No. 18-9012 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

MARC ANTHONY LOWELL ENDSLEY -- PETITIONER
(Your name)

vs.

CALIFORNIA DEPARTMENT OF STATE HOSPITALS, et al. -- RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Marc Anthony Lowell Endsley
(Your Name)

Napa State Hospital, 2100 Napa-Vallejo Hwy.
(Address)

Napa, CA 94558-6293
(City, State, Zip Code)

(707) 255-9637
(Phone Number)

QUESTION(S) PRESENTED

1. Do civilly detained persons retain their fundamental rights to engage in voluntary sexual relations -- i.e., privacy, freedom of association, reproductive choice, and informed consent to medical treatment; and
   (a) can the "exercise of professional judgment" contemplated in Youngberg v. Romeo, 457 U.S. 307 (1982) be used to deny such fundamental rights where there is *no danger of violence*;
   (b) are said detainees entitled to a hearing to determine if professional judgment was in fact exercised;
   (c) can said detainees refuse such professional judgment as part of their right to informed consent to medical treatment; and
   (d) can said detainees be subjected to punishment or "deterrence" for engaging in voluntary sexual relations?

2. Are civilly detained insanity acquittees similarly situated to those civilly detained as incompetent and/or gravely disabled for purposes of their fundamental rights to privacy, freedom of association, reproductive choice, and informed consent to medical treatment, and does the State need to show a legitimate and neutral, compelling governmental interest where disparity in such fundamental rights exist?

3. Are civilly detained persons entitled to proper Due Process procedures and pre-deprivation Due Process procedures prior to denial of their rights or privileges?

4. Can civilly detained persons be denied treatment for engaging is voluntary sexual relations?

5. Are civilly detained persons entitled to an opportunity to amend a complaint prior to a ruling on a motion to dismiss?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the Case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

MARC ANTHONY LOWELL ENDSLEY,
PETITIONER,

VS.

CALIFORNIA DEPARTMENT OF STATE HOSPITALS by and through EDMUND G. BROWN, sued in his official and individual capacities;
DOLLY MATTEUCCI, sued in her individual capacity; and
PAM AHLIN, sued in her individual capacity,

RESPONDENT(S).

The petitioner is Marc Anthony Lowell Endsley, a civilly detained insanity acquittee at Napa State Hospital in Napa, California. The respondents are Edmund G. Brown, former Governor of the State of California; Dolly Matteucci, former Executive Director of Napa State Hospital; and Pam Ahlin, the Director of the California Department of State Hospitals.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix __ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix __ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 3-19-2019.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment I to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This case involves Amendment XIV to the United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Amendments are enforced by Title 42, Section 1983, United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Amendments are enforced by Title 42, Section 12101(b)(4), United States Code:

> [The purpose of the ADA Amendments Act of 2008 is] to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

STATEMENT OF THE CASE

The petitioner's complaint alleged: (I) his fundamental rights to voluntary sexual relations had been infringed; (II) he was punished for engaging in voluntary sexual relations even though he cannot Constitutionally be punished at all; (III) violation of his Due Process right to be heard at a meaningful time and in a meaningful manner; (IV) violation of his Equal Protection rights to engage in voluntary sexual relations; and (V) violation of his Due Process right to treatment.

The facts alleged are as follows. Petitioner, a civil detainee, was "caught" by Napa State Hospital ("Napa") employees engaging in voluntary sexual relations with another patient in petitioner's own assigned hospital bed and room. Pursuant to the usual hospital procedures for rule infractions, petitioner was called into a Treatment Team conference at which he was informed that, for being "out-of-bounds", he would receive the standard, disciplinary Incident Management note ("IM") and 30-day restriction to the unit; that he would not get an "Exemption" by which he could continue to go to off-unit treatment groups during that time; and that he would be indefinitely delayed in getting a job. Petitioner demanded all documents associated with these punitive actions. Petitioner told his Social Worker that he wanted to file for an Exemption, even though his Treatment Team had said they would deny it, and petitioner was told that he could not file for an Exemption or otherwise appeal the punitive actions taken against him. Petitioner asked for a copy of the policy which outlined the Exemption process. Petitioner was never provided any of the documents he requested by respondents or their agents. Petitioner filed a Patients' Rights Complaint ("PRC"), which described the Constitutional violations he was subjected to, with Patients' Rights, the direct patient interface for Disability Rights of California ("DRC"), a law firm contracted to provide advocacy and investigative services for all civilly detained persons in petitioner's class. Petitioner pursued the PRC up to the second level of appeal where it was denied by Agnes Lintz, DRC Patients' Rights Specialist.

On 8-30-2017, petitioner filed a civil rights complaint ("complaint") pursuant to 42 U.S.C. §1983 in the U.S. district court, Northern District of California, Case No. 17-cv-05038-WHA. The complaint sought damages, injunctive and declaratory relief, and supplemental

jurisdiction tort claims. On 2-12-2018, the district court granted respondents' Motion to Dismiss on the grounds that petitioner failed to allege facts to state a claim upon which relief could be granted and stated that: (1) the Due Process Clause allows petitioner's fundamental rights to voluntary sexual relations -- i.e., privacy, freedom of association, reproductive choice, and informed consent to medical treatment -- to be affirmatively oppressed based on "exercise of professional judgment" in the absence of any danger of violence; (2) the Due Process Clause does not prohibit petitioner's rights, privileges, or access to therapeutic services from being denied in order to "deter" him from engaging in voluntary sexual relations, and such a denial does not constitute punishment; and (3) the Equal Protection Clause does not require that petitioner be treated as though similarly situated to LPS detainees who have established rights to engage in voluntary sexual relations under the laws of the State of California because LPS detainees "are committed under an entirely distinct statutory scheme" and, unlike those detainees, petitioner "is committed because he is not guilty of murder by reason of insanity", and the State has no requirement to provide any compelling governmental interest to justify this disparity in fundamental, Constitutional rights. The district court did not address petitioner's other claims that he was denied his Due Process rights to be heard at a meaningful time and in a meaningful manner and to treatment. The district court gave petitioner no leave to amend the complaint so that he could allege the facts necessary to state a claim upon which relief could be granted. The district court accepted as true all allegations made in respondents' Motion to Dismiss including respondents' defamatory, prejudicial, and perjurious characterization of petitioner as engaging in "predatory behavior" -- an allegation never stated prior to the Motion to Dismiss -- without any fact-intensive inquiry. The district court ignored petitioner's motion for appointment of counsel despite supporting documents concurrently submitted which averred that petitioner has substantial disabilities in the presentation of his claims including an inadequate law library and no ability to investigate the facts.

The court of appeals affirmed the order to dismiss, stating: (1) petitioner failed to allege facts to support a due process claim and to show a substantial departure from professional judgment; (2) petitioner failed to allege facts to show he was treated differently from those

similarly situated; and (3) petitioner was properly denied leave to amend because, even if he did allege such facts, any amendment would be "futile". The court of appeal did not consider petitioner's other claims that he was denied due process procedures and denied treatment. Petitioner raised those claims in his complaint, but the district court did not address them in it's Order to Dismiss. Thus, the court of appeal did not consider them, saying the court of appeal does not "consider arguments and allegations raised for the first time on appeal".

REASONS FOR GRANTING THE PETITION

A. Conflicts with Decisions of Other Courts.

The holdings of the courts below that: (1) "exercise of professional judgment" can be used to affirmatively oppress civilly detained, U.S. citizens' fundamental, Constitutional rights, such as their rights to engage in voluntary sexual relations, where there is no danger of violence; (2) said detainees are not entitled to a hearing so that the courts can make certain that professional judgment was in fact exercised; (3) said detainees cannot reject such professional judgment as part of their right to informed consent to medical treatment; (4) said detainees can be punished for engaging in voluntary sexual relations as long as it's called "deterrence" and not "punishment"; (5) civilly detained insanity acquittees are not similarly situated to other civilly detained persons for purposes of fundamental, Constitutional rights, and the State does not need to provide any compelling governmental interest to justify any resulting disparity in fundamental rights; (6) said detainees are not entitled to Due Process and pre-deprivation Due Process procedures; (7) said detainees can be denied treatment as a form of punishment or "deterrence" for engaging in voluntary sexual relations; and (8) said detainees have no right to amend a complaint prior to a ruling on a motion to dismiss, are all in direct conflict with the relevant decisions of numerous courts including this Court.

A.1. Exercise of Professional Judgment

The lower courts have decided important questions of fundamental, Constitutional rights in ways that conflict with the relevant decision of this Court in Youngberg v. Romeo, (1982) 457 U.S. 307. In Youngberg, this Court specifically determined that affirmative restraints on the liberty of those involuntarily committed, based on the exercise of professional judgment, is justified only in the context of protecting those committed from "violence". Youngberg, supra, 457 U.S. at 320 ("[T]here are occasions in which it is necessary for the State to restrain the movement of residents -- *for example, to protect them as well as others from violence....*" (emphasis added)). Danger of actual *violence* forms the Constitutional prerequisite contemplated

in Youngberg for the exercise of professional judgment in order to affirmatively restrain a patient's fundamental liberty. Without danger of violence, the professional and the State have no authority to exercise professional judgment to restrain the patient's liberty in the first instance. This rationale flows from the understanding that civilly detained persons are U.S. citizens who have not been convicted of crimes and have not suffered the inherent extinguishment of liberty associated with a criminal conviction. As such, they retain substantial liberty interests. Youngberg did not overrule the exercise of fundamental, Constitutional rights where no danger of violence exists, and such an interpretation is contrary to the rights of civil detainees as recognized by the courts and State and Federal authorities for the last 46 years. Foy v. Greenblott, 141 Cal.App.3d 1, -- (1st Dist. 1983) ("...A conservatee or other institutionalized mental patient enjoys 'the same legal rights and responsibilities guaranteed all other persons' except those which are specifically denied her by law or by the order authorizing commitment or conservatorship. [Citations.]"); Cal. Welfare & Institutions Code ("W&I") §5325.1(a), (b), (g) (persons with mental illness have rights including, but not limited to: individual autonomy, personal "privacy", and "social interaction"); 42 U.S.C. §9501(1)(A), (F), (G), (J) (State mental health programs should provide treatment in the least restrictive environment). Wyatt v. Stickney, (M.D. Ala. 1972) 344 F.Supp. 373 aff'd *sub nomine* Wyatt v. Aderholt, (5th Cir. 1974) 503 F.2d 1305; Davis v. Balson, (N.D. Ohio 1978) 461 F.Supp. 842; Gary W. v. State of La., (E.D. La. 1976) 437 F.Supp. 1209 (Federal Constitutional right to the least restrictive conditions of institutional treatment). Youngberg, supra, 457 U.S. at 324 ("reasonably nonrestrictive confinement conditions" are constitutionally mandated). Central to petitioner's case is Foy, a case decided one year after Youngberg. In Foy, the court ruled on the rights of a gravely disabled and incompetent woman, civilly committed under the State's LPS statutes (Lanterman-Petris-Short, W&I §5000, et seq.), to engage in voluntary sexual relations. The Foy court ruled that other cases "are to be distinguished; they involved mental hospitals' failures to protect patients from sexual assault rather than to prevent voluntary sexual relations...[U]nder some circumstances, as where a hospital assumes care and custody of a suicidal patient, it does have a responsibility to protect that patient from her own voluntary acts. [Citations.] However,

...voluntary sexual conduct is [not] an objective harm which the patient must be spared". (Foy, supra, 141 Cal.App.3d at part III of the opinion.) The Foy court specifically rejected the argument that voluntary sexual relations are a danger from which a patient must be protected. The holdings of the courts below would overrule Foy and interpret Youngberg in such a way that *any* professional can at *any* time affirmatively oppress *any* fundamental right in the absence of any danger of violence. Thus, any professional could, without more, extinguish any fundamental liberty of a civil detainee simply because the professional believes exercise of the right is not "therapeutic". In the case of voluntary sexual relations, this would override the detainee's rights to "privacy, freedom of association, reproductive choice and informed consent to medical treatment". (Foy, supra, 141 Cal.App.3d at part III of the opinion.) Rights which fall under the penumbra of the First and Fourteenth Amendments to the U.S. Constitution. The exercise of professional judgment could thus be used to extinguish Free Speech, the right to vote, freedom from unreasonable search or seizure, reproductive choice, refuse involuntary medication, etc. A chilling thought, but one consistent with the holdings of the courts below.

An interesting aspect of this case which appears to be totally ignored is its application to petitioner's partner. Petitioner, a non-lawyer, cannot represent his sexual partner; however, the respondents' alleged impetus for the Constitutional violations complained of -- which were also inflicted upon petitioner's partner -- was that respondents had some supposed "duty" to protect petitioner's partner from her own sexual choices. Respondents simply assumed that this duty overrode her -- a civilly detained, consenting-adult woman's -- rights to privacy, freedom of association, reproductive choice, and informed consent to medical treatment. That was the exact subject of Foy, and the Foy court expressly ruled that, where sex is consensual, a hospital has no such duty. Where it was alleged that hospital employees had a duty to intervene to prevent the patient's "irresponsible sexual behavior", the Foy court held that the statutes and case law discussed in that case "do more than define the minimum patients' rights, which mental health professionals are obliged to respect; they also express a public policy of maximizing patients' individual autonomy, reproductive choice, and rights of informed consent. Within the considerable range of discretion left to them, mental health professionals are expected to opt for

the treatments and conditions of confinement least restrictive of patients' personal liberties. The threat of tort liability for insufficient vigilance in policing patients' sexual conduct and in second-guessing their reproductive decisions would effectively reverse these incentives and encourage mental hospitals to accord patients only their minimum legal rights. Consequently, these aspects of [hospital employees'] conduct are not actionable". (Foy, supra, 141 Cal.App.3d at part III of the opinion.) Thus, in the instant action, respondents had neither a right nor a legally actionable duty to prevent voluntary sexual relations of either petitioner *or his partner.* The respondents simply assumed that they had such a right or duty to tell petitioner's partner what she could or could not do with her own body, based on their own moral judgment, in the guise of "exercise of professional judgment".

Contrary to the opinions of the courts below, the exercise of professional judgment contemplated in Youngberg was not intended to extinguish fundamental, Constitutional rights where no danger of violence exists and to serve the moral agenda of the State. The restraints of liberty in Youngberg were intended to prevent actual violence, and thus the proper inquiry is whether or not professional judgment was exercised to restrain the patient's liberty in order to protect them or others from actual violence. Here, there was no danger of violence. The voluntary acts that respondents sought to restrain the exercise of were fundamental rights guaranteed by the U.S. Constitution and the laws of the State of California, not violence. As there was no danger of violence, respondents did not meet the Constitutional prerequisites of Youngberg necessary to authorize "exercise of professional judgment" in order to restrain petitioner's liberty in the first place. Because respondents had no authority to exercise professional judgment to restrain petitioner's liberty, the restraints were unconstitutional and petitioner had no obligation to show that the professional judgment was invalid.

A.2. Entitlement to Hearing

The courts below assumed that professional judgment was exercised based solely on respondents' statements in their Motion to Dismiss. Just because respondents asserted in a motion to dismiss that professional judgment was exercised, that is not dispositive of the factual

question. Youngberg, supra, 457 U.S. at 321 (the correct standard is " 'the Constitution only requires that *the courts make certain that professional judgment in fact was exercised....*' ", quoting Romeo v. Youngberg, 644 F.2d 147, 178 (3d Cir. 1980) (emphasis added)). The holdings of the courts below that professional judgment was exercised without a fact-intensive inquiry fail the Youngberg standard. They also fail the rights of any plaintiff to not have factual disputes resolved on a motion to dismiss and to "accept the allegations of the complaint as true and construe those allegations, and any reasonable inferences that might be drawn from them, in the light most favorable to the plaintiff". (Kay v. Bemis, 500 F.3d 1214, 1217 (10th Cir. 2007).) See also Bell Atlantic Corp. v. Twombly, (2007) 550 U.S. 544, 555 (stating that the decisions on a motion to dismiss rest "on the assumption that all the allegations in the complaint are true").

Here, the courts below assumed that all the allegations in the *Motion to Dismiss* were true and that any reasonable inferences that might be drawn should be seen in the light most favorable to the *defendants*.

A.3. Right to "Informed Consent"

The common law and Fourteenth Amendment right to refuse treatment is part of the doctrine of "informed consent". (Cruzan by Cruzan v. Director, Mo. Dep't of Health, (1990) 497 U.S. 261, 267-70.) Informed consent constitutes "a right to such information as is reasonably necessary to make an informed decision to accept *or reject* proposed treatment...." (White v. Napoleon, (3d Cir. 1990) 897 F.2d 103, 113 (emphasis added).) This right is clearly established in the context of voluntary sexual relations for civil detainees. (See generally, Foy, supra, 141 Cal.App.3d 1.) See also In re Greenshields, 227 Cal.App.4th 1284 (2nd Dist. 2014) (applying informed consent to insanity acquittees' right to refuse antipsychotic medication). Civil detainees have a right to refuse treatment, and cannot be punished for doing so. Assuming arguendo that some professional did make the determination that consensual sex was "detrimental" or "not therapeutic" for either petitioner or his partner, neither of them were required to agree to or comply with that prescribed treatment; they both had a Constitutional right to refuse. In this country, civil detainees cannot be forced or coerced to comply with any

treatment the State chooses to prescribe. Youngberg is to be distinguished because it concerned restraints in the context of danger of violence, not non-violent, consensual acts. This point was made explicit in both Foy, supra, 141 Cal.App.3d at part III of the opinion ("...under some circumstances, as where a hospital assumes care and custody of a suicidal patient, it does have a responsibility to protect that patient from her own voluntary acts", but that does not apply to "voluntary sexual conduct"); and Greenshields, supra, 227 Cal.App.4th 1284 (right to refuse antipsychotic medication absent separate judicial finding of either incompetence or dangerousness).

A.4. Punishment and Deterrence

The courts below held that the deprivations petitioner was subjected to were legitimately to "deter" him, but were not "punishment". Assuming arguendo that respondents had the right to affirmatively oppress petitioner's partner's fundamental rights to privacy, freedom of association, reproductive choice, and informed consent to medical treatment (the bases for their Motion to Dismiss) based on the alleged professional judgment that voluntary sexual relations for her would be "detrimental", this does not justify the deprivations inflicted upon petitioner, who cannot legally be punished *at all.* (Jones v. United States, (1983) 103 S.Ct. 3043, 3045 ("...because an insanity acquittee was not convicted, he may not be punished").) The lower courts concluded presumptuously that petitioner was not punished, stating "...The suspension of privileges described by plaintiff was very limited and reasonably related to *deterring* or preventing him from engaging in sexual activity again...." (Appendix B, page 4, lines 7-9 (emphasis added).) However, this Court has stated in Kennedy v. Mendoza-Martinez, (1963) 372 U.S. 144, 168 (retribution and *deterrence* are *not legitimate, non-punitive* governmental objectives). Lane v. Hutcheson, (E.D. Mo. 1992) 794 F.Supp. 877, 882 (the Disproportionality Test analyzes a sanction against a variety of criteria including whether its operation will promote the traditional aims of *punishment* -- i.e., retribution and *deterrence*); Foucha v. Louisiana, (1992) 504 U.S. 71, -- ("A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of *deterrence* and retribution...[In the case of insanity acquittees], the

State has no such *punitive* interest...." (emphasis added)); *Black's Law Dictionary*, 9th Ed., "deterrence" means ("The act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of *punishment*" (emphasis added)). Yet the lower courts held that the deprivations petitioner was subjected to were legitimately to *deter* him, but were not *punishment*.

As a matter of law, when a civil detainee is subjected to deterrence, the detainee is being punished because *deterrence* is *punishment*.

A.5. Equal Protection

The courts below dismissed petitioner's Equal Protection claim that he was being treated differently than similarly situated LPS detainees on the grounds that petitioner failed to allege facts sufficient to show that he was treated differently from similarly situated individuals, *and* that, even if he did allege facts showing that he was treated differently, it would be irrelevant because petitioner is committed pursuant to "an entirely distinct statutory scheme". Whether or not petitioner alleged facts to show that he was being treated differently than LPS detainees was plainly irrelevant to the lower courts who had already decided that petitioner was not entitled to the fundamental rights in question because of his different statutory commitment. Factual allegations notwithstanding, the laws and case law of the State of California clearly establish that LPS detainees have a right to voluntary sexual relations and to not be punished for engaging in voluntary sexual relations. See generally, Foy and W&I §5325.1. Anyone aware of the state of the law -- such as a judge or the Attorney General -- would be aware that petitioner was being treated differently. In California, persons civilly detained as either incompetent or gravely disabled and unable to care for themselves are committed pursuant to the LPS Act. California also civilly detains sexually violent predators ("SVP", W&I §6600) under a distinct statutory scheme upon completion of a criminal sentence and houses the majority of its SVP population at Coalinga State Hospital ("Coalinga"). On information and belief, SVPs at Coalinga are not punished for engaging in voluntary sexual relations. Petitioner, however, is detained pursuant to an acquittal on grounds of insanity. ("NGI", Cal. P.C. §1026.) The courts below did not even

consider that petitioner could be similarly situated to LPS detainees because petitioner "is committed because he is not guilty of murder by reason of insanity, unlike LPS detainees who have not been charged with a crime or found insane by a fact-finder". (Appendix B, page 5, lines 3-5.) This holding is indicative of a pervasive class-based animus which does not allow insanity acquittees such as petitioner to be seen as civil detainees, but rather causes them to be seen as "criminals who got away with it". This is despite the legal facts that insanity acquittees have been *acquitted* of all criminal charges against them and are committed for the same purposes of treatment and the protection of the public as other civil detainees including LPS detainees. People v. Gibson, (1988) 204 Cal.App.3d 1425, 1436 (civilly detained parolees (P.C. §2962), insanity acquittees, juvenile wards (W&I §1801.5), persons imminently dangerous due to mental defect (W&I §5300(a)-(c) of the *LPS Act*), and the mentally retarded (W&I §6500) are all similarly situated for purposes of the law because "one purpose of all of these pertinent involuntary commitment schemes is the protection of the public from the dangerous mentally ill and their involuntary commitment for treatment...until they no longer pose a danger....") However, in the words of the courts below, petitioner "is committed because he is not guilty of murder by reason of insanity, unlike LPS detainees who have not been charged with a crime...." (Appendix B, page 5, lines 3-5.) This is not even legally correct. California law stipulates that a person charged with a serious felony involving death, great bodily harm, or a serious threat to the physical well-being of another, but deemed incompetent to stand trial, can be held as incompetent for a maximum of 3 years. Beyond that, the incompetent must be committed through proper LPS procedures for the commitment of the "gravely disabled". (P.C. §1370(a)(6)(B)(c)(1) and (2); W&I §§ 5008(h)(1)(B), 5350.) Thus, there are LPS detainees who have been charged with serious felonies, never tried for them due to incompetence, and then committed as gravely disabled with the right to voluntary sexual relations (as well as numerous other rights) which petitioner, a person who stood trial and was acquitted, is denied.

Equal Protection turns on the determination that the inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged. (Cooley v. Superior Court, (2002) 29 Cal.4th 228, 253.) People v. Mckee, (2010) 47

Cal.4th 1172, 1202 ("[W]e ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws"); People v. Endsley, (2018) 28 Cal.App.5th 93, 106 ("...a finding that a person meets the definition of an SVP is 'the functional equivalent of the NGI acquittal' ", quoting McKee, supra, 47 Cal.4th at 1191); Hydrick v. Hunter, 500 F.3d 978, 989-990 (9th Cir. 2007) ("...[W]here there is clearly established body of law that applies to all civilly committed persons, there is no reason that the law should not apply to SVPs as well...."); Jones v. Blanas, 393 F.3d 918, 933 (9th Cir. 2004) (concerning determining the rights of SVPs "The state cannot have it both ways...Civil status means civil status, with all the Fourteenth Amendment rights that accompany it"). Under Equal Protection, the question is not: are insanity acquittees similarly situated to LPS detainees for all purposes, such as the procedures for their commitment, but for purposes of the law challenged. The question is: are insanity acquittees similarly situated to LPS detainees for purposes of voluntary sexual relations -- i.e., privacy, freedom of association, reproductive choice, and informed consent to medical treatment? As "all of these pertinent involuntary commitment schemes" are for the civil detention of those not convicted of crimes, for the purposes of treatment and the protection of the public, the only reasonable answer is: yes. Greenshields, supra, 227 Cal.App.4th 1284 ("NGIs are similarly situated to persons civilly committed who may be subject to treatment with antipsychotic medication against their will", citing provisions of the *LPS Act* for the right to refuse); Gibson, supra, 204 Cal.App.3d at 1436 (civilly detained parolees, insanity acquittees, juvenile wards, persons imminently dangerous due to mental defect, and the mentally retarded are all similarly situated for purposes of the law).

Moreover, this case concerns fundamental, Constitutional rights -- i.e., privacy, freedom of association, reproductive choice, and informed consent to medical treatment. Where fundamental rights are at issue, classifications are held to strict scrutiny. Conservatorship of Valerie N., 40 Cal.3d 144, 164 (1985) ("...in assessing any restriction on the exercise of a fundamental constitutional right, we must determine whether the state has a compelling interest that is within the police power of the state in regulating the subject, whether the regulation is

necessary to accomplish that purpose, and if the restriction is narrowly drawn...."); Gibson, supra, 204 Cal.App.3d at 1435 ("...when the classification touches on a fundamental right, it must be judicially determined under the strictest standard whether it is necessary to promote a compelling government interest", citing Shapiro v. Thompson, (1969) 394 U.S. 618); In re Moye, (1978) 22 Cal.3d 457, 465 (where personal liberty is at stake, strict scrutiny is required and the State must establish both compelling interest and that the distinctions drawn are necessary to further that interest). Neither respondents nor the State have even offered a compelling governmental interest to justify this disparity, nor can they because the State has no compelling governmental interest that is within its police power to regulate voluntary sexual relations between consenting-adults. See generally, Lawrence v. Texas, (2003) 539 U.S. 558.

The courts below presumed erroneously that because insanity acquittees such as petitioner are "criminals who got away with it": (1) they simply do not enjoy the fundamental rights in question like "real" civil detainees; (2) that the State does not need to provide any compelling governmental interest to justify any disparity in fundamental rights; and (3) that the State has the police power to regulate voluntary sexual relations of those persons acquitted of crimes but whom the State wants to punish anyway. This erroneous presumption flows from the same type of class-based animus identified in Lawrence, supra, 539 U.S. at 574, where this Court identified an Equal Protection violation under a law that criminalized sexual intimacy of same-sex couples, but not identical behavior of different-sex couples. As this Court has stated, "Our obligation is to define the liberty of all, not to mandate our own moral code". (Planned Parenthood of Southeastern Pa. v. Casey, (1992) 505 U.S. 833, 850.) Lawrence, supra, 539 U.S. at 574 (" 'These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment....' ", quoting Casey, supra, 505 U.S. at 851); O'Connor v. Donaldson, (1975) 422 U.S. 563, 575 ("Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty" (citations omitted)); Kansas v. Hendricks, 117 S.Ct. 2072, 2075 (U.S. Kan. 1997) ("The conditions surrounding confinement -- *essentially the same as conditions for any civilly committed patient* -- do not suggest a punitive

purpose" (emphasis added)).

Here, the courts of the State of California and State law acknowledge the rights of those civilly detained as incompetent and gravely disabled, including those who were too "gravely disabled" to be prosecuted for serious felonies, and apparently also of those detained as sexually violent predators, to engage in voluntary sexual relations, but deny that right to insanity acquittees. No compelling governmental interest has ever been offered, and no legitimate or neutral one can exist. This is the exact same class-based animus identified by this Court in Lawrence.

A.6. Due Process Procedures

The fundamental tenet of Due Process is the right to notice and an opportunity to be heard "at a meaningful time and in a meaningful manner". (Hamdi v. Rumsfeld, (2004) 542 U.S. 507, 533.) Generally speaking, post-deprivation remedies do not satisfy Due Process if: (1) the courts have already held that a pre-deprivation hearing is required (Patterson v. Coughlin, (2d Cir. 1985) 761 F.2d 886, 892-93); (2) pre-deprivation process is possible (Zinermon v. Burch, (1990) 484 U.S. 113, 136-40); (3) the deprivation resulted from "established state procedure" (Logan v. Zimmerman Brush Co., (1982) 455 U.S. 422, 436) or "policy" (Piatt v. MacDougall, (9th Cir. 1985) (en banc) 773 F.2d 1032, 1036-37) or if it was "predictable" (Zinermon, supra, 494 U.S. at 138) or "authorized" (New Windsor Volunteer Ambulance Corps., Inc. v. Meyer, (2d Cir. 2006) 442 F.3d 101, 115-16) even if it is contrary to State or local law (Honey v. Distelrath, (9th Cir. 1999) 195 F.3d 531, 534); or (4) the people who denied the hearing were the same people who had the ability and authority to give you a hearing (Zinermon, supra, 494 U.S. at 138).

The courts below held that none of this applies to insanity acquittees such as petitioner.

First, other courts have already held that a civilly detained patient is entitled to a pre-deprivation hearing. The minimum Due Process safeguards which must be afforded *prior* to withdrawal of patient privileges are: (1) notice (oral or written) of the intent to remove one or more privileges, afforded at a reasonable time prior to the hearing; (2) a hearing before someone other than the complainant, at which the patient may testify; and (3) a written statement of the

grounds for removal of the privileges. (Clutchette v. Procunier, (9th Cir. 1974) 510 F.2d 613, 615; Craig v. Hocker, (D.C. Nev. 1975) 405 F.Supp. 656, 662; Davis v. Balson, (N.D. Ohio 1978) 461 F.Supp. 842, 877-78.) An even more rigorous standard has been provided by this Court for disciplinary proceedings of convicted criminals. Morrissey v. Brewer, (1972) 408 U.S. 471, 489; Wolff v. McDonnell, (1974) 418 U.S. 539, 563-567 (the proceedings shall include the right to: (1) a written notice of the charges twenty-four hours prior to the hearing; (2) disclosure of the evidence against him; (3) the opportunity to be heard in person; (4) present documentary evidence; (5) present his testimony at the hearing and to call witnesses and present evidence on his behalf, unless to do so would unduly endanger institutional safety or rehabilitation goals; (6) confront and cross-examine witnesses; (7) a written statement of the findings of fact and some evidence relied upon; (8) have assistance from another resident, or member of the staff (if the accused is illiterate or the issues are complex); (9) prior notice that the conduct in which he engaged was prohibited; and (10) an impartial fact finding body (or person)). This Court's holdings in Morrissey and Wolff establish the proper pre-deprivation Due Process procedures for insanity acquittees because civilly detained persons "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish". (Youngberg, supra, 457 U.S. at 322.) Hydrick, supra, 500 F.3d at 989 ("the rights afforded prisoners set a floor" for those that must be afforded civil detainees).

Second, pre-deprivation process was possible. No emergency existed.

Third, the deprivations occurred pursuant to established State procedure or policy. The deprivations were both "authorized" and "predictable", and there was no "necessity for quick action".

Fourth, the persons responsible for denying petitioner a pre-deprivation hearing were the ones who had the ability and authority to give him a pre-deprivation hearing.

The courts below, by ignoring this claim, have ruled that insanity acquittees are entitled to no Due Process at all; that respondents need provide civilly detained persons, who have been convicted of nothing, no opportunity to be heard at a meaningful time and in a meaningful manner, either before or after they are deprived of rights or privileges. The courts below have

held that this is acceptable even if it deprives an insanity acquittee of the one and only thing the State has to justify his detention: treatment.

A.7. Right to Treatment

The courts have held that "to deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process". (Stickney, supra, 344 F.Supp. at 377.) Youngberg, supra, 457 U.S. at 322 (civilly detained persons are "entitled to minimally adequate training"); Donaldson v. O'Connor, 493 F.2d 507, 521 (5th Cir.) (when the rationale for confinement is that the patient is in need of treatment, the Constitution requires that minimally adequate treatment in fact be provided); Seling v. Young, 531 U.S. 250, 265 (2001) (due process requires that the conditions and duration of confinement for civilly confined persons bear some reasonable relation to the purpose for which persons are committed).

Petitioner, an insanity acquittee, is housed for treatment of his (alleged) mental illness. When respondents gave petitioner an IM, including a thirty-day restriction to his residential unit, he could not go to off-unit *treatment* for 30 days, and he was disqualified from occupational *therapy.* Insanity acquittees are constitutionally entitled to treatment; without treatment, the State has no justification for holding them. This situation might be different if the restrictions were necessary to serve a legitimate State interest, such as to protect petitioner or others from petitioner's danger of violence; however, they were not. The restrictions at issue -- i.e., depriving an insanity acquittee of access to therapeutic services, and disqualifying him from occupational therapy -- were punitive, intended only to serve as "deterrence" to discourage petitioner from engaging in consensual sex which respondents find morally objectionable for persons *acquitted of crimes* on grounds of insanity.

In depriving petitioner of therapy, respondents violated the "very fundamentals" of Due Process.

A.8. Right to Amend

The courts below held that leave to amend was properly denied because petitioner failed to state a claim upon which relief could be granted and specifically that the complaint "failed to allege facts" both to support petitioner's due process and equal protection claims and to refute respondents' alternative explanations. To this, the court of appeal added that any amendment to allege such facts would be "futile". As a threshold matter, the complaint met or exceeded the pleading standards announced by this Court in Erickson v. Pardus, (2007) 551 U.S. 89 (per curiam) and Bell Atlantic Corp. v. Twombly, (2007) 550 U.S. 544, 555. Also, the complaint could not refute respondents' alternative explanations because the alternative explanations that respondents stated to petitioner (that he was "out-of-bounds"), were not the same alternative explanations that respondents stated to the courts in their Motion to Dismiss (that they were protecting petitioner's partner from her own sexual choices). Moreover, the state of the law clearly indicates that LPS detainees have fundamental rights to engage in voluntary sexual relations which are protected by the rulings of the State courts. Why would petitioner be required to allege facts that he was being treated differently when the law clearly says that he is? What the court of appeal actually meant in saying that amendment would be "futile" is that regardless of whatever facts petitioner could ever have alleged in his complaint about professional judgment not being exercised or about being treated differently than similarly situated detainees, the court was going to rule against these claims anyway. That because petitioner is civilly detained "because he is not guilty of murder by reason of insanity, unlike LPS detainees who have not been charged with a crime", petitioner has no claim to those fundamental rights. That is prejudice. *Black's Law Dictionary*, 9th Ed., defines "undue prejudice" to mean ("2. A preconceived judgment formed with little or no factual basis; a strong bias"). When you apply prejudice to an entire group of people, you have class-based animus.

Due Process entitles any plaintiff with an "arguable" claim to an opportunity to amend a complaint prior to a ruling on a motion to dismiss. See, e.g., Neitzke v. Williams, (1989) 490 U.S. 319, 329; Grayson v. Mayview State Hosp., 293 F.3d 103, 108-09 (3d Cir. 2002). The only way petitioner's claims could be deemed not "arguable" is if it was already decided that the

professional judgment applied could not violate petitioner's rights and that petitioner could not ever be similarly situated to those civilly detained but who *were not acquitted of crimes*.

B. Importance of the Questions Presented.

This case presents a number of questions of fundamental, Constitutional rights as well as questions concerning interpretation of this Court's decision in Youngberg v. Romeo, (1982) 457 U.S. 307. The questions presented are of great public importance because they affect the operations of the mental health systems in all 50 states, the District of Columbia, and hundreds of city and county mental health facilities. Congress, through the Americans with Disabilities Act ("ADA"), has recognized the persistent problem civilly detained persons have faced in the recognition of their civil rights. 42 U.S.C. §12101(a)(4) ("unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination"). In view of the importance of litigation concerning the rights of civilly detained persons, and the difficulties those detainees have in pursuing legal recourse to redress such discrimination, guidance on the questions is of great importance because it affects the ability of civilly detained, U.S. citizens throughout the nation to receive equal protection of the law and to receive Constitutionally adequate care and treatment under conditions of confinement that do not amount to punishment in keeping with the spirit of the Americans with Disabilities Act and their rights as unconvicted, U.S. citizens over the course of many years, or the remainder of their lives, in civil detention.

The importance of the issues are enhanced by the fact that the courts below based their rulings on a serious misinterpretation of the relevant decision of this Court in Youngberg. The restraints of liberty contemplated in Youngberg were clearly aimed at protecting those civilly committed from their own danger of violence, and that where professional judgment is alleged to have been exercised the courts are required to make certain that it in fact was. Without the prerequisite danger of violence, a professional lacks the Constitutional authority to exercise his or her judgment to affirmatively restrain a detainee's fundamental liberties. The courts below

have determined that, under Youngberg, *any or all* fundamental, Constitutional rights can be extinguished based on the alleged exercise of professional judgment in the absence of any danger of violence and without any probative inquiry as to whether professional judgment was even exercised. This misinterpretation would invalidate any concept of rights for those civilly detained, including: freedom of speech, freedom of association, freedom of religion, court access, freedom from unreasonable search and seizure, due process, equal protection, voting, privacy, refuse involuntary medication, refuse unwanted medical procedures, procreative choice, informed consent, voluntary sexual relations, etc. The lower courts' reasoning that any professional can at any time affirmatively oppress a civil detainee's fundamental rights where there is no danger of violence; that the courts have no obligation to ensure that professional judgment was actually exercised; and that insanity acquittees do not enjoy the fundamental rights of "real" civil detainees without even showing a legitimate and neutral, compelling governmental interest because, unlike "real" civil detainees, insanity acquittees were once charged with crimes of which they were *acquitted*, is wholly at odds with the common sense understanding of Youngberg as it applies to all persons civilly detained and who have not been convicted of crimes and places civilly detained persons in the position of having less rights than those convicted of crimes. It reduces civilly detained persons to non-persons with no actual *rights*. The lower courts based this reasoning on a misinterpretation of this Court's ruling in Youngberg and on a Ninth Circuit case that is completely inapposite. See Mitchell v. State of Washington, 818 F.3d 436, 443-44 (9th Cir. 2016). Mitchell held that a patient had failed to rebut the Youngberg presumption of professional judgment where a doctor decided not to administer a certain treatment. This holding does not address professional judgment being used to extinguish fundamental, Constitutional rights and to oppress voluntary, nonviolent, consensual acts. The lower courts' reliance on Youngberg is similarly misplaced. Although the lower courts correctly cite that "the decision, if made by a professional, is presumptively valid" (Youngberg, 457 U.S. at 323), they conveniently omit that The High Court was also perfectly clear that the exercise of professional judgment contemplated to restrain a patient's liberty was "to protect them as well as others from *violence*". (Youngberg, 457 U.S. at 320 (emphasis added).) This standard permits a

professional to restrain a patient's liberty when there is actual danger of violence, while recognizing that those civilly detained, but for being detained for treatment of a mental illness that causes dangerousness, retain the rights of unconvicted, U.S. citizens who would otherwise be free to do as they wished. Foy, supra, 141 Cal.App.3d at part III of the opinion ("...hospital policing of patients would not only deprive them of the freedom to engage in consensual sexual relations, *which they would enjoy outside the institution*, but would also compromise the privacy and dignity of all residents" (emphasis added)); *Idem* ("...tort liability for insufficient vigilance in policing patients' sexual conduct and in second-guessing their reproductive decisions would effectively reverse these incentives and encourage mental hospitals to accord patients only their minimum legal rights").

The common sense understanding of Youngberg, that restraints are justified only in the context of danger of violence, is based on the recognition that involuntary civil confinement constitutes a special exercise of the State's *parens patriae* power to detain persons who must otherwise be respected as consenting-adult citizens who have been convicted of nothing and who cannot be punished at all. Thus, the courts below seriously misinterpreted Youngberg by failing to distinguish between professional judgment being used to restrain a patient's liberty in order to protect them from their own violent acts, and professional judgment being used to restrain a patient's liberty to serve the moral agenda of either the professional or the State. This Court should correct that misinterpretation and make it clear that the restraints contemplated in Youngberg apply to protecting patients from their own danger of violence and not to oppressing fundamental rights and nonviolent, consensual acts.

This Court has said that it has an obligation to "define the liberty of all, not to mandate [it's] own moral code". (Casey, supra, 505 U.S. at 850.) It follows that it also has a similar obligation to not allow the States to mandate their own moral code. If this Court should fail to define the fundamental rights of all persons civilly detained for care and treatment equally as unconvicted, consenting-adult, U.S. citizens, it will authorize any State so inclined as to legislate morality to draw a bright line between those civilly detained for "acceptable" reasons and those detained for "unacceptable" reasons, as has happened in this case. It will condemn civil

detainees on the wrong side of that line to disparity and class-based animus, and it will serve as the foundation for the continuing denial of fundamental rights and consequently unnecessary institutionalization. Social inequity and oppression do not help people get better, and they are not consistent with our system of Constitutional justice. Under our Constitution, only a criminal conviction extinguishes a person's inherent liberty. Even then, there are both "constitutional limitations on the conduct that a State may criminalize" (Foucha, supra, 504 U.S. 71, --) and limits to what the State can take away. Petitioner, because he was *acquitted* of a crime on grounds of insanity, has been relegated to the status of a second-class citizen. He has been denied fundamental rights, due process, equal protection of the laws without a showing of compelling governmental interest, his right to contest defamatory and perjurious statements, and even his right to amend an allegedly factually deficient complaint so he can be heard in court. In short, petitioner has no rights, and he has no right to petition the courts to discuss what his rights are. That's a pretty harsh penalty for someone who wasn't even convicted of a crime. Allowing entire classes of persons whom the State finds "unacceptable" to be relegated to the status of second-class citizens and be denied the fundamental rights guaranteed similarly situated persons without even showing a legitimate and neutral, compelling governmental interest, does not "define the liberty of all"; it actually sounds similar to something proscribed by the Thirteenth Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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