No. S277910

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Re GERALD KOWALCZYK,

on Habeas Corpus.

Application for Leave to File Brief of *Amicus Curiae* and Proposed Brief of Alameda County District Attorney's Office in Support of Petitioner Gerald Kowalczyk

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After Decision by the Court of Appeal
First Appellate District, Division 3, Case No. A162977

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APPLICATION

Pursuant to Rule 8.520(f) of the California Rules of Court, the Alameda County District Attorney's Office ("ACDAO") respectfully applies for permission to file the *Amicus Curiae* brief contained herein.

The questions before the court hinge on identifying the precise constitutional provision that governs the denial of bail in noncapital cases within the jurisdiction of California. The determination of the governing provision transcends a mere legalistic inquiry; it bears significant ramifications for the administration of justice, public safety, and equity in the State. The proposed Amicus Curiae brief will assist the Court in deciding this matter by proffering an interpretation of the California Constitution concerning bail in noncapital cases, aligning with the core values of public safety and equity that undergird our justice system. The exigency of this inquiry lies not merely in its theoretical or jurisprudential premise but profoundly impacts real lives, communities, and the broader societal fabric.

Amicus Curiae, the ACDAO, is the governmental entity that represents the People of the State of California in the criminal prosecution of felonies and misdemeanors in Alameda County, the seventh most populous county in California. (World Population Review, *Largest Counties in the US 2023*, https://worldpopulationreview.com/us-counties (as of Nov. 6, 2023).) The ACDAO's central mission is to ensure public safety and to pursue equal and fair justice for all individuals.

The ACDAO has a strong interest in and familiarity with bail and pretrial release in California, the limits on pretrial detention under the state and federal Constitutions, and the fair and effective administration of justice. Moreover, in the wake of *In re Humphrey* (2021) 11 Cal.5th 135, bail decisions in Alameda county have become increasingly inconsistent, as they have across California, with judges inconsistently interpreting the law. (See Virani et al, Coming Up Short: The Unrealized Promise of *Humphrey* (UCLA School of Law Bail Practicum and Berkeley Law Policy, Oct. 2022) p. 20 (hereinafter Coming Up Short).) Because the Court's decision in this matter will substantially impact local efforts to address fairness and public safety related to bail, the ACDAO has a significant interest in this Court granting the petition for review.

No party, or counsel for any party, in this matter has authored any part of the accompanying proposed Amici Curiae brief. Nor has any person or entity made any monetary contributions to fund the preparation or submission of this brief.

Dated: November 8, 2023

Respectfully submitted,

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INTRODUCTION

Amicus Alameda County District Attorney's Office (hereinafter "ACDAO") addresses the issue of pretrial detention under the California Constitution presented by the Court as the following: "(1) Which constitutional provision governs the denial of bail in noncapital cases – article 1, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution – or, in the alternative, can these provisions be reconciled? (2) May a superior court ever set pretrial bail above an arrestee's ability to pay?"

The ACDAO seeks to emphasize a simple point in its analysis of the questions at hand: public safety does not favor, nor does it benefit from, an unchecked cash bail system. The ACDAO describes below how money bail thwarts public safety in numerous ways. Specifically, public safety does not favor, nor benefit from, allowing a superior court to set pretrial bail above an arrestee's ability to pay – a practice which has resulted in allowing some defendants with wealth who pose a significant public safety threat to post bail and continue to threaten the public. Nor does public safety favor, nor benefit from, an unchecked system of bail that encourages excessive pretrial detention, and in doing so, exacerbates racial and socioeconomic disparities, erodes public trust in the legal system, and bankrupts society's ability to invest in diverse public safety strategies aimed at reducing crime.

The dialectic presented herein underscores the quintessence of a carefully balanced judicial approach towards

bail and pretrial detention in noncapital cases. Such an approach is not merely a legalistic endeavor but a profound societal obligation to foster a just and effective criminal justice system in California. By eschewing overly broad interpretations that strain our resources and threaten to erode the constitutional bedrock of our justice system, and by endorsing a judicious, equitable framework for pretrial detention, this Court will be reinforcing a balanced and just criminal jurisprudence. With a hopeful gaze towards a fair and equitable justice system that prioritizes public safety, we beseech the Court to disallow the setting of pretrial bail above an arrestee's ability to pay and to uphold the nuanced, balanced approach articulated in article I, section 12, thereby manifesting a judicious blend of public safety and constitutional fidelity.

BACKGROUND

I. California's justice leaders and legislature have recognized that unchecked pretrial detention compromises victims and public safety

In 2016, the California Chief Justice established the Pretrial Detention Reform Workgroup to provide recommendations on how courts should strategically formulate decisions that treat people fairly, protect the public, and ensure court appearances. (See Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to The Chief Justice (October 2016) p. 1, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.courts.ca.gov/documents/PDRReport-20171023.pdf (Nov. 8, 2023).) At the end of its study, the Workgroup determined that California's

current pretrial release and detention system unnecessarily compromises victim and public safety because it "bases a person's liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias." (*Ibid.)* Moreover, the cost of pretrial detention detracts from the State's ability to diversify its public safety resources, namely programs and services aimed at preventing and deterring crime.[1]

These findings are not revolutionary. Imposition of monetary bail bears no rational relationship to the goal of protecting victims and public safety. Bail is not forfeited upon commission of additional crimes. (Pen. Code, §§1269b subd. (h), 1305, subd. (a), and 1278, subd. (a).) Money bail will protect the public only as an incidental effect of the defendant being detained due to their inability to pay, and this effect will not consistently serve a protective purpose, as a wealthy defendant will be released despite their dangerousness while indigent defendants – typically people of color – who poses minimal risk of harm to others will be jailed. Black and brown defendants have bail set in higher amounts than their white counterparts yet are less likely to be able to afford it. (Wendy Sawyer, *How Race Impacts Who Is*

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[1] From 2011-2015, six counties in California spent $37.5 million to detain people whose cases were dismissed or never filed. (Human Rights Watch, "Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People, at 17 (Apr. 2017), https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly (Nov. 8, 2023).)

Detained Pretrial (Prison Policy Initiative 2019), *https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/* Nov. 8, 2023).) Moreover, many people are detained, at great economic cost, based on accusations that ultimately do not justify the filing of a criminal charge.[2] Meanwhile, others are released without regard to evidence-based predictors of future violence, despite posing high public safety risk, solely because they can afford monetary bail.

II. An untested, expansive interpretation of section 28 has undermined fairness and justice in pretrial detention

In March 2021, the California Supreme Court held in *Humphrey* that "[t]he common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional", and that "unless there is a valid basis for detention –[a court must] set bail at a level the arrestee can reasonably afford." (*Humphrey, supra*, 11 Cal. 5th 135, 143, 154). While this Court chose then not to decide which constitutional provision governs the denial of bail in noncapital cases – article I, section 12(b) and (c) or article section 28(f)(3), the holding was predicted to be a sea change moment for California jurisprudence, with projected significant reductions in pretrial detention state-wide. (Coming Up Short, *supra*, at 3.) However, a qualitative and quantitative

[2] According to Human Rights Watch, from 2011 to 2015, 64 percent of people in California jails at any time are held pretrial; in this period, over a quarter-million Californians were detained entirely based on accusations that ultimately did not justify filing of a criminal charge. *Id.* at 17 (Apr. 2017).

review of California courts conducted by the UCLA School of Law Bail Practicum in collaboration with Berkeley Law's Policy Advocacy Clinic found "the promise of *Humphrey*, 18 months after it was decided, remains unmet" in terms of decreased jail population, decreased bail amounts, or decreased length of pretrial detention. (*Ibid.*)

The reasons identified through the UCLA review for the diluted impact of *Humphrey* are compound. Diving into the decision's impact on judicial behaviors and practices, the review found judges to commonly misapply the holding in *Humphrey*:

> Some judges are imposing no bail holds in cases where a person is entitled to bail, while others are refusing to consider less restrictive alternatives [for protecting the public or ensuring against abscondence]. (*Id.* at 20.)

Further, the review indicates that this misapplication cannot be traced to case law or statute, but directly to a memorandum and associated training webinar constructed by Retired Judge Richard Couzens. The Judicial Council sent that memorandum and webinar to all the presiding judges and court executives of all superior courts throughout California outlining "procedures for bail setting after the California Supreme Court's *In re Humphrey* decision..." (*Ibid.* (citing Email from Shelley Curran, Dir. of Crim. Just. Serv. of the Judicial Council of CA, to "JCC PJs-All Trial Courts; JCC Court Execs – ALL Trial Courts," (Apr. 2, 2021) (on file with the authors of Coming Up Short)).) In this memorandum, and a subsequent webinar offered to judges, Judge Couzens provides judges with advice on how to circumvent the limits on pretrial detention created by *Humphrey*.

Specifically, Judge Couzens instructs judges to rely on article I, section 28 of the California Constitution to open a new mechanism of preventative detention distinct from that based on article I, section 12 or laid out under *Humphrey*.[3] Judge Couzens encourages the utilization of Section 28 to justify preventative detention in cases "where cash bail may have been set previously or where people would have been released from custody on their own recognizance." (Coming Up Short, *supra.* at p. 21.) An email cited in the review from a Chief Assistant District Attorney in Monterey County aptly summarizes how Judge Couzens instructed judges to use section 28 to broaden the ability to detain arrestees in the wake of *Humphrey*:

> According to Couzens, there are two legal avenues to deny bail... The other avenue to deny bail I was not aware of. It is Art. I sec. 28(f)... Because *Humphrey* limits preventative detention to the most serious crimes, it may be that under Art. 1. Sec. 28(f) we are limited to serious and violent felonies. But it seems all we have to prove is D committed the serious or violent felony (according to *Humphrey* the court must assume the truth of the criminal charges) and that no lesser restraint will assure the safety of the public and victim or the appearance of D in court. We never get to *Humphrey* or zero bail. (*Id.* at 22.)

Half of the defense attorneys surveyed in the UCLA review agreed that since Couzens' memorandum was circulated, "judges are more likely to place no bail holds than before Humphrey" and

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[3] While the California Supreme Court requested parties brief the issue, in *Humphrey*, it chose to not rule on which constitutional provision governs the denial of bail in noncapital cases – article I, section 12, subdivision (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution. (Humphrey (Kenneth) on H.C., 417 P.3d 769 (2018).)

forty-four percent indicated that "no bail holds were being used for cases [including misdemeanors] outside that allowed under article I, section 12 of the California Constitution." *(Ibid.)*

In addition to relying on article I, section 28 to expand no bail holds, the UCLA review also credits Judge Couzens' memorandum for a pattern of judges misinterpreting or ignoring the *Humphrey* holding requirement that they consider less restrictive alternatives to detention. (*Id.* at 21, 23.) Under *Humphrey*, in order to detain a person, the court must make a finding that "detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests." (*Id.* at 23 (citing *Humphrey, supra*, 11 Cal.5th at 156).) Instead, judges adopted a false dichotomy approach based on Couzens' memo, either denying bail outright or releasing arrestees on affordable bail without conditions and ignoring the plethora of noncustodial measures that can be installed to protect the public or ensure appearance of the defendant in court. (See *id.* at 21, 23.)

Finally, judges are failing to comply with the procedural requirements laid out in *Humphrey,* and instead insisting on adhering rigidly to bail schedules. In one such example, in *In re Brown*, the Los Angeles Superior Court refused to consider the affordability of bail and held rigidly to the approved bail schedule, stating that *Humphrey* required "consideration of an arrestee's financial condition only if the court first determined there existed unusual circumstances justifying a deviation from

the approved bail schedule." (*In re Brown (2022)* 76 Cal.App.5th 296, 300.) The Court of Appeals held that *Humphrey* always requires that courts consider a person's ability to pay when setting bail, and to "set bail at a level the arrestee can reasonably afford." (*Id.* at 308 (citing *Humphrey*, *supra*, 11 Cal.5th at 151).)

The post-*Humphrey* rulings in Alameda County mirror those of other judges across the state. The County initially experienced reductions in pretrial after *Humphrey*, likely due to its participation in a legislative pilot program to reduce pretrial detention[4] and implementation of the COVID-19 pandemic zero-dollar bail policy.[5] During this period, the County saw evidence of decreased racial bias in pretrial detention and absconding, with

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[4] The Budget Act of 2019 (Assem. Bill 74; Stats. 2019, ch. 23) earmarked $75 million to the Judicial Council to launch and evaluate two-year pretrial projects in local trial courts. The projects aimed to increase the safe and efficient release of arrestees before trial, use the least restrictive monitoring practices possible while protecting public safety and ensuring court appearances, validate and expand the use of risk assessment tools, and assess any bias. Alameda County participated in this pilot project.

[5] "Due to the COVID-19 pandemic, the California Judicial Council issued an emergency zero-dollar bail policy in April 2020.54 This policy altered the bail schedule across the state by setting bail at zero dollars for most misdemeanors and low-level felonies. The policy was in effect statewide from April through June 2020." (Coming Up Short, *supra,* at p. 12 (citing Ca. Jud. Council, Emergency Rules of the California Rules of Court (April 6, 2020), https://jcc.legistar.com/View.ashx?M=F&ID=8234474&GUID=796115436A40-465C-8B8B-D324F5CAE349)).

no increased harm to public safety.[6] (See Judicial Council of California, Pretrial Pilot Program: Final Report to the Legislature (July 21, 2023) pp. 12-13, 24-25, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.courts.ca.gov/documents/Pretrial-Pilot-Program_Final-Report.pdf (Nov. 8, 2023).) However, in the last eighteen months, Judge Couzens' approach has become entrenched themselves in our County, including rigid deference to the bail schedule, reliance on article 1, section 28 to justify denial of bail, failure to use non-detention measures to support public safety, and the use of unaffordable bail to detain people.

III. Recent tragedies in Alameda County illustrate public safety harm of interpreting bail through section 28

Highlighting the urgency of this matter, Alameda County recently experienced two tragedies involving people who were released pretrial only to be charged with murder. These cases highlight the ways reliance on interpreting bail through article I, section 28 can devastate public safety. [7]

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[6] Generally, research has shown that bail alternatives like supervised release programs have no negative impact on public safety and actually increase the rate at which defendants return to court. (See *Barno et. al,* Exploring Alternatives to Cash Bail: An Evaluation of Orange County's Pretrial Assessment and Release Supervision (PARS) Program (2019) *Am. J. of Crim. Just. available at https://link.springer.com/article/10.1007/s12103-019-09506-3.)*

[7] It is the policy of the ACDAO not to comment on cases currently being prosecuted by the office. For purposes of this discussion, information summarizing this case is taken from public media accounts and contains no unpublished information. *See* Rodgers,

The first case highlights how ignoring the less restrictive alternatives to detainment under *Humphrey* fails to keep victims safe. This person arrested was charged with assault and gun possession for allegedly firing three shots during a May 28, 2023 argument with a family member. (*See* Gartrell.) The trial court agreed to release the arrestee on his own recognizance without bail, and imposed minimal conditions: The arrestee was prohibited from drinking alcohol and possessing guns or ammunition, ordered to stay away from the alleged victim and told to report to a pretrial services officer. *(Ibid.)* After the arrestee repeatedly failed to take mandatory breathalyzer tests and failed a breathalyzer test with a blood alcohol content at more than six times the legal limit, a probation officer attempted to jail him for pretrial release violations. *(Ibid.)* At that time the trial court could have imposed more significant safety measures such as requiring the arrestee enter a treatment program. Instead, the court failed to implement noncustodial safety measures and changed nothing. *(Ibid.)* Three days later, the arrestee was in court being charged anew for allegedly shooting and killing a 32-year-old man. (*Ibid.*)

Oakland man free on bail in earlier shooting charged with murder near same retirement center, The Mercury News (August 16, 2023), https://www.mercurynews.com/2023/08/16/oakland-man-free-on-bail-in-earlier-shooting-charged-with-murder-near-same-retirement-center/ (hereinafter Rogers); Gartrell, *Three days before, Oakland homicide judge denied probation's request to jail suspect for alleged pretrial release violations in prior shooting case*, The Mercury News (September 5, 2023), https://www.mercurynews.com/2023/09/05/three-days-before-oakland-homicide-judge-denied-probations-request-to-jail-suspect-for-alleged-pretrial-release-violations-in-prior-shootil;ng-case/ (hereinafter Gartrell)).

The second case highlights how setting unaffordable bail to detain does not protect the public but allows people with wealth to circumvent safety measures. This person arrested was charged in a shooting. (See Rogers.) Instead of detaining the arrestee without bail, bail was set high at $200,000; the trial court declined to reduce bail to the defense's requested affordable level. (*Ibid.*) However, the arrestee was able to post the significant bail. (*Ibid.*) Not a month later, the arrestee was charged with murder related to a shooting in the same location as the prior incident. (*Ibid.*)

These two recent cases illuminate the dangers to public safety at issue with the questions before the court: which section of the Constitution should govern bail; and may a superior court set bail above an arrestee's ability to pay. Lessons learned from these recent tragedies compelled the ACDAO to weigh in on this matter. Safety and fairness demand that our courts not attempt to use unaffordable bail as a mechanism for detention and that the courts strictly limit bail around section 12 of the California Constitution.

ARGUMENT

Overuse of pretrial detention, whether due to a superior court knowingly setting unaffordable bail to detain an arrestee or as result of a broad construction of the Constitution, erodes public safety, and generates an inequitable criminal justice system. To avoid a result so adverse to the intended principles of fairness, justice, and equity, first, article I, section 12 must govern bail. A narrow construction of this section puts public

safety at the forefront of the detention decision by offering ample mechanisms to detain arrestees who threaten the community. Second, bail can never be intentionally set above an arrestee's ability to pay. When courts engage in that practice, public safety arbitrarily hinges on one's financial status, thus benefiting the wealthy and undermining the safety of us all.

I. Section 12 must control the denial of bail to protect public safety

The pivotal question before this Court hinges on identifying which constitutional provision governs the denial of bail in noncapital cases within the jurisdiction of California, article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3) of the California Constitution. The determination of the governing provision transcends a mere legalistic inquiry; it bears significant ramifications for the administration of justice, equity, and public safety within the state. The accurate interpretation and application of the constitutional provision in question are foundational to establishing a fair and equitable bail system, thereby preserving the integrity of the judiciary, and upholding the societal contract of public safety.

The exigency of this inquiry lies not merely in its theoretical or jurisprudential premise but profoundly impacts real lives, communities, and the broader societal fabric. As discussed in the Background section of this brief, the delineation between article I, section 12, and article I, section 28, in governing denial of bail in noncapital cases, manifests in

practical outcomes capable of impacting life and death, discrimination, and social order. The stakes are elevated by the potential for disparate treatment and outcomes, exacerbated by racial and economic biases that could be unwittingly institutionalized through misinterpretation or misapplication of the constitutional provisions at hand. Moreover, the fiscal and resource implications for the state and local jurisdictions are substantial, with a broad or unrestricted approach to detainment sans affordable bail posing a significant strain on already stretched public safety resources.

A. Construing section 28 to expand preventative detention would erode public safety and justice

ACDOA argues for a narrowly construed utilization of article I, section 12 to govern bail as the best mechanism for ensuring a balanced approach that strongly addresses public safety concerns while mitigating the risks of overbreadth, abuse, and systemic biases.

ACDOA concurs with the legal analysis proffered by Petitioner Kowalczyk in his Opening Brief on the Merits and Reply to Brief on the Merits supporting his argument that section 12 controls the denial of bail, while section 28(f)(3) sets forth additional criteria for trial courts to consider.

ACDOA adds support to the Petitioner's argument by asserting that the background information provided in this brief illustrates the dangers in action should section 28(f)(3) control the denial of bail in non-capital cases. Considering our County, for example, in the year since the conclusion of the State's Pilot

Bail Program, the influx of the influence of section 28(f)(3) to our Superior Court's jurisprudence has most certainly undone the work created to reduce racial bias in pretrial detention, and it has contributed to two unchecked acts of gun violence resulting in loss of lives in just the last few months, as described in Background. We must do better to protect our community. Article I, section 12 offers the best mechanism for preserving public safety while supporting fairness and equity.

B. Section 12 offers significant mechanism to detain arrestees for public safety

While not encouraging expansive pretrial detainment without bail, article I, section 12 capably safeguards public safety in both misdemeanor and felony cases while protecting against abuse and overreach.

Article I, section 12, subdivision (b) allows a court to detain a person without bail for felony offenses involving violence or felony sexual assault "when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others[.]" (Cal. Const., art. I, § 12, subd. (b).) Article I, section 12, subdivision (c) allows a court to detain a person without bail for "[f]elony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released." (Cal. Const., art. I, § 12, subd.

(c).)

A pretrial detention order under article I, section 12, subdivision (b) requires the trial court make two specific factual findings. (*In re White* (2020) 9 Cal.5th 455, 471.) First, the record must contain evidence of a qualifying offense sufficient to sustain a hypothetical verdict of guilt on appeal. (*Ibid.*) Second, a trial court must make a finding of clear and convincing evidence of a substantial likelihood that the defendant's release would result in great bodily harm to others. (*Ibid.*)

A trial court's decision to deny bail is reviewed for abuse of discretion. (*Id.* at 469.) An abuse of discretion exists when a decision is "so arbitrary or irrational that no reasonable person could agree with it." (*Id.* at 470.) An abuse of discretion also occurs when a trial court "is unaware of its discretion, fails to consider a relevant factor that deserves significant weight, [or] gives significant weight to an irrelevant or impermissible factor[.]" (*Ibid.*) In exercising its discretion, the trial court must consider, "at a minimum, 'the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of their appearing at the trial or at a hearing of the case'—and among those factors, 'public safety shall be the primary consideration." (*Id.* at p. 470 quoting Pen. Code § 1275, subd. (a)(1).) The Court further explained that "[u]nder this standard, a trial court's factual findings are reviewed for substantial evidence, and its conclusions of law are reviewed de novo." (*Id.* at p. 470)

For the findings underlying a detention order, substantial

evidence must support the qualifying offense and the finding by clear and convincing evidence of a substantial likelihood that the defendant would cause great bodily injury if released. (*Id.* at pp. 463–466, 469, 471.) For the qualifying offense, the reviewing court considers whether any reasonable trier of fact could find the defendant guilty beyond a reasonable doubt, drawing all reasonable inferences in favor of the prosecution. (*Id.* at pp. 463–464, 472.) "That the circumstances might also reasonably be reconciled with the defendant's innocence does not render inadequate the evidence pointing towards guilt." (*Id.* at p. 464.) For the showing of a substantial likelihood of great bodily injury, the reviewing court employs the deferential substantial evidence standard to determine if any court could have found clear and convincing evidence that the person's release posed a substantial likelihood of great bodily injury to others. (*Id.* at pp. 465–469.)

Therefore, prosecution has a clear path for securing a no bail hold: proffering, as set forth in *White*, substantial evidence supporting the qualifying offense; and proffering substantial evidence that defendant's release poses a substantial likelihood of great bodily injury to others. Under these circumstances, clear and convincing evidence would show that there would be a substantial likelihood that defendant's release would result in great bodily harm to others.

In misdemeanor cases, under section 12, liberty prior to trial is the norm and pre-trial detention is a carefully limited exception. Pre-trial detention is only constitutionally permissible when clear and convincing evidence shows that less restrictive

conditions of release cannot reasonably satisfy the state's compelling interests of protecting public and victim safety or ensuring a defendant's appearance in court. (See, e.g., *Humphrey, supra*, 11 Cal.5th 135, 42-143, 151-153.) Courts must also make an individualized assessment and consider relevant factors like public and victim safety, the seriousness of the charged offense, the defendant's prior criminal history, the defendant's history of compliance with court orders, and the likelihood that the defendant will appear in court. (*Id.* at p. 152.) If the court imposes monetary bail, it must consider the defendant's ability to pay under *Humphrey*.

A defendant who appears in custody for arraignment on a misdemeanor is entitled to an own recognizance release, unless the trial court makes findings under section 1275 "that an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required." (Pen. Code, § 1270, subd. (a).) Under section 1275, a court must consider the seriousness of the charge, any prior criminal record of the defendant, and the probability that the defendant will appear in court. (Pen. Code, § 1275, subd. (a)(1).) Public safety is the primary consideration. (Pen. Code, § 1275, subd. (a)(1); see also Pen. Code, § 1270, subd. (a).) If the court makes one of those findings, the court "shall then set bail and specify the conditions, if any, whereunder the defendant shall be released." (Pen. Code, § 1270, subd. (a).)

Again, under section 12, the prosecution has a clear path for securing public safety by arguing the court should detain the

defendant pending trial by proffering analysis concerning the relevant factors, possibly including: public and victim safety, the seriousness of the charged offense, the defendant's prior criminal history, the defendant's history of compliance with court orders, and the likelihood that the defendant will appear in court, number of pending charges, similarity between pending charges and new case, number of charges involving same conduct, victim, or area, violations of or failure to abide by previous conditions of release (stay away order, protective order), repeated unexcused failures to appear, felony holds from other jurisdictions, comparison of seriousness of local charge to outside jurisdiction charges, uncertainty about when the defendant will be returned, *inter alia*.

The architecture of article I, section 12 provides a bulwark for public safety, enabling the judiciary to exercise discretion in bail denial predicated on clear, established criteria. This provision does not truncate public safety; rather, it augments a structured approach to ensure that bail decisions are rooted in objective assessment rather than subjective bias.

C. Section 12 fosters a judicious framework for bail determination

The adoption of a narrowed interpretation of article I, section 12 fosters a judicious framework for bail determination. It aligns the scales of justice with the imperatives of public safety, ensuring that the bail system operates as a bridge to justice, rather than a barrier. The underpinning rationale for a narrowly construed cash bail system encapsulates a vision of a safe and

just society, one where the law serves as a beacon of fairness, regardless of economic standing. The case law significantly underscores the sufficiency and effectiveness of article I, section 12 of the California Constitution in addressing concerns related to public safety without resorting to replacing section 12 with section 28. Through adherence to the narrowly tailored construction of section 12, as illustrated in *In re White* and *In re Humphrey*, the courts can effectively navigate the dichotomy of individual rights and public safety, providing protection for the community while fostering a fair and just bail system.

II. Setting pretrial bail above an arrestee's ability to pay offends public safety and fairness

ACDOA asserts that as a practical safety measure, no arrested individual who is judicially determined to pose a substantial threat should ever be allowed to buy their unconditional release. Violating this premise would constitute a basic failure of our system of justice.

A court intentionally setting unaffordable cash bail is also inconsistent with the principles of transparency and fairness underlying *Humphrey*. Humphrey requires an arrestee be detained "in a fair manner" and that courts be explicit regarding reasons for detention to "facilitate review of the detention order, guard against careless or rote decisionmaking, and promote public confidence in the judicial process." (*Humphrey, supra,* 11 Cal.5th 135, 155-156).

By setting unaffordable bail, courts circumvent their duty to articulate why a person qualifies to be held without bail under

the *Humphrey* test and the California Constitution. Further, allowing the intentional setting of unaffordable bail has in practice allowed courts to shift away from individualized public and victim safety evaluations to impersonal bail schedules that discriminate against low-income people by not considering affordability. Freedom based on ability to pay is fundamentally unfair, and this practice ignores the reality that the lowest possible bail will still be too expensive for many people while millions of dollars in bail will be affordable to others. Courts must abide by the Constitution's guarantee of bail without skewing the system in favor of the wealthy and away from safety considerations.

Moreover, allowing courts to intentionally set unaffordable bail will work against elimination of bias in the justice system. Unaffordable bail disproportionately drains wealth and resources from Black, brown, and indigenous communities across the state as loved ones try to scrape together the money for their loved one's freedom. (Coming Up Short, *supra*, at 6). Currently, bail amounts for Black and brown people are set twice as high as bail amounts for white people, with Black women taking on a disproportionate burden of the cost. (*Ibid.*) To the extent arrestees can post unaffordable bail, they often do so through bail bonds agencies, which take billions from low-income communities without returning any investment in terms of public safety. (James, *How the Bail Bond Industry Became a $2 Billion Business*, Global Citizen (Jan. 31, 2019),

https://www.globalcitizen.org/en/content/bail-bond-industry-2-billion-poverty/.)

Lastly, ACDOA forcefully rejects the respondent's assumption that allowing the setting of unaffordable bail is preferable over a complete denial of bail. First, this assumption ignores the documented reality of severe poverty prevalent among the vast majority of arrestees in California criminal courts.[8] Second, justice should not hinge on winning the lottery or another radical shift in financial circumstance; nor, in the reverse, should winning the lottery by being born into privilege allow one to pay one's way out of pretrial detention aimed at protecting the public.[9]

Intentionally setting cash bail at an unaffordable level is an unfair system that benefits the wealthy at the cost of public safety and fairness for us all.

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[8] Cash bail extracts wealth from the poorest communities. (See, e.g., Bryan et al, The Price for Freedom: Bail in the City of L.A., Ralph J. Bunche Center for African American Studies, University of California, Los Angeles (2017), *https://bunchecenterdev.pre.ss.ucla.edu/wp-content/uploads/sites/112/201...* .)

[9] Cash bail allows rich people to buy their freedom while poor people who pose no danger may languish in jail. (John Mathews II and Felipe Curiel, *Criminal Justice Debt Problems,* ABA (Nov. 30, 2019), *https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/ .)*

CONCLUSION

For the foregoing reasons, the Courts should hold that section 12 sets the outer limits on preventative detention under the California Constitution and to reverse the holding that trial courts may detain through the use of unaffordable bail.

Dated: November 8, 2023

Respectfully submitted,

Alameda County District Attorney's Office

By: 

Cynthia Chandler

Attorneys for Amicus Curiae
Alameda County District Attorney's Office

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I certify pursuant to California Rule of Court 8.204 that this Brief of Amici Curiae contains 6174 words, including footnotes, but excluding the cover, application, tables, signature block, and this certification, as calculated by the word count feature of Microsoft Word.

Dated: November 7, 2023

By: _____

Cynthia Chandler
Counsel for *Amicus Curiae*

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Executed this 8 day of November, 2023 in Oakland, California.

Melissa G. Clack

Melissa G. Clack

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Supreme Court of California

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11/8/2023

Date

/s/Melissa Clack

Signature

Clack, Melissa (Other)

Last Name, First Name (PNum)

Alameda County District Attorney's Office - Environmental Division

Law Firm