

IN THE SUPREME COURT OF CALIFORNIA

In re GERALD KOWALCZYK,
On Habeas Corpus.

Case No.: S277910

PETITIONER'S ANSWER TO AMICI CURIE BRIEFS

Court of Appeal Case No. A162977
San Mateo Superior Court Case No. 21-SF-003700-A
The Honorable Susan Greenberg, Superior Court Judge
The Honorable Elizabeth K. Lee, Superior Court Judge
The Honorable Jeffrey R. Finigan, Superior Court Judge

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Petitioner respectfully submits this answer to the 14 amicus briefs that were filed in this matter:

1. Brief of amicus curiae Alameda County District Attorney's Office (hereinafter "Amicus ACDAO");
2. Brief of amici curiae Bar Association of San Francisco, Los Angeles County Bar Association, and the Santa Clara County Bar Association (hereinafter "Amici Bar Associations");
3. Brief of amicus curiae California District Attorneys Association (hereinafter "Amicus CDAA");
4. Brief of amici curiae California Public Defenders Association, Public Defenders for Alameda and San Francisco Counties, and Los Angeles County Alternate Defender (hereinafter "Amici Public Defenders");
5. Brief of amici curiae Civil Rights Corps and the ACLU of Northern California (hereinafter "Amici CRC and ALCU");
6. Brief of amicus curiae Crime Survivors for Safety and Justice (hereinafter "Amicus CSSJ");
7. Brief of amicus curiae Criminal Justice Legal Foundation (hereinafter "Amicus CJLF");

8. Brief of amicus curiae Human Rights Watch (hereinafter “Amicus HRW”);
9. Brief of amicus curiae Office of the State Public Defender (hereinafter “Amicus OSPD”);
10. Brief of amici curiae Professors Kellen R. Funk and Sandra G. Mayson (hereinafter “Amici Funk and Mayson”);
11. Brief of amicus curiae Orange County Public Defender’s Office (hereinafter “Amicus Orange PD”);
12. Brief of amicus curiae San Francisco District Attorney Brooke Jenkins (hereinafter “Amicus SFDA”);
13. Brief of amicus curiae Silicon Valley De-Bug (hereinafter “Amicus De-Bug”); and
14. Brief of amicus curiae Alicia Virani (hereinafter “Amicus Virani.”)

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is the scope of pretrial detention allowed for under the California Constitution. Petitioner and 11 amici curiae briefs all contend that the scope of constitutional pretrial detention is limited to those arrestees subject to the exceptions listed in article I, section 12, subdivisions (a) through (c), of the California Constitution. (See Amicus

ACDAO; Amici Bar Associations; Amici Public Defenders; Amici CRC and ALCU; Amicus CSSJ; Amicus HRW; Amicus OSPD; Amici Funk and Mayson; Amicus Orange PD; Amicus De-Bug; Amicus Virani.) All other arrestees are entitled to “release on bail by sufficient sureties,” requiring a court to set bail in an amount that is reasonably affordable. (Cal. Const., art. I, § 12; *In re Humphrey* (2021) 11 Cal.5th 135, 135-136.)

These eleven amici briefs support petitioner’s claim with the presentation of evidence: the harms of pretrial detention on arrestees, their families, crime survivors and communities (Amicus CSSJ; Amicus OSPD); the detrimental effect that pretrial detention has on public safety (Amicus ACDAO; Amicus CSSJ; Amicus HRW); the programs in place to facilitate pretrial release through the administration of services and supervision (Amicus OSPD); the success of other jurisdictions in decreasing rates of pretrial incarceration while also protecting public safety (Amicus OSPD); the particular impact of pretrial detention on persons charged with misdemeanors (Amici Public Defenders); the impact of pretrial detention on the integrity of the criminal justice system (Amicus HRW); trial courts’ inability or unwillingness to implement changes in how they approach pretrial detention decisions in light of *In re Humphrey* (Amicus De-Bug; Amicus Virani; Amici Bar Associations); and a comprehensive history of bail and the term “sufficient sureties” (Amici Funk and Mayson.) In

contrast, the three amici in support of respondent’s position that virtually any defendant may be detained pretrial, rely on fear and assumptions about voter intent and public safety. (Amicus SFDA; Amicus CDAA; Amicus CJLF.)

In the interest of efficiency and in order to avoid repeating legal arguments already presented, petitioner is not addressing all arguments by all amici. Rather, petitioner will focus primarily on the arguments by Amici SFDA and CDAA in this brief. Petitioner first explains that Amicus SFDA is arguing for implied repeal, despite calling her approach an alternative method of harmonization. Petitioner then challenges the assumptions underlying Amici SFDA and CDAA’s claims that Proposition 9’s focus on public safety allows for expanded pretrial detention authority. Finally, petitioner asks this Court to reject Amici SFDA and CDAA’s appeal to decide the issues before it based on their policy preferences rather than the law.

ARGUMENT

I. DESPITE CALLING HER APPROACH “HARMONIZATION,” AMICUS SFDA IS ACTUALLY ARGUING FOR IMPLIED REPEAL OF THE MANDATORY LANGUAGE OF SECTION 12.

The Court of Appeal harmonized sections 12 and 28, subdivision (f)(3), of the California Constitution (hereinafter “section 12” and “section 28(f)(3)”) by finding that “section 12’s general right to bail in noncapital

cases remains intact, while full effect must be given to section 28(f)(3)'s mandate that the rights of crime victims be respected in all bail and own recognizance release determinations." (*In re Kowalczyk* (2022) 85 Cal.App.5th 667, 672.) Amicus SFDA takes issue with this manner of reconciliation and purportedly puts forth an alternative path of harmonizing the two constitutional sections that maintains both as fully operative. (Amicus SFDA, pp. 21-24.)

While calling her approach a "harmonization" of sections 12 and 28(f)(3), Amicus SFDA in fact is asking this Court to find an implied repeal of section 12's right to release on bail by arguing that a trial court may deny bail in any case "*regardless of whether the offense is enumerated in section 12* where clear and convincing evidence shows that no less restrictive condition of release can reasonably protect victim and public safety or ensure a defendant's future reappearance in court." (*Id.* at p. 12, *emphasis in original*.) In support of this so-called harmonization, Amicus SFDA puts forth nonsensical arguments that the word "shall" in section 12 does not indicate a mandatory obligation to release on bail, but rather a permissive one. (Cal. Const., art. I, § 12; Amicus SFDA, p. 23.)

Amicus SFDA relies on two distinguishable cases, *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, and *People v. Lara* (2010) 48 Cal.4th 216, in support of this argument. (Amicus SFDA,

p. 22.) *Matosantos* analyzes an “enabling statute” whereas *Lara* analyzes a jurisdictional one. Neither is relevant here.

In *Matosantos*, this Court considered whether redevelopment agencies, created pursuant to statutory enactment, may be subsequently dissolved by statutory enactment. (*Matosantos, supra*, 53 Cal.4th at p. 242.) In asserting that they may not, the *Matosantos* plaintiff argued the dissolution provision was inconsistent with article XVI, section 16 of the California Constitution. (*Id.* at p. 256.) That section provides for the taxation structure of community development projects. (*Id.* at pp. 256-257; Cal. Const., art. XVI, § 16.) It concludes that: “The Legislature *shall* enact those laws as may be necessary to enforce the provisions of this section.” (Cal. Const., art. XVI, § 16, *emphasis added*.) It is in response to plaintiff’s argument that this Court stated “[t]he word ‘shall,’ however, depending on the context in which it is used, is not necessarily mandatory.” (*Matosantos, supra*, 53 Cal.4th at p. 257.) Therefore, in *Matosantos*, the court merely recognized that the text at issue did not impose an obligation to enact any particular law, but simply confirmed the Legislature’s authority to carry out the purposes of the statute. (*Id.* at p. 258.)

In *Lara, supra*, 48 Cal.4th 216, this Court considered an entirely different issue—whether the violation of a statutory filing deadline divested the trial court of jurisdiction to later try the matter. The statutory language

at issue directed that the prosecution “shall” file a petition to extend the commitment of a person found not guilty by reason of insanity at least 90 days before the expiration of commitment, absent good cause. (*Id.* at p. 222.) The question before the court was not whether the statute created a mandatory duty, but rather whether the statutory time limitation was “mandatory” or “directory” in nature. (*Id.* at p. 224-229.) As *Morris v. County of Marin* (1977) 18 Cal.3d 901, 908, explained:

defendant simply confuses the “mandatory duty” terminology . . . with the entirely distinct and unrelated legal doctrine pertaining to “directory” or “mandatory” provisions. [In the first context], the term “mandatory” refers to an obligatory duty which a governmental entity is required to perform, as opposed to a permissive power which a governmental entity may exercise or not as it chooses. By contrast, the “directory” or “mandatory” designation does not refer to whether a particular statutory requirement is “permissive” or “obligatory,” but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates.

(See also *City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 923, stating that “[t]he ‘mandatory-directory’ dichotomy is linguistically similar but analytically distinct from the ‘mandatory-permissive’ . . . dichotomy.”) It was in this context that the *Lara* Court stated that “it should not be assumed that every statute that uses [the term ‘shall’] is

mandatory.” (*Lara, supra*, 48 Cal.4th at p. 227.) As such, it is inapposite.

Courts that have considered the mandatory versus permissive effect of the word “shall” do not support Amicus SFDA’s position. In *Morris*, this Court took a plain approach to analyzing whether the word “shall” created a mandatory obligation. The *Morris* Court held that the language of Labor Code section 3800, that “[e]very county or city . . . shall require” that every applicant for a building permit have worker’s compensation coverage, “makes quite clear that the Legislature intended the statutory requirements to be obligatory rather than permissive.” (*Morris, supra*, 18 Cal.3d at p. 910.) This Court noted that the Labor Code section “does not ‘request’ the county’s assistance, nor ‘solicit’ the county’s aid . . . but rather *requires* the county” to ensure that each applicant carries insurance. (*Ibid, emphasis in original.*)

Similarly, in *People v. McGee* (1977) 19 Cal.3d 948, 959-961, this Court held that the language of former Welfare and Institutions Code sections 12250 and 12850 that “restitution *shall* be shought by request, civil action, or other suitable means prior to the bringing of a criminal action,” imposed a mandatory duty on the state. (*Emphasis in original.*) The *McGee* Court explained the state “enjoys no discretion to refrain from complying with the dictates of the statute.” (*Id.* at p. 961.) In *Braman v. State of California* (1994) 28 Cal.App.4th 344, 351, the court held that the

use of the word “shall” in a statute regarding the investigation of prospective firearm purchasers “means that investigation is a mandatory obligation.”

Here, the phrase “*shall* be released on bail” in section 12 is subject to the same basic analysis. (Cal. Const., art. I, § 12, *emphasis added*.) The broad right to release on bail is clearly limited by the exceptions that follow in subdivisions (a) through (c), evidenced by the phrase “except for.” (Cal. Const., art. I, § 12.) A plain reading of this straightforward language indicates that the directive to release on bail is *mandatory*, unless a delineated exception applies. Therefore, section 28(f)(3) cannot expand the availability of pretrial detention to categories of offenses outside those enumerated in section 12 if section 12 is fully operative.

Ultimately, Amicus is arguing for precisely the same result as respondent but attempting to make such a result more palatable by calling it harmonization rather than implied repeal. Labeling an implied repeal “harmonization” does not make it so. This Court should reject SFDA Amicus’ implied repeal argument for the same reasons petitioner articulated in his reply. (See Petitioner’s Reply Brief on the Merits, pp. 7-22.)

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II. AMICI SFDA AND CDAA RELY ON ASSUMPTIONS RATHER THAN EVIDENCE IN ARGUING THAT LIMITING DETENTION TO THE CIRCUMSTANCES ALLOWED FOR IN SECTION 12 IS INCONSISTENT WITH PROPOSITION 9'S FOCUS ON PUBLIC SAFETY.

Respondent's primary argument is that section 12's limits on pretrial detention are inconsistent with article I, section 28's focus on victim and public safety. (Answer Brief on the Merits [hereinafter "Answer"], pp. 8-9, 15-16, 26-31.) In order to justify this argument, respondent attempts to place the two constitutional sections into a "detainee versus victim" dichotomy. (*Id.* at p. 28.) Amici in support of respondent's position rely on this same zero-sum framework that courts must choose between *either* protecting a defendant's right to pretrial release *or* protecting public safety. (Amicus SFDA, pp. 21, 24, 25-28, 29; Amicus CDAA, pp. 8-10, 25-26, 31; Amicus CJLF, p. 34 [“The only method of ensuring public and victim safety is to preventatively detain an arrestee until a jury of his or her peers renders a verdict of guilty or not guilty.”]) However, this argument fails because section 12 *does* consider victim and public safety, and because public safety does not necessarily require increased pretrial detention.

Amicus CDAA warns that failing to follow the *Kowalczyk* Court's approach would be "to the detriment of public safety" and states that "the will of the People to place public safety and the integrity of the criminal justice system of primary importance" should control. (Amicus CDAA, p.

7.) Amicus SFDA similarly states that “[o]ur Constitution demands that victim and public safety remain at the forefront of all pretrial release decisions,” and argues that section 28(f)(3) expanded trial court’s authority to detain in order to protect public safety. (Amicus SFDA, pp. 13, 19, 21.) Both Amici, however, are relying on assumptions about public safety in order to make their legally baseless argument appear colorable. They ignore the scope of article I, section 28’s focus on public safety and use fear to argue against a dystopian future that will never exist.

The overarching foci of article I, section 28 of the California Constitution (hereinafter “section 28”) are victims having a greater voice in criminal proceedings and public safety. (Cal. Const., art. I, § 28.) However, it does not follow that this necessarily means increased authority for courts to issue orders resulting in pretrial detention. As explained by a number of amici, increased pretrial detention *undermines* public safety. (Amicus CSSJ, pp. 36-37; Amicus ACDAO, pp. 8-10, 19-20; Amicus HRW, pp. 27-29 [“data shows that pretrial detention actually increases rearrest rates, introduces more crime into communities, and causes irreparable harm to individuals and their communities.”]) Amici SFDA and CDAA’s argument to the contrary relies on a series of assumptions unsupported by evidence.

First, Amici’s advocacy for increased detention as a means to ensure

public safety assumes discrete communities of victims and defendants. The argument depends on the reasoning that the fewer alleged criminals living in the community, the safer victims and the community at large will be. This is a fallacy. Victims most often are members of the same vulnerable communities as criminal defendants and are themselves impacted by pretrial detention. (Amicus CSSJ, pp. 51-52.) Consequently, when pretrial detainees return to their communities, “crime survivors are disproportionately more likely to suffer the brunt of the direct and systemic harms caused by pretrial detention.” (*Id.* at p. 53.) Further, victims of violent crime are “at an increased risk of substance-abuse, worsening mental and physical health, difficulty with school, work, and relationships, and criminal activity themselves.” (*Id.* at pp. 52-53.) In short, these communities overlap and impact one another.

Next, Amici SFDA and CDAA’s argument assumes that the harms of pretrial detention are outweighed by the purported public safety benefits. Data indicates that the harms of pretrial detention are in fact expansive and long-lasting. (See Amicus CSSJ, pp. 30-59; Amicus ACDAO, pp. 19-20; Amicus Public Defenders, pp. 28-31; Amicus OSPD, pp. 35-36; Amicus HRW, pp. 27-41.) Pretrial detention harms the arrestees themselves, as well as those who depend on them, creating additional impacts on public safety and a criminogenic cycle. (See Amicus CSSJ, pp. 36-51.) Amicus

OSPD articulates the significant and steadfast negative impact that increased detention has on community welfare generally:

Imprisoning individuals during the pendency of their criminal case has both financial costs borne by the local government and collateral costs (both financial and human) inflicted on the largely indigent populations detained through unaffordable bail. Detention frequently harms children and elderly dependents in need of care and employers who depend on potential detainees' labor and who also provide a critical link to their successful integration into society. Finally, detention has devastating impacts on a range of familial and social relationships critical to ensuring that people accused of crimes continue to lead productive lives.

(Amicus OSPD, pp. 35-36; see also Amicus CSSJ, pp. 37-45, detailing the harms of detention to an arrestee's physical health, mental health, economic well-being, familial relationships, and housing security.)

This Court in *Humphrey*, recognized these harms: impairment in a defendant's ability to prepare a defense, heightened risks of losing a job, a home, or custody of a child, and possibly a higher likelihood of reoffense, beginning "a vicious cycle." (*Humphrey, supra*, 11 Cal.5th at pp. 147-148.) A person who loses their job as a result of even a short detention is less likely to regain employment, less likely to be able to access government services, and more likely to live in poverty, leading to a higher risk of engaging in crime. (Amicus CSSJ, pp. 43-44.) A parent's incarceration increases a child's likelihood of themselves spending time

incarcerated and trapping these children “in a cycle of poverty that is . . . strongly correlated with future legal system involvement.” (*Id.* at pp. 48-49.) This combination of harms, including the psychological toll of imprisonment, “increase[s] future crime through a criminogenic effect,” which “cancels out the ‘incapacitation’ effect of jail.” (*Id.* at p. 46.)

The impact of pretrial incarceration on arrestees is especially important considering that “the vast majority of individuals [] will return to their communities after completing custodial time,” particularly those facing the type of non-serious cases that do not qualify them for pretrial detention under section 12. (Amicus OSPD, p. 36.) As Amicus HRW notes, the professed public safety purpose of pretrial detention is undermined by the routine practice of individuals’ being released immediately upon guilty plea: “courts and prosecutors take the contradictory position that a person poses a threat to public safety and should be detained, but once they plead guilty they are suddenly safe to be in the community.” (Amicus HRW, p. 30.) Therefore, the incapacitation effect of pretrial detention becomes less relevant the less severe the charged crime, as the arrestee is more likely to be released shortly after resolution of his case. (*Ibid.*)

Lastly, the argument relies on an assumption that pretrial detention is ultimately the most effective way—indeed the only way—to ensure victim

or public safety in many cases. This is not correct. Increased pretrial detention diverts resources away from other options that may be more effective at reducing crime, thus undermining public safety. (Amicus ACDAO, pp. 9, 19-20; Amicus CSSJ, pp. 54-59.)

Alternatives to incarceration are not only available, but also work. In San Francisco, approximately 87-95 percent of defendants participating in conditional release programs through the pretrial services agency are not charged with new offenses while released. (Amicus OSPD, pp. 16-17; Amicus Public Defenders, p. 35.) Under the Judicial Council of California's Pretrial Pilot Program, there was actually a decrease in rearrest and rebooking of individuals released pretrial. (Amicus OSPD, pp. 25-26.) In Kentucky, the state's comprehensive pretrial release structure led a rearrest rate of only six percent in 2019. (*Id.* at p. 29.) New Jersey actually reduced the crime rate—both violent and non-violent crime—in the years following implementation of bail reform in the state. (*Id.* at pp. 34-35.) However, these programs can only be effective if they remain available and properly resourced.

In conclusion, respondent, and Amici SFDA and CDAA base their arguments on assumptions and conjecture. What Amici OSPD, CSSJ, HRW, ACDAO, and Public Defenders offer, in contrast, is *evidence*, not speculation. This Court must consider section 28's public safety command

thoughtfully, as “public safety” is not synonymous with increased detention. (See Amicus CSSJ, pp. 60-67.) This reading of section 28(f)(3) is consistent with Proposition 9’s focus on public safety and is entirely consistent with section 12’s mandate of release on bail by sufficient sureties.

III. AMICI SFDA AND CDAA ARE ASKING THIS COURT TO INTERPRET THE LAW IN ACCORDANCE WITH THEIR POLICY PREFERENCES.

Both Amici SFDA and CDAA argue that limiting detention to the circumstances allowed for in section 12 would lead to “absurd results.” (Amicus SFDA, p. 24; Amicus CDAA, p. 7.) Amicus CDAA warns against defendants who would be “free to do as they please” because they are “guaranteed release,” turning the criminal justice system into a “proverbial revolving door.” (Amicus CDAA, p. 8.) Additionally, Amicus CDAA invokes the purposes of bail and detention—“public safety”—in imploring this Court not to allow this state of affairs. (*Ibid.*) Similarly, Amicus SFDA argues that holding section 12 fully operative, “would produce absurd results by allowing criminal defendants to commit felonies while released on their own recognizance with impunity.” (Amicus SFDA, p. 24.)

Amicus CDAA goes further, arguing that the *Kowalczyk* Court faced the “dilemma” posed by section 12: a “Hobson’s choice” whereby a trial

court must either deny bail entirely in contravention of section 12 or set it at an amount low enough to guarantee “that a Defendant who *should be detained* will instead be released.” (Amicus CDAA, p. 8, *emphasis added.*)

The decision that this hypothetical defendant *should be detained* is based on Amicus CDAA’s political belief, not based on the law. What Amici fail to acknowledge is that the law reflects a weighing of interests, harms, evidence, and values by the voters who have determined that the injustices and harms that result from a presumptively innocent defendant remaining in custody are simply not worth imposing for anything other than the most serious offenses and the most dangerous offenders.

Moreover, section 12 allows for detention in situations where public and victim safety is an issue. (Cal. Const., art. I, § 12.) This allowance is simply more limited than respondent and Amici SFDA and CDAA wish it to be. As Amicus ACDAO notes, section 12 provides for a “nuanced, balanced approach” to pretrial detention, “manifesting a judicious blend of public safety and constitutional fidelity.” (Amicus ACDAO, p. 8.) Rather than abide by this democratic process, Amici SFDA and CDAA urge this Court to interpret the law as they would prefer it.

In particular, Amicus SFDA invokes crimes involving the sale of fentanyl to “highlight the absurd result” that must be avoided. (Amicus SFDA, p. 25.) Yet, this example is not only misplaced, but also misused in

a cynical attempt to inject a political issue into a legal forum.

Even as a policy argument, Amicus SFDA’s reasoning fails.

Amicus SFDA is attempting to use the blunt tool of pretrial incarceration to address one of the most complex and intractable problems our society has faced. Drug crime, including the sale of drugs, is not new. While the widespread illicit use of fentanyl may be relatively new, localities across the United States have been struggling to combat drug crime and the attendant social and economic difficulties that result for a century.

(Gottfredson, et al., *Substance Use, Drug Treatment and Crime: An Examination of Intra-Individual Variation in a Drug Court Population*

(2008) Journal of Drug Issues, at pp. 601-102.)¹ The United States launched its infamous “war on drugs” throughout the 1980s and 1990s, which saw the imposition of draconian sentences on non-violent drug offenders. (Lord, *Moral Panic and the War on Drugs* (2022) 20 U.N.H. L.Rev. 407, 410-411 [hereinafter “Lord”].) However, research has consistently shown that increased criminalization does not reduce either drug use or related issues such as overdose deaths, and may in fact make the problem worse. (*Id.* at p. 413; Vitiello, *The War on Drugs: Moral Panic and Excessive Sentences* (2021) 69 Clev. St. L.Rev. 441, 456

¹ Available at <https://ccjs.umd.edu/sites/ccjs.umd.edu/files/pubs/COMPLIANT-Drug%20Use%2C%20Drug%20Treatment%2C%20and%20Crime.._0.pdf>.

[hereinafter “Vitiello”]; Osler, *What We Got Wrong in the War on Drugs* (2021) 17 U. St. Thomas L.J. 968, 969 [hereinafter “Osler”]; Lancaster, *1 Year After Chesa Boudin’s Recall, Is San Francisco Safer Under His Successor’s More Punitive Policies?*, Reason (Jul. 12, 2023).)² Further, focusing on detaining street sellers—“the most easily replaced part of the network of transactions involved” in the drug trade—diverts law enforcement resources from more effective strategies to combat drug trafficking and addiction. (Osler, at p. 973, fn. 40.)

While the “war on drugs” failed to eliminate drug crime, it did result in skyrocketing jail and prison populations, gross racial disparities in the criminal justice system, empowered international criminal organizations, and a tremendous waste of resources. (Kristof, *Drugs Won the War*, New York Times (Jun. 13, 2009) [hereinafter “Kristof”]; Lord, at pp. 411-412, 415-416; Osler, at pp. 971-972).³ The “war on drugs” has been widely recognized as “a colossal failure” and policymakers across the political spectrum have supported policy changes toward ending it—often in the form of decarceration and decriminalization of drug-related activity. (Osler, at p. 969; Kristof; Minhee, et al., *The Cure for America’s Opioid*

² Lancaster available at <<https://reason.com/2023/07/12/1-year-after-chesa-boudins-recall-is-san-francisco-safer-under-his-successors-more-punitive-policies/>>.

³ Kristof available at <<https://www.nytimes.com/2009/06/14/opinion/14kristof.html>>.

Crisis? End the War on Drugs (2019) 42 Harv. J.L. & Pub. Pol'y 547, 576-577.)

In short, the lesson of the failed war on drugs is that we cannot incarcerate our way to a drug-free society. Thus, pretrial detention for alleged non-violent drug offenders as a means to reduce drug crime simply does not work. (See Lord, at pp. 969-970.) Amicus SFDA recently acknowledged as much: “I came in a year ago to try to use the criminal justice system as a vessel to intervene in this situation, but as of now, that’s not working.” (Hoeven, *Brooke Jenkins says Breed’s plan to arrest drug users ‘isn’t working.’ That doesn’t mean scrapping it*, San Francisco Chronicle (Dec. 16, 2023).)⁴ Nonetheless, Amicus urges this Court to grant trial courts broader authority to detain pursuant to this failed political strategy.

Amicus SFDA’s argument also implores this Court to not engage in traditional statutory construction analysis, but instead interpret constitutional provisions to effectuate her preferred policy. (Amicus SFDA, p. 26.) That stated policy is to keep alleged drug sellers incarcerated. (Pena, *SF DA files 800+ drug cases 1st year in office but blames judges for allowing dealers to go free*, ABC7 News (Jul. 12,

⁴ Available at <<https://www.sfchronicle.com/opinion/article/sf-jenkins-breed-drug-prosecution-18547389.php>>.

2023).)⁵ Another elected District Attorney, Amicus ACDAO, has taken a wildly different policy approach to pretrial detention. (See Amicus ACDAO, pp. 18-25.) Amicus ACDAO states that public safety does not favor or benefit from “an unchecked cash bail system,” setting bail above an arrestee’s ability to afford, or excessive pretrial detention. (*Id.* at p. 7.) Instead, Amicus ACDAO advocates for the “nuanced, balanced approach” of section 12. (*Id.* at p. 8.) In addition to these two amici, there are 56 elected prosecutors in California, each subject to the different political forces and priorities in their jurisdictions. Although an elected prosecutor may shift her legal analysis in response to political pressure, courts may not indulge in the same calculus.

The insulation of the judicial branch from political forces is by design. (Hamilton, *Federalist No. 78* (1788).)⁶ It is the purpose of the judiciary “to protect fundamental rights against mob rule.” (Vitiello, at p. 443, citing Chemerinsky, *The Case Against the Supreme Court* (2014) [hereinafter “Chemerinsky”].) As the constitutional scholar, Erwin Chemerinsky, recognized: “A constitution is society’s attempts to tie its own hands, to limit its ability to fall prey to weaknesses that might harm or undermine cherished values. History teaches that the passions of the

⁵ Available at <<https://abc7news.com/san-francisco-district-attorney-brooke-jenkins-sf-drugs-fentanyl-tenderloin-drug-dealers/13495575/>>.

⁶ Available at <<https://guides.loc.gov/federalist-papers/text-71-80#s-lg-box-wrapper-25493470>>.

moment can cause people to sacrifice even the most basic principles of liberty and justice.” (Chemerinsky, at p. 35.)

Amicus SFDA’s focus on the “passions of the moment”—the fentanyl dealer—illustrates precisely why courts must remain insulated from such political influences. Before fentanyl, there is a long history in the United States of similar “crackdowns” on those involved with particular types of drugs: methamphetamine, crack cocaine, LSD and other psychedelic drugs, peyote, heroin, so-called “date-rape drugs,” ecstasy, opium, PCP, marijuana, and even alcohol. (See Peterson, et al., *Meth Mouth, White Trash and the Pseudo-Racialization of Methamphetamine Use in the U.S.* (2019) volume 34, No. 10, Health Commun. 1173; Trueblood, *Crack as a moral panic: The racial implications inherent to crack and powder cocaine sentencing* in UNLV Retrospective Theses and Dissertations (1999) pp. 20, 23, 24, 28; Stanger, “*Moral Panic*” in the *Sixties: The Rise and Rapid Declination of LSD in American Society* (2021) volume 1, No. 2, The Cardinal Edge; Vitiello, at pp. 447, 453-455; Hernandez, *Peyote and the Ensuing Moral Panic*, Ramapo Journal of Law & Society (Mar. 6, 2014) [hereinafter “Hernandez”]; Denham, *Folk Devils, News Icons and the Construction of Moral Panics: Heroin chic and the amplification of drug threats in contemporary society* (2008) volume 9, No. 6; Weiss & Colyer, *Roofies, Mickies and Cautionary Tales: Examining the*

Persistence of the “Date-Rape Drug” Crime Narrative (2010) volume 31, No. 4, Deviant Behavior 348; Blanchard, *The “Date-Rape Drug” Narrative Has Been Weaponized Against GHB Users*, Filter (Sep. 22, 2020) [hereinafter Blanchard”]; Cohen, Folk Devils and Moral Panics (2002) pp. xiv-xvi [hereinafter “Cohen”]; Goode & Ben-Yehuda, Moral Panics: The Social Construction of Deviance (2d ed. 2009) pp. 1197-217; Hunt, *Marijuana Panic Won’t Die, but Reefer Madness Will Live Forever*, Jstor Daily (Apr. 23, 2020) [hereinafter “Hunt”]; *Media hysteria around fentanyl & other drugs continues. Here’s why that matters, and the harm it can cause*, San Francisco AIDS Foundation (Feb. 6, 2023) [hereinafter “San Francisco AIDS Foundation”].)⁷ Nearly all of these panics and subsequent crackdowns were rooted in racist, classist, or cultural stereotypes. (Vitiello, at pp. 447-448; Trueblood, at p. 20; Newkirk, *What the ‘Crack Baby’ Panic Reveals About the Opioid Epidemic*, The Atlantic (Jul. 16, 2017) [hereinafter “Newkirk”].)⁸ As one scholar noted, “[t]he consistent thread

⁷ Hernandez available at <<https://www.ramapo.edu/law-journal/thesis/peyote-ensuing-moral-panic/>>; Blanchard available at <<https://filtermag.org/date-rape-ghb-stigma/>>; Cohen available at <https://infodocks.files.wordpress.com/2015/01/stanley_cohen_folk_devils_and_moral_panics.pdf>; Hunt available at <<https://daily.jstor.org/marijuana-panic-wont-die-but-reefer-madness-will-live-forever/>>; San Francisco AIDS Foundation available at <<https://www.sfaf.org/collections/beta/media-hysteria-around-fentanyl-other-drugs-continues-heres-why-that-matters-and-the-harm-it-can-cause/>>.

⁸ Vitiello, pp. 447-448; Newkirk available at <<https://www.theatlantic.com/politics/archive/2017/07/what-the-crack-baby-panic-reveals-about-the-opioid-epidemic/533763/>>.

through much of this history is moral panic. Politicians appealed to ‘ordinary’ Americans by portraying a national emergency that required drastic measures.” (Vitiello, at p. 452.) Here, Amicus SFDA is exploiting the moral panic surrounding fentanyl. Acknowledging the panicked media and political frenzy around fentanyl is not to diminish its harmfulness. The denial of liberty, however, should be made according to established law, not fear-based reaction.

While Amicus SFDA may exploit the fears of her constituents, courts may not and must hold true to “the most basic principles of liberty and justice.” (Chemerinsky, at p. 35.) So serious a determination as whether a legally innocent person should remain confined in a cell—cut off from his family, his employment, his medical and mental health care, and his community—should not depend on “the passions of the moment.”

CONCLUSION

Section 12’s guarantee of release on bail by sufficient sureties limits pretrial detention to specified exceptions. Petitioner and 11 amici curiae briefs in support of petitioner argue that pretrial detention may not be expanded beyond the limits of section 12, either by orders of pretrial detention or detention through the use of affordable bail.

In advocating for expanded authority for courts to detain, amici in support of respondent put forth specious arguments that rely on unsound

logic, faulty assumptions about public safety, and political appeals.

Petitioner asks this Court to reject these arguments based on fear and conjecture. As such, this Court should affirm that section 12 and section 28(f)(3) may be harmonized, with section 12 providing the exclusive circumstances wherein pretrial detention may be ordered, and hold that trial courts may not impose bail in excess of what an arrestee can reasonably afford.

Dated: January 8, 2024

Respectfully Submitted,


MARSANNE WEESE
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WORD COUNT CERTIFICATE

I, Marsanne Weese, declare and certify under penalty of perjury that I am an attorney licensed to practice law in the State of California (SBN 232167.) I certify that the brief contains 6,057 words, according to the word count produced by the Microsoft Word program used to produce this document and that the brief uses a Times New Roman size 13 font.

Dated: January 8, 2024



MARSANNE WEESE
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I, the undersigned, declare that I am over 18 years of age and not a party to the within cause; my business address is 255 Kansas Street, Suite 340, San Francisco, CA 94103.

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Supreme Court of California

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