy]; *People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater* (1982) 128 Cal.App.3d 937, 940 [public nuisance abatement action for obscenity]; *Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611, 620 (*Sanderson*) [conservatorship proceedings].)

The answering brief creates a false choice between "substantial evidence" review and taking the higher burden of proof into account on appeal. (ABOM 9.) There has never been any question that the substantial evidence standard of review governs appellate review of any factual issue. (*Shade Foods, supra,* 78 Cal.App.4th at pp. 891-892, citing references.) The question is whether appellate courts should disregard the clear and

convincing evidence standard when evaluating if the evidence is substantial. As explained below, appellate courts should not disregard the clear and convincing evidence standard.

B. The answering brief incorrectly argues that the Legislature accepted the "longstanding rule that the clear and convincing evidence standard applies in the trial court and disappears on appeal."

The answering brief contends that "[f]rom the beginning, the rule routinely and repeatedly applied in California has been that a clear and convincing evidence standard is to be applied by a trial court, but not on appeal." (ABOM 15.) The brief also asserts that the Legislature knew about this rule when it added the clear and convincing evidence standard to the conservatorship statute and did nothing to alter it. (ABOM 48-49.) While it is generally true that "the Legislature is presumed to know about existing case law when it enacts or amends a statute" (*In re W.B.* (2012) 55 Cal.4th 30, 57), here there is no clear consensus from the case law that the Legislature could have implicitly accepted. California cases have conflicted on this point for over 100 years.

The answering brief cites several cases holding that the clear and convincing evidence standard disappears on appeal (see ABOM 15-21; see also p. 25, fn. 2, 3, *post*), but there are many other cases taking the opposite position and holding that courts should take the heightened standard of proof into account on appeal.

In 1899, this Court reversed a trial court decision finding that a deed conveyed land into a trust rather than as a fee simple. (See *Sheehan v. Sullivan* (1899) 126 Cal. 189, 192-193 (*Sheehan*).) The Court noted that to overcome the apparent plain text of the deed, the trier of fact must find " 'clear and convincing' " evidence that the parties intended a trust. (*Id.* at p. 193.) The Court further held that this heightened standard of proof "should govern trial courts, and that, where an absolute deed has been found to be something else, the sufficiency of the evidence to support the finding should be considered by the appellate court *in the light of that rule*." (*Ibid.*, emphasis added.)

Indeed, in explaining why the trial court's decision was not supported by clear and convincing evidence (even though there was some evidence supporting the decision below), this Court noted that in similar cases "courts have not infrequently reversed judgments declaring such deeds to be mortgages or trusts, where there was considerable evidence supporting them." (*Sheehan, supra*, 126 Cal. at p. 194; see *ibid.* [explaining that the evidence in two other cases was "vastly stronger than in the case at bar" but those cases were still reversed for lack of clear and convincing evidence]; see also *Stromerson v. Averill* (1943) 22 Cal.2d 808, 817 (dis. opn. of Traynor, J.) ["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 light of that rule' "]; *Moultrie v. Wright* (1908) 154 Cal. 520, 525 [as

part of its appellate review, noting that "there is no basis for the claim that the evidence of the trust was not clear or convincing"].)

Indeed, from 1980 to 1987, a period contemporaneous to the Legislature's consideration of the statutory amendment to add the clear and convincing evidence requirement to the punitive damages statute in 1987, many appellate decisions applied the clear and convincing evidence standard on appeal. (See, e.g., *Mardikian v. Commission On Judicial Performance* (1985) 40 Cal.3d 473, 476 ["In this review the court makes an independent evaluation of the evidence taken in proceedings before the Commission to determine whether the Commission findings are supported by clear and convincing evidence"]; *In re Mark V.* (1986) 177 Cal.App.3d 754, 757 ["On review [of a decision terminating parental custody], we are limited to a determination of whether substantial evidence supports the conclusions reached by the trial court while using the 'clear and convincing evidence' standard"].)[2]

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[2] See also *McCoy, supra,* 42 Cal.3d at p. 842 (actual malice); *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 266 (actual malice); *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 365 (judicial censure); *Angelia P., supra,* 28 Cal.3d at p. 924 (termination of parental rights); *McNair v. Worldwide Church of God* (1987) 197 Cal.App.3d 363, 378-379 (actual malice); *In re Amie M.* (1986) 180 Cal.App.3d 668, 673-674 (termination of parental rights); *In re Nordin* (1983) 143 Cal.App.3d 538, 543 (denial of bail); *Gomes v. Fried* (1982) 136 Cal.App.3d 924, 934-935 (actual malice); *Maxon v. Superior Court* (1982) 135 Cal.App.3d 626, 634 (forced medical procedure); *In re Bernadette C.* (1982) 127 Cal.App.3d 618, 627 (termination of child custody); *Heritage Publishing Co. v. Cummins* (1981) (continued...)

Likewise, during the 1990-1995 period, close in time to when the Legislature considered and codified the clear and convincing evidence standard in the conservatorship statute in 1995, many California appellate decisions continued to apply the clear and convincing evidence standard on appeal. (See, e.g., *Stuart v. Truck Ins. Exchange,* (1993) 17 Cal.App.4th 468, 482, fns. omitted (*Truck Ins. Exchange)* ["We see no reason why this standard should not apply here. If Stewart was ever going to prevail on his punitive damage claim he could only do so by the presentation of clear and convincing evidence that Truck had by its conduct, demonstrated malice. Thus, the trial court properly viewed the evidence presented by Stewart with that higher burden in mind. In our review of the trial court's order granting the nonsuit, we can do no differently"]; *Looney v. Superior Court* (1993) 16 Cal.App.4th 521, 540 [a reviewing court must view the plaintiff's "evidence through the prism of the 'clear and convincing' evidentiary burden"].)[3]

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124 Cal.App.3d 305, 310, fn. 5 (actual malice); *In re Amos L.* (1981) 124 Cal.App.3d 1031, 1038 (termination of child custody); but see *In re Marriage of Saslow* (1985) 40 Cal.3d 848, 863 (community property); *Estate of Wilson* (1980) 111 Cal.App.3d 242, 248 (adoption).

[3] See also *Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552, 555 (judicial censure); *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1496 (actual malice); *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 358 (actual malice); *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 59 (punitive damages); *Aquino v. Superior Court* (1993) 21 Cal.App.4th 847, 850 (punitive damages); but see *Patrick v. Maryland Casualty Co.* (1990) 217 Cal.App.3d 1566, 1576 (punitive damages).

This line of cases applying the clear and convincing evidence standard on appeal has continued past 1995. (See, e.g., *Angelia P., supra*, 28 Cal.3d at p. 924 [termination of parental rights]; *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [punitive damages]; *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 34 [punitive damages], disapproved on another ground in *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167; *Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [punitive damages]; *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1049-1052 (*American Airlines*) [punitive damages]; *Shade Foods, supra,* 78 Cal.App.4th at p. 891 [punitive damages].)

Given this case law, the answering brief is simply wrong to assert that the Legislature assumed that the clear and convincing evidence standard would disappear on appeal when it added that standard to multiple statutes.

II. Non-California courts routinely apply the clear and convincing evidence standard on appeal.

A. Federal courts regularly apply the clear and convincing evidence test on appeal.

The answering brief claims that appellate courts are not competent to apply a heightened burden of proof on appeal. (See ABOM 24-35.) But as detailed below, many cases in federal and state courts across the country show that appellate courts have no

difficulty viewing the evidence through the prism of a higher standard of review.

The United States Court of Appeals for the Federal Circuit, for example, after explaining the role of the clear and convincing evidence standard for fact finders, explained that appellate courts must also take that standard into account: "[T]he appellate court must first focus on what support is needed for the trial court determination and then review, in accordance with the standard of review permitted in the type of case, whether that finding is properly supported." (*SSIH Equipment S.A. v. U.S. Intern. Trade Com'n* (Fed.Cir. 1983) 718 F.2d 365, 383.)

Similarly, in *Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242, 254 [106 S.Ct. 2505, 91 L.Ed.2d 202], the United States Supreme Court held that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden."[4]

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[4] See *Schneiderman v. United States* (1943) 320 U.S. 118, 159 [63 S.Ct. 1333, 87 L.Ed. 1796] ("So uncertain a chain of proof does not add up to the requisite 'clear, unequivocal, and convincing' evidence for setting aside a naturalization decree"); *Glaverbel Societe Anonyme v. Northlake Marketing & Supply, Inc.* (Fed.Cir. 1995) 45 F.3d 1550, 1554 ("When trial is to the court, the district court's finding with respect to anticipation is reviewed for clear error, with due regard to the burden and standard of proof"); *Klein v. Peterson* (Fed.Cir. 1989) 866 F.2d 412, 414 ("the precise question raised before the district court and which this court must now answer is whether a reasonable mind could have found the evidence of misconduct clear and convincing"); Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics* (2001) 11 Fed.Cir. B.J. 279, 325-326 (more evidence is needed to persuade the jury if the evidence must be proven by

(continued...)

Indeed, it is the uniform practice in the federal courts for appellate courts to consider the trial court burden of proof when reviewing the judgment on appeal. (*Checkpoint Systems v. U.S. Intern. Trade Com'n* (Fed.Cir. 1995) 54 F.3d 756, 761, fn. 5 ["When reviewing a factual finding, a reviewing court must consider the quantum of proof required to prove the fact at trial in applying its standard of review. [Citation.] Thus, when this court reviews the factual findings underlying the ITC's conclusion of invalidity for 'substantial evidence,' we must review those findings to ascertain whether they were established by evidence that a reasonable person might find clear and convincing."]; accord, *MacDonald v. Kahikolu, Ltd.* (9th Cir. 2009) 581 F.3d 970, 976 [same]; *Henson v. C.I.R.* (11th Cir. 1988) 835 F.2d 850, 853 [same]; *Marsellus v. C. I. R.* (5th Cir. 1977) 544 F.2d 883, 885 [same].)[5]

In criminal cases, as acknowledged by the answering brief, the United States Supreme Court has highlighted the importance of considering the "beyond a reasonable doubt" standard of proof when reviewing a lower court's decision:

> [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly

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"clear and convincing evidence" than if it only needs to be proven by a "preponderance of the evidence" and "[t]he policies that justify an enhanced standard of proof apply equally to justify a strict standard of review").

[5] See also *Carlson v. United States* (11th Cir. 2014) 754 F.3d 1223, 1230-1231; *Grossman v. C.I.R.* (4th Cir. 1999) 182 F.3d 275, 277-278; *Schaffer v. C.I.R.* (2d Cir. 1985) 779 F.2d 849, 857; *Mazzoni's Estate v. C. I. R.* (3d Cir. 1971) 451 F.2d 197, 201-202; *Webb v. C. I. R.* (5th Cir. 1968) 394 F.2d 366, 378.

> instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. . . . [Citation.] . . . [T]he 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. [Citation.] This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

(*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560], fns. omitted.)[6]

The United States Supreme Court has also explained the critical role appellate courts must play in defamation cases in reviewing whether there is clear and convincing evidence of actual malice:

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[6] See *United States v. Glasser* (2d Cir. 1971) 443 F.2d 994, 1006, citing *American Tobacco Co. v. United States* (1946) 328 U.S. 781, 787, fn. 4 [66 S.Ct. 1125, 90 L.Ed. 1575]; *United States v. Sweig* (2d Cir. 1971) 441 F.2d 114, 118; *United States v. Kahaner* (2d Cir. 1963) 317 F.2d 459, 467-468; *United States v. Skinner* (D.C. Cir. 1970) 425 F.2d 552, 554.

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

(*Bose Corp. v. Consumers Union of U. S., Inc.* (1984) 466 U.S. 485, 510-511 [104 S.Ct. 1949, 80 L.Ed.2d 502]; see *McCoy, supra,* 42 Cal.3d at pp. 845-856 [California Supreme Court confirms that appellate review in a defamation case includes considering the heightened standard required to prove actual malice].)

If appellate courts are competent to consider the heightened standard of review when reviewing the sufficiency of the evidence in criminal cases or in defamation cases, they are also competent to perform the same exercise in other contexts.

B. State courts regularly apply the clear and convincing evidence test on appeal.

Other state courts have reached a consensus that the clear and convincing evidence standard remains relevant during appellate review.[7] In Tennessee, for example, "[w]hether the

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[7] As far as we can tell, only two states—New Mexico and South Carolina—explicitly reject the notion that appellate courts should consider the appropriate burden of proof on appellate review, and two other states—Arizona and Oregon—are split on this question. (See, e.g., *Duke City Lumber Co., Inc. v. Terrel* (N.M. (continued...)

evidence is clear and convincing is a question of law that appellate courts must review de novo without a presumption of correctness." (*Reid ex rel. Martiniano v. State* (Tenn. 2013) 396 S.W.3d 478, 515.)

Nearly all other states likewise take the burden of proof into account on appellate review even if not de novo review as in Tennessee. (See, e.g., *Niehaus v. Dixon* (Fla.Dist.Ct.App. 2018) 237 So.3d 478, 480-481 ["While the trial court's conclusion that a fraud upon the court has occurred and its decision to dismiss the case with prejudice are reviewed for an abuse of discretion, appellate courts employ a more scrupulous and less deferential abuse of discretion standard in such cases to account for the heightened 'clear and convincing' evidentiary burden and the gravity of the sanction"]; *Mullins v. Ratcliff* (Miss. 1987) 515 So.2d 1183, 1189 [on appeal "we bear in mind the quantum of proof the party burdened at trial was required to produce in order to prevail. . . . Where the appealing party has [the burden of proving his facts by 'clear and convincing evidence'] at trial, he necessarily has a higher hill to climb on appeal, as we look at all of the evidence and decide whether a rational trier of fact may have found undue influence, etc., by clear and convincing evidence"]; *In re J.F.C.*

1975) 540 P.2d 229, 231; *Kiriakides v. Atlas Foods Systems & Services, Inc.* (S.C. 2001) 541 S.E.2d 257, 261-262; compare *In re Lamfrom's Estate* (Ariz. 1962) 368 P.2d 318, 322 with *Webber v. Smith* (Ariz.Ct.App. 1981) 632 P.2d 998, 1001; compare *Burton v. Oregon State Bd. of Dental Examrs.* (Or.Ct.App. 1977) 571 P.2d 1295, 1296 with *Stork v. Columbia River, etc.* (Or.Ct.App. 1982) 646 P.2d 1372, 1375 and *Onita Pacific Corp. v. Trustees of Bronson* (Or.Ct.App. 1993) 858 P.2d 453, 456.)

(Tex. 2002) 96 S.W.3d 256, 264 [" 'a finding that must be based on clear and convincing evidence cannot be viewed on appeal the same as one that may be sustained on a mere preponderance' "].)[8]

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[8] See also *J.C. v. State Department of Human Resources* (Ala.Civ.App. 2007) 986 So.2d 1172, 1186; *Air Logistics of Alaska, Inc. v. Throop* (Alaska 2008) 181 P.3d 1084, 1099; *Stockstill v. Arkansas Dept. of Human Services* (Ark.Ct.App. 2014) 439 S.W.3d 95, 100; *Geier v. Howells* (Colo. 1910) 107 P. 255, 257; *Mangiante v. Niemiec* (Conn.Ct.App. 2004) 843 A.2d 656, 660; *Hudak v. Procek* (Del. 2002) 806 A.2d 140, 149-150; *In re Estate of Musil* (Fla.Dist.Ct.App. 2007) 965 So.2d 1157, 1160; *COMCAST Corp. v. Warren* (Ga.Ct.App. 2007) 650 S.E.2d 307, 311; *Doe v. Doe* (Idaho 2017) 395 P.3d 814, 817; *McClure v. Owens Corning Fiberglas Corp.* (Ill. 1999) 720 N.E.2d 242, 264; *In re N.G.* (Ind. 2016) 51 N.E.3d 1167, 1170; *Smith v. State* (Iowa 2014) 845 N.W.2d 51, 54; *Fox v. Wilson* (Kan. 1973) 507 P.2d 252, 265; *Andrus v. Fontenot* (La.Ct.App. 1988) 532 So.2d 306, 310; *Shrader-Miller v. Miller* (Me. 2004) 855 A.2d 1139, 1145; *Exxon Mobil Corp. v. Albright* (Md. 2013) 71 A.3d 30, 48, abrogated in part on another ground in (Md. 2013) 71 A.3d 150; *In re Adoption of Gillian* (Mass.App.Ct. 2005) 826 N.E.2d 742, 748; *Kokx v. Buechele* (Mich.Ct.App. 1967) 149 N.W.2d 915, 916-917; *Sun Life Assur. Co. of Canada v. Allen* (Mich. 1935) 259 N.W. 281, 284; *Hentges v. Schuttler* (Minn. 1956) 77 N.W.2d 743, 746 (*Hentges*); *In re Adoption of C.M.B.R.* (Mo. 2011) 332 S.W.3d 793, 815, abrogated in part on another ground in *S.S.S. v. C.V.S.* (Mo. 2017) 529 S.W.3d 811; *Cartwright v. Equitable Life Assur. Soc. of U.S.* (Mont. 1996) 914 P.2d 976, 994; *In re Estate of Brionez* (Neb.Ct.App. 2000) 603 N.W.2d 688, 694; *Vu v. Second Jud. Dist. Ct.* (Nev. 2016) 371 P.3d 1015, 1019; *Gagnon v. Pronovost* (N.H. 1951) 80 A.2d 381, 385; *Bhagat v. Bhagat* (N.J. 2014) 84 A.3d 583, 593; *In re Dodge* (N.J. 1967) 234 A.2d 65, 91; *Scarborough v. Dillard's, Inc.* (N.C. 2009) 693 S.E.2d 640, 644; *In Interest of R.N.* (N.D. 1994) 513 N.W.2d 370, 371; *Cross v. Ledford* (Ohio 1954) 120 N.E.2d 118, 123; *Hickey v. Ross* (Okla. 1946) 172 P.2d 771, 773; *In re Novosielski* (Pa. 2010) 992 A.2d 89, 107-108; *In re Veronica T.* (R.I. 1997) 700 A.2d 1366, 1368; *Brown v. Warner* (S.D. 1961) (continued...)

III. Legislative history provides additional support for applying the clear and convincing evidence standard on appeal.

A. The Legislature added the clear and convincing evidence standard to support a claim for punitive damages because greater safeguards are required before permitting such punishment.

In 1987, the Legislature raised the burden of proof for claims seeking punitive damages. (Sen. Com. on Judiciary, com. on Sen. Bill No. 48 (1987-1988 Reg. Sess.), p. 1 (hereafter Comment on SB 48); Declaration of Jeremy B. Rosen, exh. A, p. 362.) Advocates for the bill argued that "the usual preponderance of the evidence standard is inappropriate for punitive damages awards which are assessed for punishment purposes and that due process and fairness considerations argue for a higher standard." (Comment on SB 48, p. 2; Rosen Decl., exh. A, p. 363.) As they explained, punitive damages awards "may be deemed sufficiently punitive in purpose and effect so as to require safeguards against [their] unjust imposition. Thus, . . . a higher standard than that required for ordinary civil remedies is justified." (Comment on SB 48, p. 3;

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107 N.W.2d 1, 5; *In re C.H.* (Tex. 2002) 89 S.W.3d 17, 25; *Paulsen v. Coombs* (Utah 1953) 253 P.2d 621, 624; *In re N.H.* (Vt. 1998) 724 A.2d 467, 470; *In re Sego* (Wash. 1973) 513 P.2d 831, 833-834; *Franz v. Brennan* (Wis.Ct.App. 1988) 431 N.W.2d 711, 713, affd. (Wis. 1989) 440 N.W.2d 562; *Alexander v. Meduna* (Wyo. 2002) 47 P.3d 206, 211.

Rosen Decl., exh. A, p. 364.) The Committee noted that " 'a preponderance [standard] calls for probability while clear and convincing proof demands a higher probability' " " 'sufficiently strong to demand the unhesitating assent of every reasonable mind.' " (Comment on SB 48, p. 5; Rosen Decl., exh. A, p. 366.)

The Committee report also noted that several other states had recently required clear and convincing evidence to support an award of punitive damages, including Alaska, Arizona, Indiana, Maine, Minnesota, Montana, Oregon, and Wisconsin. (Comment on SB 48, p. 3; Rosen Decl., exh. A, p. 364.) Most of those states' appellate courts took the clear and convincing evidence standard into account on appeal.

For example, during that period, the Supreme Court of Maine could not have been clearer in explaining the role of appellate courts in ensuring that the trial court decision is supported by clear and convincing evidence: "Believing, as we do, that the policies that motivated the imposition of the 'clear and convincing evidence' standard apply with equal force at both the factfinding and appellate stages, we prefer a definition of 'clear and convincing evidence' that allows meaningful appellate review of the lower court's findings. Under the intermediate standard of proof we can address the question whether the factfinder could reasonably have been persuaded that the required factual finding was or was not proved to be highly probable." (*Taylor v. Commissioner of Mental Health* (Me. 1984) 481 A.2d 139, 153.)

Likewise, appellate courts in each of the other states specified in the legislative history, with the possible exception of

Arizona and Oregon, also took the clear and convincing evidence standard into account in their review of trial court decisions. (See, e.g., *City of Fairbanks v. Metro Co.* (Alaska 1975) 540 P.2d 1056, 1058; *Traveler's Indem. Co. v. Armstrong* (Ind. 1982) 442 N.E.2d 349, 365; *Hentges*, *supra*, 77 N.W.2d at p. 746; *Huggans v. Weer* (Mont. 1980) 615 P.2d 922, 925; *Platon v. Wisconsin Dept. of Taxation* (Wis. 1953) 58 N.W.2d 712, 717; *ante*, pp. 30-31, fn 7.)

The committee report also noted that the clear and convincing evidence standard is required for proof of actual malice in libel actions,[9] in actions to sever the relationship between parent and child, to rebuff the presumption of parentage, to prove novation of a contract or an oral agreement to make a mutual will, and to establish a probate conservatorship. (Comment on SB 48, p. 5; Rosen Decl., exh. A, p. 366.)

B. The Legislature added the clear and convincing evidence standard to impose a conservator because of the important individual rights involved in such a decision.

Before the Legislature amended Probate Code section 1801 to include the clear and convincing evidence requirement, the Court of Appeal determined that the proper standard for a probate

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[9] See *ante*, pp. 29-30. The answering brief asks this court to ignore appellate cases considering higher burdens of proof on appeal when they are constitutionally required. (ABOM 44-47.) But the legislative history makes clear that the Legislature looked to these constitutionally required cases as a model for the statutory amendment it enacted.

conservatorship should be clear and convincing evidence because of the potential "adverse consequences to the individual." (*Sanderson, supra,* 106 Cal.App.3d at pp. 619-621 [Court of Appeal reversed because the evidence did not meet the heightened burden of proof].)

In 1995, the Legislature codified the clear and convincing evidence standard into Probate Code section 1801, subdivision (e). The Senate Committee on the Judiciary explained that "[t]his bill provides that the standard of proof that a person requires a conservator shall be by clear and convincing evidence. Case law has consistently provided that the rights of the individual to make decisions regarding his or her own affairs is constitutionally protected and thus, the standard of proof in such cases must be by clear and convincing evidence." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 730 (1995-1996 Reg. Sess.), p. 24; Rosen Decl., exh. B, p. 647.)

C. The Legislature's policy rationale for adding the clear and convincing evidence standard to various statutes can only be satisfied with robust appellate review taking the standard into account.

Under the Court of Appeal's reasoning, even when the evidence required to impose a conservatorship is barely adequate to satisfy the preponderance of the evidence standard, the Court of Appeal would treat that evidence as sufficient to support a finding by clear and convincing evidence. Such a rule is inconsistent with

the Legislature's clear purpose in requiring greater certainty to find certain facts. The Legislature believed that an individual's right to govern his or her own affairs is so important that it added a requirement of clear and convincing evidence requirement to support the appointment of a conservator. (*Ante*, pp. 35-36.) That concern for individual rights cannot disappear on appeal or the vital protection afforded by the higher burden of proof is not guaranteed to each individual who loses their personal autonomy.

In short, the Court of Appeal's rule, that the clear and convincing evidence standard disappears on appeal, renders meaningless the important differences in the standards of proof and deprives litigants of the important procedural safeguards that the clear and convincing evidence rule provides. (See, e.g., *Honda Motor Co. v. Oberg* (1994) 512 U.S. 415, 433 [114 S.Ct. 2331, 129 L.Ed.2d 336] ["clear and convincing standard of proof, is an important check" on trial court decisions]; *Shade Foods, supra,* 78 Cal.App.4th at pp. 891-892 [when "[a] record . . . presents a close case" there is no clear and convincing evidence]; *Truck Ins. Exchange, supra,* 17 Cal.App.4th at pp. 482-483 [reversing trial court because evidence did not rise to level of clear and convincing].)

Put differently, under the Court of Appeal's approach, a party has no remedy on appeal if the opposing party, who must prove a fact by clear and convincing evidence, fails to meet that burden. The Court of Appeal will not even consider whether a reasonable factfinder could have found that evidence to be clear and convincing in cases involving important individual rights that

the Legislature deemed to be so important that the risk of error should not be shared equally by both sides as occurs in cases governed under a preponderance of the evidence standard. That is not and should not be the law.

Moreover, when the same terms appear in many statutes, "the usual presumption is that the Legislature intended the same construction." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135.) Thus, the Legislature presumptively intended the clear and convincing evidence standard to mean the same thing in the conservatorship context as it does in all other contexts in which the standard applies. (See *ante* pp. 33-35.) Because of the important policy reasons for imposing the clear and convincing evidence standard in a myriad of circumstances, this Court should confirm that the standard must be consistently taken into account on appeal in all contexts.

CONCLUSION

This Court should confirm that the clear and convincing evidence standard applies on appeal.

October 10, 2019

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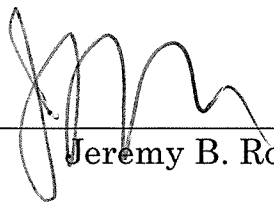
By: 
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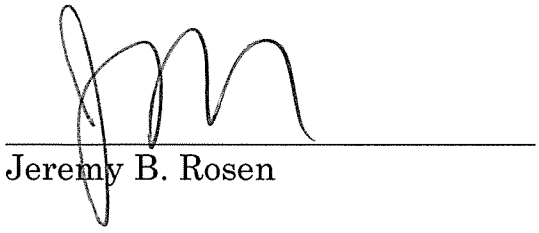
The text of this brief consists of 5,821 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: October 10, 2019



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