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

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*; PROPOSED BRIEF OF *AMICI CURIAE* PROFESSORS KELLEN R. FUNK AND SANDRA G. MAYSON

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APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* PROFESSORS KELLEN R. FUNK AND SANDRA G. MAYSON

Pursuant to Rule 8.520(f) of the California Rules of Court, Professors Kellen R. Funk and Sandra G. Mayson respectfully apply for permission to file the *Amicus Curiae* Brief contained herein.

INTERESTS OF AMICI CURIAE

Kellen R. Funk and Sandra G. Mayson are professors at Columbia Law School and the University of Pennsylvania Carey Law School, respectively. They are among the foremost experts on the law and history of bail in the U.S. legal academy, have published widely on related topics, and have a strong interest in the sound development of these fields. Their most recent scholarly collaboration, *Bail at the Founding* (forthcoming in the *Harvard Law Review*),[1] draws on primary and secondary sources to document the early history of bail in the United States. *Amici* seek to assist the court's consideration of the issues raised in this case by clarifying the historical context and meaning of the right-to-bail provision codified in Section 12 of the California Constitution.

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[1] Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, HARV. L. REV. (forthcoming 2024), available at https://ssrn.com/abstract=4367646 (hereinafter "*Bail at the Founding*").

DISCLOSURE OF AUTHORSHIP AND MONETARY CONTRIBUTION

No party, or counsel for any party, in this writ petition has authored any part of the accompanying proposed *Amicus Curiae* brief. In addition, no person or entity has made any monetary contributions to fund the preparation or submission of this brief. This brief was authored exclusively by the attorney signatories below in consultation with Professors Funk and Mayson.

Dated: November 8, 2023

Respectfully submitted,

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INTRODUCTION

This brief addresses the second issue identified in this Court's Order of Review: May a superior court ever set pretrial bail above an arrestee's ability to pay?

As scholars of the law and history of bail, Professors Funk and Mayson urge this Court to affirm the Court of Appeal's conclusion that Section 12 of California's Constitution protects a general right to bail by sufficient sureties, ***and*** to recognize that, as a historical matter, the right was designed to allow even the most destitute defendant to remain at liberty pending trial. As explained below, the right codified in Section 12 was intended to limit pretrial detention to the bare minimum of necessity while assuring appearance for trial. It was not intended to let courts condition pretrial liberty on an unaffordable cash bail requirement.

Section 12's right to bail—"bail by sufficient sureties"—is one iteration of what Professors Funk and Mayson have called the "dissenter" model of bail, originally created by religious dissenters in the American colonies specifically to reduce local judges' power to jail people prior to conviction. Historically, a "surety" was a person who could vouch for the defendant's future compliance with the court's order, and just about any surety was "sufficient." The founding-era understanding of "sufficient sureties" did not involve any

upfront cash deposit. Instead, bail meant that a defendant and his sureties made an *unsecured pledge* to forfeit a specified sum if the defendant failed to appear for trial or got into trouble in the meantime. And courts were cautioned against requiring such an unrealistic pledge amount that it would effectively deny bail. To the contrary, the onus was on the local magistrate or court to find a way to release bailable defendants, including by considering a defendant's (and his sureties') means when determining the pledge amount. Thus, even the poorest defendant remained at liberty so long as he had sureties to vouch for him.

The California Constitution should be interpreted consistently with this historical understanding. When the people of California adopted the dissenter model of bail in 1849, and re-adopted it again in the 1879 state Constitution, they were reacting in part to what delegates to the conventions perceived as unjust pretrial detention of the poor and runaway judicial discretion. Contrary to the Court of Appeal's historical analysis, the legislative history rejects, rather than condones, the setting of unaffordable bail.

In short, the right to bail codified in Section 12 was not originally understood to permit detention on an unaffordable cash bail requirement. It was intended, rather, to prohibit pretrial detention so long as one or more members of the community were willing to put their word and reputations on the line to vouch for the accused person's compliance with

his obligations, and pledge to forfeit a sum within reach if he did not. The notion that courts might condition pretrial liberty on an upfront, unaffordable cash payment is inconsistent with that history, and this Court should interpret Section 12 accordingly.

ARGUMENT

For purposes of our analysis, we assume—as the Court of Appeal concluded—that Section 12 remains in force and protects a general right to bail by sufficient sureties, subject only to the exceptions enumerated in the same provision. The salient corollary question raised by the opinion below is whether a court may ever set unaffordable cash bail for (and thus detain) an arrestee *outside the detention-eligibility categories* of Section 12. In other words: Does an unaffordable cash bail requirement violate the right to bail by sufficient sureties? History cannot conclusively answer this legal question on its own. But history does bear on the inquiry, and it demonstrates that the language of Section 12 did not originally contemplate unaffordable cash bail.

Four aspects of the history of bail lead to the conclusion that Section 12 was not intended to permit detention on an unaffordable cash bail amount. ***First***, the original intent of the American dissenter model was to radically constrain judges' power to detain individuals before they stood trial. ***Second***, the notion of conditioning pretrial release on any

upfront monetary payment—let alone an intentionally unaffordable one—is inconsistent with the historical meaning of "sufficient sureties." ***Third***, while local magistrates sometimes detained those from groups on the margins of their communities who had *no* sureties willing to pledge *any* amount of bail, courts have repeatedly recognized that a defendant's means should be considered when determining what pledge amount is "sufficient." And ***finally***, California's constitutional convention adopted the dissenter bail model with the intention of protecting pretrial liberty even for those who could not afford to post cash bail.

A. Section 12 of California's Constitution Follows the American Tradition of Protecting a Right to Pretrial Release for Non-Capital Defendants.

Since the founding, American law has fiercely protected the pretrial liberty of criminal defendants. While many of the fundamental principles related to the right to bail date back to English common law, the right to bail that is enshrined in most state constitutions is a distinctly American legal tradition, one that Professors Funk and Mayson have called the "dissenter" model of bail.[2] This model emerged in reaction to English bail abuses. It prioritized pretrial liberty by limiting judicial discretion in the bail process in two ways: (1) mandating that nearly all

[2] *See Bail at the Founding* at 20.

criminal defendants have a right to release on bail and (2) requiring that any bail amount be carefully calibrated to a defendant's financial circumstances. Section 12 of the California Constitution replicates this model and should be interpreted accordingly: as a strict limit on judges' discretion both in granting bail and in determining the amount of bail.

1. The English Common Law Model

By the late 1700s, pretrial release on bail was a fundamental part of English constitutionalism, with procedural protections developed in Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights. Together, this body of law required bail determinations to be made in open court sessions, with an evidentiary record, and in a timely manner.[3] But the hallmark of the English bail system was judicial discretion. Bail determinations were made by magistrates, usually county-level justices of the peace in the first instance, appealable to the judges of the King's Bench.

At the extremes, English judges were more constrained. Charges of the most serious nature, such as intentional homicide or treason, were reserved exclusively

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[3] *See* Timothy R. Schnacke et al., PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 3, 4 (2010); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 528-29 (1983).

for the King's Bench to make the initial bail decision, but even there, the court could order release if it felt the circumstances so warranted.[4] At the other end of the spectrum, magistrates were effectively bound to admit to bail those accused of the most petty offenses, especially if the accused were "of good fame."[5] In these cases, a justice could not, "under the pretence of demanding sufficient surety, make so excessive a requisition, as in effect to amount to a *denial* of bail."[6]

But between the poles—charges ranging from minor thefts to varieties of manslaughter—magistrates enjoyed broad discretion over whether to grant bail. This discretion did not extend to the amount of the pledge required, which was commonly reported to be a standard £40 for a felony charge (about a year's wages for a common artisan).[7] Rather, the question was whether the accused was *bailable or not*. Judges decided whether, pending trial, the defendant would

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[4] 3 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ed. Thomas Leach (7th ed. 1795 [1716]), 4 vols. at 203-04; 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW (1st Am. ed. 1819 [1816]), 4 vols. at 95; *see also* 2 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN, 129–34 (1736); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 298 (1765–1769).

[5] 1 CHITTY 97; *see also* 2 HALE 127; 3 HAWKINS 212; 4 BLACK. COMM. 298–99.

[6] 1 CHITTY 84 (emphasis added); *see also* 3 HAWKINS 187.

[7] Paul Lermack, *Peace Bonds and Criminal Justice in Colonial Philadelphia*, 100 PENN. MAG. HIST. & BIO. 173, 180 (1976).

be (a) permitted to offer sureties to meet this standard sum or (b) detained outright, no matter his financial means.

A host of treatises and manuals with titles like *The Officer's Assistant* or the *Country Justice* offered guidance on how magistrates should use their discretion.[8] The first consideration was the probable guilt of the defendant, and here English magistrates were invited to weigh the available evidence and essentially pre-judge the case. "Bail is only proper," one treatise advised, "where it stands indifferent whether the person accused were guilty or innocent."[9] The more probable the guilt, the more likely the accused would remain detained.[10] And where judges had discretion whether to deny bail outright, the rules tolerated detention even when it resulted from an impossible bail demand.[11]

In sum, the English common law model of bail allowed judges wide discretion to release or detain defendants. The early American bail system was a reaction to that wide

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[8] *See generally* JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW (1st Am. ed. 1819 [1816]), 4 vols. Chitty's work in turn simplified and updated WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ED. THOMAS LEACH (7th ed. 1795 [1716]), 4 vols.; and MICHAEL DALTON, THE COUNTRY JUSTICE (1727 [1666]).

[9] 3 HAWKINS 207.

[10] 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 494 (1866).

[11] *See Bail at the Founding* at 18 (citing John A. Dunlap, THE NEW-YORK JUSTICE 41 (1815); John Chandler Bancroft Davis, THE MASSACHUSETTS JUSTICE 289 (1847)).

discretion and the inconsistent (and unfair) outcomes it permitted.

2. The American "Dissenter" Model

The English common law model was fiercely criticized by seventeenth-century religious dissenters, both Puritans and Quakers, who were frequently detained without bail. The most influential of these dissenters was the Quaker founder of Pennsylvania, William Penn, who was himself detained without bail for preaching without a permit. Penn wrote that his 1682 Frame of Government for Pennsylvania ("Frame") aimed to accomplish "that which is extraordinary, and to leave myself and successors no power of doing mischief."[12] To prevent the "undue Imprisonment of Persons upon mere Surmises,"[13] Penn crafted a clause whose language will be familiar to this Court: "All prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident, or the presumption great."[14]

This "dissenter" model of bail inverted the English common law model. Whereas the common law prescribed

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[12] William Penn to Robert Turner, Anthony Sharp, and Roger Roberts, 12 April 1681, *in* 2 PAPERS OF WILLIAM PENN 89.

[13] *See* FRAME OF GOVERNMENT OF PENNSYLVANIA, art. xx (1682) (cleaned up).

[14] 5 AMERICAN CHARTERS 3061 (F. Thorpe ed. 1909).

only a limited right to bail, the dissenter model gave virtually every defendant a right to bail by default. And whereas the common law allowed broad judicial discretion in most cases, the dissenter model afforded judges extremely limited discretion to detain (*i.e.*, only for capital crimes).[15]

To be sure, while Penn's Frame called for release by "sufficient sureties," the mandatory right to bail brought with it the same rules and practices that protected it in England: Magistrates were duty-bound to require bail pledges sufficiently within the reach of the defendant and his sureties; if, "under the pretence of demanding sufficient surety," they made "so excessive a requisition, as in effect to amount to a *denial* of bail," they could be liable for a false imprisonment or malicious prosecution.[16] Whether in a common law or dissenter jurisdiction, one treatise summarized, "bail only is to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge."[17] But while the English common law tolerated imprisonment upon

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[15] In Penn's Pennsylvania, only murder and treason were capital crimes. Therefore, Penn's limitation on judicial discretion was quite radical. *See* FRAME OF GOVERNMENT OF PENNSYLVANIA, art. xxv (1682) (listing only treason and murder as capital offenses); H.W.K. Fitzroy, *The History of Punishment of Crime in Provincial Pennsylvania*, 60 PENN. MAG. HIST. 242 (1936).

[16] *See Bail at the Founding* at 16; 1 CHITTY 97, 102; 3 HAWKINS 187.

[17] 1 CHITTY 131.

a charge for most non-capital defendants, the dissenter model did not.

Thus, under the American dissenter model, the right to bail was intended to be more than just a right to the option of bail—it was intended as a right to release.

3. Widespread Adoption of the Dissenter Model

The language of Penn's dissenter model was ultimately adopted by every state that entered the Union after 1789, save for West Virginia and Hawaii.[18] California was no exception. In 1849, the state's first constitution exactly copied the language of Penn's Frame: "All persons shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or the presumption great."[19] The language was repeated again in the Constitution of 1879,[20] and today is found in California's Section 12, largely unaltered except for an expanded category of felony charges for which bail may be denied.

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[18] Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 927-31 (2013).

[19] CAL. CONST. (1849), art. I, § 7.

[20] CAL. CONST. (1879), art. I, § 6.

B. Unaffordable Cash Bail is Inconsistent with the Historical Understanding of "Sufficient Sureties."

A bail system that conditions a defendant's liberty on their ability to provide an upfront cash deposit is inconsistent with Section 12's conception of "bail by sufficient sureties." The current system for releasing a defendant on bail in California involves the defendant tendering an *upfront* payment of *cash*, and the defendant's non-appearance automatically triggers forfeiture of that cash. But bail at the time of America's (and California's) founding differed in important respects, including what a "surety" was and what made a surety "sufficient."

1. "Sureties"

A "surety" was an individual who pledged to forfeit property if the defendant failed to appear.[21] By statute, California recognizes the same definition: "one who promises to answer for the debt, default, or miscarriage of another."[22] Two facets of the historical meaning of "sureties" make clear that unaffordable bail—that is, detention resulting from a defendant's inability to pay the cash deposit required—is unsupported by the historical record. ***First***, courts did not

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[21] 1 CHITTY 100-02; *see also* Black's Law Dict. *Surety* (11th ed. 2019) ("[s]omeone who is primarily liable for paying another's debt or performing another's obligation").

[22] Cal. Civ. Code § 2787 (1872).

require defendants to make any upfront deposit, of cash or otherwise, to be released. ***Second***, the "collateral" at stake for a defendant's non-appearance was predominantly their surety's reputation, not their own (or their surety's) property. Taken together, these features suggest that founding-era jurists would not have recognized a system that detains defendants based on the money they have on hand.

a. Founding-era bail practice did not require upfront deposits.

The first central difference between bail at the founding and the modern practice involves the timing of any financial loss. A surety's property was never attached, transferred, or secured in advance of trial. The defendant would be "deliver[ed]" (released) to their "surety" in advance of trial without anyone—the defendant or their surety—parting with the property that was pledged. The surety's pledges were unsecured, unlike a lien. Scholars have found no evidence in primary source documents of any defendant providing collateral *in order* to be released.[23] In other words, while released on "bail," the defendant kept their property.

In contrast, the "modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture" means that while released on "bail," a defendant has already

[23] *See Bail at the Founding* at 35; Thomas R. Schnacke, *A Brief History of Bail*, 57 JUDGES' J. 4, 6–7 (2018).

suffered a loss of property.[24] This use of deposits developed only in the last century,[25] and almost exclusively in the United States.[26] Founding-era courts would have been unfamiliar with policies that made a defendant's pretrial liberty dependent on his ability to proffer cash or secured collateral.

Although both founding-era and modern practices provide the defendant an incentive to appear at trial, the burdens have flipped. Whereas at the founding, the defendant (and their surety) faced the risk of losing property *later* if the defendant *did not* appear, in today's system, the defendant loses property *before trial* unless the defendant *does* appear. Today, it is the defendant's burden to reclaim their property, rather than the government's burden to collect it.

This reversal has practical, destructive consequences for defendants that would be unrecognizable to founding-era courts. At the founding, if a court required the surety to pledge to pay a sum higher than the surety (or defendant) could afford, the defendant would *still be released*. If a court imposes unaffordable bail in today's system, the defendant

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[24] *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

[25] *See Holland v. Rosen*, 895 F.3d 272, 293-95 (3d Cir. 2018) (discussing transition from a surety system to secured cash bonds in late 1800s).

[26] Schnacke, *A Brief History of Bail*, at 4, 6.

will be detained. In other words, the timing of when collateral is due is the difference between the right to bail operating as a right to release and becoming a *de facto* order of detention. The latter—which the Court of Appeal's decision permits—has no historical support.

b. At the founding, sureties primarily risked reputational, not financial, harm.

The second notable feature of the founding-era conception of bail was its reliance on social rather than financial capital.

At the outset, a defendant's access to sureties—and therefore, release—depended on whether the defendant was well-regarded in the community.[27] Primary source documents reveal that even working-class defendants, such as laborers and artisans, had the local clout to find sureties, yet wealthy defendants who were new to town might lack sureties.[28] Indeed, the common term for a pretrial detainee

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[27] In the new nation, requirements that one citizen would vouch for another by pledging a bond were ubiquitous. *See Bail at the Founding* at 30. For example, state laws required that postmasters, tavern owners, and local bureaucrats obtain sureties as a sign of their trustworthiness. *Id.* (collecting sources).

[28] *See* SIXTH ANNUAL REPORT OF THE PRISON DISCIPLINE SOCIETY 22 (Mass. 1831).

was a "stranger," not an "indigent."[29] In other words, the requirement of sureties was a reputational rather than financial requirement.

Likewise, the incentive to appear at trial was based on protecting the surety's reputation rather than shielding the surety's property. In theory, sureties risked losing the money they pledged if the defendant failed to appear. But in practice, the government was unlikely to ever collect that money. There are hardly any founding-era examples of courts or governments actually collecting on forfeited recognizance bonds.[30] Scholars agree—based on archival research—that even during periods where many defendants failed to appear, the government seldom initiated collection actions.[31] Because loss of property was not a meaningful risk for the defendant or their sureties, direct money incentives played a minor, if any, role in ensuring a defendant's

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[29] *See, e.g.*, *Taft v. Hoppin*, Ant. N.P. Cas. 187, 255 (N.Y. S. Ct. 1816).

[30] *See Bail at the Founding* at 35, 37 ("For suretied citizens, bail was not likely to entail any transfer of property at *any* time."). The first recorded "forfeited bond" arrived at the United States Treasury in 1825. *See* AN ACCOUNT OF THE RECEIPTS AND EXPENDITURES OF THE UNITED STATES FOR THE YEAR 1825, at *16 (1826).

[31] *See, e.g.,* Lermack, *supra* note 7, at 181; Julius Goebel Jr. & Raymond Laughton, *Recognizances*, *in* LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE, at 523-25 (1944).

appearance. Instead, it was well understood that if a defendant failed to appear, the surety's character and judgment would be called into question.

In sum, the sureties that enabled release at the founding were individuals who made unsecured pledges. So today, even under the Court of Appeals' framework, an indigent defendant has lesser *access* to release, no matter their standing in the community or their trustworthiness, because the system conditions liberty on an upfront payment of cash. And even if an indigent defendant does secure release, the practical penalty for nonappearance has changed from a damaged reputation to the nearly instantaneous loss of cash collateral.

2. "Sufficient"

Although the word "sufficient" in the phrase "bail by sufficient sureties" afforded judges some discretion in bail determinations, it was not intended to permit detention based on an unaffordable cash bail requirement. A "sufficient surety" was a person who had sufficient standing in the community to be trusted, and sufficient resources to pledge an amount that was appropriate to the case and the individuals concerned. In practice, defendants with ***no*** sureties—that is, no one willing to vouch for them—were often detained. But the law on the books required judges to

calibrate the sureties' pledge amount with the goal of the defendant's release and subsequent reappearance.

The limited founding-era case law on the subject makes it clear that judges were supposed to determine what pledge was "sufficient" according to what the defendant's sureties could guarantee. The founding-era understanding is best reflected in three of Chief Justice John Marshall's opinions, each of which calibrated bail to the defendant's (and their sureties') means. ***First*,** Chief Justice Marshall oversaw the pretrial proceedings for the 1807 treason trial of Aaron Burr, the former Vice President of the United States. Burr faced two charges: treason, a capital offense, and conspiracy, a misdemeanor. The First Judiciary Act followed the dissenter's model for bail, providing a right to bail in all but capital cases, and, even there, permitting bail at the judge's discretion. Burr thus had a right to bail on the misdemeanor charge. If Burr could not procure sureties willing to pledge the amount demanded by the court, Chief Justice Marshall encouraged Burr to return (within a day or less) to have the amount adjusted downward.[32]

After a jury found Burr not guilty of treason, Burr and his counsel advocated for an affordable pledge amount for

[32] *See* 1 DAVID ROBERTSON, REPORTS ON THE TRIALS OF COLONEL AARON BURR, FOR TREASON, AND FOR A MISDEMEANOR at 20 (1808) (Marshall: "If bail for ten thousand dollars cannot be had, I will hear an application to reduce the sum.").

the remaining conspiracy charge, and Justice Marshall obliged. Burr stated that because he "had incurred great expenses," he was unable to pledge "as large a sum as he had given at first."[33] Burr's counsel argued that:

> [I]n this country the only mode of establishing a criterion to regulate the amount of bail to be taken from any individual is by looking at the state of his property. A man of no property ought not to be required to give bail in a large sum of money. The court has always inquired into the amount of the estate of the party accused . . . and makes him give security accordingly.[34]

Apparently in agreement, Chief Justice Marshall required a new pledge of only $5,000–half of the prior requirement.[35]

The Burr trial illustrates that at the founding, the means of the defendant—even one as wealthy as the Vice President of the United States, and even where affected by their own spending—were well understood to be germane to bail determinations. Chief Justice Marshall lowered the pledge amount as Burr's financial condition worsened, thereby making bail affordable in order to allow for Burr's release.

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[33] *See* 2 DAVID ROBERTSON, REPORTS ON THE TRIALS OF COLONEL AARON BURR, FOR TREASON, AND FOR A MISDEMEANOR at 485 (1808).

[34] *Id.*

[35] *Id.* at 487.

Second, *Ex Parte Burford* supports the view that a "sufficient" surety amount was one that the defendant could afford. 7 U.S. 448 (1806). There, a man who was imprisoned because he was unable to satisfy a $4,000 peace bond[36] filed a habeas petition alleging in part that the terms of the peace bond violated the federal Excessive Bail Clause. *Id.* at 452. Before his case reached the Supreme Court, the federal circuit court reduced the bond amount to $1,000. Chief Justice Marshall expressed approval that the Circuit court had "correct[ed] . . . the errors committed" by reducing the amount of the bond to an affordable level. *Id.* at 453.

Third, riding circuit, Chief Justice Marshall held in *Feely* that a court could set aside the forfeiture of a recognizance bond if the principal who had missed court appeared at the next court session with a good excuse. *U.S. v. Feely*, 25 F. Cas. 1055, 1056 (C.C.D. Va. 1813). He noted that a defendant who missed court once could be required to give an additional recognizance for his future appearance, "but not in such a sum as to amount to refusal of bail, or to be really oppressive." *Id.*

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[36] A "peace bond" was a promise to "keep the peace" for a specified term. *See Bail at the Founding* at 31. Like a bail bond, it consisted of an unsecured pledge, often involving the pledge of sureties as well.

In sum, the founding-era bail system was based on promises, not deposits, and reputation, not cash. This meant that defendants detained before trial were held because they lacked access to social capital, not because they lacked money. And to the extent a defendant's financial capital was considered, it was to tailor the amount pledged (*i.e.*, the amount that would be "sufficient") to what the defendant could afford.

This history should inform the Court's ruling here. This Court's prior holding in *Humphrey*—that once a court concludes money bail is reasonably necessary, the court must (subject to narrow exceptions) set bail "at a level the arrestee can reasonably afford"—is consistent with these founding-era principles. *See In re Humphrey*, 11 Cal. 5th 135, 154 (2021). But to the extent the Court of Appeal here undercut *Humphrey*'s requirement that courts take care to avoid bail that would be unaffordable, its opinion finds no support in the historical record. *See, e.g., In re Kowalczyk*, 85 Cal. App. 5th 667, 691 (2022), *reh'g denied* (Dec. 8, 2022). If California's bail system allows defendants to be detained because the upfront cash deposit required is treated as the *only* "surety" that is "sufficient," then it is a stark departure from the founding-era conception of "bail by sufficient sureties."

C. Contrary to the *Kowalczyk* Decision, the History of Section 12's Enactment Does Not Support Allowing Courts to Set Intentionally Unaffordable Bail.

Against this historical backdrop, in 1849, California adopted a clause in its Constitution using nearly identical language from Penn's Frame, creating a right to release "on bail by sufficient sureties." The context of that enactment suggests that the California constitutional convention included the clause for the purpose of limiting judicial discretion and preventing pretrial detention on the basis of indigency.

California borrowed wide swaths of its first constitution in 1849, adopting some 70 of its 136 provisions from Iowa and 20 more from New York.[37] But California's adoption of the dissenter model's language was not among these bulk borrowings. Instead, what is now Section 12 was deliberately inserted by Myron Norton, a noted justice of the peace and later defense attorney from San Francisco, who chaired the constitutional convention's judiciary committee. Norton explained that while some might think the dissenter bail clause redundant to the excessive bail clause, in his view, the dissenter bail clause covered different ground. He advised, "[a]n innocent man may be kept in prison and

[37] Cardinal Goodwin, *The Establishment of State Government in California 1846–1850*, at 242 (1913).

refused bail, without such a provision as this."[38] Indeed, Norton saw codification of the right to bail as essential. California was at a crossroads, deciding whether to adopt the common law or hue closer to civilian law inherited from Spanish rule. Norton inserted the dissenter bail clause "so that in all cases, except capital offenses, where the proof is evident or the presumption great, the party accused *shall be entitled to bail*."[39]

The other delegates apparently agreed that judicial discretion should be limited. Indeed, the only debate on the clause in the first California convention concerned whether the phrase "the proof is evident or the presumption great" left *too much* "to the courts to decide." When one delegate proposed striking the phrase entirely so that courts would not come to conflicting opinions in prejudging capital cases, another delegate replied that "[w]e cannot lay down here a general rule to provide for every possible variety of circumstances" and so bail in capital cases "must be left to the discretion of [the] court."[40] The clause remained intact. The striking feature of this debate is that the delegates understood their argument about judicial discretion applied

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[38] BROWNE, J. ROSS, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER 1849 at 579 (1850).

[39] *Id.* at 293 (emphasis added).

[40] *Id.*

only to capital cases. In every other (*i.e.*, non-capital) case, the delegates apparently understood that defendants were entitled to release on bail—an entitlement with which judicial discretion could not interfere.

We respectfully submit that the Court of Appeal's decision misconstrued this history. Focusing on the 1879 Constitution, the court concluded from the legislative history that what is now Section 12 "has never been understood as mandating affordable bail[.]" *In re Kowalczyk*, 85 Cal. App. 5th at 687. In fact, the legislative history cited by the Court of Appeal directly supports the opposite conclusion. The court quoted a convention delegate who noted that Californians were being jailed on unaffordable bail, observing that "if [a man] [is] poor and unable to give bail, he must go to jail, there to remain perhaps for months to await the meeting of the Grand Jury." *Id.* Contrary to the Court of Appeal's reading, that delegate was ***not*** arguing that this practice was acceptable but rather than it showed the *failure* of local courts to carry out their constitutional duties. *Cf. id.* at 663. Indeed, far from suggesting that unaffordable bail was acceptable, the delegate advised that the grand jury system should be entirely abolished so as to eliminate the entire basis for unconstitutional pretrial

detentions.[41] The convention obliged by significantly limiting the use of grand juries under the new Constitution (substituting them with prosecutions on information rather than indictment).[42] Thus, rather than confirming the propriety of pretrial detentions based on indigency, the delegate was in fact lamenting that grand jury practice had developed in a way that was illegally "depriving men of their liberty."[43] Outrage at this state of affairs motivated legislators to maintain the clause requiring that "all persons shall be bailable by sufficient sureties unless for capital offenses when the facts are evident or the presumption great," while limiting the grand jury practices that had led to its abuse. In citing this historical interlude to support the imposition of unaffordable bail, the Court of Appeal interpreted it precisely backwards.

As explained above, California's right to bail was always intended to protect pretrial liberty even for those with limited means. The convention recognized that those who are "poor and unable to give bail" should not lose their fundamental right to pretrial liberty. The Court should bear in mind this historical context when interpreting Section 12.

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[41] 1 Willis & Stockton, Debates and Proceedings, Cal. Const. Convention 1878–1879 (1880), at 317.

[42] *See* CAL. CONST. (1879), art. I, § 8.

[43] 1 Willis & Stockton, *supra* note 41, at 317.

CONCLUSION

This Court is tasked with deciding, among other things, whether unaffordable bail violates the right to "release[] on bail by sufficient sureties" in Section 12 of California's constitution. While history alone cannot provide a definitive answer to that question, it is a crucial piece of the puzzle. Both the founding-era history of the American right to bail and the California-specific history reveal that the modern-day cash bail system has diverged dramatically from the vision of the founders who crafted it. "Bail by sufficient sureties" meant liberty secured by the pledge of guarantors who had sufficient status in the community to make the pledge credible. It did not require any upfront cash transfer. And the right to bail by sufficient sureties was intended to function as a right to release for even the poorest accused person, so long as he had one or more reputable friends to vouch for him. To interpret the right to bail "by sufficient sureties" to permit unaffordable cash bail demands would risk undermining the broad right to pretrial liberty that the "dissenter" model sought to protect.

We therefore urge the Court to (1) affirm the Court of Appeal's conclusion that Section 12 protects a general right to pretrial release on bail and (2) reverse the Court of Appeal's decision to the extent that it allows discretion to set an unaffordable bail.

Dated: November 8, 2023

Respectfully submitted,

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Dated: November 8, 2023

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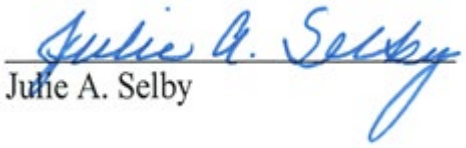

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Date

/s/Julie Selby

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