zSupreme Court Case No. S278330

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DISABILITY RIGHTS CALIFORNIA,

PETITIONER,

V.

GAVIN NEWSOM, in his official capacity as Governor of the State of California; and MARK GHALY, in his official capacity as Secretary of the California Health and Human Services Agency,

RESPONDENTS.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. Introduction

The Preliminary Opposition underscores the need for the Court to decide this case on its merits. The State does not dispute that the Petition raises critical statewide issues affecting not only 7,000-12,000 unhoused individuals,[1] but also California's entire mental health care and court systems.

The State acknowledges that "[i]f the alarming assertions about the CARE Act made by petitioner Disability Rights California were correct . . . intervention in mandamus might well be warranted." *Id.* The Preliminary Opposition attempts to refute these assertions, but the State at best shows that the in-artfully drafted CARE Act presents important issues of statutory interpretation that this Court should address. And far from dispelling fears about the Act, the Preliminary Opposition expressly or tacitly acknowledges facts showing:

- There is very little "voluntary" about the CARE Act. Unhoused individuals will be subject to court orders depriving them of major life choices, especially relating to medical treatment;
- The CARE Act creates a scheme that can lead to institutionalization and further loss of freedom by authorizing a presumption that a respondent who fails to comply with a CARE plan needs further intervention in conservatorship proceedings;
- A wide array of individuals, including family members and police officers, can initiate CARE Act proceedings;
- CARE Act measures can be imposed on individuals deemed

[1] Preliminary Opposition to Writ of Mandate (Opp.) 14.

"likely" to become gravely disabled based on projections with a notoriously low track record of accuracy;

- The CARE Act will have its greatest impact on Black people, who are disproportionately misdiagnosed with schizophrenia.

These are not modest statutory changes. No other California law permits competent adults to be dragged into court upon citizen petitions, ordered into treatment, and subjected to statutory penalties for noncompliance when they have done nothing wrong, are not creating a danger to anyone, and are competent to make their own medical decisions. A law this radical threatening so much harm needs the careful review that this Court should provide. The Court should grant an alternative writ.

II. The Court should exercise original jurisdiction because the issues are of great statewide importance and require immediate resolution.

In line with the standard allowing this Court to exercise original mandamus jurisdiction, the CARE Act raises at least two urgent issues of critical statewide importance: constitutional violations resulting in significant harm and the risk and costs of establishing a new court process before ensuring valid procedures and standards. In opposition, the State concedes the "compelling public interest" raised by the CARE Act. Opp. 36; *see also id*. at 21 ("[T]housands of Californians [ ] suffering from untreated schizophrenia … [and their] families, and communities deserve a path to care and wellness."). It does not argue against statewide importance and acknowledges that if DRC's contentions regarding constitutional harms are correct, "intervention in mandamus might well be warranted." *Id*. at 14.

Yet, despite the asserted constitutional infringements and agreed-upon statewide importance, the State challenges this Court's jurisdiction. It declares that "Respondent[] Governor Gavin Newsom, the CARE Act's sponsor," and Secretary Ghaly should not be subject to mandamus

enforcement, even though the State's administration is responsible for creating, implementing, and enforcing a constitutional statutory scheme. *Id*. at 15, 41-44. This Court previously rejected that notion: "Although the courts in a few jurisdictions have held that they will not enforce ministerial duties imposed upon a governor by a constitution, we can see no logical basis for this classification. It would seem just as important to enforce duties directed by the people through the Constitution as those prescribed by the Legislature." *Jenkins v. Knight*, 46 Cal.2d 220, 223 (1956).

Nor is it an "'adequate' alternative remedy[,]" as the State contends, to wait and bring facial constitutional challenges "in individual CARE Act proceedings as they arise…." Opp. 42; *see also* Section IV.A *infra*. None of the State's cases support this contention or that immediate resolution is unnecessary. *Id*. at 32-33, 42-43. Indeed, one case directly belies the adequacy of alternative fact-specific remedies: "in the exercise of [the court's] discretion it may take into consideration the desirability of the prompt settlement of an important jurisdictional question so that a multiplicity of void proceedings in other cases will be prevented." *Rescue Army v. Mun. Ct. of City of L.A.*, 28 Cal.2d 460, 467 (1946). And, even if lower court venue is appropriate, this Court still retains jurisdiction where "the matters to be decided are of sufficiently great importance and require immediate resolution." *Cal. Redevelopment Ass'n v. Matosantos*, 53 Cal.4th 231, 252-53 (2011) ("original jurisdiction" is "constitutional" and "may not be diminished by statute" even where the Legislature mandates a specific judicial process).[2]

[2] The State's cited cases (Opp. 33) raise issues of statewide importance key to the orderly functioning of government systems. *Cf. Clean Air Constituency v. Cal. State Air Res. Bd.*, 11 Cal.3d 801, 808 (1974) (threat to pollution reduction program presented a "question of great (cont'd)

When "*the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question*" courts recognize their jurisdiction to resolve concrete disputes. *Vandermost v. Bowen*, 53 Cal.4th 421, 452 (2012) (issuing peremptory writ months before an election to preserve orderly function of electoral system) (italics in original).

The CARE Act implementation deadline—October 2023—is fast-approaching. Petition (Pet.) 31-32. As in *Matosantos*, where original jurisdiction was exercised to consider the "threat of immediate dissolution" of redevelopment agencies (53 Cal.4th at 253), here original jurisdiction is appropriate to prevent constitutional harm to thousands of Californians and to consider the creation and development of a new, expensive, but constitutionally unsound, CARE Act system.

III. Jurisdiction is proper because the CARE Act imposes significant harms requiring immediate resolution before it is implemented.

The State minimizes the harm created by the CARE Act, asserting that these claims are mere statutory misinterpretation. Opp. 36-41. But it is precisely because the Act "is susceptible of multiple interpretations" and "ambiguous" when "[r]ead in context" that this Court's intervention is necessary. *Tonya M. v. Superior Ct.*, 42 Cal.4th 836, 844 (2007) (examining dependency statutory scheme in its entirety considering "the human problems the Legislature sought to address"); *see also* Pet. 24-25 (Judicial Council comments regarding substantive "ambiguities" of the Act and the resulting anticipated struggle for the courts).

This petition outlines the many harms facing CARE respondents, as

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public importance" where the implementation of the program affected the health and safety of the majority of California's citizens); *Legislature v. Padilla*, 9 Cal.5th 867, 874-75 (2020) (issue implicating orderly functioning of electoral system necessitated peremptory writ).

well as the prospect of problematic enforcement by the lower courts. *See, e.g.*, Pet. 23-30, 42-46, 56-57. The State ignores these: the coercive nature of the civil justice system (*i.e.*, the "black robe effect"); the lack of guaranteed housing needed for CARE Plan compliance; and the harm caused by basing CARE Act eligibility on diagnosis rather than actual behavior. *Id.* at 22, 26-30. The State also ignores the disfavor and stigmatization that people with schizophrenia, especially Black people who are disproportionately misdiagnosed, will experience when targeted by the CARE Act (other than to dismiss the harm imposed by the Act as only a "disproportionate impact"). *Id*. at 22, 52-57; *see also* Opp. 52, n.41.

A. The CARE Act proceedings can impose consequences on respondents without their participation, based on the opinion of professionals who have never examined the respondent.

The State paints a falsely rosy picture, describing courtroom scenes where CARE respondents voluntarily engage in negotiated "settlement agreements[]" with attorneys, "supporters," and licensed behavioral health professionals by their side. Opp. 37. The State admits, however, that court-ordered CARE Plans will be imposed if a respondent does not enter into a CARE "agreement[.]" *Id*. The State also conveniently omits other important language in the CARE Act that demonstrates the harm to those swept into this judicial system. For example, CARE "supporters" are not necessarily friends or family, or the respondent's established advocate, as the State implies, but simply "volunteers" who may be (or may not be) appointed by the court. §§5980(a), 5977(b)(5).[3] Similarly, while the respondent is "entitled to be represented by counsel," the statutory scheme does not require any certain level of representation, relying only on an

[3] All statutory cites are to the Welfare & Institutions Code.

already overburdened legal services and public defender system. §§5976(c), 5977(a)(3)(A)(ii), 5977(a)(5)(C)(ii), 5981.5.

The State extols the role of licensed County behavioral health professionals (Opp. 25, 28, 37, 47), yet fails to address that the Act allows these professionals to render a "clinical evaluation" in the absence of and without any in-person contact with the respondent. *Id*. The professional is permitted to make findings *without any requirement that the professional meet or examine the respondent* to bring the respondent into the jurisdiction of the court. Pet. 25 (citing §5975(d)(1)). The findings must "explain[] with specificity in [an] affidavit, that the respondent meets the diagnostic criteria for CARE proceedings[,]" even if respondent has not met or seen the person. §5975(d)(1). If the County is not the original CARE petitioner, the behavioral health professional must make the same diagnostic findings, explain "the outcome of efforts made to voluntarily engage the respondent" and provide "[c]onclusions and recommendations about the respondent's ability to voluntarily engage in services." §5977(a)(3)(B)(ii), (iii). If the county requests an extension because it "is making progress to engage the respondent," the court may grant an extension. §5977(a)(4). Otherwise, if the County's report supports "the petition's prima facie showing" regarding diagnostic criteria necessary to bring the respondent into the system, the court will move forward with the CARE proceedings. §5977(a)(5)(C). Not once does the State divulge that the CARE Act does *not* require the behavioral health professional to provide an in-person examination to determine whether the respondent meets the Act's criteria. *See* Pet. 25 (discussing ethics of conducting assessments without examination).

B. The CARE Act provisions are involuntary.

The State argues that the CARE Act does not create an involuntary treatment regime and that court-ordered CARE plans are "not 'involuntary'

in the ways that petitioner suggests." Opp. 36-37. But neither does the State characterize the CARE procedures as "voluntary," nor could it. Black's Law Dictionary defines "voluntary" as "[u]nconstrained by interference; not impelled by outside influence." Black's Law Dictionary (11th ed. 2019).

The CARE Act expressly compels actions affecting CARE respondents regardless of their agreement. The court will order respondents to comply with a CARE Plan that dictates where they live, what therapists they see and what treatment programs they attend. Pet. 26. Consequently, CARE respondents are subject to what Justice Kennard once accurately described as the "awesome coercive power" of the judiciary. *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 36 (1992) (Kennard, J., concurring and dissenting). Thus, because the "assertion of jurisdiction exposes defendants to the State's coercive power," it is "subject to review for compatibility" with the due process clause. *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S.Ct. 1773, 1779 (2017); *cf. Out of Line Sports, Inc. v. Rollerblade, Inc.*, 213 F.3d 500, 502 (10th Cir. 2000) (settlement is not voluntary if party acts under the "actual or implied compulsion of judicial power").

That a respondent may "contribute" to the plan (Opp. 37) does not make it less compulsory. Coercion is the essence of outpatient commitment programs. One study of "perceived coercion" involved a similar North Carolina program with a risk-of-civil-commitment sanction comparable to §5979(a)(2); Swartz et al., *The Perceived Coerciveness of Involuntary Outpatient Commitment: Findings From an Experimental Study*, J. Am. Acad. Psychiatry Law 30:207-17 (2002), https://jaapl.org/content/jaapl/30/2/207.full.pdf. Participants reported experiencing high levels of coercion, with "[h]igher levels of coercion [] associated with African-American race." *Id*. at 213.

The State also sidesteps the problem of court-ordered forced medical

treatment of respondents who are fully competent and refuse consent by focusing solely on forced administration of *medication.* Pet. 42. It points to court-ordered evaluations that consider the respondents' capacity for informed consent. Opp. 37-38. But the State ignores that the court can order respondents into *treatment* programs, such as group therapy, even if they retain capacity and refuse consent. §5982(a)(1). The only limitation is on medication orders, which may be ordered only if respondents lack capacity. §5977.1(d)(3).

C. The CARE Act imposes a genuine threat of commitment hearings.

The State also urges this Court to accept its premise that Section 5979 imposes "only adverse consequences" that "are very different from the types of 'penalties' that can be imposed for violating [other] court orders…." Opp. 38-40. It argues that a respondent's failure to comply with their CARE Plan only results in "limited consideration" in subsequent LPS[4] commitment hearings. *Id*. at 39. In other words, it admits the Act includes coercive consequences, but asks this Court to ignore them as de minimis.

Had the State fully explained the Act's consequences, it would need to concede that the threat of an LPS commitment hearing persists "at any time during the proceedings" and if the respondent is terminated for "not participating in the CARE process…." §5979(a)(1), (2). In fact, "the court may utilize existing legal authority pursuant to [the LPS commitment statute]" by simply invoking a vague need to "ensure the respondent's safety…." *Id*. Thus, if such authority is exercised, a CARE respondent will need to defend an LPS commitment procedure, even without a finding of dangerousness, solely because they are under the CARE Court's jurisdiction—even if they otherwise would never have become entangled in

[4] "LPS" refers to the Lanterman-Petris-Short (LPS) Act. Pet. 21.

the judicial system.

CARE respondents will be unable to comply with the CARE proceedings for any number of reasons, including a justifiable inability to travel and appear at multiple hearings. Pet. 28-29. The Act requires multiple court hearings, the creation of an involuntary plan, and capacity findings to order compulsory medication. These events can proceed without the respondent's input or knowledge, even if "the respondent does *not* waive personal appearance…." §5977(b)(3) (emphasis added) (the court may determine, relying entirely on a professional report generated from hearsay information, that it is "in the respondent's best interest" to "conduct[] the hearing without the participation or presence of the respondent").

Failing to attend a hearing or to participate in the CARE process, moreover, are specific grounds to invoke the LPS statute under Section 5979. §5979(a)(2)-(3). Although "entitled to be represented by counsel" (§5976(c)), having an attorney who may have never met the respondent does not mitigate that issue. In fact, the CARE Act does not explain how an attorney-client relationship is formed if the attorney has not met or retained the respondent. Accordingly, the State attempts a sleight-of-hand by first stating that Section 5979 "merely authorizes the court to utilize . . . the LPS Act to order appropriate treatment . . ." and then concluding that "[t]he civil detention provision to which [DRC] objects is not a feature of the CARE Act." Opp. 40.

Contrary to the State's claim, using the LPS commitment proceedings to control people who are unable or unwilling to participate in involuntary outpatient treatment plans is a primary feature of the CARE Act.

IV. The text of the CARE Act is facially unconstitutional.

A. Because the CARE Act will result in constitutional violations in the vast majority of cases, a facial challenge is appropriate.

A facial challenge to the constitutional validity of a statute, especially to a statute with broad reach and consequences, is proper. This Court looks to "the *generality* or *great majority* of cases… [as] the minimum showing we have required for a facial challenge to the constitutionality of a statute." *San Remo Hotel L.P. v. City and Cnty. of S.F.*, 27 Cal.4th 643, 673 (2002) (italics in original).

The State argues that this CARE Act challenge is too "speculative[,]" depending on "some future hypothetical situation" and that this Court should leave it to others to "fill any needed gaps as the statute is implemented and applied." Opp. 34-35, 42-43, 49-50, 57. However, DRC asks this Court to consider "only the text of the measure itself, not its application to the particular circumstances of an individual[,]" precisely because the future "availability of an as-applied challenge [] is no safeguard against the chilling effect" of the CARE Act. *Cal. Teachers Ass'n v. State of Cal.*, 20 Cal.4th 327, 338, 350 (1999). This is particularly true when statutory procedures serve to create a deprivation of fundamental rights. Pet. 32-33. On its face, the CARE Act subjects every respondent to the possibility of a court-imposed involuntary CARE Plan without their participation and without any personal professional assessment.

The State effectively concedes the ambiguous language of the statute, arguing that "the Court of Appeal stands ready" to correct the errors

through "saving constructions." Opp. 49-50.[5] However, the State's own case law suggests that "saving" these constitutional violations may not be possible by any court. Opp. 34-35. When a statute impinges upon constitutional rights, as here, the "statute… [cannot be] cured through case-by-case analysis of the fact situations to which the statute is applied." *In re Marriage of Siller*, 187 Cal.App.3d 36, 49 (1986). Instead, statutes are "declared invalid in their entirety if piecemeal adjudication of the legality of the statute would entail the vague or uncertain future application of the statute, thereby inhibiting the exercise of constitutional rights." *Id*. (citing *Mulkey v. Reitman*, 64 Cal.2d 529, 543-44 (1966)).

Speculating about the CARE Act's future application or hypothesizing how it will be repaired would subject thousands of mentally ill individuals to unwarranted petitions and court proceedings as the lower courts attempt to parse the ambiguous language. *See* Section III *supra*. This Court has stated that it will not "ignore the actual standards contained in a procedural scheme and uphold the law simply because in some hypothetical situation it might lead to a permissible result." *Cal. Teachers Ass'n*, 20 Cal.4th at 347. Because the CARE Act will result in constitutional violations in the vast majority of cases, this facial challenge is appropriate.

[5] The illegality identified in *Conservatorship of Murphy*, 134 Cal.App.3d 15 (1982), cited by the State, is precisely the kind of conduct the CARE Act would authorize. Unlike the CARE Act, the *Murphy* court actually refused to allow future speculation about whether a conservatee would become "gravely disabled…." *Id*. at 19.

B. The CARE Act violates due process guarantees because its vague eligibility criteria fail to provide adequate notice to respondents, petitioners, or the courts.

1. The Act's vague eligibility criteria do not provide requisite notice.

The State acknowledges that the key terms in the eligibility criteria are ambiguous and undefined but argues the courts will eventually clarify the vague criteria by relying on dictionary definitions and medical literature to fill missing standards. Opp. 45-46. Even if true, the State ignores the injury to the thousands of innocent respondents wrongfully swept into CARE proceedings in the interim. *See* Section III *supra.* Not once does the State acknowledge the impact of the confusing eligibility criteria on CARE petitioners and respondents, discussing only the impact on the courts. Opp. 45, 49-50.

The State thus ignores the first factor in a vagueness challenge: whether the language is "sufficient[ly] definite[] that ordinary people can understand what conduct is prohibited…." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983). Unclear and undefined eligibility standards do not provide CARE respondents enough information to respond to petition allegations; they do not have specialized knowledge or access to the medical definitions the State references, and therefore cannot fill in missing gaps in the statute. Pet. 40-41. Significantly, the State never claims that notice to CARE respondents is adequate, nor can it.

Equally important is the impact on CARE *petitioners*: family members, police, group home staff and other individuals deputized by the Act. §5974. Relying on vague and speculative statutory language, petitioners will inevitably file against people who are not genuinely at risk of relapse or harm, or already clinically stabilized. The need for medical and professional treatises further emphasizes the vague criteria (Opp. 48-

49, n.39), since these materials are unavailable to non-professional CARE petitioners (who still must allege under penalty of perjury that an individual meets the eligibility criteria). §5975. Even if courts eventually sort out their cases, respondents will still experience trauma and stigma when wrongly and needlessly forced into court. The State is also unconcerned about how the Act will lead to over-inclusive filings against vulnerable individuals.

In striking down a vagrancy statute in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the high court warned:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.

Id. at 165 (citation omitted); *accord*, *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (anti-loitering statute cast too wide a net because it "fail[ed] to give the ordinary citizen adequate notice of what is forbidden and what is permitted"). That is precisely what the CARE Act does with its vague eligibility criteria. Here the wide net is cast by uninformed petitioners, dragging thousands of people into court and leaving it to judges to sort out who is subject to court orders based on criteria not reflected in the statute. Since county mental health departments must respond to petitions with reports and evaluations, §§5977(a)(3)(B), 5977.1(b), 5977.3(a)(1), significant numbers of unfounded petitions will also divert resources needed to provide voluntary treatment to willing recipients. This Court should not permit this outcome.

2. The statute is vague because it requires speculation about the likelihood of relapse, grave disability or dangerousness.

The Act's eligibility criteria require a court to determine whether, without supervision and services, the respondent's condition is "substantially deteriorating" and respondent is "*unlikely* to survive safely in

the community," or that respondent faces "relapse or deterioration that would be *likely* to result in grave disability or serious harm…." §5972(d)(1),(2) (emphasis added). To determine this, the court must answer two nested questions: whether relapse or deterioration is likely; and if so, whether the predicted relapse will lead to grave disability or dangerousness. *Id*. Numerous authorities, including those cited by the State (Opp. 46-47), conclude the impossibility of a reliable answer to either question. The CARE Act combines these two questions, thereby increasing the unreliability of the inquiry.

Regarding the likelihood of relapse, the State argues that "clinicians and other health professionals regularly make such judgments [regarding likelihood of relapse] on the basis of objective considerations." Opp. 47, n.38.[6] But the same article the State cites in support of its argument squarely refutes its claim, concluding that "reliable predictors for relapse have not been identified…." Olivares, *Definitions and Drivers of Relapse in Patients with Schizophrenia: A Systematic Literature Review* at 8. The article further reports "the absence of widely accepted relapse definition criteria[,]" which "considerably hampers achieving this goal" of relapse prevention and that "there are currently no established criteria by which to define relapse, and our current understanding of relapse may not be sufficient to combat this problem effectively…." *Id.* at 1-2.

Answering the second question—whether relapse or deterioration (if it occurs) will lead to grave disability or dangerousness—is equally unreliable. Decades ago, federal officials stated that "[a]lthough the psychiatric profession is frequently called upon to predict the potential

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[6] The State cites Olivares et al., *Definitions and Drivers of Relapse in Patients with Schizophrenia: A Systematic Literature Review*, Annals of Gen. Psychiatry 12:32 at 1, 7 (2013), https://annals-general-psychiatry.biomedcentral.com/articles/10.1186/1744-859X-12-32.

dangerousness of persons brought before the courts, no scientifically reliable method for predicting dangerous behavior exists." Diamond, B., *The Psychiatric Prediction of Dangerousness*, 123 U. Pa. L. Rev. 439, 451–52 (1974) (quoting *U.S. Dep't of Health, Educ., and Welfare, HEW News* (News Release, Aug. 8, 1974)), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5299&context=penn_law_review. While new predictor tools are available, prediction remains significantly unreliable. As one article summarized, the "track record of mental health professionals' efforts to predict future violence has not been good." Boldt, *Perspectives on Outpatient Commitment*, 49 New Eng. L. Rev. 39, 51 (2014), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2522&context=fac_pubs. A 1974 study "relied on substantial data suggesting that clinicians' predictions of dangerousness were likely to be no more accurate than chance." *Id*. (citations omitted). The article acknowledges that more recent research "has found that the accuracy of clinical predictions of violence has improved somewhat, *perhaps reducing the rate of false positives below 50%*." *Id.* (emphasis added).

Nonetheless, the State also claims that the CARE Act criteria are "similar to other accepted statutory standards requiring courts to make evidence-based predictive judgments." Opp. 47-48. The State cites *Anderson v. Davidson*, 32 Cal.App.5th 136 (2019), but this case also does not support its claim. There, the trial court suspended a driver with a seizure disorder, relying on a Vehicle Code section permitting suspension of drivers with a condition "which *could* affect the safe operation of a motor vehicle…." *Id*. at 138, 145 (emphasis added). The appellate court rejected this provision as a permissible basis, and instead relied on an alternative criterion that was measurable and objective: that he had "a

disorder characterized by lapses of consciousness…." *Id*. at 146. Accordingly, *Anderson* demonstrates the need for clear and concise statutory language that does not rely on evidence-based predictive judgments.

The State also cites two cases concerning statutory bans on firearm possession after a psychiatric detention under Section 5150. Opp. 48. The inquiry under these statutes is whether the individual would be "likely to use firearms or other deadly weapons in a safe and lawful manner." §8100 *et seq*. In *People v. Mary H.*, the court found that the statutory words used "are all of common usage" and comprehensible to "persons of common intelligence." 5 Cal.App.5th 246, 261 (2016). *Rupf v. Yan*, 85 Cal.App.4th 411 (2000), concerned Section 8102, which applies after a 5150 detention when "the return of a firearm ... would be likely to result in endangering the person or others…." *Id*. at 419. The *Rupf* court recognized that a "statute will be deemed void for vagueness where persons of common intelligence must guess as to its meanings and differ as to its applications[,]" but found that persons of "common intelligence" could understand the statutory words used in the firearms statute. *Id*. at 425-26.

Unlike the terms at issue in the CARE Act, the likeliness of the dangerous use of firearms in the future is something that these courts concluded a lay person could make based on past conduct; indeed, the individuals in these cases were already found to be a present danger to self or others. *Mary H.*, 5 Cal.App.5th at 262-63; *Rupf*, 85 Cal.App.4th at 432-33. Here, the CARE Act's finding of likeliness of future conduct is based only on a professional assessment for which, as the research materials discussed above indicate, they lack sufficient standards to reliably predict conduct. *Mary H*. and *Rupf* are inapposite.

The State cites only one case that supports its claim that "[p]redictive standards of this type have repeatedly been upheld against

vagueness challenges[,]" (Opp. 48 (citing *Schall v. Martin,* 467 U.S. 253 (1984))), but this case focuses on the predictability of future criminal activity after charging an individual with a crime. In *Schall*, three 14-year-old boys were charged with various crimes, including first-degree robbery, attempted grand larceny, second degree assault, and criminal possession of a weapon. *Id.* at 257-60. In each instance, guns were used or threatened, and each of the boys committed these crimes or previous crimes against other children. *Id*. A New York statute authorized pretrial detention of a juvenile based on a finding of a "serious risk" that the child would commit a crime before their hearing. *Id.* at 255. The Court rejected an argument that this standard was vague because "there is nothing inherently unattainable about a prediction of future criminal conduct." *Id.* at 278.

In dissent, Justice Marshall points out that all cases relied on by the majority involved someone who "had already been *convicted* of a crime." *Id.* at 294, n.20 (emphasis added). In addition, he cites a large collection of scholarly articles calling again into question the reliability of predictive standards in judicial proceedings. *Id.* at n.19. And in other cases not cited by the State, the high court refused to countenance deprivation of rights based on predictions of "[f]uture criminality[.]" *Papachristou*, 405 U.S. at 169; *accord*, *Morales,* 527 U.S. at 59-60 (anti-loitering statute to deter gang activity was vague because it cast its "net" too wide).

3. Medical articles and dictionary definitions cannot clarify the Act's confusing standards.

The State also argues that the courts will resolve vagueness by employing dictionary definitions and "any 'established technical or common law' understandings to define statutory terms." Opp. 46 (citing *People v. Mirmirani*, 30 Cal.3d 375, 384 (1981)). In *Mirmirani*, the statute prohibited threats of violence "in order to achieve social or political goals." *Id*. at 381. However, the existence of dictionary definitions did not save the

vague statute because the definitions failed to "provide clear lines by which citizens, law enforcement officials, judges and juries can understand what is prohibited and what is not." *Id*. at 384. While each term had a dictionary definition, the combined phrase was susceptible to multiple interpretations. *Id*. Because this section was "constitutionally vague" but "vital to the statute," this Court deemed the entire statute unconstitutional. *Id*. at 388.

Here, the eligibility criteria require a finding that the respondent is not "clinically stabilized in on-going voluntary treatment[,]" and that the CARE plan is "necessary to ensure the person's recovery and stability." §§5972(c), (e). The State points to dictionary definitions for these terms. Opp. 48-49. But the offered definitions are generic and impossible to correlate with observable behavior. For example, the State's example of "recovery" from a heart attack (Opp. 48, n.39), has nothing to do with the difficult process of "recovery" from schizophrenia. Similarly, one proposed definition refers to a spectrum of outcomes: "clinical response, stability, remission, and recovery." *Id*. (citing a journal of experimental psychopathology). Non-clinical petitioners—and the court itself—cannot ascertain whether an individual engaged in voluntary treatment has responded but not stabilized, or if they are in remission but not recovery. As in *Mirmirani*, even with the proffered definitions, the Act allows "unguided discretion [which] is an impermissible violation of constitutional due process requirements." 30 Cal.3d at 384-85.

C. The CARE Act violates California's Equal Protection Clause.

1. The Court should apply heightened scrutiny because the Act burdens fundamental privacy and liberty interests.

The CARE Act implicates long-established rights of self-determination and autonomy over health care, housing, and confidentiality. Pet. 42-46. Rather than disputing that "constitutionally protected liberty interests" are at stake in this case, the State asks this Court to accept its assurances that "any burden" on those rights will be "de minimis." Opp. 53. This is incorrect. Because fundamental liberty interests are at stake, strict scrutiny should apply.

For example, this Court has long upheld the fundamental right to refuse "medical treatment of any form irrespective of the personal consequences." *Thor v. Superior Ct.*, 5 Cal.4th 725, 732 (1993) (prisoner had right to refuse food and medical treatment, even if that choice resulted in death). "No right is held more sacred, or is more carefully guarded" than the right to "possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id*. at 731 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); *accord*, *Conservatorship of Wendland*, 26 Cal.4th 519, 531 (2001) ("[A] competent adult has the right to refuse medical treatment, even treatment necessary to sustain life.").

Yet the State freely admits that the Act was designed as a mechanism to judicially order people to take "stabilizing medications." Opp. 55. The State also effectively concedes that competent adults who do not lack decision-making capacity and who pose no danger to anyone may be ordered to adhere to a treatment plan that they object to. Opp. 23-24, 29. Alarmingly, the State suggests that the CARE Act is just the first "step" in

subjecting competent Californians to court-ordered mental health treatment—implying that it may expand this new statutory regime to include people with other mental health conditions. Opp. 55-56.

This Court has already rejected the State's argument, based on *People v. Wilkinson* (Opp. 53), and held that applying strict scrutiny to mental health classifications is appropriate. *People v. McKee*, 47 Cal.4th 1172, 1204 (2010) (rejecting the state's argument that rational basis applied to mental health classifications under *Wilkinson*); *cf. Wilkinson*, 33 Cal.4th 821, 838 (2004) (rational basis applied to sentencing scheme because criminal defendants do "not have a fundamental interest in a specific term of imprisonment"). The *McKee* Court held that heightened scrutiny was the proper standard for examining the mental health commitment statutes at issue, and that the classifications that "disfavor a particular group" must be narrowly tailored to reflect the "degree of danger presented" by the person with mental illness. 47 Cal.4th at 1204, 1208; *cf. Pub. Guardian of Contra Costa Cnty. v. Eric B.*, 12 Cal.5th 1085, 1102, 1107 (2022) (in mental health commitment case, affirming that statutes "touch[ing] upon fundamental interests are subject to strict scrutiny," but declining to adjudicate claims due to the Court of Appeal's finding of harmless error).

Heightened scrutiny is even more appropriate in this case than in the criminal and civil commitment cases that the State cites. None of the cases cited by the State involved the kind of irrational, improper legislative motives present here. And, unlike criminal defendants and civil committees who enjoy the procedural protections afforded by the criminal and commitment systems (including, in many cases, the right to a jury trial), CARE respondents face the loss of fundamental rights without any determination at all relating to wrongdoing or dangerousness. Section III.C *supra*; *Wilkinson*, 33 Cal.4th at 829 (defendant convicted after jury trial); *McKee*, 47 Cal.4th at 1201-02 (after conviction of a crime, civil

commitment was tied to finding of dangerousness). Applying heightened scrutiny here is also consistent with other cases involving rights that the State would presumably deem "limited" when compared to the total loss of liberty arising from incarceration or commitment. Opp. 53; *In re Marriage Cases*, 43 Cal.4th 757, 847 (2008) (strict scrutiny applies to privacy interest in marriage).

As these cases demonstrate, this Court has historically made meaningful distinctions in adjudicating equal protections claims based on the specific statute and rights presented in each case. As a result, the State's alarmist argument that application of heightened scrutiny in this case would result in "automatically" doing the same with "all" criminal and civil commitment laws is not availing. Opp. 52-53; *Ark. Game & Fish Comm'n v. U.S.*, 568 U.S. 23, 36-37 (2012) (recognizing and rejecting the slippery slope argument).

The State's suggestion that heightened scrutiny is not appropriate because people with schizophrenia do not "perform or contribute to society" is also unavailing—and offensive. Opp. 51-52. Such categorical generalizations demonstrate the fear and prejudice at the heart of the CARE Act—particularly since the State does not dispute that schizophrenia diagnoses are unreliable, especially for Black Californians who will be most impacted by the law, and that severity of presentation ranges widely. Pet. 48 n.9, 56. The State's broad and unsupported generalizations about people's ability to contribute to society are not a basis for determining the standard of review applicable in this case.

Heightened scrutiny is appropriate because the specific statute at issue here—which permits court-ordered treatment and housing over the objections of competent adults—burdens well-established fundamental liberties on the basis of prejudice and stereotypes about the inherent characteristics of a disfavored group: unhoused people with schizophrenia,

who are disproportionately Black. Pet. 51-57.

2. The Act violates Equal Protection under any standard, including rational basis.

The State concedes that Equal Protection applies in this case (Opp. 50), but argues that rational basis, not strict scrutiny, is the appropriate standard of review. Opp. 50, 54. As discussed above, the State is wrong. But, in any event, the CARE Act fails under either standard because it is not rationally related to the State's purported goal of "ensur[ing] access to comprehensive services and supports for some of the most ill and most vulnerable Californians." Petitioner's Request for Judicial Notice in Support of Petition (RJN), Ex.1 at §1(f). In fact, the Act actively undermines that purpose.

As a preliminary matter, legislators considered evidence that court-ordered outpatient treatment—like that imposed by the CARE Act—is *not effective* at engaging individuals in services and can actually undermine treatment goals and recovery. Pet. 58-59.[7] In addition, the Act will divert resources *away* from existing voluntary mental health services already intended to serve CARE respondents. Pet. 58-59. Evidence-based studies have long shown—and behavioral health leadership (who will be charged with providing services under the Act) in fact recognize—that voluntary services are the foundation for successfully ensuring that individuals with serious mental health disabilities are connected to the care that they need.[8]

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[7] The State's citation to Assisted Outpatient Treatment (AOT) (Opp. 18-19) is not to the contrary, since 70% of people referred to AOT voluntarily engaged *without* forcing a court process. Pet. 30.

[8] *See, e.g.*, U.S. Dep't of Health and Hum. Servs., Substance Abuse and Mental Health Services Administration, *Evidence-Based Resource Guide: The Evidence, Assertive Community Treatment* (2008) https://store.samhsa.gov/sites/default/files/d7/priv/theevidence_1.pdf;

(cont'd)

There is already a dearth of these comprehensive, community-based services and the CARE Act will take resources away from these well-established, successful models of care. RJN, Ex.11 at 0285 (written testimony from county behavioral health leadership stating that the Act could "easily result in a significant redirection of staff and other resources," impacting counties' "ability to fund" "core" services).

In addition, despite recognizing that housing is fundamental to ensuring access to mental health services and supports, the Act does not provide housing and undermines California's Housing First policy. Pet. 58-61. Moreover, the Act singles out a disfavored group—unhoused people with schizophrenia—for less favorable treatment based on irrational generalizations about people living with this serious mental health disability. Pet. 55-56 (citing legislator's comments preserved in hearing transcripts). The State's opposition conveniently ignores the discriminatory comments that litter the legislative record, which make clear that legislators were motivated by irrational generalizations about people with schizophrenia. *Id*.

Lastly, and importantly, the State acknowledges—as the Legislature did—that the Act will disproportionately impact Black Californians, who are far more likely than Whites to be diagnosed with schizophrenia and unhoused. Opp. 52, n.41. The State's only answer to this disturbing and undisputed discriminatory impact is to say that the Act will address any "racial bias" through "training," "data" collection and analysis, and "stakeholder engagement." *Id.* Thus, the State makes clear that the CARE

Oklahoma Dep't of Mental Health and Substance Abuse Servs., *One Year Pre- and Post-Admission Comparison*, https://oklahoma.gov/content/dam/ok/en/odmhsas/documents/a0002/one-year-pre-and-post-admission-comparison.pdf (voluntary services resulted in 65% fewer days in jail and 71% fewer days in hospitals).

Act contains no provision to *prevent the perpetuation* of existing racial discrimination embedded in the mental health system. *Id.* Since no amount of training and data collection will change the discriminatory criteria written into the text of the Act (§5972(b); RJN, Ex.14 at 0332), it appears the State is content to simply monitor the racial impact, not mitigate it. The State's *laissez faire* response to undisputed racial harm is irrational and discredits the stated purpose of "ensur[ing] access to comprehensive services and supports." RJN, Ex.1 at §1(f).

All this evidence was before the Legislature, and the State does not dispute any of it. Opp. 54-57. Considering this substantial and critical evidence, the State's insistence that the only options other than CARE Court are to wait until a "crime is committed" or a "hospitalization is effected" (Opp. 57) is disingenuous and irrational. The Act therefore fails Equal Protection even under the rational basis standard. *In re Taylor*, 60 Cal.4th 1019, 1038, 1042 (2015) (residential restrictions on sex offenders were not rationally related to goal of "public safety" and "protecting children" because restriction would "hamper, rather than foster" the stated purpose); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (1985) (ordinance requiring special permit for home was not rationally related to stated zoning goals and instead rested on "irrational prejudice" against people with disabilities).

This Court declared that "we may not blind ourselves to official pronouncements of a hostile and discriminatory purpose solely because the ordinance employs facially neutral language." *Parr v. Mun. Ct.*, 3 Cal.3d 861, 865 (1971). In *Parr*, this Court invalidated a facially neutral law under rational basis review because it was motivated by "hostility and prejudice" toward a "certain group[] of individuals" and was intended to "rid the city of the blight it perceived to be created by the presence of the hippies." *Id.* at 864-65; *accord*, *U.S. v. Windsor*, 570 U.S. 744, 769-70 (2013) (invalidating

law under rational basis review because of improper purpose to restrict privacy rights for a disfavored group). The same reasoning applies here, where legislators were motivated to remove a disfavored group of Californians—unhoused people with schizophrenia, who are disproportionately Black—from public view.

The *Parr* Court was also concerned with the "probable impact" of improper legislative statements, which had the potential to perpetuate stigma and encourage private citizens to deny services to the disfavored group. *Id*. at 869. Here, the "probable impact" of legislators' statements is even more concerning than in *Parr* because the Act empowers private citizens to initiate judicial proceedings against a disfavored group—people perceived to be mentally ill and unhoused. Indeed, in written testimony to the Legislature, behavioral health leadership raised alarms about a flood of "inappropriate referrals" by third parties who "view[] this as a means to address homelessness and broader systemic challenges with access to behavioral health treatment." RJN, Ex.11 at 0287.

The State's reliance on statements by Secretary Ghaly (Opp. 56-57) cannot save the Act because the Act itself embodies the impermissible legislative purpose of singling out a disfavored group for less favorable treatment. *Parr*, 3 Cal.3d 861 at 864 (legislation improper under rational basis review because it was not "related to *permissible* purposes") (italics in original). While Secretary Ghaly may have made benign statements in support of the Act, he is not a legislator and his statements cannot erase the fear and prejudice that plainly motivated the legislators voting for the law. *Hunter v. Underwood*, 471 U.S. 222, 225, 231-32 (1985) (invalidating law on equal protection grounds and holding that "the existence of a permissible motive" did not "trump[]" a "parallel impermissible motive").

When the Act's shameful legislative history and its undisputed racial disparities are considered together with the ineffectiveness of providing

services by court order, it becomes clear that the Act's primary purpose is to create a politically expedient legal mechanism for sweeping a disfavored group of Californians out of view. Such classifications are not constitutionally permissible, even under rational basis review. The Act cannot be allowed to stand. This Court must intervene now.

V. Conclusion

The CARE Act is facially unconstitutional and warrants this Court's review. Accordingly, Petitioner DRC requests that this Court issue its alternative Writ of Mandate and/or order to show cause ordering Respondents to show cause why a Peremptory Writ should not issue to compel the State to refrain from enforcing the CARE Act, and to set this matter for full briefing.

Dated: February 21, 2023

Respectfully submitted,

DISABILITY RIGHTS CALIFORNIA
WESTERN CENTER ON LAW & POVERTY
PUBLIC INTEREST LAW PROJECT

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CERTIFICATE OF WORD COUNT

I certify that this Reply in Support of Petition for Writ of Mandate contains 7,200 words, including footnotes, according to the computer program used to generate the document.

Dated: February 21, 2023

Respectfully submitted,

By: _____

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PROOF OF SERVICE

I am over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 350 South Bixel Street, Suite 290, Los Angeles, California 90017.

On February 21, 2023, I served the following documents:

1. **Reply in Support of Petition for Writ of Mandate** and

2. **Application for Leave to File an Overlength Reply Brief**

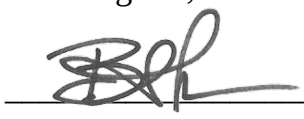
on the interested parties as follows:

By electronically filing the above documents with the Court's TrueFiling system.

I certify that all participants in the case are registered TrueFiling users and that service will be accomplished by the TrueFiling system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 21, 2023, at Los Angeles, California.



Declarant, Beverly Familar