No. S277910

In the Supreme Court of the State of California

In re GERALD JOHN KOWALCZYK,

On Petition for Writ of Habeas Corpus.

After a Decision of the Court of Appeal
First District, Division Three, No. A162977

Superior Court of San Mateo County, No. 21–SF–003700–A
Hon. Susan Greenberg, Superior Court Judge
Hon. Elizabeth K. Lee, Superior Court Judge
Hon. Jeffrey R. Finigan, Superior Court Judge

CORRECTED BRIEF OF *AMICUS CURIAE* CRIME SURVIVORS FOR SAFETY AND JUSTICE IN SUPPORT OF PETITIONER GERALD JOHN KOWALCZYK

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INTRODUCTION

Advocates of routine pretrial detention often purport to speak for the interests of crime survivors and their families. *See generally* Resp.'s Answering Brief. Crime Survivors for Safety and Justice (CSSJ) submits this *amicus curiae* brief to provide the perspective of diverse and underrepresented California crime survivors—those who are most impacted by this debate but whose voices are rarely heard. They overwhelmingly do not favor and do not benefit from routine pretrial detention.

Routinely detaining criminal defendants before trial, including by setting unaffordable bail, undermines public safety. When pretrial detainees are released from even short stays in jail, they are often much worse off, and much more likely to commit crimes than they would have been. In fact, when pretrial detention lasts only eight to fourteen days, a defendant with a low risk of recidivism is ***51% more likely*** to commit a new crime within two years of the resolution of their case than if they had been released within one day.[1]

This Court already knows why. "The disadvantages to

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[1] U.S. Comm. on Civil Rights, *The Civil Rights Implications of Cash Bail* 52 (2022), https://perma.cc/NR5H-E884.

remaining incarcerated pending resolution of criminal charges are immense and profound." *In re Humphrey*, 11 Cal. 5th 135, 147–48 (2021). Detention immediately exposes detainees to the risk of physical injury and mental trauma.[2] It cuts off access to health care and housing, to employment and education, and to child support and child custody.[3] And it stigmatizes detainees upon release, assuming that they survive their detention at all.[4] These injuries are enduring and make pretrial detainees more likely to commit crime.[5] Worse, crime survivors often bear the brunt of those crimes, because they are the most likely to be victimized again.[6]

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[2] Nazish Dholakia, *Prisons and Jails are Violent; They Don't Have to Be*, Vera Institute of Justice (Oct. 18, 2023), https://perma.cc/7697-59YC; Substance Abuse & Mental Health Serv. Admin., *Principles of Community-Based Behavioral Health Services for Justice-Involved Individuals* 11 (2019), https://perma.cc/Z4WX-UHXU.

[3] Tracey Meares & Arthur Rizer, *The "Radical" Notion of the Presumption of Innocence*, at 27 (2020), https://perma.cc/A68W-KEVE.

[4] Sam McCann, *40 People Have Died in LA County Jails This Year,* Vera Institute of Justice, (Nov. 6, 2023), *https://perma.cc/V93W-ZJBL*.

[5] U.S. Comm. on Civil Rights, *supra* note 1, at 52.

[6] Californians for Safety & Justice, *California Crime Survivors*

Pretrial detention also compels the innocent to plead guilty. Adults arrested on felony charges in California often have not committed the crime that caused their arrest—officially 38.6% of the time in 2022.[7] But the conditions of pretrial detention, to which 59% of arrestees are subjected, harm the innocent with equal force as the guilty. For that reason, innocent detainees are incentivized to falsely plead guilty to get out.[8] As a result, in too many of these cases, the true perpetrators are never identified. And, shockingly, once innocent detainees have pled guilty, they are more likely to return to jail: "[P]retrial detention is creating 'recidivators'

Speak: A Statewide Survey of California Victims' Views on Safety and Justice 3 (2019), https://perma.cc/9R6T-YAZS; Californians for Safety & Justice, *California Crime Victims' Voices: Findings from the First-Ever Survey of California Crime Victims and Survivors* 5, 7-8 (2013).

[7] California Dep't of Justice, *2022 Crime in California,* 2, 55 (Table 37) (Jun. 30, 2023), https://data-openjustice.doj.ca.gov/sites/default/files/2023-06/Crime%20In%20CA%202022f.pdf.

[8] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. of L., Economics & Org. 512 (2018), https://perma.cc/8G4V-KZYV; Pranita Amatya et al., *Bail Reform in California* 6 (May 2017), https://perma.cc/4BMB-BZYB.

out of individuals who might not otherwise (re)offend."[9]

Worse still, pretrial detention diverts defendants who need rehabilitation away from the evidence-based pretrial programs that reduce recidivism.[10] In other words, pretrial detention not only creates more crime, but it undermines programs that are proven to prevent crime. This creates a negative feedback loop, wherein crime begets more pretrial detention, and more pretrial detention begets more crime. Eliminating this criminogenic cycle is essential to protecting the safety of the public, crime survivors, and their families.

Fortunately, this Court has the chance to break the cycle of excessive pretrial detention. Now presented are two issues: (1) whether Article I, Section 12 or Article I, Section 28(f)(3) of the California Constitution governs the denial of bail in noncapital cases, or whether they operate together; and (2) whether unaffordable bail is lawful. Order Granting Review at 1. Put more plainly, these questions ask whether Superior Courts may detain criminal defendants before trial

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[9] Sandra Susan Smith, Pretrial Detention, Pretrial Release, and Public Safety 6 (2022), https://perma.cc/VP2F-3SAD.

[10] Jud. Council of Cal., *Re: Pretrial Pilot Program: Final Report to the Legislature* 33-34 (Jul. 25, 2023), https://perma.cc/YN2L-LEQU.

who do not pose a clear and convincing danger (as set out in Section 12), including through the use of unaffordable bail. They also ask what role public safety considerations play in setting, reducing, or denying bail to criminal defendants writ large. The severe harms of excessive pretrial detention bear directly on this Court's consideration of both these issues.

CSSJ respectfully submits that this Court should adopt Kowalczyk's merits position and hold that Section 12 and Section 28(f)(3) are reconcilable. Pet.'s Opening Brief at 26–27; Pet.'s Reply at 7, 14–17. In short, Section 12 provides the ***only*** grounds for detaining criminal defendants before trial, which can exist only for certain violent criminal defendants. Section 28(f)(3) enumerates several factors—primarily, public safety and victim safety—that Superior Courts must consider in setting, reducing, or denying bail. But Section 28(f)(3) does ***not*** create any independent basis for detaining criminal defendants in the name of public or victim safety, including by setting unaffordable bail resulting in detention. There are two critical reasons to adopt this interpretation.

First, limiting pretrial detentions to those that Section 12 authorizes will benefit public safety. Pretrial release rarely results in crime, even in cases where violent felonies

are charged.[11] Section 12 thus appropriately limits pretrial detention in non-capital cases to those special situations where criminal defendants (1) are accused of violent felonies and there is a clear and convincing evidence of a substantial likelihood that their release would cause great bodily harm to others, or (2) have already threatened physical violence on a specific individual and there is clear and convincing evidence they will carry out that threat if they are released.

Detaining other defendants before trial—including by setting unaffordable bail—serves only to cause them and their families to suffer severe harm that increases their risk of recidivism. Those are precisely the detentions that Superior Courts are using Section 28(f)(3) to authorize under the guise of public safety, as in Kowalczyk's case here. That type of routine detention of non-violent criminal defendants does nothing except to ultimately harm the public's safety. Thus, this Court should hold—and may hold without harm to public safety—that criminal defendants may be detained before trial only in the circumstances authorized by Section 12, and that detention by unaffordable bail is thus unlawful.

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[11] U.S. Comm. on Civ. Rights, *supra* note 1, at 82, 133; Smith, *supra* note 9, at 8.

Second, and further to this interpretation, this Court should hold that Section 28(f)(3) requires Superior Courts—in setting, reducing, or denying bail—to consider the holistic impact of pretrial detention on public safety. The plain text of Section 28(f)(3) unambiguously demands it: "The judge or magistrate shall take into consideration the protection of the public. . . . Public safety and the safety of the victim shall be the primary considerations." Cal. Const., Art. I, § 28(f)(3). Nothing suggests that this consideration of public safety is limited to threats, if any, posed by a criminal defendant. To the contrary, it would be irrational to ignore the fact that pretrial detention causes such great harm that it is literally criminogenic. With this in mind, CSSJ hopes that pretrial detention may again become the exception in California, and pretrial release the rule. *Humphrey*, 11 Cal. 5th at 155.

BACKGROUND

This case encapsulates the tragedy of excessive pretrial detention. It also illustrates the confusion rife among the Superior Courts about when to set and deny bail. The facts recited below, taken from Kowalczyk's habeas petition and the Court of Appeal's underlying opinion, are undisputed.

I. Kowalczyk was detained on unaffordable bail, and then without bail, for a very minor theft.

Kowalczyk, who is an unhoused and disabled person, was arrested for buying a cheeseburger with a credit card someone had left at a gas station a few months earlier. He tried a few cards, including his own, before one worked. But he quickly regretted this purchase and sought a refund. When the restaurant refused, he left without taking his food. Petition for Writ of Habeas Corpus ("Pet.") at 16 (Ex. D), 36(Ex. F), 69, 72–74, 78–79, 86–87(Ex. H), 125–26 (Ex. L).

For this unlawful purchase of seven dollars' worth of food—a crime he tried to abandon—the San Mateo District Attorney charged Kowalczyk with six crimes: (1) three felony counts of identity theft; (2) one misdemeanor count of theft of identifying information; (3) one misdemeanor count of petty theft of lost property; and even (4) one felony count of vandalism for an unrelated incident in which someone had put superglue in a business's lock years earlier. Pet. at 7–9 (Ex. B) (citing Pen. Code §§ 485, 530.5(a), (c)(1), 594(b)(1)).

After Kowalczyk waived arraignment on these charges, the San Mateo Superior Court ordered him held on $75,000 bail. *In re Kowalczyk*, 85 Cal. App. 5th 667, 672–73 (2022). Given that he was houseless, disabled, and seemingly could not afford to buy food to feed himself, the court's bail order

was plainly equivalent to an order of pretrial detention.

Detained, Kowalczyk filed a motion requesting release on his own recognizance with electronic monitoring and drug testing conditions. *Id.* He contended that he had been charged only with a minor property crime, and that he was neither a threat to anyone's safety nor a flight risk. *Id.* Further, he was scheduled to receive a long-delayed surgery that would cure his partial deafness, and pretrial detention would cause him to miss the surgery. Pet. at 93–94 (Ex. H).

The prosecutor disagreed. He said that Kowalczyk's "ongoing commission of crimes" and significant history of minor drug and theft offenses proved "no less restrictive nonfinancial conditions could protect the public from him." *Kowalczyk*, 85 Cal. App. 5th at 673. At the same time, however, the prosecutor did not contend that Kowalczyk could or should be held without bail because he threatened public safety, let alone threatened any specific person. *Id.*

The Superior Court—a different judge than the first—not only denied Kowalczyk's motion, but ordered him held without bail. *Id.* While the judge determined that he posed no threat to the persons whose credit cards he had used, his history of "property crimes w[as] a significant public safety issue." *Id.* The judge also believed that because Kowalczyk was unhoused, unemployed, and itinerant, he was a serious

flight risk, even though he had never absconded in the past. *Id.* Accordingly, the Superior Court found there were "no nonfinancial or financial conditions" that could ensure the public's safety or his attendance at court proceedings. *Id.*

Kowalczyk tried and failed to secure pretrial release two more times, but to no avail. *Id.* The last of the judges to hear him even agreed with him that he posed no threat to public safety, but still refused to release him before trial. *Id.*

As a result of this pretrial detention, Kowalczyk missed his long-awaited surgery to cure his partial deafness and an appointment for public housing. Pet. at 81, 93–94 (Ex. H).

II. Kowalczyk sought habeas relief on the grounds that Section 12 did not permit his detention.

Denied release or affordable bail in the Superior Court, Kowalczyk petitioned for a writ of habeas corpus in the First District of the Courts of Appeal. *Kowalczyk*, 85 Cal. App. 5th at 674. He contended that the detention order was unlawful because he had been charged with non-violent offenses, and no proper finding was made that he posed a specific threat to someone by clear and convincing evidence, as required under Article I, Section 12 of the California Constitution. Pet. at 2.

Section 12 authorizes pretrial detention of a criminal defendant in only three situations: (1) capital crimes; (2)

violent felonies or sexual assaults where there is clear and convincing evidence that the defendant's release would cause someone great bodily harm; and (3) any other felony offense where there is also clear and convincing evidence that the arrestee 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. But none of these situations possibly applied to Kowalczyk.

The prosecutor, however, argued that Kowalczyk was properly detained to protect the public safety, citing a different provision of Article I, set out in Section 28(f)(3). Section 28(f)(3) requires Superior Courts to consider public safety and victim safety, among other things, in setting, reducing, or denying bail. Cal. Const., art. I., § 28(f)(3).

While his petition was pending, however, Kowalczyk pleaded no contest to one count of misdemeanor identity theft in exchange for a credit-for-time-served sentence. Pet.'s Supp. Traverse at 4–6 (Ex. Y). By the time that he entered this no-contest plea, he had already been detained for six months—the maximum sentence for the misdemeanor offense to which he pled. He was not placed on probation and was not subject to any restrictions upon release. *Id.*

Because the Superior Court was no longer detaining Kowalczyk, the Court of Appeal ordered his habeas petition

dismissed as moot. *Kowalczyk*, 85 Cal. App. 5th at 674.

But Kowalczyk continued to press his case. This Court granted review and transferred the matter back to the Court of Appeal with instructions to vacate its order of dismissal and "to issue an opinion that addresses which constitutional provision governs the denial of bail in non-capital cases – [Section 12], or [Section 28(f)(3)] – or, in the alternative, whether these provisions can be reconciled." *Id.* This Court had previously left this question unresolved in its landmark decision *In re Humphrey,* which held that it was unlawful to detain a criminal defendant solely because they could not afford to post bail. 11 Cal. 5th at 155, n.7. But this Court now required an answer because, after *Humphrey*, Superior Courts had increasingly used Section 28(f)(3) to detain criminal defendants by finding that they posed a threat to public safety, even for minor theft offenses like Kowalczyk's.

III. The Court of Appeal held that unaffordable bail may be used to detain a criminal defendant before trial on "public safety" grounds.

Back in the Court of Appeal, Kowalczyk contended that Section 12 exclusively governs when pretrial detentions are proper because Section 28(f)(3) was invalidly enacted. Pet.'s Add'l. Br. at 4147. Namely, the ballot initiative proposing to

add Section 28(f)(3) to the California Constitution given to the public had affirmatively misrepresented the state of the then-existing law on bail determinations. *Id*. at 43.

But even if Section 28(f)(3) were operative, Kowalczyk argued that it did not impliedly repeal, and was reconcilable, with Section 12. *Id*. at 34. In short: "[S]ection 28(f)(3) does not vest courts with any additional authority to detain outside the confines of section 12; it simply sets forth additional factors—victim safety and public safety—for the court to consider in making pretrial release determinations and makes those considerations primary." *Id.* at 53.

The Court of Appeal first found that Section 28(f)(3) was "fully operative." It explained, "courts generally assume that, when voters are provided the whole text of a proposed constitutional amendment, they have considered each aspect of the law and voted intelligently." *Kowalczyk*, 85 Cal. App. 5th at 680–81. Thus, even if the voting materials made it appear that Section 28(f)(3) was largely already in effect, voters were still provided the whole text of the law. The Court of Appeal thus "express[ed] no view" on whether this violated the Election Code, and it did not consider whether

any post-election remedy was available. *Id*. at 681–82.[12]

The Court of Appeal agreed with Kowalczyk, however, that Section 28(f)(3)was reconcilable with, and thus did not impliedly repeal, Section 12. *Id*. at 682–686. Section 12 continued to set the sole circumstances of pretrial detention, while Section 28(f)(3) provided additional factors, including public safety, that Superior Courts must consider during pretrial detention and bail determinations. *Id*. at 686.

But the Court of Appeal also held that Superior Courts may detain criminal defendants before trial on public safety grounds by ordering unaffordable bail, even when Section 12 did not authorize the detention. *Id*. at 686–90. It did so on the grounds that unaffordable bail has long been part of California law. *Id*. According to the Court of Appeal, this Court's decision in *In re Humphrey*—prohibiting pretrial detention where based solely on unaffordable bail—had not

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[12] There is thus still a serious question about whether Section 28(f)(3) is operative. Proposition 9—the initiative that proposed to add Section 28(f)(3)—affirmatively misrepresented the then-existing state of the law to the voting public, telling them that parts of Section 28(f)(3) were already in effect. More than violating the Elections Code, this falsity "affected the ability of the voters to make an informed choice." *See People v. Scott,* 98 Cal. App. 4th 514, 519 (2002) (initiatives may be invalidated where voters were misled); *see also* Elec. Code § 9086(f).

changed anything. *Id.* at 686–91 (citing 11 Cal. 5th at 143).

IV. This Court has now granted review to resolve whether Section 12 or Section 28(f)(3)govern pretrial detention, or are reconcilable, and whether unaffordable bail is ever lawful.

Kowalczyk again petitioned this Court for review. He explained that the Court of Appeal erred when it held that Superior Courts may detain criminal defendants before trial who do not qualify for pretrial detention under Section 12 as a public safety risk, including by setting unaffordable bail.

This Court granted review and directed briefing on two critical issues: (1) whether Section 12 or Section 28(f)(3) governs pretrial detention in non-capital cases, or whether they are reconcilable and govern together; and (2) whether unaffordable bail is ever lawful. Order Granting Review at 1. The harms of excessive pretrial detention—including to crime survivors and their families—bear on both issues.

ARGUMENT

This Court should adopt the interpretation of Section 12 and Section 28(f)(3) that Kowalczyk advances on review. Section 12 restricts the use of pretrial detention to certain violent criminal defendants, while Section 28(f)(3) provides a list of additional, mandatory considerations for Superior

Courts in determining whether to set, reduce, or deny bail. There are two critical reasons to adopt this interpretation.

First, Kowalczyk's interpretation will benefit public safety. Routinely detaining criminal defendants before trial does not reduce crime. It is extremely rare for criminal defendants to commit crimes when released on their own recognizance (or subject to conditions) while awaiting trial, notwithstanding what some imagine. In states that have aggressively limited the use of pretrial detention, crime rates—before and after trial—have dropped precipitously.

Conversely, pretrial detention inflicts tremendous harm on detainees, their families, and their communities. This harm—to detainees' physical and mental health, to their employment and housing, and to their dependents—creates the destabilizing conditions in which crime thrives. The San Mateo Superior Court's detention of Kowalczyk is a perfect example of how excessive pretrial detention robs detainees of opportunities to improve their lives. In doing so, excessive pretrial detention creates more crime.

At the same time, resources that governments expend on excessive pretrial detention take funding and resources away from evidence-based programs that reduce recidivism. These evidence-based programs, including drug and alcohol treatment, are often the first programs sacrificed whenever

policymakers want to demonstrate to the public that they are "tough on crime." But in reality, these policy decisions help create a negative feedback loop, wherein crime begets detention, and detention begets crime. This Court now has the chance to break this cycle of criminality that is essential to protecting the safety of the public and crime survivors.

Second, Kowalczyk's interpretation of Section 28(f)(3) requires Superior Courts to broadly consider "public safety" whenever setting, reducing, or denying bail (subject only to Section 12's limits on pretrial detention). That includes the negative impacts that pretrial detention has on public safety. The unambiguous text of Section 28(f)(3) does not limit the proper consideration of public safety to the risks, if any, immediately posed by a criminal defendant. Instead, Section 28(f)(3) should be interpreted in accordance with its plain meaning—that courts must consider public safety in all its facets when making bail and detention determinations. In this way, the Court can reinforce that pretrial release is the default rule and enforce the presumption against detention.

I. Routinely detaining criminal defendants is excessive and ultimately harms public safety.

A. Pretrial detention does not decrease crime.

Advocates of pretrial detention believe that releasing

criminal defendants pretrial would lead to a dramatic rise in the crime rate and a reduction in public safety. *See* Resp.'s Answering Br. at 19, 36. But actual data show the opposite. Jurisdictions that have reduced pretrial detention have seen reduced crime and increased public safety.[13] Pretrial detention, which costs $13.6 billion annually in the United States, is not the powerful safety tool some assume.[14]

To see why, this Court can review rearrest and crime rate data from jurisdictions that have already significantly limited their use of pretrial detention. For example, in 2017, the State of New Jersey enacted broad and significant bail reform establishing a presumption of pretrial release, applying a risk-informed approach to that process, and largely eliminating the use of cash bail.[15] Before then, 30% of pretrial detainees in the State were incarcerated because they could not afford to pay bail, and twelve percent of all persons in its jails were incarcerated because they could not

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[13] U.S. Comm. on Civ. Rights, *supra* note 1, at 82, 133, https://perma.cc/XRQ2-KFJD; Smith, *supra* note 9, at 8.

[14] Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration,* Prison *Policy* Initiative (Feb. 25, 2017), https://perma.cc/TC5T-A2ZA.

[15] N.J.P.L. 2014, c.031 (S946 3R).

afford a bail of $2,500 or less.[16] Afterwards, New Jersey's pretrial detention rate dropped by 35.7%—a 20.3% decrease in the overall jail population[17]—and ***violent crime rate fell in every category***, with homicide and robbery rates falling over 30% each.[18] New crimes charged against those subject to pretrial release increased only one percent, a statistically negligible amount.[19] And court appearance rates remained close to 90%.[20] Thus, according to the dataset, "neither of the principal concerns about bail reform – that released defendants will commit new crimes or that they will fail to appear for court dates—has come to fruition in the state."[21]

Similarly, the State of Illinois enacted significant bail reform in 2017 that required judges to set the least

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[16] U.S. Comm. on Civ. Rights, *supra* note 1, at 45.

[17] *Id*. at 118.

[18] Sarah Staudt, *Releasing people pretrial doesn't harm public safety*, Prison Policy Initiative (Jul. 2023), https://perma.cc/WZ7R-DLB5.

[19] N.J. Jud., *Report to the Governor and the Legislature Jan. 1 – Dec. 31, 2018* 13 (2019), https://perma.cc/N3G2-UA5W.

[20] *Id*. at 5.

[21] U.S. Comm. on Civ. Rights, *supra* note 1, at 119; Rebecca Ibarra, *Crime Rates Plunge in New Jersey, and Bail Reform Advocates are Gloating,* WNYC (Nov. 28, 2018), https://perma.cc/P93B-AENP.

restrictive conditions possible for pretrial release, and allows certain criminal defendants to have the amount of their bail reconsidered if they cannot afford to pay the original amount set.[22] These broad bail reforms reduced pretrial detentions, and violent crime in the City of Chicago ***decreased by almost eight percent***.[23] At the same time, criminal defendants out on pretrial release appeared at mandatory court dates with increased frequency.[24] Indeed, this bail reform was such a great success that the State of Illinois recently abolished cash bail and enacted even broader reforms to reduce pretrial detention.[25] Now, only criminal defendants facing certain charges and whom a judge finds pose a "specific, real, and present threat" to another person may be detained as a "public safety risk" before trial.[26] This language largely mirrors the text and scope of Section 12.

In the State of New Mexico, a 2016 constitutional amendment prohibited judges from imposing unaffordable

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[22] Bail Reform Act, S.B. 2034, 100th Gen. Assembly, 1st Sess. (IL 2017).

[23] U.S. Comm. on Civ. Rights, *supra* note 1, at 133.

[24] *Id*.

[25] 725 ILCS § 5/110-6.

[26] *Id*.

bail, enabled the release of low-risk defendants without bail, and allowed criminal defendants to request relief from bail. Statewide crime rates not only decreased, but the number of criminal defendants who were charged with a new criminal offense while on pretrial release also ***decreased by 9.2%***.[27]

And the State of Kentucky now allows the release of all low-risk defendants without any court appearance.[28] The number of criminal defendants who committed new crimes while awaiting trial stayed ***completely flat***, and there was ***no increase*** in the rate of new arrests for violent felonies.[29]

These examples "offer compelling evidence" that bail reform that substantially decreases the number of pretrial detainees does not threaten public safety, but aids it.[30]

At minimum, these data show that pretrial detention increases public safety "when it detains *only* the most dangerous people."[31] The broader costs imposed on society

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[27] Sarah Staudt, *Releasing people pretrial doesn't harm public safety*, Prison Policy Initiative (July 6, 2023), https://perma.cc/R3M8-PSL8.

[28] *Id.*

[29] *Id.*

[30] Smith, *supra* note 9, at 8.

[31] *Id.*

in detaining individuals who do not pose a significant risk of violent crime, detailed below, vastly outweigh the costs and risks associated with pretrial release.[32] That is not to say that judges should default to pretrial detention even in cases involving violent felony charges. Defendants are extremely unlikely to commit violent crimes while awaiting trial, even in cities with high crime and pretrial release rates.[33] Indeed, the evidence shows that only "5% of defendants have more than a 5% chance of being rearrested on a violent felony charge, with a few having higher than a 10% chance."[34]

Thus, the fundamental premise underlying widespread pretrial detention—that public safety improves when more criminal defendants are detained pending trial—is false.[35]

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[32] Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 Bos. U. L. Rev. 27-28 (2017).

[33] Shima Baradaran Baughman & Frank L. McIntyre, *Predicting Violence*, 90 Tex. L. R. 497, 537 (2012). Chelsea Barabas, Karthik Dinakar & Colin Doyle, *The Problems with Risk Assessment Tools*, N.Y. TIMES (July 17, 2019), https://perma.cc/BQ3R-8Y7E.

[34] Baradaran Baughman, *supra* note 33, at 537.

[35] Smith, *supra* note 9, at 5.

B. Excessive pretrial detention causes crime and otherwise undermines public safety.

Excessive pretrial detention not only does not prevent crime from happening; it ultimately increases crime. This Court recently explained why. *See Humphrey,* 11 Cal. 5th at 147–48. The collateral consequences of pretrial detention on detainees—housing insecurity, unemployment, loss of child support and custody, and negative health effects from incarceration—are severe.[36] That's why detention that lasts ***more than a day or two*** "significantly increases a person's chance of being arrested and charged again pretrial."[37]

The criminogenic effects of pretrial detention are "especially pronounced for low-risk defendants," who likely would not have interacted with the criminal justice system again if they had not been detained before trial.[38] "[W]hen low-risk defendants are held pretrial for two to three days, low-risk defendants are about ***40 percent more likely*** to commit a new crime before trial."[39] And when "low risk

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[36] U.S. Comm. on Civ. Rights, *supra* note 1, at 5.

[37] Smith, *supra* note 9, at 6.

[38] *Id.*

[39] U.S. Comm. on Civ. Rights, *supra* note 1, at 52.

detainees . . . are held for 8 to 14 days, they were found to be ***51 percent more likely*** to commit another crime within two years after the resolution of their case when compared to similar defendants held for 24 hours or less."[40]

1. Pretrial detention imposes numerous, severe harms on vulnerable detainees.

To understand why pretrial detention is so harmful to detainees, this Court must first understand that they are often the most vulnerable Californians. Pretrial detainees are disproportionately low-income people of color.[41] Nationally, over sixty percent of people who are unable to post bail fall within the poorest third of society, and eighty percent fall within the bottom half.[42] In California, Black and Latinx arrestees are significantly more likely to be detained before trial.[43] This is in line with national data.

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[40] *Id.*

[41] Human Rights Watch, *Not in it for Justice: How California's Pretrial Detention and Bail System Unfairly Punishes Poor People* 2 (2017), https://perma.cc/YJ2K-8ZCP.

[42] Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time*, fn. 11 (May 10, 2016), https://perma.cc/3XY2-7ZC7.

[43] Sonya Tafoya et al., *Pretrial Release in California* 14 (2017) https://perma.cc/T3T6-K3V6.

"Black and Latinx individuals have higher rates of pretrial detention, are more likely to have financial conditions imposed and at higher amounts, and lower rates of being released on recognizance bonds or other nonfinancial conditions compared to white defendants."[44] Low-income and underrepresented groups already face tremendous systemic disadvantages.[45] Pretrial detention compounds these disadvantages by causing additional trauma, including by limiting or cutting off access to essential resources.

First, pretrial detention can cause serious harm to a detainee's physical health. The risk of physical violence is omnipresent, from both other detainees and prison staff.[46] Healthcare access has also long been a significant issue in California's jails.[47] Pretrial detainees who require regular

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[44] U.S. Comm. on Civ. Rights, *supra* note 1, at 33-34.

[45] *See, e.g.*, Sandra Bohn et al., *Poverty in California,* Public Policy Institute of California (Oct. 2023), https://perma.cc/W3CH-WFYX; Cal. Task Force to Study and Develop Reparation Proposals for African Americans, *The California Reparations Report (Jun. 2023),* https://oag.ca.gov/system/files/media/full-ca-reparations.pdf.

[46] Dholakia, *supra* note 2.

[47] Nikie Johnson, *Five key sources for investigating the health care crisis in California jails,* USC Annenberg (Sept. 20, 2019),

medical interventions are often unable to get such care while detained pretrial.[48] Even pretrial detainees who do not have existing medical issues are at increased health risks. Pretrial detainees are more likely than those released to contract HIV/AIDS, hepatitis B and hepatitis C, syphilis, gonorrhea, chlamydia, and tuberculosis infection."[49] Pretrial detention also subjects these individuals to a high risk of exposure to COVID-19 within the California jail system – a risk that detained individuals could not avoid by taking enhanced safety precautions as they might have done if they were released pending trial.[50] Thus, when pretrial detainees

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https://perma.cc/PP46-WMJ6 (noting that three large California counties – Los Angeles, San Bernadino, and Riverside – "have come under orders since 2015 to fix a combination of mental healthcare, medical healthcare, and use-of-force policies").

[48] Susie Nelson, *Its patients are literally a captive market. Is this California health care giant failing them?,* S.F. Chronicle (Jul. 23, 2023), https://www.sfchronicle.com/california/article/wellpath-health-care-jails-17917489.php.

[49] Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 Clinical Infectious Diseases 1047 (2007), https://perma.cc/5FYR-CPS2.

[50] Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 Nw. U. L. Rev. Online 59 (2020), https://perma.cc/FY5G-HSUX; see also Hadar Aviram, *Fester* 102 (forthcoming Mar. 2024) (noting that COVID-19 spread rapidly in jails in California,

are released, their physical health is often significantly worse than it was before. They are also much more likely to spread a serious, infectious disease to their communities.[51]

Second, jails are extremely damaging to the mental health of vulnerable detainees. On September 30, 2019, statewide data demonstrated that "20,023 people in jail had an open mental health case and 18,020 were receiving psychotropic medications."[52] Approximately "17 percent of people entering pretrial detention have a serious mental illness" upon entering, and "26 percent of people in jail were found to meet the criteria for serious psychological

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including in the Los Angeles jail complex where by late April 2020, 71 jail residents and 61 staff members had tested positive, in Fresno County Jail where 1,200 residents were quarantined in June 2020, and in the Placer County jail in Auburn where 17 residents and an officer all tested positive).

[51] *See, e.g.*, Aviram, *supra* note 50, at 131 (explaining that because jails and prisons are hotspots for transmission of COVID-19, and "prison staff enter and exit the facilities on a daily basis," the risks of COVID-19 transmission "applies not only to the incarcerated population but also to their home communities").

[52] Scott Graves, *Many Californians in Prisons and Jails have Mental Health Needs, California Budget & Policy* Center (Mar. 2020), https://perma.cc/LFD8-ZAFK.

distress."[53] Pretrial detention prevents these individuals from receiving treatment in the community or support from their families or communities outside of the jail.[54] It can also mean missing mental health medication, which can lead to devastating withdrawal symptoms.[55] Even for pretrial detainees without existing mental health issues, the confinement and isolation of jail is traumatizing.[56] They may also experience violence, intimidation, and coercion.[57]

As a result, pretrial detention is sometimes fatal. More than forty people have died in Los Angeles County jails this year.[58] This fact is, sadly, unsurprising. "[B]etween 2008 and 2019, 4,998 people died while in pretrial detention" in

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[53] Natalie Lima & Susan Nembhard, *Pretrial Deaths in Custody are Prevalent but Preventable,* Urban Institute (Dec. 14, 2022), https://www.urban.org/urban-wire/pretrial-deaths-custody-are-prevalent-preventable.

[54] Hallie Fader-Towe & Fred C. Osher, *Improving Responses to People with Mental Illnesses at the Pretrial Stage* 9 (2015), https://perma.cc/ZSK3-LS9Z.

[55] *Id.*

[56] Substance Abuse & Mental Health Serv. Admin, *supra* note 2, at 11; Meares, *supra* note 3, at 20.

[57] Substance Abuse & Mental Health Serv. Admin, *supra* note 2, at 11.

[58] McCann, *supra* note 4.

America's largest jails alone.[59] In fact, compared to state prisons, "local jails experience ***far higher*** proportions of unnatural deaths, which include suicides, drug/alcohol intoxication, homicides, and accidents."[60] And when pretrial detention is fatal, it is fast. The United States Department of Justice found that nearly 40% of inmates who died in pretrial detention in 2019 had been in jail for less than a week.[61] In fact, about a quarter of the suicides committed in pretrial detention occurred within the first three days.[62]

Third, the economic consequences of pretrial detention can be devastating and long-lasting. Even a very short detention—up to a few days—means that a detainee may

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[59] Nigel Duara, *Record Numbers of people have died in California jails. Now lawmakers could crack down*, Cal Matters (Aug. 9, 2023), https://perma.cc/443A-5KP4; Lima, *supra* note 53.

[60] Bernadette Rabuy, *The life-threatening reality of short jail stays*, Prison Policy Initiative (Dec. 22, 2016), https://perma.cc/Z8LC-79E8.

[61] E. Ann Carson, *Mortality in Local Jails, 2000-2019,* U. S. Dept. of Justice Bureau of Justice Statistics (2021) 1, https://perma.cc/EES4-5978.

[62] Daniel Liebelson & Ryan J. Reilly, *Sandra Bland Died One Year Ago*, Huffington Post (July 13, 2016), https://perma.cc/U8WN-X7V6.

lose their "job, housing, or custody of [their] children."[63] That's because pretrial detainees typically hold low-wage positions and are often easily replaceable.[64] As a result, they are approximately ten percent less likely to be employed in the formal labor market three to four years after their bail hearing than their peers who are not detained.[65] Pretrial detainees are also significantly less likely to be able to access unemployment insurance or earned income tax credits after being detained.[66] This leads to increased rates of poverty, which reinforces the very financial difficulties that prevent detainees from paying their way out of detention in the first place. These negative economic consequences increase the risk that individuals will engage in illegal economic activity

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[63]. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 713 (2017), https://perma.cc/VY5K-KWFE.

[64] Alexander Holsinger & Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes,* 82 Fed. Probation 40 (Sept. 2018), https://perma.cc/W292-ZXPA.

[65] Will Dobbie & Crystal Yang, *The Economic Costs of Pretrial Detention* 253 (2021), https://perma.cc/HQ3W-9RRF.

[66] Id.

to meet their basic needs, increasing crime rates.[67]

Fourth, pretrial detention interferes with childcare, and can cause detainees to lose custody of their children. Perhaps surprisingly, over half of those detained pretrial are the parents of minor children.[68] Even a short pretrial detention can mean these parents will lose custody of their children.[69] Further, having a parent in custody punishes the children impacted—despite that neither the children nor their parents have been found guilty of any criminal offense. And children suffer immensely when a parent is detained.[70]

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[67] Patrick Liu et al., *The Economics of Bail and Pretrial Detention* 13, (2018), https://perma.cc/EDD4-QV6X (noting that "recidivism can be a response to economic hardship" and "people with criminal records who receive clearances to work experience a decrease of 2.2 and 4.2 percentage points, respectively, in the likelihood of a subsequent arrest within 1 and 3 years").

[68] Wendy Sawyer, *How does unaffordable money bail affect families*?, Prison Policy Initiative (Aug. 15, 2018), https://perma.cc/6G98-2NGR.

[69] Heaton, *supra* note 63, at 713 fn. 4 (2017) (citing Nick Pinto, *The Bail Trap*, N.Y. Times Mag. (Aug. 13, 2015), https://perma.cc/TXN7-GSPW (chronicling the story of a woman who, "five months after her arrest, . . . was still fighting in family court to regain custody of her daughter").

[70] Amatya, *supra* note 8, at 45 [citing Charlene Wear Simmons, Children of Incarcerated Parents 3 (2003)], https://perma.cc/G7KN-Q8KW.

Fifth, pretrial detention can cause a loss of housing. Detainees may miss rent or mortgage payments, or lose out on work that causes these payments to become unaffordable. The likelihood of losing housing access ***increases by 1,800 percent***—from "1 in 200 for the general population to ***1 in 11*** for individuals recently released from incarceration."[71] Even a short amount of time in jail combined with a record of arrest "can result in denial from a landlord or the inability to stay with family members who live in public housing where living with a person with a criminal record is banned."[72] And because houselessness is often met with arrest in California,[73] when pretrial detainees lose access to

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[71] Human Impact Partners, *Liberating Our Health: Ending the Harms of Pretrial Incarceration and Money Bail* iii (2020), https://perma.cc/KT6M-GLRX (citing Human Impact Partners and Free Hearts, *Keeping Kids and Parents Together: A Healthier Approach to Sentencing in Tennessee* (2018)).

[72] Holsinger, *supra* note 64, at 40.

[73] *See, e.g.*, Alicia Victoria Lozano, *California city bans people from living in tents amid homeless crisis,* NBC News (Feb. 18, 2023), https://perma.cc/L5JU-DL55; Marisa Kendall, *California cities are cracking down on homeless camps. Will the state get tougher too?* , Cal Matters (May 22, 2023), https://perma.cc/XQ3X-762V; Sam Levin, *Unhoused and unequal: a California crisis,* The Guardian (July 18, 2022), https://perma.cc/RVY2-UH28.

housing, they are more likely to be arrested again.[74]

Beyond these individual harms, any time spent detained before trial exposes people to the overall negative and criminogenic impacts of imprisonment. Researchers have found that pretrial detention increases future crime through a criminogenic effect, and that this effect cancels out the "incapacitation" effect of jail (that individuals in jail cannot, at the time they are in jail, commit crimes outside of the jail).[75] People who are detained pretrial are associated with an increased risk of inmate misconduct if sentenced to state prison—and where inmates serve longer terms in pretrial detention, the general likelihood and seriousness of their offenses in state prison has been shown to increase.[76] In other words, when an arrestee is kept in jail because they cannot afford bail, the experience changes the individual,

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[74] National Law Center on Homelessness & Poverty, *Housing, Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities* 50 (Dec. 2019), https://perma.cc/H4AH-YLMZ.

[75] Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 102 Am. Economic. R. 201, 203-205, (2018) https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20161503.

[76] Elisa Toman et al., *Jailhouse Blues?,* 45 Crim. J. & Behavior 316, 333 (2018), https://perma.cc/5GQN-BZZY.

and increases the risk that they will commit future crimes.

To avoid this panoply of harms, some pretrial detainees will plead guilty, even if they did not commit the crime with which they are charged. Overall, pretrial detainees "are ***18 percentage points*** more likely to be convicted than those released pretrial," primarily due to "the impact that being detained has on the likelihood of being influenced to plead guilty."[77] This increase is "largely explained by an increase in the likelihood of pleading guilty among those who otherwise might have been acquitted, diverted or had their charges dropped."[78] Thus, a substantial percentage of guilty pleas are coming from pretrial detainees who would not have been convicted of any crime if they had been released before trial, including because they did not commit any crime at all. Those false pleas not only give them a criminal record that negatively impacts their futures far beyond the time spent in detention, but it immunizes those who actually committed the crime. In this way, excessive pretrial detention both punishes the innocent and absolves the guilty.

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[77] Sandra S. Smith et al., *Mass Incarceration and Criminalization*, Malcolm Weiner Center for Social Policy: Social Policy Data Lab (2021), https://perma.cc/W2H4-CQK4.

[78] Stevenson, *supra* note 8, at 511-512.

2. Pretrial detention harms the families and communities of those detained.

Excessive pretrial detention also immediately harms the uncharged—the families and communities of those who are detained in the name of public safety and cannot afford to pay unaffordable bail to get out of jail before their trial.

Over half of the criminal defendants who are detained before trial because they cannot afford bail are the parents of minor children—53% of detained men and 66% of detained women are parents of children under 18.[79] Losing a parent to pretrial detention often has an immediate impact on these children. In a 2016 survey of pretrial detainees who were detained because they could not afford bail, over 40% responded that being detained "has or will change [the] living situation for [at least one] child in my custody."[80]

The harmful effects of pretrial detention on minor children are severe and long lasting. These children are "profoundly affected by the incarceration of a parent, from psychological problems and mental health problems to poor

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[79] Sawyer, *supra* note 68.

[80] Catherine S. Kimbrell & David B. Wilson, *Money Bond Process Experiences and Perceptions* 13 (Sept. 9, 2016), https://perma.cc/3FHL-YNY8.

school performance and a greater likelihood of future incarceration."[81] The pretrial detention of a parent of a child between seven and twelve years old significantly reduces the future economic mobility of those children.[82] This traps the children who cannot afford bail in a cycle of poverty that is, again, strongly correlated with future criminal legal system involvement.[83] And because pretrial detainees are more likely to recidivate than criminal defendants who are released,[84] the children of detainees are more likely to lose their parent to further incarceration in the future.

Adult family members are also harmed by the pretrial detention of their relatives due to unaffordable bail. Family members may lose the benefit of the income brought in by

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[81] Amatya, *supra* note 8, at 45 [citing Charlene Wear Simmons, *Children of Incarcerated Parents* 3 (2003), https://perma.cc/G7KN-Q8KW].

[82] Dobbie, *supra* note 65, at 254.

[83] Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned*, Prison Policy Initiative (Jul. 9, 2015), https://perma.cc/9BNN-A4EZ (noting that "in 2014 dollars, incarcerated people had a median annual income of $19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages.").

[84] Tafoya, *supra* note 43, at 14.

the detained family member.[85] As a result, if they were residing with the detained person, they may lose their own housing. They may also end up responsible for childcare, and for the court costs for the detained individual.[86] Because people who are detained due to unaffordable bail are already more likely to live in poverty, losing even a few days of work can thus have a significant impact on the detained person's family. And because even a few days of pretrial detention significantly decreases the likelihood that an individual will be able to retain or gain a job upon release, these familial impacts can last long beyond a detainee's time in jail.[87]

Excessive pretrial detention also creates an economic burden on local communities. Pretrial detention costs local

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[85] U.S. Comm. on Civ. Rights, *supra* note 1, at 32, (noting that "a family member's incarceration is associated with a 64 percent decline in household assets and criminal cases can result in the average family going into over $13,000 in debt over court fees and fines.").

[86] *Id.*

[87] U.S. Comm. on Civ. Rights, *supra* note 1, at 32, 49 (noting that "a family member's incarceration is associated with a 64 percent decline in household assets and criminal cases can result in the average family going into over $13,000 in debt over court fees and fines.").

governments nationwide an estimated $13.6 billion dollars each year.[88] At the same time, it also deprives communities of the economic benefit of their fellow citizens. The estimated lifetime loss in earnings for the average person detained before trial is over $29,000.[89] The life-long financial impact of excessive pretrial detention means that those who were detained will be significantly less financially able to contribute to their communities over their lifetime.

In all of these ways, excessive pretrial detention harm directly and often quickly harms the safety of the public.

3. The consequences of pretrial detention are disproportionately visited upon the crime survivors it purports to protect.

Like pretrial detainees, California crime survivors are disproportionately members of underrepresented, vulnerable groups.[90] These groups—which include low-income people of

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[88] *Pretrial Detention,* Prison Policy Initiative (Nov. 3, 2023), https://perma.cc/X3JP-MX4W.

[89] Dobbie, *supra* note 65, at 269.

[90] Lenore Anderson, *In Their Names: The Untold Story of Victims' Rights, Mass Incarceration, and the Future of Public Safety* (2022); Alliance for Safety & Justice, *Voices of Redemption: A National Survey of People with Records* (2023),

color, immigrants, people with disabilities, and LGBTQIA+ and unhoused people—are significantly more likely to be victims of violent crime due to generations of structural inequity.[91]

These experiences with violent crime have caused these crime survivors to incur substantial debt, profound physical harm, and severe mental health consequences, like higher levels of depression, anxiety and symptoms of post-traumatic stress disorder.[92] Unless crime survivors receive help in dealing with this trauma, they are at an increased risk of substance-abuse, worsening mental and physical

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https://perma.cc/Z42J-BUSK; Heather Warnken & Janet Lauritsen, *Who Experiences Violent Victimization and Who Accesses Services?* (Apr. 2019), https://perma.cc/JLX5-C4D8.

[91] *Id.*

[92] Alliance for Safety & Justice, *Crime Survivors Speak 2022: National Survey of Victims' Views on Safety and Justice* 6 (2022), https://perma.cc/F5TN-5TGW (noting that nationally 7 in 10 victims report experiencing at least one symptom of trauma); Alliance for Safety & Justice, *National Crime Victims Agenda* (2021); Danielle Sered, *Young Men of Color and the Other Side of Harm: Addressing Disparities in Our Responses to Violence*, Vera Institute of Peace (2014), https://www.vera.org/publications/young-men-of-color-and-the-other-side-of-harm-addressing-disparities-in-our-responses-to-violence/.

health, difficulty with school, work, and relationships, and criminal activity themselves.[93] But the same communities that most commonly experience crime face the greatest barriers to securing trauma recovery help in California.[94]

Excessive pretrial detention compounds these traumas because California crime survivors often live in the same community as pretrial detainees.[95] Thus, when pretrial detainees return to their community, crime survivors are disproportionately more likely to suffer the brunt of the direct and systemic harms caused by pretrial detention.[96] Indeed, as previous victims of crime, crime survivors are

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[93] John Grych et al., *The resilience portfolio model: Understanding healthy adaptation in victims of violence*, 5 Psych. of Violence 343 (2015); Kevin A. Wright et al., *The cycle of violence revisited: Childhood victimization, resilience, and future violence*. 34J. of Interpersonal Violence 1261, 1286 (2016).

[94] Claudia Lauer & Mike Catalini, *Every state offers victim compensation. For the Longs and other Black families, it often isn't fair.*, Associated Press (May 17, 2023), https://apnews.com/article/crime-victims-compensation-racial-bias-58908169e0ee05d4389c57f975eae49b; Californians for Safety & Justice, *supra* note 6.

[95] Annelies Goger et al., *A better path forward for criminal justice: Prison reentry* (April 2021), https://perma.cc/5Z7S-E5HP.

[96] Californians for Safety & Justice, *supra* note 6, at 7.

even more likely to be victimized again than others.[97] In this way, routine pretrial detention directly undermines its own goal—to protect the public and crime survivors from harm.

C. Excessive pretrial detention diverts public resources and defendants from evidence-based programs that reduce recidivism.

Yet excessive pretrial detention continues to divert critical resources away from trauma recovery services for crime victims, and other evidence-based programs that are proven to reduce crime and improve public safety.

The State of California has repeatedly recognized that evidence-based programs are more effective alternatives to pretrial detention. "California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices that will achieve improved public safety returns on this state's substantial investment in its criminal justice system." Pen. Code § 17.5(a)(4). "[E]vidence-based practices" include "supervision policies, procedures, programs, and practices demonstrated

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[97] *Id.* at 8.

by scientific research to reduce recidivism among individuals under probation, parole, or post release supervision."[98]

California counties that have implemented evidence-based pre-trial practices have "significantly reduced jail pressures."[99] For example, in Santa Clara County, the county has worked with Silicon Valley De-Bug to implement the Community Release Project, which provides individuals arrested and released with court reminders, transportation to court, navigation to access social services and re-entry services, and identifying housing options and mental health and substance abuse cases.[100] Between 2013 and 2016, the Santa Clara' Office of Pretrial Services' diversion program demonstrated truly extraordinary results: defendants released on their own recognizance or under monitoring appeared in court 95% of the time and avoided re-arrest 99%

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[98] *Id.* § 17.5(a)(9).

[99] Californians for Safety & Justice, *Pretrial Release in California: Legal Parameters for Evidence-Based Practices* 3, https://perma.cc/9YWF-AGTV.

[100] Raj Jayadev, *Decarceration Doesn't Have to Mean Supervision Expansion – The Santa Clara Story,* SV De-Bug (Sept. 16, 2021), https://perma.cc/X6WJ-FEJT.

of the time.[101] In fact, a 2012 review of five California counties that had implemented evidence-based practices in place of pretrial detention "all had positive outcomes related to the number of pretrial detainees in jails, defendant court appearance rates, and new crimes committed."[102]

Given this success, in 2019, the State of California—through the Judicial Council—funded a sixteen-site pilot project to develop alternative pretrial services programs.[103] As a result of this pilot program, there was a "5.8 percent decrease in rearrest/rebooking for misdemeanors," a "2.4 percent decrease in rearrest/rebooking for felonies.[104]

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[101] Cnty. of Santa Clara Bail and Release Work Grp., *Final Consensus Report on Optimal Pretrial Justice* 46 (2016), https://countyexec.sccgov.org/sites/g/files/exjcpb621/files/final-consensus-report-on-optimal-pretrial-justice.pdf.

[102] Partnership for Community Excellence, *Pretrial Detention & Community Supervision: Best Practices for California Counties* 4 (Sept. 2012), https://perma.cc/53EE-G3LD.

[103] Jud. Council of Cal., *supra* note 10, at 33-34; *see also, e.g.*, Lauren Gill, *Advancing Justice Through Supportive Pretrial Services*, Advancing Pretrial Policy and Research (Feb. 2023), https://perma.cc/N5XG-WJWU (noting state grants for alternative pretrial programs allowed Sacramento County to reduce its jail population, as required by a federal consent decree, while maintaining a low re-offense rate before trial).

[104] Jud. Council of Cal., *supra* note 10, at 1.

Evidence-based practices have also been demonstrated to reduce the likelihood of individuals failing to appear for their trial.[105] These practices empower arrestees to return to their community and participate in the justice process.

The nonprofit Bail Project has modeled a cash-bail-free system in communities across the country, Community Release with Support, which pays clients' bail and works to provide clients with ongoing communication, effective court notification, referrals to social services and community-based programs, and transportation to and from hearings.[106] By providing these services to assist clients in returning to court for their hearings, the Bail Project has been able to maintain an approximately 90% appearance rate for their clients.[107]

For these reasons, the vast majority of California crime survivors "want the state to focus on providing supervised probation and rehabilitation programs instead of more

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[105] Dylan Ashdown, *The End of Cash Bail: As Simple as Sending a Text Message?*, St. Louis U. L. J. Online (Sept. 7, 2020). https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1043&context=lawjournalonline.

[106] The Bail Project, *After Cash Bail: A Framework for Reimagining Pretrial Justice,* The Bail Project (Jan 14, 2020), https://perma.cc/7N74-35R6.

[107] *Id.*

prisons and jails."[108] Of them, "[w]omen, younger victims, African-American and Latino victims, lower-income victims, and victims of multiple crimes are all especially likely to believe that California should spend more on prevention."[109]

Consistent with these views are the findings from a 2022 representative national poll of crime victims conducted by CSSJ, in which nearly 7 in 10 victims (69%) said that they "prefer reducing the number of people in jail by releasing those who can safely await trial in the community or serve their sentence through diversion, community service, or treatment programs over keeping people in jail instead."[110] The overwhelming majority of California crime survivors also see incarceration as exacerbating rather than solving public safety issues. By a factor of seven to one, they believe prisons and jails will make someone who committed crimes as a result of mental illness more unwell and thus

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[108] Californians for Safety & Justice, *California Crime Victims' Voices: Findings from the First-ever Survey of California Crime Victims and Survivors* (2013), https://perma.cc/6Q8Y-ND3D.

[109] *Id.*

[110] Alliance for Safety & Justice, *Crime Survivors Speak 2022: National Survey of Victims' Views on Safety and Justice* 6 (2022), https://perma.cc/F5TN-5TGW.

more of a public safety risk, versus rehabilitating them.[111]

But routine pretrial detention, including through the use of unaffordable bail, diverts detainees and funding from these evidence-based programs. Pretrial detention costs the State of California almost $30 billion dollars a year.[112] At the same time, pretrial detention has been shown to lead to a higher likelihood that an individual will commit another offense. California therefore spends money in the name of public safety that instead increases crime and reduces public safety—at the expense of programs and policies which could actually benefit the State. Excessive pretrial detention thus creates a negative feedback loop, in which detention causes more crime, and more crime causes more detention.

To break this cycle of excessive, criminogenic pretrial detention, this Court should adopt Kowalczyk's proposed reconciliation of Section 12 and Section 28(f)(3). Limiting pretrial detention to criminal defendants who are accused of violent felony offenses, and who pose a specific risk of harm to third parties, will not cause harm to public safety. And,

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[111] Californians for Safety & Justice, *CA Crime Survivors Speak* 9, (2019), https://perma.cc/2GBQ-APFY.

[112] *See* Section I, *supra;* Amatya, *supra* note 8, at 39.

more importantly, it avoids imposing severe harm on low and moderate risk criminal defendants that dramatically increases the chance that they will commit future crimes that would most likely be visited upon crime survivors.

II. Section 28(f)(3) requires Superior Courts to broadly consider the harm that excessive pretrial detention causes to public safety.

There is another critical reason why this Court should adopt Kowalczyk's proposed reconciliation of Section 12 and Section 28(f)(3). District attorneys and Superior Courts have misinterpreted Section 28(f)(3)'s requirement that Superior Courts, in setting, reducing, or denying bail, consider public safety to focus exclusively on the risk that a pretrial detainee poses to others if released. But there is no support for this narrow reading of Section 28(f)(3). To the contrary, its plain text unambiguously provides that Superior Courts must consider the protection of the public, subject only to the limitations on pretrial detention set out in Section 12. And to protect the public, Superior Courts must consider the fact that excessive pretrial detention undermines public safety.

This Court adheres to well-established principles to interpret a constitutional provision enacted by an initiative. *Silicon Valley Taxpayers' Ass'n, Inc. v. Santa Clara Cty.*

Open Space Authority, 44 Cal. 4th 431, 444 (2004). First, courts examine the language of the constitutional provision, giving its words their usual and ordinary meaning. *Id.* If the language is clear and unambiguous, courts must follow the plain meaning. *Id.* If the language is ambiguous, courts also "consider extrinsic evidence in determining voter intent, including the Legislative Analyst's analysis and ballot arguments for and against the initiative." *Id.* at 444–45.

In this case, both the text and the extrinsic record show that Section 28(f)(3) requires a broad consideration of public safety beyond any dangerousness of the criminal defendant.

1. The text of Section 28(f)(3) requires the broad consideration of "public safety."

Subject to the strict limitations on pretrial detention set out in Section 12, the relevant language of Section 28(f)(3) provides: "In setting, reducing, or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations." Cal. Const., art. I, § 28(f)(3).

This plain and unambiguous language charges that Superior Courts, in setting, reducing, or denying bail, must do nothing less than consider "public safety" in its entirety. Public safety is assigned no special definition in the text, so this Court should look to ordinary dictionary definitions. *See Kowalczyk,* 85 Cal. App. 5th at 687 (looking to *Black's Law Dictionary* to interpret terms in Sections 12 and 28(f)(3)).

"Public safety" is commonly defined as "[t]he welfare and protection of the general public," wherein "public" refers to the "community as a whole." *Black's Law Dictionary* (11th ed. 2019). This was the same definition in effect at the time when Proposition 9 proposed adding Section 28(f)(3) to the California Constitution. *See Black's Law Dictionary* (8th ed. 2004); *see also Black's Law Dictionary* (9th ed. 2009). This definition of public safety is broad and expansive, and it is not limited to considerations of harm that could be caused by a criminal defendant if he or she is released before trial. Nothing less than the "protection of the public" is in play.

The contrary interpretation—that Superior Courts may ignore the fact that excessive pretrial detention harms public safety ***in considering public safety***—is irrational and lacks textual support. Section 28(f)(3) does not say that Superior Courts shall take into consideration the protection of the public "from the defendant," it says only that "public

safety"—"the protection of the public"—is a necessary and primary consideration of bail determinations. See Cal. Const., art. I, § 28(f)(3). Writing this language into Section 28(f)(3) would be particularly improper because, in the same list of considerations, the text twice specifies when the consideration exclusively concerns the defendant. See *id.* § 28(f)(3) (listing as other considerations "the previous criminal record ***of the defendant***" and "the probability of ***his or her*** appearing at the trial or hearing of the case") (emphases added). That makes perfect sense for those two items, because a defendant's record and flight risk depends on the defendant alone. Public safety—and indeed the safety of the victim—turn on far broader considerations.

This plain interpretation of public safety is strongly supported by Section 28's findings and declarations, which focus on the shared rights of victims and the general public.

Section 28 begins by finding that "[c]riminal activity has a serious impact on the citizens of California," and declares "[v]ictims of crime are entitled to have the criminal justice system view criminal acts as serious threats to the safety and welfare of the people of California." *Id.* § 28(a)(2). And it finds that "the rights of victims pervade the criminal justice system." *Id.* § 28(a)(3). It then declares that "[t]he rights of victims also include ***broader shared collective***

rights that are held in common with all of the People of the State of California[.]" Id. § 28(a)(4) (emphasis added). These collective rights include the right that criminal defendants are "***appropriately*** detained"—not detained whatever other costs to public safety. *Id.* (emphasis added). Section 28(f) reiterates these "collectively held rights" with specific regard to its provision for "Public Safety Bail." *Id.* § 28(f), (f)(3).

These findings and declarations are exactly consistent with a broad consideration of public safety that understands the increased recidivism caused by excessive pretrial detention infringes upon the rights of crime survivors, who are the most likely to directly suffer from those crimes, as well as the larger collective rights of their communities. The San Mateo District Attorney, however, would like this Court to interpret these findings and declarations exclusively through the lens of threats to a victim's safety that are posed by the criminal defendant, as justification for broad pretrial detention. But that is not what Section 28's text says.

By contrast, where a criminal justice initiative intends to narrowly define "public safety" to focus on the potential danger that a criminal poses to the public, it is quite clear. For example, Proposition 36—known as the Three Strikes Reform Act —enacted mandatory resentencing for certain prisoners "unless the court, in its discretion, determines that

resentencing the petitioner would pose an unreasonable risk of danger to public safety." *People v. Valencia*, 3 Cal. 5th 347, 354 (2017). There, the text is plain and clear: the only relevant "public safety" consideration is whether a prisoner would endanger the public if released early from custody.

Another instructive example is Proposition 47, known as the Safe Neighborhood and Schools Act. That initiative reclassified certain criminal offenses as misdemeanors and required resentencing for prisoners affected by the change, "unless," like Proposition 36, "the court . . . determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." *Id.* at 355. But Proposition 47 went even further than Proposition 36 and expressly defined "unreasonable risk of danger" to refer only to certain serious felonies. *Id.* No similar intent to narrowly define public safety appears in the text of Section 28(f)(3).

2. Extrinsic materials also confirm that Section 28(f)(3) requires a broad consideration of public safety.

Even if the term "public safety" were ambiguous, a holistic interpretation of that phrase honors the spirit of Proposition 9 as it was presented to the voting public. Apart from the text, the ***only*** reference to bail or pretrial detention

in Proposition 9's ballot materials was to state that counties may respond to its restrictions on early release from prison by "decreasing the use of pretrial detention of suspects." If anything, this expresses a concern for overincarceration and decreasing pretrial detention to address it. As Kowalczyk correctly notes in his opening brief, "it was only in the course of the *Humphrey* litigation that the government first claimed that Proposition 9 had implicitly repealed section 12."

Similarly, there are numerous legislative findings in the Penal Code that strongly suggest the Superior Courts should broadly interpret the term "public safety" in setting, reducing, or denying bail. Indeed, these findings recognize over and over again that public safety is a broad concept that must include consideration of the negative, systemic impacts of excessive pretrial detention. *E.g.*, Pen. Code § 4496.02(f) (finding that eliminating the problem of jail overcrowding is "essential to public safety" because of the systemic harms that it causes); *id.* § 17.5(3) (finding that "[c]riminal justice policies that rely on building and operating more prisons to address community safety concerns are not sustainable, and will not result in improved public safety"); *id.* § 17.5(4) (finding that "California must reinvest its criminal justice resources to support community-based corrections programs and evidence-based practices that will achieve improved

public safety returns on this state's substantial investment in its criminal justice system"); *id.* § 17.5(7) (finding that the government must "manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable"); *id.* § 3450(3) (finding that "[c]riminal justice policies that rely on the reincarceration of parolees for technical violations do not result in improved public safety"); *id.* § 6240(b) (finding that "[t]he relationship between public safety, recidivism, and substance abuse is undeniable and significant"). Taken together, these legislative findings make clear that the term "public safety" should not be narrowly interpreted to mean the risk of danger, if any, posed by a person—far from it.

This Court should thus hold that Section 28(f)(3) mandates a broad consideration of public safety that is aware of the harms caused by excessive pretrial detention.

CONCLUSION

For the foregoing reasons, this Court should adopt Kowalczyk's proposed reconciliation of Section 12 and Section 28(f)(3). Pretrial detention is limited to the specific circumstances set out in Section 12. For that reason, this Court should also hold that unaffordable bail is unlawful.

This Court should further hold that Section 28(f)(3), which provides additional considerations when setting, reducing, or denying bail under Section 12, requires Superior Courts to consider the harms of pretrial detention. That is the only way to break the criminogenic cycle of pretrial detention and to restore the presumption of pretrial release.

Dated: November 9, 2023

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Dated: November 8, 2023

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S277910**
Lower Court Case Number: **A162977**

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Date

/s/Ian Kanig

Signature

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