IN THE SUPREME COURT OF CALIFORNIA

In re GERALD KOWALCZYK, On Habeas Corpus.	Case No.: S277910

OPENING BRIEF ON THE MERITS

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

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IN THE SUPREME COURT OF CALIFORNIA

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TO THE HONORABLE PATRICIA GUERRERO, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, Gerald Kowalczyk, respectfully submits this Opening Brief on the Merits following review ordered on petitioner's motion.

ISSUES ON REVIEW

In the Order of Review, the Court limited the issues to be briefed and argued as follows:

(1) Which constitutional provision governs the denial of bail in noncapital cases - article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution - or, in the alternative, can these provisions be reconciled?

(2) May a superior court ever set pretrial bail above an arrestee's ability to pay?

INTRODUCTION

Petitioner, Gerald Kowalczyk, an unhoused, disabled man, was first detained on unaffordable bail of $75,000 for trying to buy a hamburger using found credit cards belonging to other people. After asking the superior court to reduce his bail to an affordable amount, he was ordered held without bail. Whether his pretrial detention was lawful on a non-violent, non-serious felony matter is the issue before this Court.

Three features of California law set forth the parameters of pretrial detention in the state: article I, section 12 of the state constitution, providing that "[a] person *shall* be released on bail by sufficient sureties" unless subject to three limited exceptions (Cal. Const., art. I, § 12, *emphasis added*); article I, section 28, subdivision (f)(3), providing that "[a] person *may* be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great" and directing the court to primarily consider "[p]ublic safety and the safety of the victim" in bail determinations (Cal. Const., art. I, § 28, subd. (f)(3), *emphasis added*); and *In re Humphrey* (2021) 11 Cal.5th 135, 154, holding that "unless there is a valid basis for detention—[a court must] set bail at a level the arrestee can reasonably afford."

This Court asked the Court of Appeal to decide which California constitutional provision regarding bail controls, article I, section 12

(hereinafter "section 12") or article I, section 28, subdivision (f)(3) (hereinafter "section 28(f)(3)"), or, alternatively, whether the two provisions can be reconciled. The lower court correctly held that the two provisions can be reconciled, with section 12's general right to bail remaining intact and section 28(f)(3) providing additional factors for courts to consider, as well as listing the rights of crime victims at bail-related hearings. (*In re Kowalczyk* (2022) 85 Cal.App.5th 667, 691.) The Court of Appeal went a step further, however, giving trial courts and prosecutors an escape hatch from the restrictions of section 12. It held that in cases where a formal order of pretrial detention is unavailable, trial courts can issue an unaffordable cash bail order, so long as certain findings are made, accomplishing the functional equivalent of pretrial detention. (*Id*. at pp. 691-692.) This is contrary to the Second District's opinion in *In re Brown* (2022) 76 Cal.App.5th 296, 299, which held that, when a trial court finds that pretrial detention is necessary, the court's only option is to issue an order of detention and it may not "make continued detention depend on the arrestee's financial condition." (*Kowalczyk, supra*, at p. 690 [acknowledging the split in authority.])

This escape hatch is not only prohibited by law, it defies the principles that have guided California's right to release on bail since its inception. First, the use of unaffordable bail undermines the principles

Humphrey relied on, particularly fairness and transparency in pretrial detention decisions, and its mandate that detention comply with constitutional provisions specifically addressing bail. Second, section 12 prohibits the intentional and strategic use of bail as the equivalent of an order of pretrial detention. Third, the use of unaffordable bail as a means to detain violates the guarantee of equal protection under the law. Last, expanding the use of pretrial detention in the manner suggested by the Court of Appeal violates the fundamental constitutional principle that liberty is the norm and pretrial detention the careflully limited exception.

Therefore, to address the questions posed by this Court: sections 12 and 28(f)(3) may be harmonized, with section 12 providing the exclusive circumstances where pretrial detention may be ordered and section 28(f)(3) providing additional mandatory considerations in making bail and detention decisions; and a trial court may not set bail in an amount beyond an arrestee's ability to afford.

FACTUAL AND PROCEDURAL HISTORY[1]

I. STATEMENT OF FACTS

In January of 2021, Gerald Kowalczyk, a 55-year-old, disabled

[1] Petitioner draws the relevant facts and procedural history from the Court of Appeal opinion, as well as his Petition for Writ of Habeas Corpus and subsequent briefing. Petitioner filed a Petition for Rehearing with the Court of Appeal, calling attention to omissions and misstatements of fact. (Rules of Court, rule 8.500(c)(2).)

unhoused man, allegedly ordered a hamburger from a fast food restaurant in San Mateo County. (Petition for Writ of Habeas Corpus [hereinafter "Pet."] Exh. D, p. 16; Exh. H, p. 69; Exh. L, p. 125.) He attempted to pay with six different credit cards—three of which belonged to other people. (Pet. Exh. H, pp. 69, 73-74.) Mr. Kowalczyk had found the three cards after their owners accidentally left them in gas stations around San Mateo months before. (Pet. Exh. F, p. 36; Exh. H, pp. 73-74, 78, 86-87; Exh. L, p. 126.) After purchasing the hamburger, he discarded all six cards, told the restaurant's manager he had changed his mind and asked that the charge be refunded. (Pet. Exh. H, pp. 69, 72.) The manager refused, and Mr. Kowalczyk left without taking the hamburger. (*Id*. at p. 79.)

II. STATEMENT OF THE CASE

A. Trial Court Proceedings

In an April 2021 complaint, Mr. Kowalczyk was charged with one felony count of vandalism (Pen. Code, § 594, subd. (b)(1)), three felony counts of identity theft (Pen. Code, § 530.5, subd. (a))—one for each swipe of a credit card—one misdemeanor count of petty theft of lost property (Pen. Code, § 485), and one misdemeanor count of theft of identifying information (Pen. Code, § 530.5, subd. (c)(1)). (Pet. Exh. B, pp. 7-9.) At arraignment, the superior court imposed bail in the amount of $75,000. (Pet. Exh. C, pp. 12-13.) Mr. Kowalczyk remained in custody because he

could not afford to pay the $75,000.

On May 4, 2021, Mr. Kowalczyk filed a motion in the superior court asking to be released on his own recognizance or to have his bail reduced to an amount he could afford. (Pet. Exh. D, p. 15.) At the hearing on the motion on May 6, 2021, the prosecution asked the trial court to leave Mr. Kowalczyk's bail at $75,000, but did not request that he be held without bail. (Pet. Exh. F, pp. 28-30.)

Mr. Kowalczyk argued that there was no evidence that he presented a risk of flight or a threat of violence to the community and proposed less restrictive alternatives to incarceration, such as drug testing and reporting to Pretrial Services. (Pet. Exh. F, p. 31; Exh. D, p. 19.) He also told the court that he had a surgery scheduled for later in the month, which he would miss if he remained in custody. (Pet. Exh. F, pp. 32-33.) Mr. Kowalczyk was suffering from a cyst along his jawline that rendered him deaf in one ear, and the procedure had already been delayed for months due to the COVID-19 pandemic. (Pet. Exh. H, pp. 93-94.) The trial court nonetheless ordered Mr. Kowalczyk detained without bail, reasoning that property crimes posed a public safety issue and that Mr. Kowalczyk had a lengthy criminal history, albeit primarily for non-violent theft and drug-related offenses. (Pet. Exh. F, at pp. 30-31, 34-36.)

At Mr. Kowalczyk's May 11, 2021 preliminary hearing, the

vandalism charge was discharged for lack of sufficient evidence. (Pet. Exh. H, p. 92.) After the dismissal of the vandalism charge, Mr. Kowalczyk again asked the trial court to release him on affordable bail or appropriate conditions of release. (*Id*. at pp. 93-94.) The court rejected that request. (*Id*. at pp. 96-97.) Six days later, the prosecution filed an information alleging an additional sentencing enhancement—a prior strike offense (Pen. Code, § 1170.12, subd. (c)(1))—potentially doubling Mr. Kowalczyk's sentencing exposure. (Pet. Exh. A, pp. 2-5.)

Mr. Kowalczyk petitioned the trial court once more for his pretrial release on June 15, 2021. (Pet. Exh. I, pp. 100-106.) At that hearing, the trial court found that Mr. Kowalzyk presented no threat to public safety but nevertheless left the detention order in place. (Pet. Exh. L, pp. 126, 128.)

On July 6, 2021, Mr. Kowalczyk filed a habeas petition in the First District Court of Appeal challenging his detention. While the petition was pending, Mr. Kowalczyk accepted a plea deal to a single misdemeanor count of theft of identifying information (Pen. Code, § 530.5, subd. (c)(1)), which allowed for his immediate release from custody. (Petitioner's Supplemental Traverse [hereinafter "Supp. Traverse"] Exh. Y, pp. 3-6.)

In all, Mr. Kowalczyk spent six months detained before trial: the statutory maximum period of incarceration for the misdemeanor of which he was ultimately convicted. (Supp. Traverse Exh. Y, pp. 3-6; Pen. Code §

530.5, subd. (c)(1).) He was not placed on probation and was not subject to any restrictions upon his release. (Supp. Travere Exh. Y, pp. 4-6.) During his pretrial detention, Mr. Kowalczyk missed appointments with the Department of Housing that were meant to address his homelessness and he missed the long-awaited surgery to restore his hearing. (Pet. Exh. H pp. 81, 93-94.)

B. Appellate Proceedings

On habeas, Mr. Kowalczyk argued that the superior court erred in detaining him because he was charged only with nonviolent offenses. He further argued that the first judge had erred in relying on the prosecution's contested proffers to make a finding that he posed a danger by the clear and convincing evidentiary standard articulated in *Humphrey*, *supra*, 11 Cal.5th 135, and section 12 of the California Constitution. (Pet., p. 2.)

On March 11, 2022, the Court of Appeal dismissed Mr. Kowalczyk's petition as moot, citing that he was no longer in pretrial custody and many of the legal questions raised in his petition had been decided in a separate case, *In re Harris* (2021) 71 Cal.App.5th 1085 (review granted Mar. 10, 2022.) (Order Dismissing Pet. (Mar. 11, 2022) *In re Kowalczyk,* A162977.)

On April 20, 2022, Mr. Kowalczyk filed a petition for review in this Court asking it to decide an unresolved question of law presented by his

detention: may someone be detained pretrial if the circumstances render them ineligible for pretrial detention under article I, section 12 of the California Constitution? (Petition for Review, p. 5.)

On June 22, 2022, this Court granted the petition for review and directed the Court of Appeal to "issue an opinion that addresses which constitutional provision governs the denial of bail in noncapital cases - article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution – or, in the alternative, whether these provisions can be reconciled." (Order Granting Pet. for Rev. (June 22, 2022) *Kowalczyk (Gerald John) on H.C.,* S274181.)

The Court of Appeal issued its opinion on November 21, 2022, holding that section 12 and section 28(f)(3) can be harmonized, with section 12 outlining the exclusive circumstances in which someone can be ordered detained pretrial. (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 691.) But the Court of Appeal went beyond this Court's grant of review, holding that trial courts may bypass section 12's enumerated exceptions and evidentiary requirements, so long as the court makes the findings justifying detention required by *Humphrey*. (*Id*. at pp. 691-692.)

This second question—when and whether courts could set unaffordable money bail—was not presented on this Court's transfer, nor briefed by either party. Rather, eighteen days before oral argument, the

Court of Appeal sent a focus letter, asking both parties to address several questions, including whether "there [are] circumstances where the court may, after making the findings *Humphrey* requires for a detention order, set bail at an amount the defendant cannot afford?" (Memorandum to Counsel (Oct. 13, 2022).) The Court of Appeal's opinion answering this question in the affirmative created a split in authority with the Second District Court of Appeal, which held in *Brown, supra,* 76 Cal.App.5th 296, that trial courts could never require an unaffordable amount of cash bail as a condition of a person's pretrial release.

On December 6, 2022, petitioner filed a Petition for Rehearing in the Court of Appeal to address the opinion's misstatements and omissions of fact concerning Mr. Kowalczyk's case, including the allegations underlying Mr. Kowalczyk's charges and the basis for the superior court's detention order. (Pet. for Rehearing; Rules of Court, rule 8.500(c)(2).) The court denied the petition two days later. (Order Denying Pet. for Rehearing (Dec. 8, 2022).)

On December 30, 2022, petitioner filed a Petition for Review in this Court, which was granted on March 15, 2023. (Order granting Pet. for Rev. (Mar. 3, 2023).)

III. BACKGROUND ON CALIFORNIA LAW CONCERNING PRETRIAL DETENTION

At issue in this case are two constitutional provisions relating to bail:

article I, section 12 and article I, section 28(f)(3). The history of their enactment, as well as their interaction with *Humphrey*, *supra*, 11 Cal.5th 135, is critical to showing whether and how these two provisions can be harmonized. Accordingly, petitioner sets forth the relevant information here.

A. Article I, Section 12 of the California Constitution

Unlike the federal constitution, the California Constitution explicitly recognizes the right to pretrial release on bail in noncapital cases. That provision has existed since the constitution was first adopted in 1849 and has been sparingly amended only three times over the past 174 years. It is now enshrined in section 12, which provides, in relevant part, that:

> A person shall be released on bail by sufficient sureties, except for:
>
> (a) Capital crimes when the facts are evident or the presumption great;
>
> (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or
>
> (c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

(Cal. Const. art I, § 12.)

Both the original 1849 constitution and the version ratified in 1879 required that "all persons shall be bailable by sufficient sureties unless for capital offenses when the facts are evident or the presumption great." (Cal. Const. of 1849, art. I, § 7; Cal. Const. of 1879, art. I, § 6.) In 1974, voters adopted a proposition amending the phrase "shall be bailable by sufficient sureties unless" to "shall be released on bail by sufficient sureties except" and renumbered the provision as article I, section 12. (Ballot Pamp. (1974) text of Prop. 7, p. 71.)[2]

California voters have twice narrowed this constitutional right to pretrial release. In 1982, voters adopted Proposition 4, a ballot initiative which added clauses (b) and (c) to section 12, excluding felonies involving violence or the threat of violence from the right to pretrial release on bail when a judge makes additional findings concerning the person's guilt and future dangerousness. (Prop. 4, as approved by voters, Prim. Elec. (Jun. 8, 1982); California Proposition 4, Rules Governing Bail (June 1982), Ballotpedia.)[3] In 1994, the voters again amended section 12 via Proposition 189, which added felony sexual offenses to the list of offenses for which courts could deny bail after making the same requisite findings. (Prop. 189,

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[2] Available at <https://repository.uclawsf.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1789&context=ca_ballot_props/>.
[3] Available at <https://ballotpedia.org/California_Proposition_4,_Rules_Governing_Bail_(June_1982)>.

as approved by voters, Gen. Elect. (Nov. 8, 1994); Petitioner's Additional Brief [hereinafter "Pet. Add'l Brief"] Exh. B, p. 28.)

The ballot materials accompanying both Proposition 4 and Proposition 189 repeatedly emphasized that the provision would narrow the longstanding right to release on bail. (Ballot Pamp. (1982) Prop. 4 official title and summary & analysis by the leg. analyst, p. 16;[4] Pet. Add'l Brief Exh. A, pp. 6-9; Exh. B, p. 22; e.g. the Legislative Analyst's statement that the Proposition 4 initiative "would broaden the circumstances under which bail could be denied"; the Attorney General's summary stating that Proposition 189 would "add felony sexual assault to crimes excepted from right to bail. . .") There have been no amendments to section 12 since 1994.

B. Article I, Section 28(f)(3) of the California Constitution

1. In 1982, Voters Considered Proposition 8

In 1982, the same year that voters passed Proposition 4 adding sections (b) and (c) to section 12, they also considered a competing initiative, Proposition 8, which would have repealed section 12 entirely. (Prop. 8, as approved by voters, Prim. Elec. (Jun. 8, 1982).) The proposition also would have "made release on bail permissive rather than mandatory and enacted the language that is presently found in section

[4] Available at <https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1917&context=ca_ballot_props>.

28(f)(3), including making public safety 'the primary consideration' in 'setting, reducing or denying bail.'" (*In re Humphrey* (2018) 19 Cal.App.5th 1006, 1047, fn. 28, approved in part (Cal. 2020) 472 P.3d 435, and affd. (2021) 11 Cal.5th 135 [hereinafter "*Humphrey (2018)*".]) The section concerning bail was article I, section 28, subdivision (e) (hereinafter "section 28(e)".)

The text of Proposition 8 demonstrated it would repeal section 12 by placing that section in strike-through type. (Pet. Add'l Brief Exh. A, p. 11.) Such strikethroughs are required by state election law to inform voters which changes to existing law are being proposed for their consideration. (See Elec. Code, § 9086, subd. (f).)

The analysis from the Legislative Analyst explained that the existing state constitutional right to release on bail was contained in section 12 and that Proposition 8 would abrogate that right by repealing section 12 and "amend[ing] the State Constitution to give the courts discretion in deciding whether to grant bail." (Pet. Add'l Brief Exh. A, pp. 11, 14.) The rebuttal to the argument for Proposition 8, authored by its opponents, was more succinct: "CONSIDER THESE EFFECTS OF PROPOSITION 8: Takes away everyone's right to bail." (*Id.* at p. 12.)

Ultimately, both competing initiatives—Proposition 8 and Proposition 4—passed. Because Proposition 4 received significantly

more votes than Proposition 8, the California Supreme Court concluded that the provisions of section 28 concerning bail were preempted by the amendments to section 12.[5] (*In re York* (1995) 9 Cal.4th 1133, fn. 4; *People v. Standish* (2006) 38 Cal.4th 858, 874-878.) Accordingly, "the amendments to article I, section 12 proposed by Proposition 4 took effect" and the provisions of section 28(e) never took effect and were inoperative. (*Standish, supra,* at pp. 877-878.)

2. In 2008, Proposition 9 Amended the Inoperative Bail Provisions of Proposition 8

In 2008, voters approved Proposition 9 (also known as Victim's Bill of Rights: Marsy's Law), which expanded the rights of crime victims and their families, restricted early release of convicted state prisoners, and changed the procedures for granting and revoking parole. (Prop. 9, as approved by voters, Gen. Elec. (Nov. 4, 2008); Pet. Add'l Brief Ex. C, pp. 35-45.) Proposition 9 also made minor changes to section 28(e), the provision that the California Supreme Court had held inoperative in *York* and *Standish*. (Pet. Add'l Brief Exh. C, p. 43.)

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[5] The voters approved Proposition 4 overwhelmingly, with almost 83% of the vote, in 1982. (California Proposition 4, Rules Governing Bail (June 1982), Ballotpedia.) In contrast, Proposition 8 received about 56% of the vote. (California Proposition 8, Victims' Bill of Rights (June 1982), Ballotpedia, available at < https://ballotpedia.org/California_Proposition_8,_Changes_to_Criminal_Proceedings_Initiative_(June_1982)>.)

Before settling on the final version of Proposition 9 in 2008, its proponents submitted four alternative versions of the initiative to the Attorney General. (See Pet. Add'l Brief Exh. D, pp. 59-94.) Unlike the version that prevailed, all of them were explicit in their intent to repeal section 12. In these versions, the repeal of section 12 was indicated by placing its text in strike-through type. (*Id*. at pp. 64, 73, 82, 90-91; Elec. Code, § 9086, subd. (f).)

In addition, in the first three versions, the drafters proposed more changes to section 28(e), broadly expanding the prohibition on own recognizance release. (Pet. Add'l Brief Exh. D, pp. 59-85.) In each iteration, *all* of the language in the 1982 version of section 28(e) that the Supreme Court had held inoperative was also set in strike-through type, indicating its removal. (*Ibid.*) The same language was then included in the proposed section 28(f) and set in italicized type, indicating that the text would be new content in the Constitution. (*Ibid.*; Pet. Add'l Brief Exh. C, p. 41 ["New provisions proposed to be added are printed in *italic type* to indicate that they are new."]) The fourth version submitted to the Attorney General largely mirrored the final version that became Proposition 9 except that the fourth version also explicitly repealed section 12 (by setting it in strike-through type) and retained the prohibition on own-recognizance release for people charged with serious felonies that appeared in section

28(e). (Pet. Add'l Brief Exh. D, pp. 88-94.)

Eventually, the proponents submitted a fifth version. This version removed the strikethrough of section 12's text, and, rather than italicizing the entirety of the language the Supreme Court held inoperative, italicized only the newly added portions of that section relating to consideration of victim safety and notice to victims of bail hearing:

> ~~e)~~ *(3)* Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. 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 ~~consideration~~ *considerations*.
>
> A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. ~~However, no person charged with the commission of any serious felony shall be released on his or her own recognizance.~~
>
> Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney *and the victim* shall be given notice and reasonable opportunity to be heard on the matter.
>
> When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the

record and included in the court's minutes.

(Pet. Add'l Brief Exh. C, p. 43.)

Of all of the versions, only the fifth version, Proposal 07-0100, qualified for the ballot and went to the voters as Proposition 9. (Pet. Add'l Brief Exh. D, pp. 95-102, Exh. 139-140, 143.) The materials accompanying Proposition 9 did not inform voters that section 28(e) was inoperative law. Unlike the ballot materials for Propositions 4, 8, and 189, which proposed narrowing or repealing the right to pretrial release, the Proposition 9 materials focused primarily on the rights of crime victims and post-conviction issues, making no mention of altering or curtailing the existing constitutional right to pretrial release. (Pet. Add'l Brief Exh. C, pp. 34-40.)

In the voluminous ballot materials, bail was scarcely mentioned at all. According to the Legislative Analyst's overview of the measure, the main outcomes of Proposition 9 would be to: "(1) expand the legal rights of crime victims and the payment of restitution by criminal offenders, (2) restrict the early release of inmates, and (3) change the procedures for granting and revoking parole." (Pet. Add'l Brief Exh. C, p. 35.) The analysis only mentioned bail when informing the voters that the initiative would require courts to consider victim safety when making pretrial release decisions and ensure that victims be given notice of bail hearings. (*Id.* at pp. 35-38.) There was no reference to section 12, to eliminating the right to

pretrial release on bail, or to any proposed expansion of the state's authority to detain people pretrial. (*Ibid*.)[6]

In the four pages of Proposition 9's ballot summary and analysis, there are only four one-sentence references to bail: two indicating that the initiative will ensure that victim safety is considered in pretrial bail decisions, and two indicating that the initiative will ensure that victims are notified of pretrial bail proceedings. (Pet. Add'l Brief Ex. C, pp. 35-38.) The Legislative Analyst's discussion of "Fiscal Effects" did not mention expanded eligibility for pretrial detention or its anticipated costs, unlike with Propositions 4 and 8 in 1982 or Proposition 189 in 1994. (*Id*. at pp. 37-38.) In fact, its only reference to bail or pretrial detention was to state that counties may respond to Proposition 9's early release restrictions by "*decreasing* the use of pretrial detention of suspects." (*Id.* at p. 38, *emphasis added*.)

It was only in the course of the *Humphrey* litigation that the government first claimed that Proposition 9 had implicitly repealed section 12. (*Humphrey (2018), supra*, 19 Cal.App.5th at p. 1047.) This new construction was a response to the anticipated impact of *Humphrey*, which held that "[t]he common practice conditioning freedom solely on whether an arrestee can afford bail is unconstitutional." (*Humphrey, supra*, 11

[6] The same is true for the summary prepared by the Attorney General. (Pet. Add'l Brief Exh. C, p. 35.)

Cal.5th at p. 143.) With this "common practice" of wealth-based detentions no longer available, the focus shifted to the limits of pretrial detention under sections 12 and 28(f)(3).

ARGUMENT

Personal liberty is "a fundamental interest second only to life itself in terms of constitutional importance." (*Van Atta v. Scott* (1980) 27 Cal.3d 424, 435.) Since it was first enacted in 1849, the California Constitution has provided an "absolute right to bail." (*In re White* (2020) 9 Cal.5th 455, 457, citing *In re Law* (1973) 10 Cal.3d 21, 25.) That right, now enshrined in section 12, limits pretrial detention in noncapital cases to certain felonies involving violence, sexual assault, or threats of violence, where evidentiary requirements are met, and guarantees to all other defendants the right to "be released on bail by sufficient sureties." (Cal. Const., art. I, § 12.) This "absolute" right to pretrial release outside the listed exceptions of section 12 is a vital safeguard of that liberty interest. Petitioner contends that section 12's guarantee of release on bail is just that—the right to *release*—and should not be interpreted to allow for intentional pretrial detention through unaffordable bail.

Here, petitioner answers the two questions posed by this Court. Section I answers the first question, finding that sections 12 and 28(f)(3) may be reconciled, with section 12 providing the exclusive circumstances

when pretrial detention may be ordered and section 28(f)(3) providing additional criteria for a court to consider. Sections II-V address the second question and conclude that trial courts may not set bail in an amount above an arrestee's ability to pay for four primary reasons: first, *Humphrey* requires that orders resulting in detention be issued transparently, fairly and in compliance with constitutional provisions addressing bail; second, section 12 prohibits the use of unaffordable bail as a means to intentionally detain; third, the guarantee of equal protection prohibits intentional detention via unaffordable bail; and fourth, expanding detention beyond section 12's limits offends the foundational principle that liberty is the norm and pretrial detention the limited exception.

I. SECTION 12 CONTROLS THE DENIAL OF BAIL, WHILE SECTION 28(f)(3) SETS FORTH ADDITIONAL CRITERIA FOR TRIAL COURTS TO CONSIDER.

There is a strong presumption against implied repeal. As this Court has previously concluded, "[i]t would be unusual in the extreme for the people, exercising legislative power by way of initiative, to adopt … a fundamental change only by way of implication." (*California Redevelopment Assn v. Matosantos* (2011) 53 Cal.4th 231, 260-261; see also *In re Christian S.* (1994) 7 Cal.4th 768, 782 [similar reasoning regarding the state legislature]; *Wiseman Park, LLC v. Southern Glazer's Wine & Spirits, LLC* (2017) 16 Cal.App.5th 110, 122 [rejecting a claim that

a proposition had implicitly repealed a "fundamental part of our system of jurisprudence."])

In this case, the Court of Appeal correctly rejected the argument that Proposition 9 silently repealed section 12 and replaced it with section 28(f)(3), rendering the denial of bail discretionary in every case. (*Kowalczyk, supra*, 85 Cal.App.5th at pp. 684-685.) As a general rule, one constitutional provision should not be construed to effect the implied repeal of another constitutional provision. (*City & Cty. of San Francisco v. Cty. of San Mateo* (1995) 10 Cal.4th 554, 563.) The presumption against implied repeal is so strong that no California court has ever found an implied repeal of a constitutional provision—let alone one that concerns a fundamental right enshrined in the state constitution since California's founding.

Because of the strong presumption against implied repeal, it is effectuated only if (1) the later-enacted provision provides "*undebatable* evidence of an intent to supersede the earlier" and (2) the two provisions are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." (*Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419-420, *emphasis added*.) Neither prong is met here. First, there is no evidence that, in passing Proposition 9, voters intended to repeal section 12 or expand pretrial detention. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 684.) Second, sections 12 and

28(f)(3) can be harmonized, with full effect given to both section 12's absolute right to release on bail and the requirements in section 28(f)(3) concerning victim notice and the court's consideration of victim and public safety in all pretrial release determinations. (*Id.* at p. 685.)

A. Voters Did Not Intend to Expand Preventive Detention in Enacting Proposition 9.

There is no evidence that voters intended section 28(f)(3) to expand the state's preventive detention authority, let alone repeal section 12. Nothing in either the text of Proposition 9 or the election materials informed voters that by adding victim safety as a consideration in determining pretrial release and notifying victims of bail hearings, they would be *eliminating* the constitutional right to pretrial release and replacing it with a broad grant of authority to courts to order preventive detention in any case, no matter how minor. According to the Legislative Analyst's overview of the measure, the main outcomes of Proposition 9 would be to: "(1) expand the legal rights of crime victims and the payment of restitution by criminal offenders, (2) restrict the early release of inmates, and (3) change the procedures for granting and revoking parole." (Pet. Add'l Brief Exh. C, p. 35.) The small part of the ballot summary and analysis that mentioned bail simply informed the voters that the initiative would require courts to consider victim safety when making pretrial release decisions and ensure that victims be given notice of bail hearings. (*Id.* at

pp. 35-38.) There was no reference to section 12, to eliminating the right to pretrial release on bail, or to any proposed expansions to preventive detention.[7] (*Ibid*.)

The Title and Summary and Analysis which accompany ballot materials are statutorily-imposed requirements designed to "educate voters about the effect of proposed initiatives and to protect them from being misled or confused." (*People v. Valencia* (2017) 3 Cal.5th 347, 375.) These ballot descriptions are critical to determining voter intent, because "as a practical matter, voters often rely on the experts employed by the Attorney General and the Legislative Analyst to summarize proposed initiatives to discuss their significant effects." (*Id.* at p. 384 [concurrence, Kruger, J.]) Although a ballot pamphlet is not expected to explain every aspect of an initiative, where the matter is one of "substantial import," the "voters could reasonably expect that . . . the ballot materials would mention it." (*Id.* at p. 364, fn. 6; see also *Giles v. Horn* (2002) 100 Cal.App.4th 206, 225–26 ["It is extremely unlikely that such as a major limitation on [a part of the law] would be added . . . without any discussion in the ballot pamphlet."])

The complete omission from the ballot materials of what would

[7] The same is true for the summary prepared by the Attorney General and the arguments for and against the proposition prepared by its proponents and opponents. (Pet. Add'l Brief Exh. C, p. 35.)

otherwise have been a key provision in the initiative—the expansion of the California's preventive detention authority—"suggests no such change was contemplated." (*Valencia*, *supra*, 3 Cal.5th at p. 371 [finding that the failure of Proposition 47's Title and Summary to mention the Three Strikes Reform Act, indicated that the voters did not intend to apply the dangerousness standard for resentencing under Proposition 47 to resentencing under the Three Strikes Reform Act]; See *Legislature v. Eu* (1991) 54 Cal.3d 492, 504-505 [reaffirming the Court's view that the ballot materials' arguments for and against an initiative are important "indicia of the voters' intent other than the language of the provision itself."])

The lack of any evidence of intent to expand the State's detention authority in the Proposition 9 ballot pamphlet materials is all the more stark when compared to those of Propositions 4, 8, and 189. The Title and Summary and Analysis for each of those initiatives told the voters explicitly about the existing constitutional right to pretrial release and that the initiative proposed to alter—or, in the case of Proposition 8, repeal—that right. (Ballot Pamp. (1982) Prop. 4 official title and summary & analysis by the leg. analyst; Pet. Add'l Brief Exhs. A, pp. 6-11; B, pp. 24-25; .) So did the arguments for and against each proposition. (Pet. Add'l Brief Exhs. A, pp. 8-9; B, pp. 26-27; Ballot Pamp. (1982) Prop. 4 arguments in favor and against, pp. 18-19.) In each case, the Legislative

Analyst's financial assessment had also included the increased cost of housing people pretrial that would accompany an increase in the state's preventive detention authority. (Pet. Add'l Brief Exhs. A, p. 6; B, p. 24; Ballot Pamp. (1982) Prop. 4 official title and summary & analysis by the leg. analyst, p. 16.) Proposition 9's materials did none of these things. If Proposition 9's potential expansion of the State's detention authority was opaque to everyone who prepared the ballot materials, it was "almost certainly opaque to the average voter as well." (*Valencia*, *supra*, 3 Cal.5th at p. 372.) Simply put: there is not "undebatable evidence" of the voter's intent to supersede section 12 because voters were never told they were being asked to do so.

B. Sections 12 and 28(f)(3) Can Easily Be Harmonized.

The second prong of the implied repeal analysis likewise fails. Far from being "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation," sections 12 and 28(f)(3) can easily be harmonized. (*Western Oil & Gas Assn. Unified Air Pollution Control Dist. v. Monterey Bay* (1989) 49 Cal.3d 408, 419.)

The substance of section 28(f)(3) differs from the substance of section 12 in just four ways: it includes the phrase carried over from the defunct section 28(e) stating that a person "may" be released on bail in noncapital cases where certain other requirements are met; it requires courts

to provide notice and an opportunity to be heard to victims before certain bail hearings; it makes victim safety and public safety factors which the court must consider when making pretrial release determinations; and it directs that victim safety and public safety must be the court's primary considerations when making pretrial release considerations. (Cal. Const., art. I, § 28, subd. (f)(3).)

The only potential conflict between the two provisions is found in 28(f)(3)'s first phrase—"[a] person *may* be released on bail . . ." in noncapital cases. If "may" is read as permissive, this could be interpreted to mean that there is no right to release on bail in any noncapital case. (Cal. Const., art. I, § 28, subd. (f)(3), *emphasis added*.) Section 12, in contrast, requires that all persons "*shall* be released on bail . . .", unless a court finds their case falls into one of the narrow listed categories. (Cal. Const., art. I, § 12, *emphasis added*.)

As the *Kowalczyk* Court explained, however,

> "May" is a term that also refers to an expression of possibility. Given the fact that section 12 was fully operative when Proposition 9 was presented to the voters and approved, the most natural reading of section 28(f)(3)'s phrase '[a] person *may* be released on bail by sufficient sureties' is that the phrase is a declarative statement of existing law. That is, the phrase acknowledges that a person may or not be released on bail, consistent with the dictates of section 12.

(*Kowalczyk, supra*, 85 Cal.App.5th at pp. 683-684, *emphasis in original* [internal citations omitted.]) Under this reading, section 28(f)(3) does not vest courts with any additional authority to detain outside the confines of section 12; it simply broadly restates the right to bail contained in section 12 and sets forth additional factors—victim safety and public safety—for the court to consider in making pretrial release determinations, and makes those considerations primary.

The process for determining release under these harmonized provisions would be as follows: first, the court must determine if the defendant is eligible for detention under section 12. Second, if the defendant is eligible, the court considers the factors in section 12: "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." The court must also consider the additional factors set forth in section 28(f)(3): "the protection of the public" and "the safety of the victim," which shall be the "primary considerations," before determining whether detention is appropriate. Third, the court should evaluate whether any conditions of release could address such concerns, and ensure that the detention otherwise complies with due process. (*Humphrey, supra,* 11 Cal.5th at pp. 151-152, 155.)

If a court cannot make the requisite findings justifying a detention

under section 12, then the person may not be detained before trial and must be released on their own recognizance or on conditions that are reasonably necessary to assure public safety and the person's future appearance in court.

II. USING UNAFFORDABLE BAIL AS A DE FACTO DETENTION ORDER IS INCONSISTENT WITH THE PRINCIPLES UNDERLYING *HUMPHREY*.

Two years ago, this Court held that detaining an arrestee pretrial solely because of his inability to afford bail is unconstitutional. (*Humphrey, supra*, 11 Cal.5th at p. 143.) In so holding, this Court "undertook a fundamental reexamination of the use of money bail as a means of pretrial detention." (*In re Brown* (2022) 76 Cal.App.5th 296, 303.) It also affirmed that pretrial detention should be reserved for "narrow" and "unusual" circumstances where "the need to protect community safety may conflict with the arrestee's fundamental right to pretrial liberty . . . to such an extent that no option other than refusing pretrial release" would be sufficient to protect those interests. (*Humphrey, supra,* at p. 143.)

In *Humphrey*, this Court laid out the constitutional framework for imposing an order of pretrial detention. In order to detain an arrestee, a court must first find by clear and convincing evidence that the defendant poses a risk of harm based on "an identified and articulable threat to an

individual or the community," or presents a flight risk.[8] (*Humphrey, supra,* 11 Cal.5th. at p. 153, quoting *United States v. Salerno* (1987) 481 U.S. 739, 751.) Second, a court must "consider whether nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial." (*Humphrey, supra,* 11 Cal.5th at p. 154.) Third, detention can be ordered only when a court finds, "by clear and convincing evidence that no other conditions of release could reasonably protect those interests." (*Ibid*.)

Finally, *Humphrey* holds that even when the court's bail determination complies with the above requirements, "the court must still consider whether the deprivation of liberty caused by an order of pretrial detention is consistent with state statutory and constitutional law specifically addressing bail . . . and with due process." (*Humphrey, supra,* 11 Cal.5th at p. 155.) The *Kowalczyk* Court's holding undermines the founding principles of *Humphrey* and violates its requirement that orders resulting in detention comply with constitutional provisions specifically addressing bail.

A. *Humphrey* Emphasized Fairness and Transparency in Pretrial Detention Orders.

Humphrey emphasized the importance of fairness and transparency

[8] *Humphrey* did not decide whether "risk of nonappearance or flight alone, divorced from public and victim safety concerns" could justify pretrial detention. (*Humphrey, supra*, 11 Cal.5th at p. 153, fn. 6.)

in pretrial detention decision-making. It requires that an arrestee be detained "in a fair manner" and that courts be explicit regarding the reasons for detention to "facilitate review of the detention order, guard against careless or rote decisionmaking, and promote public confidence in the judicial process." (*Humphrey, supra,* 11 Cal.5th at pp. 155-156.)

In 2022, the Second District Court of Appeal affirmed this focus on fairness and transparency in *In re Brown, supra*, 76 Cal.App.5th 296. The *Brown* Court rejected the trial court's attempt to detain the defendant through the imposition of a $2.45 million in bail order. (*Id.* at p. 299-300.) The court held that, if conditions of release are insufficient to protect the state's interest, "the trial court's *only* option is to order pretrial detention, assuming the evidentiary record is sufficient to support the findings necessary to justify such an order." (*Id.* at p. 308, *emphasis added*.) The *Brown* Court stated:

> The trial court's use of an unreasonably high, unaffordable bail to protect the public and past victims from the defendant—that is, setting bail *knowing full well that it was the equivalent of a pretrial detention order*—is directly at odds with the requirements for a constitutionally valid bail determination as articulated in *Humphrey*.

(*Id.* at p. 306, *emphasis added*.)

In contrast, the Court of Appeal decision in this case undermines these principles by holding that "section 12's general right to bail remains

intact"—meaning that a formal pretrial detention order may not be imposed outside of the circumstances authorized by section 12—but nonetheless approved the practice of intentionally setting unaffordable bail when formal detention is unavailable. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 686.) In so holding, it denies those intentionally detained through unaffordable bail the fairness of the detention procedures required by section 12, as well as the transparency of a formal order of detention.

B. *Humphrey* Requires that an Order Resulting in Detention Comply with Constitutional Provisions Specifically Addressing Bail.

In addition to the due process requirements for detention elaborated by the *Humphrey* court, an order of pretrial detention must still be "consistent with state statutory and *constitutional law specifically addressing bail . . .*" (*Humphrey, supra*, 11 Cal.5th at p. 155, *emphasis added*.) As this Court has held, courts may not "impose greater limits on the right to bail as guaranteed by the California Constitution." (*In re Underwood* (1973) 9 Cal.3d 345, 350 [superseded by statute on other grounds.])

Section 12 is California's controlling constitutional provision specifically addressing bail, with the additional considerations mandated by section 28(f)(3). It provides a series of procedural requirements before detention can be ordered. (Cal. Const., art. I, § 12.) First, section 12's

detention eligibility net is limited to the three enumerated categories: capital crimes, violent or sexual felonies, and felonies where there is a threat of bodily harm. (Cal. Const., art. I, § 12, subds. (a)-(c).) Second, all three provisions require proof that "the facts are evident or the presumption great" that the accused committed the qualifying charged offense. (*Ibid*.) Third, for non-capital cases, section 12 requires that the requisite level of risk—substantial likelihood of great bodily harm in the case of violent and sexual felonies and the threat of great bodily harm with a likelihood that the threat would be carried out for other felonies—be proven by clear and convincing evidence. (Cal. Const., art. I, § 12, subds. (b)-(c).)

In *In re White, supra,* 9 Cal.5th at pp. 457, 463-469, this Court, for the first time, reviewed a trial court's denial of bail under section 12, and affirmed the high evidentiary standards section 12 articulates. *White* held that the "facts are evident or presumption great" threshold requires "enough evidence of reasonable, credible, and solid value to sustain a guilty verdict on one or more of the qualifying crimes." (*Id*. at p. 463.) Regarding the "substantial likelihood" of "great bodily harm" requirement for 12(b) qualifying offenses, *White* emphasized that "[c]lear and convincing evidence requires a specific type of showing – one demonstrating a '"high probability"' that the fact or charge is true." (*Id.* at p. 467.) As noted by the *White* Court of Appeal decision affirmed by this Court: "This standard

requires more than a mere possibility, and it cannot be based on speculation about the general risk to public safety if a defendant is released." (*In re White* (2018) 21 Cal.App.5th 18, 28.)

Even given the factual record in *White*—establishing that the petitioner aided and abetted his co-defendant in an assault on and forcible rape attempt of a minor—this Court acknowledged that the issue of the petitioner's future dangerousness was "a close question." (*White, supra*, 9 Cal.5th at p. 469.) *White* affirms that the requirements of section 12 are exacting and must be met before an arrestee may be ordered detained pretrial. (*Id*. at p. 471.)

The *Kowalczyk* Court's approach would expand pretrial detention beyond the limits of section 12 and undercut these strict standards. It would make any defendant eligible for detention, including those charged with only misdemeanors and nonviolent felonies. Even in cases where the arrestee is charged with a section 12 qualifying offense, a trial court could detain in the absence of evidence of a "substantial likelihood" of "great bodily harm," or that the individual would carry out a threat of great bodily harm. (Cal. Const., art. I, § 12, subds. (b)-(c).) It could detain absent any finding that "the facts are evident or presumption great" of the arrestee's guilt. (Cal. Const, art. I, § 12, subds. (a)-(c).) The requirements of section 12 would be rendered meaningless because the state would be able to

achieve its desired end—preventing the defendant from being released from custody—through a far less rigorous and transparent process. Detention must therefore be limited to the circumstances allowed for by section 12.

C. *Humphrey* Prohibits Detention Based Solely on an Arrestee's Financial Condition.

Humphrey requires that detention not be conditioned "solely" on an arrestee's financial condition. (*Humphrey, supra*, 11 Cal.5th at p. 143.) The *Kowalczyk* Court cited two federal cases, *United States v. Fidler* (9th Cir. 2005) 419 F.3d 1026, 1028 and *United States v. McConnell* (5th Cir. 1988) 842 F.2d 105, 108-110, to support its proposition that detention via unaffordable bail complies with this requirement. (*Kowalczyk*, *supra*, 85 Cal.App.5th at pp. 689-690.) The Court of Appeal, however, relied on logical fallacy and ignored how these cases are distinguishable.

First, these two federal cases deal exclusively with the interpretation of a federal statute and include no constitutional analysis. They hold that setting bail in excess of what a defendant can afford, under certain circumstances, does not violate the federal 1984 Bail Reform Act (hereinafter "BRA")—a statute for which there is no California analog. (*Fidler, supra*, at pp. 1027-1029; *McConnell, supra,* at pp. 108-109.) And unlike section 12's guarantee of release on bail, the federal constitution contains no comparable right to bail or pretrial release. (See *Underwood, supra*, 9 Cal.3d at p. 349.)

Fidler and *McConnell*'s holdings also rely on the detention eligibility net established in the BRA. Unlike section 12, the BRA does not limit detention to defendants charged with certain classes of offenses. Rather, it allows for the detention of most defendants so long as certain findings are made. (18 USCS § 3142, subd. (f).) Other federal cases affirm that detention—whether imposed through a formal detention order or unaffordable bail—must comply with the BRA's procedural safeguards. (See *United States v. Westbrook* (5th Cir. 1986) 780 F.2d 1185, 1187, n. 3 [recognizing that the BRA "eliminates de facto preventative detention while at the same time establishing *de jure* preventive detention regulated by both procedural and substantive safeguards"]; *United States v. Maull* (8th Cir. 1985) 773 F.2d 1479, 1483 [affirming a trial court's decision to proceed to a detention hearing after the defendant indicated he could not make $1,000,000 bond]; *McConnell, supra*, 842 F.2d at p. 109, fn. 5 [noting that "the detention hearing is a critical component of the Bail Reform Act"]; *United States v. Jessup* (1st Cir. 1985) 757 F.2d 378, 388-389 [finding that it is consistent with the federal statute to detain through unaffordable bail where the person is eligible for detention under the statutory criteria]; *United States v. Mantecon-Zayas* (1st Cir. 1991) 949 F.2d 548, 550 [holding that if bail is set in an amount the defendant cannot afford, the court "must satisfy the procedural requirements for a valid *detention* order,"

emphasis in original.]) To the extent that *Fidler* allows for detention outside the circumstances provided in the BRA, it is the outlier in federal jurisprudence.

Moreover, the Court of Appeal relied on logical error to suggest that, when bail is set, a person remains in custody for reasons other than an inability to pay that bail amount. (*Kowalczyk, supra*, 85 Cal.App.5th at pp. 689-690.) Consider an illustrative example. In 2017, a California "heiress" avoided pretrial detention for an alleged conspiracy to commit murder by posting $35 million in bail. (Pelisek, *California Heiress Posts 'Unprecedented' $35M Bail After Allegedly Plotting to Kill Her Ex* (Apr. 6, 2017) People at <https://people.com/crime/california-murder-suspect-tiffany-li-posts-35-million-bail/>.) In contrast, her codefendant, given the same amount of bail and charged with the same conspiracy, remained in custody through trial. (Walsh, *Gruesome evidence revealed in Hillsborough heiress murder case*, ABC7 News (Sep. 25, 2019) at <https://abc7news.com/tiffany-li-keith-green-kaveh-bayat-olivier-adella/5569460/>.) The *only* determining factor regarding pretrial detention was these two defendants' access to money.

Brown recognized and rejected precisely this logical fallacy. It considered *Humphrey*'s prohibition on detention "solely because" of a lack of resources and held that: "When no option other than refusing pretrial

release can reasonably protect the state's compelling interest in victim and community safety," a trial court may order pretrial detention with the requisite findings and compliance with constitutional requirements. (*Brown, supra*, 76 Cal.App.5th at p. 299, citing *Humphrey, supra*, 11 Cal.5th at p. 143.) However, "[w]hat the trial court may not do is make continued detention depend on the arrestee's financial condition." (*Brown, supra,* at p. 299.)

III. SECTION 12 DOES NOT ALLOW FOR INTENTIONAL DETENTION THROUGH UNAFFORDABLE MONEY BAIL.

Section 12 mandates that "[a] person shall be released on bail by sufficient sureties," except for the three circumstances discussed above. (Cal. Const., art. I, § 12, *emphasis added*.) The plain language of this provision implies that *intentional* detention is limited to those circumstances listed in section 12. (See *In re Christie* (2001) 92 Cal.App.4th 1105, 1109 [holding that "bail is a matter of right" for all offenses other than those allowing for preventive detention under section 12.]) The Court of Appeal nonetheless held that this provision allows a trial court to set bail in excess of an arrestee's ability to afford, where "there is a valid basis for detention." (*Kowalczyk, supra*, 85 Cal.App.5th at p. 691, quoting *Humphrey, supra*, 11 Cal.5th at p. 154.)

This position fails, however, for two reasons. One, the law does not allow for bail to be used as a means to *intentionally* detain, and two, the history and purposes of bail indicate its role to facilitate release, not effectuate detention.

A. Courts May Not Intentionally Detain Through the Imposition of Money Bail.

The Court of Appeal relied on both historical California cases and language from other state constitutions to assert that the right to bail "has never been construed as imposing an absolute requirement that bail be affordable." (*Kowalczyk, supra*, 85 Cal.App.5th at p. 688.) However, this body of law does not allow for the use of money bail as an *intentional* detention order.

While the Court of Appeal did not explicitly frame its holding under the excessive bail clause, it relied on excessive bail case law to support its contention that bail need not be affordable. (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 688, citing *Ex Parte Duncan* (1879) 53 Cal.410 [*Duncan I*]; *Ex Parte Duncan* (1879) 54 Cal. 75 [*Duncan II*]].) Under both the federal and state constitutions, excessive bail may not be required. (Cal. Const., art. I, § 12; U.S. Const., 8th Amend.) Neither *Humphrey* nor *Kowalczyk* is an excessive bail case. As *Humphrey* made clear, "the claim that bail is excessive under the Eighth Amendment is not one Humphrey makes in this case—and this opinion does not purport to address or resolve

any such claim." (*Humphrey, supra*, 11 Cal.5th 135.) *Kowalczyk* likewise did not raise an excessive bail claim before the Court of Appeal. (See Pet., Pet. Add'l Brief, generally.)

However, since the Court of Appeal relied heavily on excessive bail cases—*Duncan I* and *Duncan II*—it is worth noting the aspects of that jurisprudence that the court omitted. Excessiveness is chiefly concerned with whether a financial condition is objectively too high, given the seriousness of a charge or other circumstance, independent of whether or not it will result in detention. (See *e.g. In re Burnette* (1939) 35 Cal.App.2d 358 [finding bail was not excessive because the court had set the same amount of money bail in a different case with the same charges, though the previous defendant could afford the amount and Burnette could not.]) Thus, a court might conclude that a money bail amount is "excessive" even when the person accused can afford to pay it. (*Galen v. County of Los Angeles* (9th Cir. 2007) 477 F.3d 652, 661.) The excessive bail clause, therefore, focuses on the amount of bail in relation to the charges, not the defendant's ability to afford it.

What the *Kowalczyk* Court failed to acknowledge, however, is that the excessive bail clause does not support setting money bail in an amount *intended* to prevent an arrestee's release. (See *Galen, supra*, 477 F.3d at p. 660 [affirming that "[t]he state may not set bail to achieve invalid

interests," such as "setting bail at a level *designed* to prevent an arrestee from posting bail," *emphasis added*]; *Wagenmann v. Adams* (1st Cir.1987) 829 F.2d 196, 213 [affirming a finding of excessive bail where bail was set beyond defendant's ability to pay "purposefully to guarantee continued confinement"]; *Christie, supra*, 92 Cal.App.4th at p. 1109 [holding that, outside the circumstances of section 12, a court "may neither deny bail nor set it in a sum that is the functional equivalent of no bail"]; see also *Stack v. Boyle* (1951) 342 U.S. 1, 9 (conc. Opn. of Jackson, J.) [setting money bail to intentionally detain a defendant pretrial "is contrary to the whole policy and philosophy of bail"]; *Bandy v. United States* (1960) 81 S.Ct. 197 (memorandum opinion) ["It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom."])

Kowalczyk's reliance on the language and case law of "sister states" makes the same error. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 687, fn. 7.) *Kowalczyk* notes the "materially identical" clauses of Iowa, New Mexico, Arizona, and Illinois requiring that pretrial defendants "be bailable by sufficient sureties" subject to certain limitations, and respective case law in those jurisdictions holding that the guarantee does not require that the bail be affordable. (*Ibid*.) However, the Court of Appeal ignores that these same states also prevent trial courts from *intentionally* detaining through the use of unaffordable bail. (*Ibid*; *State v. Briggs* (Iowa 2003) 666 N.W.

2d 573, 584 [state bail provision would prohibit bail order that "absolutely precluded [the defendant] from accessing a surety of some form."]; *People ex. rel. Sammons v. Snow* (Ill. 1930) 340 Ill. 464, 467 [when someone is entitled to bail, "excessive bail may not be required for the purpose of preventing the prisoner from being admitted to bail"]; *Gusick v. Boies* (Ariz. 1951) 72 Ariz. 233, 235-238, [same]; *State v. Brown* (N.M. 2014) 338 P.3d 1276, 1292 ["Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release."])

Other states not cited by the Court of Appeal state this rule even more expressly. (See *State ex rel. Corella v. Miles* (Mo. 1924) 303 Mo. 648, 262 S.W. 364 ["[t]he bail bond must be fixed with a view to giving the prisoner his liberty, not for the purpose of keeping him in jail. If, in order to keep him in custody, the bond is ordered at a sum so large that the prisoner cannot furnish it the order violates [the right to bail under the Missouri Constitution]. For that is saying the offense is not bailable when the Constitution says it is."]; *State v. Jackson* (Mo. 2012) 384 S.W.3d 208, 215 [state constitution does not "permit [the] use of bail to keep a defendant from being released"]; *Foreman v. State* (Ark. 1994) 875 S.W. 2d 853, 854 [It was an abuse of discretion for judge to "purposefully set [pretrial] bond out of [bailable defendant's] reach.])

By focusing on a judge's *intent* rather than the result of the judge's orders, this body of law created a "loophole" whereby defendants could remain detained on unaffordable bail so long as courts were not explicit that they were imposing bail for that purpose. California closed that loophole with its decision in *Humphrey*. *Humphrey* requires that an order resulting in an arrestee's pretrial detention must only be issued after the court finds "that detention is *necessary*" and states the reasons for such a finding on the record. (*Humphrey, supra*, 11 Cal.5th at pp. 155-156.) It further directs courts to inquire as to a defendant's ability to pay in order to "know whether requiring money bail in a particular amount is likely to operate as the functional equivalent of a detention order." (*Id*. at p. 151.) *Brown* affirmed that "the trial court must be explicit that it is ordering pretrial detention . . ." (*Brown*, *supra*, 76 Cal.App.5th at p. 308.)

Thus, under *Humphrey*, unaffordable bail could only ever be imposed in circumstances where the trial court intends for the defendant to be detained. This intentional detention is precisely what section 12 prohibits outside of its specified exceptions. As such, there are no circumstances in which an order of unaffordable bail would comply with constitutional requirements.

B. The Purpose of Bail Is to Facilitate Release, Not Detention.

In justifying its holding, the Court of Appeal also incorrectly

determined that allowing courts to use unaffordable bail as an intentional detention order accomplishes the purposes of bail, particularly protecting public safety. (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 687.) However, the purpose of bail has traditionally been to serve as a mechanism for release pending trial, not detention. As Justice Jackson noted over 70 years ago, "[t]he practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty." (*Stack, supra*, 342 U.S. at pp. 7-8 (conc. Opn. of Jackson, J.))

Historically, the imposition of bail primarily ensured a defendant's future appearance in court. (*McDermott v. Superior Court* (1972) 6 Cal.3d 693, 695 ["The purpose of bail is to insure the attendance of the defendant in court and his obedience to the court's orders and judgment."]) While the precise when and why the concept of "release on bail" originated is not clearly known, the early practice typically involved sheriffs releasing prisoners "either on their own recognizances, with or without requiring the posting of some sort of bond, or on the promise of a third party to assume personal responsibility for the accused's appearance at trial." (*Bail: An Ancient Practice Reexamined* (1961) 70 Yale L.J. 966.) At the period of American colonialism, American states and the burgeoning United States

government "provided an absolute right to bail in all but capital cases." (*Id*. at p. 967.) Indeed, "[i]n the colonial era, bail was generally synonymous with release." (Brunt & Bowman, *Toward a Just Model of Pretrial Release: a History of Bail Reform and a Prescription for What's Next* (2019) 108 J. Crim. Law & Criminology 701, 710 [hereinafter "Brunt & Bowman".]) Therefore, the purpose of bail was to facilitate the release of defendants pending trial, while providing the government with a reasonable guarantee of their return for criminal proceedings.

The concept of "public safety" as a factor to consider in setting bail, did not arise until the latter part of the 20th century. (Brunt & Bownman, at p. 731.) However, while public safety may be a valid concern in determining whether *detention* is appropriate and under what conditions, it does not follow that setting bail at a particular amount is an appropriate mechanism to address public safety concerns. There is no logical correlation between money bail and public safety. Committing a new offense while out on bail or failing to abide by the court's conditions of release does not trigger a forfeiture of bail. (Pen. Code, §§ 1269b, subd. (h), 1305, subd. (a), and 1278, subd. (a).) Therefore, the imposition of a monetary amount of bail cannot provide an incentive for a defendant not to commit a new crime. The only way a high monetary bail could logically serve to protect the public is as a *sub rosa* detention order.

Similarly, flight risk cannot be quantified or correlated to a specific bail amount. Bail functions as a deterrent to flight only to the extent that it incentivizes the defendant to return to court by creating a stake in the criminal proceedings. Therefore, the amount of bail sufficient to incentivize a defendant's return would be highly specific to each defendant. A bail amount over what a defendant can reasonably afford can never serve as a deterrent to flight, as the defendant has no opportunity to obtain that stake in the criminal proceedings. Like with public safety, there is no logical way an unaffordable bail order can mitigate flight risk, other than as serving as a de facto detention order.

This history affirms that bail is meant to facilitate release, not detention. The purpose of bail, therefore, is not served by intentionally detaining an arrestee by setting bail beyond her means to reasonably afford. Section 12's right to release on bail by sufficient sureties should be interpreted in line with this historical purpose.

IV. DETENTION VIA UNAFFORDABLE BAIL VIOLATES EQUAL PROTECTION GUARANTEES, AS IT RESERVES THE PROTECTION OF SECTION 12 FOR WEALTHY DEFENDANTS.

In *Humphrey,* this Court applied the hybrid due process and equal protection analysis developed by the United States Supreme Court in *Bearden v. Georgia* (1983) 461 U.S. 660, 665-666, to the money bail context. (*Humphrey, supra*, 11 Cal.5th at pp. 149-150.) As the high Court

has held: "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court." (*Griffin v. Illinois* (1956) 351 U.S. 12, 17.) As *Humphrey* noted:

> If a court does not consider an arrestee's ability to pay, it cannot know whether requiring money bail in a particular amount is likely to operate as the functional equivalent of a pretrial detention order. Detaining an arrestee in such circumstances accords insufficient respect to the arrestee's crucial state and federal equal protection rights against wealth-based detention *as well as* the arrestee's state and federal substantive due process rights to liberty.

(*Humphrey, supra*, 11 Cal.5th at p. 151, *emphasis added*.)

Humphrey acknowledged that an arrestee's substantive due process right to liberty may be curtailed where the government's need to protect community safety is sufficiently weighty and there are no conditions other than detention sufficient to address this interest. (*Humphrey, supra,* 11 Cal.5th at p. 143.) However, using unaffordable money bail to detain in such a circumstance, even where this due process standard is met, nonetheless violates equal protection's prohibition on wealth-based discrimination. This type of de facto detention creates a clear disparity in how and when liberty is denied between the wealthy and the indigent.

Fundamentally, the equal protection clause recognizes that persons

who are similarly situated with respect to a law's legitimate purposes must be treated equally. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7; *People v. Brown* (2012) 54 Cal.4th 314, 328; *Cleburne v. Cleburne Living Center, Inc*. (1985) 473 U.S. 432, 439, [the equal protection clause is "a direction that persons similarly situated should be treated alike."])

Distinctions based on wealth in the criminal justice system implicate equal protection, particularly where liberty is at issue. *In re Antazo* (1970) 3 Cal.3d 100, 103, considered an equal protection challenge to a court order requiring a defendant unable to afford court fines "to serve them out in jail at a specified rate per day." The court concluded that the petitioner's imprisonment because of his ability to pay "constituted an invidious discrimination based on his poverty in violation of the equal protection clause of the Fourteenth Amendment." (*Id.* at p. 115.)

Similarly, in *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1160, the court found that, "using the criminal process to collect a fine [an indigent defendant] cannot pay is unconstitutional." *Dueñas* held that a court must stay fines and fees when those fines and fees are beyond a defendant's ability to pay. (*Id*. at pp. 1172-1173.) In so holding, the *Dueñas* Court noted that: "Whatever hardship poverty may cause in the society generally, the judicial process must make itself available to the indigent; it must free itself of sanctions born of financial inability." (*Id*. at

pp. 1160, 1166, quoting *Preston v. Municipal Court* (1961) 188 Cal.App.2d 76, 87-88.)

Antazo mirrored a United States Supreme Court decision, holding that the state may not imprison a defendant beyond the statutory maximum when it "results directly from an involuntary nonpayment of a fine or court costs," as it amounts to "an impermissible discrimination that rests on ability to pay." (*Williams v. Illinois* (1970) 399 U.S. 235, 240-241.) Indeed, the high Court has a long history of interpreting the Constitution as prohibiting differential treatment in the criminal justice system based on wealth status. (See, e.g. *Douglas v. California* (1963) 372 U.S. 353, 357-358 [guaranteeing an indigent defendant's right to counsel on appeal]; *Tate v. Short* (1971) 401 U.S. 395, 397-398 [declaring unconstitutional the practice of jailing indigent defendants for inability to pay fines for traffic offenses]; *Bearden, supra,* 461 U.S. at p. 668 [holding it unlawful to revoke a defendant's probation for failure to pay a fine or restitution absent evidence that nonpayment was willful].)

While generally wealth-based distinctions require only rational basis review, heightened scrutiny is appropriate where a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution . . ." (*San Antonio Independent School Dist. v. Rodriguez* (1973) 411 U.S. 1, 17 [hereinafter "*San Antonio School Dist*."].) Where a fundamental right is

implicated, heightened scrutiny is appropriate in wealth-based classifications where two characteristics are met: "because of their impecunity [the indigent] were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." (*Id.* at p. 20.) Access to judicial proceedings is one basis to apply heightened scrutiny. (See *Griffin, supra*, 351 U.S. 12.) One claiming a wealth-based equal protection violation must show "that the indigent are being treated systematically worse 'solely because of [their] lack of financial resources,' and not for some legitimate State interest." (*Walker v. City of Calhoun* (2018) 901 F.3d 1245, 1260 [internal citations omitted.])

That standard is met here. the *Kowalczyk* court's approach distinguishes between indigent individuals intentionally detained on unaffordable bail and wealthy individuals who could never be detained in such a manner. To address the *San Antonio School Dist.* standard: a defendant intentionally detained on unaffordable bail is "completely unable to pay" for the benefit of pretrial release, as the court would have to set that bail *knowing* it exceeded the defendant's ability to pay and *intending* for it to deprive the defendant the opportunity for release. As a consequence, the defendant would sustain "an absolute deprivation of a meaningful opportunity to enjoy that benefit" in a way that wealthy defendants are not

so deprived. (*San Antonio School District, supra,* 411 U.S. at p. 20.)

Again, the intentional nature of the detentions authorized by *Kowalczyk* is key here. As noted above, such a detention through unaffordable bail can be imposed only after the court has both inquired as to the defendant's ability to pay bail and made a finding that his detention is *necessary*. (*Humphrey, supra*, 11 Cal.5th at pp. 151, 155-156.) Therefore, the bail must be set at an amount *designed* to wholly deprive the defendant of the opportunity for release.

Wealthy defendants could never be so deprived, as the prohibition on excessive bail would, in nearly all cases, prevent a court from imposing bail in excess of what a wealthy defendant could afford. (See *Kowalczyk*, *supra*, 85 Cal.App.5th at p. 691 [stating that excessive bail cannot be imposed.]) Therefore, should the government seek to detain a wealthy person, the *only* option would be to seek formal detention through the section 12 procedure. If that person were charged with an offense not eligible for detention under section 12, they would *always* be able to secure their release. In contrast, an indigent defendant could be detained on any offense without the protections of section 12, including its limits on when detention can be imposed. This would create a two-track system of justice, where the procedure used to determine whether an arrestee remains detained depends on his access to wealth. This constitutes a systematic

denial of rights to indigent defendants based soley on their indigency. As such, the *Kowalczyk* court's holding violates the constitutional guarantee of equal protection.

V. LIMITING PRETRIAL DETENTION TO SECTION 12 CIRCUMSTANCES UPHOLDS THE PRINCIPLE THAT LIBERTY IS THE NORM AND DETENTION IS THE LIMITED EXCEPTION.

The fundamental guiding principle that pretrial detention should be imposed narrowly governs trial courts' use of pretrial detention. Both this Court and our nation's high Court have emphasized that "liberty is the norm, and detention prior to trial is the carefully limited exception." (*Humphrey, supra*, 11 Cal.5th at p. 155, quoting *Salerno, supra*, 481 U.S. at p. 755; see also *Kowalczyk, supra*, 85 Cal.App.5th 667, 692, affirming this "fundamental principal.") While acknowledging that the territory marking the boundary "between the general rule and the limited exception . . . has not yet been fully mapped," *Humphrey* noted that *Salerno* upheld a statutory scheme where pretrial detention was limited to "a specific category of extremely serious offenses." (*Humphrey, supra*, at p. 155, quoting *Salerno, supra*, at p. 750.) In California, those limits are found in section 12.

However, this limiting principle has not been borne out in practice. A recent study of hundreds of arraignments across three Bay Area counties, including San Mateo County, found that of all the people ordered

detained—either on unaffordable bail, or without bail—97.98% fell outside the bounds of section 12.[9] (Pet. Add'l Brief Exh. E, pp. 169-170.) Without clear limits on when and under what circumstances pretrial detention may be imposed, trial judges must resort to "guessing conducted in a vacuum." (Goldcamp, *Danger and Detention: A Second Generation of Bail Reform* (1985) 76 J. Crim. L. & Criminology 1, 55-56.) Making real the maxim that detention should only be the "carefully limited exception" depends on this Court limiting pretrial detention to only those circumstances allowed for by the Constitution.

Further, *Humphrey*'s requirement that trial courts consider non-financial conditions of release ensures that detentions are limited to situations in which they are both necessary *and* constitutional. And the circumstances in which detention is truly necessary should be exceedingly rare given the wealth of nonfinancial conditions of release available to assure that defendants return to court and avoid trouble while awaiting trial. *Humphrey* noted a few such conditions: "electronic monitoring, supervision by pretrial services, community housing or shelter, stay-away orders, and

[9] Of those who were ordered detained on unaffordable bail or without bail, 90.8% were charged with crimes that did not fall within the enumerated categories of section 12. (Pet Add'l Brief Exh. E, p.169.) Of the 9.2% who were charge eligible, the court made the requisite findings under section 12 in just 22% of cases. (*Id*. at p. 170.) Taken together, 97.98% of those who were ordered detained on unaffordable bail or without bail fell outside the bounds of section 12.

drug and alcohol testing and treatment." (*Humphrey, supra*, 11 Cal.5th at p. 135.) This only scratches the surface of available options. Courts can order regular check-ins with a pretrial case manager, residence in public housing or a shelter, search and seizure conditions, drug testing, unsecured bond, release to the custody of a third party, house arrest, court date reminder notifications, the assignment of a social worker or case manager, travel restrictions, restrictions on firearm possession, restrictions on weapons possession, a curfew, limits on computer and internet access, a limits on social media access, the surrender of a passport, driving restrictions, the installation of an ignition interlock device, the use of an alcohol monitoring bracelet, sex offender monitoring conditions, job training, counseling, anger management classes, theft awareness classes, mental health treatment, medication compliance, community service, regular school attendance, proof of employment, treatment for sex addiction or other sexual disorders, victim impact classes, participation in restorative justice programs—to name a few.

Some counties have explored more comprehensive options. San Francisco often refers defendants to Assertive Case Management, which assesses the needs of the defendant and links him with services in anticipation of release. (San Francisco Pretrial Diversion Project, *What We*

Do <https://sfpretrial.org/our-work/>.) The Sacramento Public Defender has implemented a "holistic approach" in which:

> legal interns interview individuals in custody prior to arraignment to assess their needs. These individuals are linked to social workers in the Public Defender's office, who coordinate safe discharge plans with the Courts, Correctional Health, Department of Behavioral Health, community organizations, and other agencies to ensure linkages, housing, transportation, and supportive services are in place upon discharge. Individuals are also identified for diversion and collaborative court programs to secure early engagement. Recognizing the need for continued support and case management upon discharge, individuals are provided Community Intervention Workers and a Public Defender Social Worker while on pretrial release.

(Comm. on Rev. of the Pen. Code, First Supplement to Memorandum 2022-10 Bail, Pretrial Release and Related Matters Panelist Materials (Oct. 7, 2022) Exh. F: Recommendations for Quality Bail Hearings, p. 76 <http://www.clrc.ca.gov/CRPC/Pub/Memos/CRPC22-10s1.pdf.>)[10]

[10] Such programs are in line with legislative efforts to increase the availability of pretrial services, promote diversion, and decrease incarceration rates, and the "'clear and growing movement' [] reexamining the use of money bail as a means of pretrial detention." (*Humphrey, supra*, 11 Cal.5th at p. 143; see, e.g., Sen. Bill No. 129 (2021-2022 Reg. Sess.) § 4 [allocating funding to trial courts and probation departments for pretrial services]; Pen. Code, § 17.2 [stating that trial courts "shall consider alternatives to incarceration, including, without limitation, collaborative justice court programs, diversion, restorative justice, and probation"]; Pen. Code, § 1001.35, et seq. [enacting mental health diversion to provide treatment in lieu of traditional prosecution for mentally ill offenders.])

When court orders are violated or conditions of release are not followed, trial courts still have options. They can issue warrants, impose more restrictive conditions of release or hold the defendant in contempt of court, mandating a substantial fine or a five-day term in the county jail. (Code of Civ. Pro., § 1209, et seq.)

Here, Mr. Kowalczyk was a disabled, unhoused man experiencing poverty and struggling with medical issues. His alleged crime was using found credit cards to buy a hamburger, which he did not take. In denying Mr. Kowalcyzk release, the trial court had an arsenal of non-financial conditions of release at its disposal: electronic monitoring, release to a residential treatment or medical facility, a treatment plan from a social worker, a psychological assessment or counseling, pretrial services check-ins, pretrial services assistance with finding house, medication compliance, search conditions, or drug testing. It could have prohibited the use of alcohol or drugs or set the next court date shortly after release. Any of these conditions would have been reasonable under the circumstances of the case and tailored to the specific needs of Mr. Kowalczyk. Rather than consider these options, the trial court chose the familiar path of relying on incarceration. This defies the principle that pretrial detention should be imposed only when constitutionally permissible and necessary. This Court should affirm that this course of action is no longer acceptable.

CONCLUSION

The right to pretrial liberty has been a feature of California's Constitution since its creation. That right, embodied in section 12, guarantees to all arrestees "release on bail by sufficient sureties," other than those subject to detention under section 12's enumerated exceptions. While section 28(f)(3) provides additional considerations for a trial court in determining bail, section 12 provides the exclusive circumstances in which release may be denied.

This right to release on bail by sufficient sureties has historically afforded an arrestee a meaningful opportunity for release. While this guarantee has not always been interpreted as mandating affordable bail, it does not allow for the use of unaffordable bail as a means to *intentionally* detain.

In abolishing pretrial detention based solely on an arrestee's ability to pay bail, *Humphrey* imposed additional constitutional limits on pretrial detention. In particular, it requires that any order of detention be imposed only after the court finds that detention is necessary to address the government's interests in public safety and the defendant's return to court and that no condition of release is sufficient to address those interests. It also mandates that any order of detention comply with constitutional provisions specifically addressing bail—namely, sections 12 and 28(f)(3).

Aside from these constitutional limitations, *Humphrey* emphasizes the importance of fairness and transparency in pretrial detention decisions.

The *Kowalczyk* court's escape hatch from the inevitable conclusion that pretrial detention may not be ordered outside the circumstances of section 12 violates the above framework. It turns the historical purpose of bail on its head, transforming it from a means to facilitate release to a means to facilitate detention. It nullifies the limits and procedural safeguards of section 12 by allowing trial courts to bypass them entirely. It undermines *Humphrey*'s focus on transparency and fairness in detention orders, and sidesteps its requirement that orders of detention comply with constitutional provisions addressing bail. It violates the equal protection clause's prohibition on disparate treatment between similarly situated individuals by denying indigent defendants the protection of section 12 that wealthy defendants enjoy. And it flouts the principle that liberty is the norm and that detention prior to trial is the carefully limited exception.

In essence, the Court of Appeal's opinion represents an effort to cling to the status quo where trial judges retain discretion to detain virtually any defendant in any case. Mr. Kowalczyk's case epitomizes the fault in that approach. Faced with the choice of simply detaining him or crafting a release plan that would address his individualized needs as well as assure

his return to court, the trial court went with the path of least resistance, ordering him detained. In the process, Mr. Kowalczyk's plans to address his medical conditions, homelessness, and poverty were all derailed.

The law compels a finding that orders resulting in pretrial detention are limited to the circumstances in section 12 and that defendants like Mr. Kowalczyk may not be detained pending trial.

Dated: May 14, 2023

Respectfully Submitted,

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WORD COUNT CERTIFICATE

I, Marsanne Weese, declare and certify under penalty of perjury that I am an attorney licensed to practice law in the State of California (SBN 232167.) I certify that the brief contains 13,819 words, according to the word count produced by the Microsoft Word program used to produce this document, not including the Table of Contents, Table of Authorities, or this Certificate, and that the brief uses a Times New Roman size 13 font.

Dated: May 14, 2023

MARSANNE WEESE
Attorney for Petitioner

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

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Executed in San Francisco, California on March 14, 2023.

ROSE MISHAAN

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **KOWALCZYK (GERALD JOHN) ON H.C.**
Case Number: **S277910**
Lower Court Case Number: **A162977**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/14/2023

Date

/s/Rose Mishaan

Signature

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