S277910

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re GERALD JOHN KOWALCZYK Petitioner, on Habeas Corpus.	Case No.: S_____ Related to Case No.: S274181 First District Court of Appeal No. A162977 San Mateo Superior Court No. 21-SF-003700-A

PETITION FOR REVIEW

After Opinion Filed in the Court of Appeal
First Appellate District
From Petition for Writ of Habeas Corpus
From Detention Order by Superior Court of San Mateo County
Honorable Susan Greenberg, Superior Court Judge
Honorable Elizabeth K. Lee, Superior Court Judge
Honorable Jeffrey R. Finigan, Superior Court Judge

Marsanne Weese (SBN 232167)
Rose Mishaan (SBN 267565)
Law Offices of Marsanne Weese
255 Kansas Street, Suite 340
San Francisco, CA 94103
Tel: (415) 565-9600
Fax: (415) 565-9601
marsanne@marsannelaw.com
rose@marsannelaw.com

Attorneys for Petitioner by Appointment of the Court

Carson White (SBN 323535)
Katherine Hubbard (SBN 302729)
Alec Karakatsanis, *pro hac vice*
Salil Dudani (SBN 330244)
CIVIL RIGHTS CORPS
1601 Connecticut Ave NW, Suite 800
Washington, DC 20009
Tel: 202-894-6124
Fax: 202-609-8030
carson@civilrightscorps.org
katherine@civilrightscorps.org
alec@civilrightscorps.org
salil@civilrightscorps.org

Attorneys for Petitioner

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ISSUE PRESENTED

May a trial court use unaffordable cash bail to detain a person pretrial who is not eligible for detention under article I, section 12 of the California Constitution?

INTRODUCTION

TO THE HONORABLE JUSTICE CANTIL-SAKAUYE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

This case concerns whether a trial court violated the California Constitution by detaining a disabled, unhoused man pretrial in a case where he was alleged to have used a lost credit card to buy a cheeseburger and was charged only with non-violent felonies.

Earlier this year, this Court directed the First District Court of Appeal to write an opinion answering the state constitutional question left open by *In re Humphrey* (2021) 11 Cal.5th 135*:* "which provision of the California Constitution governs the denial of bail in noncapital cases—article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3)—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.)

On November 21, 2022, the Court of Appeal issued an opinion correctly holding that article I, section 12 (hereinafter "section 12") and article I, section 28, subdivision (f)(3) (hereinafter "section 28(f)(3)") of the California Constitution could be harmonized, with section 12 outlining the exclusive circumstances in which someone could be formally ordered detained pretrial. (Exhibit A, hereinafter "Opinion".) However, the lower court went beyond this Court's grant of review. Without the issue being

briefed by either party, it further held that courts could continue ordering people detained outside section 12's enumerated circumstances by setting unaffordable cash bail rather than formally ordering detention. (*Id.* at p. 2.)

Additionally, the lower court's *sua sponte* holding undermines the requirements of section 12 as articulated by this Court just two years ago in *In re White* (2020) 9 Cal.5th 455, 616, and subverts its own core holding that section 12 governs pretrial detention under the state constitution. It also undermines the letter and the spirit of *Humphrey*, in which this Court held that unaffordable financial conditions of release are the "functional equivalent" of formal pretrial detention orders, and that pretrial detention must be limited to cases in which it is lawful under the California and United States Constitutions. (*Humphrey*, *supra*, 11 Cal.5th at pp. 151-155.)

Moreover, the lower court's opinion reintroduces a distinction between unaffordable money bail and formal orders of pretrial detention that this Court rejected in *Humphrey*. It is also in in direct conflict with the Second District Court of Appeals opinion, *In re Brown* (2022) 76 Cal.App.5th 296, which held courts could never set unaffordable cash bail. This Court should grant review to resolve these vital questions.

NECESSITY OF REVIEW

The lower court's holding in this case—that the State of California may detain someone pretrial *who does not qualify for pretrial detention under section 12* by knowingly requiring unaffordable cash bail—

repudiates the core holdings of *Humphrey.* It reintroduces a distinction between formal detention orders and unaffordable cash bail orders that *Humphrey* erased. The lower court further undermined section 12's constraints as articulated by this Court in *White* by manufacturing a loophole that allows courts to detain people outside those exacting standards by using unaffordable cash bail rather than a formal detention order. This issue was not presented on remand, was not briefed by either of the parties, was not implicated by the facts of this case.

The lower court's opinion also creates a split in authority with the Second District. In *Brown*, the court held that setting an unaffordable bail "knowing full well that it [is] the equivalent of a pretrial detention order" is "directly at odds with the requirements for a constitutionally valid bail determination as articulated in *Humphrey*." (*Brown, supra*, 76 Cal.App.5th at p. 306.)

Finally, the lower court's opinion will cause confusion in the trial courts. This opinion has created a situation in which trial courts can now opt to forego the rigorous evidentiary requirements of section 12 by simply imposing a de facto detention through unaffordable bail. This comes at a time when courts are already failing to consistently follow this Court's opinions governing pretrial detention.

Review is necessary to ensure uniformity of decision and to settle these important questions of law regarding pretrial detention. (Rule of Court 8.500(b)(2).)

STATEMENT OF FACTS AND CASE

In January 2021, Petitioner Gerald Kowalczyk tried to use three credit cards belonging to other people to buy a cheeseburger from a fast-food restaurant. Petitioner, who was 55 years old, disabled, and unhoused, had found the credit cards after their owners accidentally left them in San Mateo gas stations months before. After paying for the cheeseburger, petitioner discarded the cards and then told the manager he had changed his mind about the order. He asked that the charge be refunded. Petitioner then left without taking the meal. This was the only time he was alleged to have used, or attempted to use, the lost credit cards.

A. Trial Court Proceedings

Petitioner was ultimately charged in San Mateo County with three felony counts of identity theft (one for each time he had swiped a credit card) (Pen. Code, § 530.5 subd. (a)), 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)). On April 16, 2021, the arraignment court ordered $75,000 money bail as a condition of petitioner's release, which he could not afford. On May 4, 2021, he filed a motion in the trial court seeking release on his own recognizance or have

the money bail reduced to an amount he could reasonably afford. In response, the trial court ordered him detained without bail.

Over the next two months, petitioner twice more requested that the trial court release him on his own recognizance. At these hearings, two separate superior court judges found that petitioner did not present any threat to public safety but maintained the detention order.

In all, petitioner spent six months detained pretrial: the statutory maximum period of incarceration for the misdemeanor of which he was ultimately convicted. During that time, petitioner missed appointments with the Department of Housing which were meant to address his homelessness and was unable to receive a long-awaited surgery.

B. Habeas Proceedings

After the fourth superior court judge rejected petitioner's request to be released, petitioner filed a habeas petition in the First District Court of Appeal challenging his detention on July 6, 2021. While the petition was pending, petitioner accepted a plea deal to a single misdemeanor count of theft of identifying information (Pen. Code, § 530.5, subd. (c)(1)), which would allow for his immediate release from custody.

On March 11, 2022, the Court of Appeal dismissed petitioner's habeas petition as moot, because he was no longer in pretrial custody and some of the legal questions raised in his initial petition had been decided in a separate case, *In re Harris* (2021) 71 Cal.App.5th 1085.

On April 20, 2022, petitioner filed a petition for review in this Court raising an unresolved question of law presented by his detention and reserved by this court in *Humphrey*: may someone be detained pretrial if their detention is not authorized by article I, section 12 of the California Constitution?

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." That opinion was issued on November 21, 2022 and certified for publication. (Exh. A.)

On December 6, 2022, petitioner filed a Petition for Rehearing in the Court of Appeal to address the opinion's significant misstatements and omissions of fact concerning petitioner's case. The court denied the petition two days later without explanation.

C. The Lower Court's Holding

In answering the question posed by this Court, the lower court held that sections 12 and 28(f)(3) could be easily harmonized where "section 12's general right to bail remains intact, while full effect is accorded to section 28(f)(3)'s mandate" that crime victims be granted certain rights, including consideration of victim safety and notice of bail proceedings.

(Opinion at p. 22.) However, after answering the sole question that this Court asked on remand, the Court of Appeal went further.

The lower court held that section 12 does not "guarantee[] an unqualified right to pretrial release" or affordable bail. (Opinion at p. 2.) Effectively, the court held, arrestees who cannot be ordered detained under section 12 can be detained using unaffordable financial conditions of release. (*Id.* at pp. 22-23.) On this holding, wealth-based detention may be ordered in any case where a court complies with the more general due process standards articulated in *Humphrey,* regardless of whether the court has made the findings required by section 12 and by this Court in *White*. (*Id.* at pp. 27-29.)

This issue was not presented on remand, was not briefed by either of the parties, was not implicated by the facts of this case (petitioner had challenged an order detaining him without bail, not unaffordable cash bail), and created a split in authority with the Second District. (*Brown, supra,* 76 Cal.App.5th 296.)

ARGUMENT

I. THIS PETITION IS TIMELY.

The Supreme Court may order review of a Court of Appeal decision when necessary to secure uniformity of decision or to settle an important question of law. (Cal. Rules of Court, rule 8.500, subd. (b)(1).) A petition for review must be served and filed within 10 days after the Court of

Appeal decision is final in that court. (*Id.* at subd. (e)(1).) In habeas proceedings where the Court of Appeal issued an order to show cause, the decision becomes final 30 days after it is filed, unless otherwise ordered by the court. (Cal. Rules of Court, rule 8.387, subd. (b).)

Here, the Court of Appeal's opinion was filed on November 21, 2022 and became final on December 21, 2022. Thus, appellant's Petition for Review by this Court is timely and appropriate. Further, as is argued below, review is necessary to settle a split in authority and important questions of law.

II. THE COURT OF APPEAL'S OPINION CONTRADICTS AND UNDERMINES THIS COURT'S PRECEDENT.

Over the past two years, this Court decided a pair of landmark cases clarifying the law governing pretrial detention: *In re White, supra,* 9 Cal.5th 455, which articulated specific standards for detaining someone pretrial under section 12 of the California Constitution, and *In re Humphrey, supra,* 11 Cal.5th 135, which explained the state and federal constitution's due process and equal protection clauses' more general substantive limitations on pretrial detention. The lower court's opinion in this case undermines both.

The basic principle underlying *Humphrey* is that an unaffordable cash bail order is the "functional equivalent of a pretrial detention order." (*Humphrey, supra*, 11 Cal.5th at p. 151.) This Court further held that

pretrial detention is only lawful (1) where a court makes the threshold findings justifying detention under the state and federal Equal Protection and Due Process Clauses—that "*detention* is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate these interests" (*Id.* at p. 156, *emphasis added*); and (2) that the "deprivation of liberty is consistent with state statutory and constitutional law specifically addressing bail." (*Id.* at p. 155).

As this Court recently held in *White*, section 12 dictates that a presumptively innocent person may only be ordered detained pretrial if a court finds that "the record contains not only evidence of a qualifying offense sufficient to sustain a hypothetical verdict of guilt on appeal," but also "clear and convincing evidence establishing a substantial likelihood that the defendant's release would result in great bodily harm to others." (*White, supra,* 9 Cal.5th at p. 616.)

In this case, the Court of Appeal held that trial courts could evade the limitations on pretrial detention set forth in section 12 and *White* by using financial conditions that it knows a person cannot pay. (Opinion at pp. 29-31.) A court need only make the threshold due process and equal protection findings required by *Humphrey* to permit wealth-based detention. *(Ibid.)* The lower court's analysis is deeply flawed and as a result conflicts with both *Humphrey* and *White*.

A. The Court of Appeal Disregarded the Core Holdings of *Humphrey.*

The lower court's opinion relies upon a distinction between unaffordable cash bail and formal detention orders that *Humphrey* explicitly erased. In *Humphrey,* this Court abolished the long-standing practice of conditioning pretrial release on a defendant's financial condition. (*Humphrey, supra*, 11 Cal.5th at p. 154 ["unless there is a valid basis for detention" courts must "set bail at a level the arrestee can reasonably afford."]) The Court explained that unaffordable cash bail is the "functional equivalent to an order of detention" and that, if a trial court wishes to detain a defendant pretrial, it must comply with constitutional requirements. (*Id*. at pp. 151, 153-154.) Those requirements include finding by clear and convincing evidence that "no conditions of release could reasonably protect" the government's interests in protecting public safety and ensuring that the defendant returns to court. (*Id*. at p. 153.)

However, this Court was clear that "[e]ven when a bail determination complies with the above prerequisites, 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. 154, *emphasis added*.) While *Humphrey* declined to resolve which constitutional provision addressing bail—section 12 or

section 28(f)(3)—controlled, this Court remanded this exact issue back to the lower court in this case. (*Humphrey*, *supra*, 11 Cal.5th at p. 155, fn. 7.)

After determining that section 12 provided the exclusive circumstances in which an order of detention can be imposed, the lower court further held that the imposition of an unaffordable bail condition is permissible, even if detention is not authorized by section 12. The trial court need only find "clear and convincing evidence that no other conditions of release, including affordable bail, can reasonably protect the state's interests in assuring public and victim safety and the arrestee's appearance in court." (Opinion at pp. 21-22, 26-27.) This portion of the court's opinion directly contradicts *Humphrey*'s holdings that any order resulting in someone's pretrial detention must comport with all standards governing pretrial detention, including under the state constitutional provisions specifically addressing bail. It would also vastly expand the ability of courts to impose pretrial detention to virtually all cases, including nonviolent misdemeanors.

B. The Lower Court's Opinion Renders *White*'s Holding Irrelevant.

The portion of the lower court's opinion concerning cash bail not only repudiates core principles underlining *Humphrey*, it also renders the protections of section 12 and this court's related jurisprudence meaningless in practice. Section 12's limitations, as explained by this court in *White,* are

exacting. To order someone detained pretrial, courts must find that there is "evidence sufficient to sustain a hypothetical verdict of guilt on appeal" of a capital crime or a felony involving violence, the credible threat of violence, or sexual assault; in all but capital cases, that there is "clear and convincing evidence establishing a substantial likelihood that the defendant's release would result in great bodily harm to others" (*White, supra,* 9 Cal.5th at p. 616); and, after *Humphrey*, that "there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate these interests." (*Humphrey, supra*, 11 Cal.5th at p. 156.)

However, according to the Court of Appeal, courts can simply bypass the requirements of section 12 and *White* if they intentionally require unaffordable cash bail rather than make an explicit detention order. It would allow trial courts to detain people in cases where they are not charged with a qualifying offense (Opinion at pp. 29-31), such as misdemeanors and nonviolent felonies. Even when an arrestee is charged with a qualifying offense, a trial court would be permitted to detain in the absence of evidence of a "substantial likelihood that the defendant's release would result in great bodily harm to others," or that "the facts are evident or presumption great" that the arrestee is guilty. (Cal. Const, art. I, § 12.) Thus lowering the standards set forth by section 12 and this Court.

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C. The Lower Court's Historical Analysis Justifying its Holding is Flawed.

The historical analysis on which the lower court's anomalous outcome rests is misplaced. The lower court noted that, at the time of the drafting of the California Constitution in 1879, "people were routinely confined in jail for want of bail." (Opinion at p. 24.) Based on this, the lower court appropriately concluded that the purpose of the right to bail codified in section 12 and its predecessors was to "curtail this all-too-common situation." (*Ibid.*) However, the court's holding contradicts this founding principle.

In justifying this conclusion, the lower court relies upon a pair of 1879 cases in which the California Supreme Court held that the state Constitution's excessive bail clause did not *per se* prohibit the setting of unaffordable cash bail. (Opinion at p. 25 [citing *Ex Parte Duncan* (1879) 53 Cal.410 [*Duncan I*]; *Ex Parte Duncan* (1879) 54 Cal. 75 [*Duncan II*]].) But these holdings were decided nearly 150 years before *Humphrey* and over a century before the foundational United States Supreme Court cases, *Bearden* and *Salerno*, upon which *Humphrey* relies. (*Bearden v. Georgia* (1983) 461 U.S. 660; *United States v. Salerno* (1987) 481 U.S. 739.) Further, these cases deal with the separate concept of "excessiveness," not due process or equal protection under either the federal or state constitutions. Neither *Duncan* case addressed the issue of whether

unattainable conditions of release might be the functional equivalent of an order of detention and whether such an order is lawful. That issue was not decided until *Humphrey* in 2021.

Moreover, the mere fact that we can identify a lamentable historical practice, even one that occurred regularly, or for a very long time—such as pretrial detention through the use of unaffordable bail—does not mean that the law formally countenanced that practice. Nor does it mean that the Constitution should be retroactively interpreted to endorse it. *Humphrey* was transparent that the practices it outlawed were longstanding and widespread. (*Humphrey*, *supra*, 11 Cal.5th at pp. 142-143.) As the United States Supreme Court has explained, it is often the job of future courts to make clear that certain "old infirmities[,] which apathy or absence of challenge has permitted to stand", are not consistent with our modern understanding of fundamental legal principles. (*Williams v. Illinois* (1970) 399 U.S. 235, 245.) This is particularly true when those practices are relics of a historical time when the legal system was less sensitive, or, as was too often the case, actively hostile, to the plight of the poor and racial minorities. The constitution "must have priority over the comfortable convenience of the status quo." (*Ibid.*)

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III. THE COURT OF APPEAL'S OPINION CREATES CONFLICT OF AUTHORITY BETWEEN APPELLATE COURTS

A. The First District's Opinion Conflicts with a Second District Case, *In re Brown.*

The First District's holding in this case, that *Humphrey* neither forbids unaffordable cash bail orders nor limits them to cases where the court could lawfully order detention, directly and explicitly contradicts *Brown, supra,* 76 Cal.App.5th. (Opinion at p. 28 ["we cannot agree with the *Brown* court's conclusion that, when a trial court makes the required finding above, then *Humphrey* leaves a court with no other option than to formally order pretrial detention."].) In *Brown*, the Second District affirmed that *Humphrey's* core holding—that courts "may not effectively detain an arrestee solely because the arrestee lacked the resources to post bail"—prevents courts from requiring unaffordable money bail as a condition of release. (*Brown, supra,* 76 Cal.App.5th at p. 298, citing *Humphrey, supra*, 11 Cal.5th at p. 143.) If a court intends to detain a presumptively innocent person, it must do so transparently and consistent with the legal standards governing detention. (*Brown, supra,* at p. 308.)

Although the court below acknowledges that a "person's inability to post [a] court-ordered bail amount necessarily results in the person's detention," it argues that, so long as a court first finds the detention is necessary, "it cannot be said that the court 'effectively detain[ed]' the

person '"*solely* because"' the person '"lacked the resources to post bail."'" (Opinion at p. 27.) This is wrong. As *Brown* explained, when someone is detained on unaffordable bail, they remain in custody solely because they lack the resources to pay their bail. (*Brown, supra,* 76 Cal.App.5th at p. 308.) If they were able to post bail and secure their release—because they unexpectedly came into an inheritance, or one of the many modern charitable bail funds decided to post the money bail for them—it would be *solely* because their financial condition changed.

The lower court's caution that detention via an unaffordable cash bail amount will be limited to cases where "such a monetary condition is truly necessary to sufficiently protect the state's compelling interests in public and victim safety and in ensuring appearances in court" similarly peddles in legal fiction. (Opinion at p. 31.) Because unaffordable cash bail is unattainable, and cannot logically serve as a future incentive, the only connection it bears to flight risk or public safety is that it detains the person who cannot pay it. A court may well find that pretrial detention is necessary, but it could not meaningfully find that an unattainable financial condition would, separate and apart from its function as a *de facto* detention order, do anything to reasonably ensure the public safety or the return to court of a person for whom that financial incentive will never operate. The *Brown* opinion, like this Court in *Humphrey,* dispensed with this legal fiction.

Ultimately, the debate in *Kowalczyk* and *Brown* over whether courts can *ever* set unaffordable cash bail highlights a far more important inconsistency between the two opinions, and between *Kowlaczyk* and *Humphrey*: whether, *if* a court sets an amount of cash bail a person cannot pay, it must treat that as a detention order and ensure it meets the state and federal constitutional standards governing detention orders. The *Brown* court correctly interpreted *Humphrey* to mean that courts may, where constitutional, order someone detained pretrial but may not make that detention contingent upon that person's financial resources. The lower court in this case held virtually the opposite: courts may not detain someone pretrial outside constitutional limitations on pretrial detention *unless* they make detention contingent upon that person's financial resources. Review is necessary to resolve this conflict.

B. The Rule Articulated in *Brown* Lends Itself to More Consistent Application Across Trial Courts.

Brown also provides a rule that is easier to administer and far less vulnerable to inconsistent application. Under *Brown*'s interpretation of *Humphrey*, pretrial detention is an intentional decision that must be carried out transparently. It cannot be left to the vicissitudes of whether a person later comes into money or a third party happens to decide to pay for a person's release from jail. Moreover, in conjunction with *Brown,* the rules set forth in section 12 and *White* ensure that, across the state, presumptively

innocent individuals are detained only when courts make a consistent set of findings. Under this scheme, whether someone is detained would depend far less on the differences in individual trial judges, the differences in culture across geographic jurisdictions, or on whether a jurisdiction happens to have a charitable bail fund with sufficient capital to pay the cash bail. A rule that individual trial judges may evade the limitations of section 12 and *White* if they choose to use financial conditions to accomplish detention rather than formally ordering detention introduces arbitrariness and inconsistency that would be avoided by following the rule articulated in *Brown*.

IV. THE LOWER COURT'S OPINION EXACERBATES CONFUSION IN THE TRIAL COURTS.

The lower court's holding would allow courts to detain virtually *any* defendant—no matter how minor the offense or how short a potential term of incarceration—without the rigorous safeguards of section 12. Such a result not only contradicts *Humphrey, White* and the intent in enacting section 12, it creates an unwieldly pretrial detention regime at a time when trial courts are already struggling to properly implement the law.

As one recent study noted, "[l]ower courts are not following the California Supreme Court's *Humphrey* decision that people should not be kept in jail because they cannot afford to pay cash bail." (Committee on Revision of Pen. Code Annual Report (2022) p. 64.) Here, for example,

under the Court of Appeals' reasoning, the trial court's error was not that it detained petitioner pretrial, but that it detained him explicitly rather than leaving in place the $75,000 cash bail order set at his arraignment. This replaces the transparency and intentionality of the *Humphrey* opinion for the subterfuge and arbitrariness of pre-*Humphrey* daily practice. But it also reanimates the very disparity that lay at the heart of *Humphrey:* a status quo under which the fundamental constitutional right to pretrial release turns on a person's access to money. In authorizing pretrial detention via unaffordable cash bail under more relaxed standards than an explicit order of detention, the lower court endorsed a two-tiered system of pretrial detention in which only those able to afford financial conditions of release will benefit from section 12's protections.

The stakes could not be higher. As this Court emphasized in *Humphrey,* "[t]he disadvantages to remaining incarcerated pending resolution of criminal charges are immense and profound." (*Humphrey, supra,* 11 Cal.5th at p. 147.) More specifically:

> In California, roughly 80% of jail deaths occur during pretrial detention and deaths by suicide account for one quarter of those deaths. Requiring people to await trial in jail impedes people's ability to maintain employment and avail themselves of economic opportunities, trapping people in a cycle of poverty and repeated criminal system involvement. In the short term, pretrial detention takes an immediate and severe financial toll on people and their families. Many people lose their jobs, housing, parental rights, and/or personal property because of their pretrial detention. Families face both decreased household incomes and increased childcare costs while their

> loved ones are incarcerated. These burdens fall more heavily on Black, brown, and indigenous people who are more frequently detained pretrial than their white counterparts.

(Virani, Campos-Bui, Wallace, Bennet, & Chandrayya, *Coming Up Short: The Unrealized Promise of In re Humphrey*, UCLA School of Law Bail Practicum & Berkeley Law Policy Advocacy Clinic (October 2022) p. 6 [citations omitted].)

This court must remedy widespread confusion, affirm the longstanding right to pretrial release contained in article I, section 12, and make real the unmet promise this court made in *Humphrey*: that pretrial detention of presumptively innocent people does not turn on their wealth and that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*Humphrey, supra*, 11 Cal.5th at p. 156 [citations omitted].)

CONCLUSION

For the foregoing reasons, this Court should grant review.

Dated: December 30, 2022 Respectfully submitted,

_____/s/_____
Marsanne Weese

_____/s/_____
Carson White

Attorneys for Gerald John Kowalczyk

CERTIFICATE OF WORD COUNT

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 attached petition with memorandum of points and authorities is prepared in 13-point Times New Roman Font and contains 4,806 words, not including verification tables.

Dated: December 30, 2022

_____/s/_____
Marsanne Weese

EXHIBIT A

Filed 11/21/22

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re GERALD JOHN KOWALCZYK on Habeas Corpus.	A162977 (San Mateo County Super. Ct. No. 21SF003700A)

Gerald John Kowalczyk filed a petition for writ of habeas corpus challenging the trial court's decision denying him bail. We issued an order to show cause and later asked the parties to brief a number of issues, including whether pretrial detention is authorized outside of the circumstances specified in article I, section 12 of the California Constitution. We ultimately dismissed the habeas petition as moot on the motion of the People, the real party in interest, who informed us that petitioner had pled and been sentenced in the underlying criminal matter.

The California Supreme Court granted review and transferred the matter back to this court with directions to vacate our dismissal order and 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." At this juncture, we have received additional briefing from the parties and held oral argument on the question posed.

Adhering to settled principles governing the construction of constitutional provisions, we conclude that the bail provisions of article I, section 28, subdivision (f)(3) can be reconciled with those of article I, section 12 (hereafter section 12 and section 28(f)(3)) and that both sections govern bail determinations in noncapital cases. This means that section 12's general right to bail in noncapital cases remains intact, while full effect must be given to section 28(f)(3)'s mandate that the rights of crime victims be respected in all bail and OR release determinations. In so concluding, we reject any suggestion that section 12 guarantees an unqualified right to pretrial release or that it necessarily requires courts to set bail at an amount a defendant can afford.

FACTUAL AND PROCEDURAL BACKGROUND

The People charged petitioner by complaint with one felony count of vandalism (Pen. Code, § 594, subd. (b)(1)), three felony counts of identity theft (*id.* § 530.5, subd. (a)), one misdemeanor count of petty theft of lost property (*id.* § 485), and one misdemeanor count of identity theft (*id.* § 530.5, subd. (c)(1)). Petitioner waived arraignment on the complaint, and the court set bail at $75,000. Prior to his preliminary hearing, petitioner filed a motion seeking release on his own recognizance (OR) with drug conditions and electronic monitoring, arguing that he posed no danger to the alleged victims or the community and was a minimal risk for nonappearance at future court proceedings.

At a hearing in May 2021, the prosecutor opposed the bail motion and requested that bail remain set at $75,000. According to the prosecutor, the judge who initially set bail determined that petitioner posed a danger to the public based on the recommendation of a pretrial services report and on petitioner's extensive RAP sheet. Given petitioner's ongoing commission of

crimes, including while on probation, the prosecutor argued that no less restrictive nonfinancial conditions could protect the public from him. Petitioner contended otherwise, noting there was no showing of flight risk or a risk of "harm to others" insofar as the charged offenses were property crimes and the majority of his prior offenses were merely theft or drug related. Petitioner also urged consideration of his inability to pay the bail amount and the imposition of alternative conditions, such as drug testing.

The court denied bail altogether and ordered petitioner detained. Although the court indicated it was not worried for the safety of the victims of the charged offenses, it emphasized protection of the public as the primary concern and viewed petitioner's property crimes as a significant public safety issue. The court observed that petitioner was a chronic reoffender whose RAP sheet documented 64 prior convictions and was over 100 pages long. Among those prior convictions were at least four convictions for driving under the influence. Petitioner received the maximum score of 14 on the Virginia Pretrial Risk Assessment Instrument, and the pretrial services report indicated petitioner failed to abide by supervised OR conditions in the last five years. The court also indicated its concern that petitioner might abscond, noting his convictions spanned multiple states and multiple counties in California. Furthermore, petitioner—who was unhoused and unemployed—made no showing of any incentive to remain and attend future court appearances. Highlighting petitioner's unprecedented "level of recidivism," the court found that no nonfinancial or financial conditions could accomplish the goals of protecting the public or ensuring petitioner's appearance at future court proceedings.

At the preliminary hearing in mid-May 2021, the court (a different judicial officer than the two who considered the issue of bail before) held

petitioner to answer to the felony identity theft counts, but not the felony vandalism count, and " 'certified' " the misdemeanor counts to the superior court. The court considered and denied the defense's oral motion to reduce bail, explaining that the prior judge already considered the issue of bail and that the circumstances had not sufficiently changed to warrant disturbing that order.

In mid-June 2021, petitioner again moved to reduce bail or for OR release, contending that he posed no risk to specific victims or the public and that nonfinancial terms could be used to secure his appearance. He also noted he was not held to answer on the felony vandalism charge, which he claimed was a changed circumstance warranting reconsideration of bail. At one point during the hearing, but before the prosecutor raised the issue of petitioner's extensive criminal history and recidivism, the court (a different judicial officer than those before) indicated she did not see a public safety issue in the case. Ultimately, the court denied the motion and declined to disturb the no bail order due to the absence of changed circumstances.

In July 2021, petitioner filed his habeas petition challenging the denial of bail on various grounds. As indicated, we issued an order to show cause but ultimately dismissed the petition as moot. The California Supreme Court granted review, and transferred the matter back to this court with directions to vacate our order dismissing the petition as moot, to conduct further proceedings as appropriate, and 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."

DISCUSSION

A. California Constitutional Provisions Relating to Bail

1. Early History

In 1849, article I, section 7 of the California Constitution provided: "All persons shall be bailable, by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great." (Cal. Const. of 1849, art. I, § 7.) Article I, section 6 of the 1849 Constitution also provided: "Excessive bail shall not be required . . . ." These provisions were subsequently joined and set forth in article I, section 6 of the California Constitution of 1879, and in 1974 they were relocated to section 12 with an added provision explicitly permitting OR release at the court's discretion.[1] (*Standish*, *supra*, 38 Cal.4th at p. 874.)

2. Propositions 4 and 8 in 1982

In 1982, Proposition 4 proposed to amend section 12 by adding two subdivisions that would "broaden the circumstances under which the courts may deny bail." (Ballot Pamp., Primary Elec. (June 8, 1982) analysis of Prop. 4 by the Legislative Analyst, p. 16.)[2] According to the Legislative Analyst, under new subdivision (b), bail "could be denied in felony cases involving acts of violence against another person when . . . the proof of guilt is

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[1] In full, this former version of section 12 read: "A person shall 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. [¶] A person may be released on his or her own recognizance in the court's discretion." (Former Cal. Const., art. I, § 12; *People v. Standish* (2006) 38 Cal.4th 858, 874 (*Standish*) [prior to 1974, there was a " ' "well-established practice of releasing persons accused of crimes on their own recognizance" ' in appropriate circumstances as an alternative to requiring the posting of bail"].)

[2] Petitioner's unopposed request for judicial notice of various documents, including voter information guides, is granted.

evident or the presumption of guilt is great and . . . there is a substantial likelihood that the accused's release would result in great bodily harm to others." (*Id.*, analysis of Prop. 4 by the Legislative Analyst, p. 16; see *id.*, text of Prop. 4, p. 17.) And under new subdivision (c), bail "could be denied in felony cases when . . . the proof of guilt is evident or the presumption of guilt is great and . . . the accused has threatened another with great bodily harm and there is a substantial likelihood that the threat would be carried out if the person were released." (*Id.*, analysis of Prop. 4, p. 16.) Proposition 4 also proposed to add a constitutional "requirement that the courts, in fixing the amount of bail, consider . . . the seriousness of the offense, the person's previous criminal record, and the likelihood that the person will appear to stand trial[]." (*Ibid.*)

On the same ballot was Proposition 8—known as " 'The Victims' Bill of Rights' "—which would accord a number of constitutional rights to crime victims in areas ranging from bail to restitution. (Ballot Pamp., Primary Elec. (June 8, 1982) text of Prop. 8, p. 33.) In particular, Proposition 8 would acknowledge that "[t]he rights of victims pervade the criminal justice system, encompassing not only the right to restitution . . . , but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody." (*Ibid.*, italics omitted.) To accomplish these goals, the proposition explained, "broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives." (*Ibid.*, italics omitted.)

With regard to bail, Proposition 8 proposed to repeal section 12 and to substitute section 28, subdivision (e) ("section 28(e)") in its place. (*Standish*,

supra, 38 Cal.4th at p. 874; Ballot Pamp., Primary Elec., *supra*, text of Prop. 8, §§ 2–3, p. 33.) Section 28(e), entitled "Public Safety Bail," provided as follows: "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 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 shall be the primary consideration. [¶] 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." (Ballot Pamp., Primary Elec., *supra*, text of Prop. 8, § 3, p. 33, italics omitted.)

Ultimately, Proposition 4 and Proposition 8 both passed, but Proposition 4 received more votes than Proposition 8. Over a decade later, the California Supreme Court commented that the bail and OR provisions in Proposition 4 prevailed over those in Proposition 8 because the former received more votes than the latter. (*In re York* (1995) 9 Cal.4th 1133, 1140, fn. 4 (*York*).) However, the *York* court did not analyze at length whether the two propositions might be harmonized so that both of their bail and OR provisions could be given effect. (*Standish*, *supra*, 38 Cal.4th at pp. 876–877.)

In 2006, the California Supreme Court performed such an analysis in *Standish*, *supra*, 38 Cal.4th 858. In conducting a "section-by-section comparison of Propositions 4 and 8," the *Standish* court observed their bail and OR provisions were in "direct conflict": "Proposition 8 would have repealed . . . section 12 [citation], while Proposition 4 amended that provision.

[Citation.] Proposition 8 would have rescinded the court's discretion to grant OR release for any serious felony[3] [citation], while Proposition 4 left the court's preexisting discretion intact without any restriction. [Citation.] Proposition 4 stated that all accused persons 'shall' be admitted to bail, subject to certain limitations [citation], while Proposition 8 would have rendered bail discretionary in all cases and would have extended the restrictions it imposed upon bail to OR release." (*Id.* at pp. 877–878.) In view of this analysis and the greater number of votes Proposition 4 received, the court determined that Proposition 4's bail and OR amendments to section 12 took effect, and that Proposition 8's conflicting provisions in section 28(e) did not. (*Id.* at p. 878.)

As relevant here, the voters approved two subsequent amendments. First, in 1994 the voters passed Proposition 189, which expanded the exception in subdivision (b) of section 12 to include persons who have committed "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." (Supp. Ballot Pamp., Gen. Elec., (Nov. 8, 1994) text of Prop. 189, p. 18, italics omitted.) Second, and as will be discussed below, the voters approved Proposition 9 in 2008.

3. Proposition 9 in 2008

Proposition 9—entitled the " 'Victims' Bill of Rights Act of 2008: Marsy's Law' "—proposed to amend section 28 as added to the Constitution in 1982, including the bail provisions previously held inoperative. (Voter

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3 As noted, *post*, this specific provision rescinding a court's discretion to grant OR release for serious felonies was expressly stricken from section 28 by the passage of Proposition 9 in 2008.

Information Guide, Gen. Elec. (Nov. 4, 2008) text of Prop. 9, §§ 1 & 4.1, pp. 128–130.) Proposition 9 contained a finding that crime victims are entitled to "justice and due process" and that its provisions are necessary "to remedy a justice system that fails to fully recognize and adequately enforce" such rights. (*Id.*, text of Prop. 9, § 2, p. 128.) Specifically, Proposition 9 declared: "The People of the State of California find that the 'broad reform' of the criminal justice system intended to grant these basic rights mandated in the Victims' Bill of Rights initiative measure passed by the electorate as Proposition 8 in 1982 has not occurred as envisioned by the people. Victims of crime continue to be denied rights to justice and due process." (*Ibid.*)

Importantly, Proposition 9 included the following declaration of its purposes and intent: "*The rights of victims also include broader shared collective rights that are held in common with all of the People of the State of California and that are enforceable through the enactment of laws and through good-faith efforts and actions of California's elected, appointed, and publicly employed officials. These rights encompass the expectation shared with all of the people of California* that persons who commit felonious acts causing injury to innocent victims will be appropriately *and thoroughly investigated, [and] appropriately* detained in custody . . . so that the public safety is protected and encouraged as a goal of highest importance."[4] (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 9, § 4.1, p. 129.)

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[4] The italics in this and in the following quoted text from Proposition 9 reflect the original italicized language appearing in the ballot materials, which informed the reader: "This initiative measure amends a section of the California Constitution and amends and adds sections to the Penal Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new." (Voter Information Guide, Gen. Elec., *supra*, introductory paragraph to text of Prop. 9, p. 128.)

Upon its passage, Proposition 9 amended section 28, subdivision (a), to provide that crime victims had the personally enforceable rights described in subdivision (b)(1) through (17). (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 9, § 4.1, p. 129.) In particular, subdivision (b)(3) of section 28 guaranteed the right of crime victims *"[t]o have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant*." (Text of Prop. 9, § 4.1, p. 129.)

Proposition 9 also added subdivision (f)(3) to section 28, which reflected the same title ("Public Safety Bail") and contained language nearly identical to the language that appeared in Proposition 8's version of section 28(e). (Compare Voter Information Guide, Gen. Elec., *supra*, text of Prop. 9, § 4.1, p. 130 with Ballot Pamp., Primary Elec., *supra*, text of Prop. 8, p. 33.) Given its significance to petitioner's contentions, we set forth the following relevant text of proposed section 28(f)(3), as it appeared in the ballot materials:

> *(f) In addition to the enumerated rights provided in subdivision (b) that are personally enforceable by victims as provided in subdivision (c), victims of crime have additional rights that are shared with all of the People of the State of California. These collectively held rights include, but are not limited to, the following:*
>
> [¶] . . . [¶]
>
> ~~(c)~~ *(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.

(Voter Information Guide, Gen. Elec., *supra*, text of Prop. 9, § 4.1, p. 130.)

Unlike the situation earlier with Proposition 8, Proposition 9 did not propose to repeal section 12. Proposition 9 did, however, include a provision entitled "Conflicts with Existing Law" which specifically stated: "It is the intent of the People of the State of California in enacting this act that if any provision in this act conflicts with an existing provision of law which provides for greater rights of victims of crime, the latter provision shall apply." (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 9, § 7, p. 132, block capitalization omitted.)

B. The *Humphrey* Decision

To round out the constitutional landscape pertaining to bail, we discuss the California Supreme Court's decision in *In re Humphrey* (2021) 11 Cal.5th 135 (*Humphrey*).

In *Humphrey*, the charges against the 66-year-old petitioner included first degree residential robbery and burglary, infliction of injury on an elderly victim, and four prior strike allegations. (*Humphrey*, *supra*, 11 Cal.5th at pp. 143–144.) In seeking OR release without any condition of money bail, the petitioner cited his age, community ties, financial condition, history of appearing in court, remoteness of his prior offenses, as well as the fact that the charged offenses involved the alleged taking of $7 and a bottle of cologne

from the victim. (*Id.* at p. 144.) The court set bail at $600,000, then later at $350,000, despite the petitioner's protestations that he could not afford these bail amounts. (*Id.* at pp. 144–145.) After the Court of Appeal granted habeas relief, the California Supreme Court granted review "to address the constitutionality of money bail as currently used in California as well as the proper role of public and victim safety in making bail determinations." (*Id.* at p. 147.)

Ultimately, the Supreme Court held it unconstitutional to detain arrestees solely because they lack financial resources. (*Humphrey*, *supra*, 11 Cal.5th at p. 156.) In so holding, the court emphasized that bail determinations require "an individualized consideration of the relevant factors," including "the protection of the public as well as the victim, the seriousness of the charged offense, the arrestee's previous criminal record and history of compliance with court orders, and the likelihood that the arrestee will appear at future court proceedings." (*Humphrey*, *supra*, 11 Cal.5th at p. 152, citing §§ 12, 28(b)(3), (f)(3); Pen. Code, § 1275, subd. (a)(1).)

The *Humphrey* court underscored the following general framework for pretrial release and detention determinations: "Where the record reflects the risk of flight or a risk to public or victim safety, the court should consider whether nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial. If the court concludes that money bail is reasonably necessary, then the court must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and—unless there is a valid basis for detention—set bail at a level the arrestee can reasonably afford. And if a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released,

it may detain the arrestee only if it first finds, by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect those interests." (*Humphrey*, *supra*, 11 Cal.5th at p. 154.) In sum, "detention is impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests." (*Id.* at pp. 151–152.)

As relevant here, the *Humphrey* court expressly noted that "[e]ven when a bail determination complies with the above prerequisites, 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—a question not resolved [in *Humphrey*]—and with due process." (*Humphrey*, *supra*, 11 Cal.5th at p. 155, fn. omitted.) In a footnote accompanying this statement, the court noted it was leaving unresolved the question of whether section 12 and section 28(f)(3) "can or should be reconciled, including whether these provisions authorize or prohibit pretrial detention of noncapital arrestees outside the circumstances specified in section 12, subdivisions (b) and (c)." (*Humphrey*, at p. 155, fn. 7; *In re White* (2020) 9 Cal.5th 455, 470.) As indicated, the California Supreme Court has directed us to resolve that open issue in this case.

C. Analysis

Before turning to the question presented, we address petitioner's claim that section 28(f)(3) is completely inoperative because Proposition 8 never took effect in 1982. We review this issue de novo. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1026 (*Taxpayers for Accountable School Bond Spending*).)

1. Section 28(f)(3) is fully operative

In contending section 28(f)(3) is inoperative, petitioner emphasizes that the ballot materials accompanying Proposition 9 made no mention of the

Supreme Court's decision holding that Proposition 8's similar bail provisions were inoperative; nor did the materials otherwise indicate the voters were being asked to "re-enact" or effectuate the inoperative bail provisions of section 28(e). Thus, petitioner claims, the voters' 2008 approval of Proposition 9 did not reflect an intent to resuscitate the inoperative bail and OR provisions of Proposition 8, and section 28(f)(3) must be deemed inoperative. Alternatively, petitioner posits that effect should be given only to the "genuinely new material" of section 28(f)(3), i.e., only those portions of the constitutional text that were italicized in the ballot materials.[5]

"Under the California Constitution, '[t]he legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum.' (Cal. Const., art. IV, § 1.)" (*Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105, 1111.) The initiative power is " 'one of the most precious rights of our democratic process' " (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591), and "courts have consistently declared it their duty to ' "jealously guard" ' and liberally construe the right so that it ' "be not improperly annulled" ' " (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 934). " 'If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.' " (*Associated Home Builders*, at p. 591.) In analyzing challenges to the exercise of the initiative power, courts generally assume that, when voters are provided the whole text of a proposed constitutional amendment, they have considered each aspect of the law and

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[5] In their joint amicus brief in support of petitioner, the American Civil Liberties Union of Northern and Southern California, the California Public Defenders Association, Crime Survivors for Safety and Justice, and the Public Defender of Ventura County (hereafter amici) essentially advance this the same argument, as well as a few other of petitioner's arguments.

voted intelligently. (See *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 252 (*Brosnahan*).)

Here, there is no dispute that the voters were provided the entire text of Proposition 9. Thus, when the voters cast their ballots, they presumably considered each aspect of the law and voted intelligently to approve all of its terms, including the whole of section 28(f)(3). (*Brosnahan*, *supra*, 32 Cal.3d at p. 252.) That the ballot materials omitted to mention section 28(f)(3)'s similarity to bail provisions previously deemed inoperative despite voter approval in 1982 provides no basis for its annulment.

In arguing to the contrary, petitioner directs our attention to Elections Code section 9086, subdivision (f), which provides: "The provisions of the proposed measure differing from the *existing laws* affected shall be distinguished in print, so as to facilitate comparison." (Italics added.) Pointing to a paragraph in the 2008 ballot materials that explains "new provisions proposed to be added are printed in *italic type* to indicate that they are new" (see *ante*, fn. 4), petitioner argues that, at best, the voters intended to enact only those few italicized words and phrases within section 28(f)(3) of Proposition 9, i.e., "*the safety of the victim*," "*and the safety of the victim*," "*considerations*," and "*and the victim*."

We express no view as to whether Elections Code section 9086, subdivision (f), would have required the entirety of section 28(f)(3) to be italicized, had a timely challenge to the typeface in the Voter Pamphlet been filed. Elections Code section 9086 is silent as to whether italicization is appropriate for laws that technically exist but have been deemed inoperative, such as the bail provisions at issue. Here, petitioner cites no authority for the view that, despite section 28(f)(3)'s approval by the voters, only its italicized portions should be given effect. Indeed, when excised from the

sentences they appear in, the words and phrases that were italicized in section 28(f)(3) did not convey a complete idea and had no real meaning beyond their conceptual references. Contrary to petitioner's contention, there simply is no basis for believing that the voters intended to enact certain select words and phrases divorced from the contextual language that gave them meaning.

2. Section 12 and section 28(f)(3) can be reconciled and each given full effect

We now address whether section 12(b) and (c) or section 28(f)(3) governs the denial of bail in noncapital cases, or alternatively, whether these provisions can be reconciled. This is a matter of constitutional interpretation, which we undertake de novo. (*Taxpayers for Accountable School Bond Spending*, *supra*, 215 Cal.App.4th at p. 1026.)

We focus first on the meaning of these constitutional provisions. For this task, we adhere to well established principles similar to those governing statutory construction. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444.) Our goal is to ascertain the intent of the lawmakers "so as to effectuate the purpose of the law." (*People v. Canty* (2004) 32 Cal.4th 1266, 1276 (*Canty*).) We start by examining the language of the constitutional provisions, " ' "giving the words their usual, ordinary meaning." ' " (*Ibid*.) If the language is clear and unambiguous, we follow its plain meaning. (*Ibid*.) We construe the language in the context of the measures as a whole and the overall legislative scheme, according significance to every word, phrase, and sentence in order to achieve the legislative purpose. (*Ibid*.) "The intent of the law prevails over the letter of the law, and ' "the letter will, if possible, be so read as to conform to the spirit of the act." ' " (*Id*. at pp. 1276–1277.) Once we ascertain the meaning of each constitutional provision, we will be positioned to determine which

provision governs the denial of bail in noncapital cases or whether the two provisions can be reconciled.

To reiterate, section 12 provides in relevant part: "A person shall be released on bail by sufficient sureties, except for: [¶] (a) Capital crimes . . . ; [¶] (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person . . . and the court finds . . . that there is a substantial likelihood the person's release would result in great bodily harm to others; or [¶] (c) Felony offenses . . . and the court finds . . . 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." Section 12 further provides: "Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration 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. [¶] A person may be released on his or her own recognizance in the court's discretion."

Section 28(f)(3) provides in full: "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 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. [¶] 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."

The principal dispute centers around the language in the first sentence of each of these constitutional provisions. Specifically, the lead clauses are virtually identical except that section 12 states that a person "*shall be* released on bail by sufficient sureties," while section 28(f)(3) says that a person "*may be* released on bail by sufficient sureties." (Italics added.) The precise inquiry is this: What is the meaning of the seemingly permissive language in section 28(f)(3), and can it be reconciled with the mandatory language in section 12, which embodies a longstanding "constitutional right to be released on bail pending trial" in noncapital cases subject to two exceptions? (*Standish*, *supra*, 38 Cal.4th at p. 878; see Cal. Const. of 1849, art. I, § 7; *In re Law* (1973) 10 Cal.3d 21, 25.)

Turning to section 28(f)(3)'s use of the term "may," we observe that, ordinarily and presumptively, "may" is permissive. (*Standish*, *supra*, 38 Cal.4th at p. 869.) "May" is a term that also refers to an expression of possibility. (Black's Law Dictionary (11th ed. 2019) p. 1172, col. 2.) Given 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. (Italics added.) That is, the phrase acknowledges that a person may or may not be released on bail, consistent with the dictates in section 12 that a person is generally entitled to bail release in noncapital cases except under the circumstances articulated in

section 12(b) and (c), or (as will be discussed below) when a person may not be able to post bail as set.

Construing section 28(f)(3) in this manner fully promotes the voters' intent to "preserve and protect" the right of crime victims "to justice and due process" by having "the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant." (Voter Information Guide, Gen. Elec. (Nov. 4, 2008), text of Prop. 9, § 4.1, p. 129; *id.*, arguments in favor of Prop. 9, p. 62.) Section 28(f)(3) accomplishes this by requiring that (1) all bail determinations take into consideration and give primacy to protection of the public and victim safety[6]; (2) all OR determinations be subject to the same factors considered in setting bail; and (3) victims be notified and provided a reasonable opportunity to be heard "[b]efore any person arrested for a serious felony may be released on bail." At the same time, these victim safety provisions do not conflict with section 12 or otherwise impede its operation; they simply mandate additional considerations in bail and OR determinations in noncapital cases. Accordingly, construing the first sentence of section 28(f)(3) as declarative of the general right to bail allows for complete reconciliation of section 28(f)(3) and section 12.

The People advance a different construction of section 28(f)(3), essentially contending the phrase "[a] person *may* be released on bail by sufficient sureties" must be interpreted as a grant of judicial discretion to deny bail release in all noncapital cases. (Italics added.) Such construction, of course, would mean that section 28(f)(3) is in direct conflict with section 12

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[6] Sections 28(f)(3) and 12 both additionally require consideration of "the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of [the defendant] appearing at the trial or hearing of the case."

and its limited exceptions for denying bail release in certain noncapital cases. Setting aside for a moment the strong presumption against implied repeal, the People's construction finds no support in the text of section 28 or in the ballot materials accompanying Proposition 9.

Apart from the People's proffered interpretation of section 28(f)(3)'s first sentence, the text of section 28 contains no language indicating an intent to broaden the authority of judges and magistrates to deny bail. Indeed, when the measure mentions the topic of bail, it does so in a manner that is fully consistent with the terms of section 12. For instance, section 28's prefatory declarations include a finding that the rights of crime victims "encompass the expectation" shared by all Californians that, prior to trial, "*persons who commit felonious acts causing injury to innocent victims* will be . . . *appropriately detained in custody*." (§ 28, subd. (a)(4), italics added.) Not only does this finding align with section 12's contemplation that pretrial bail release may be denied in certain serious felony cases, but the specificity of the italicized language counters any suggestion that judges were being given discretion to deny bail to any person accused of committing a noncapital offense.

Similarly, the ballot materials accompanying Proposition 9 featured an impartial analysis by the Legislative Analyst that specifically informed the voters: "The Constitution would be changed to specify that the safety of a crime victim must be taken into consideration by judges in setting bail for persons arrested for crimes." (Voter Information Guide, Gen. Elec., *supra*, analysis of Prop. 9 by the Legislative Analyst, p. 59.) While that analysis accurately conveyed the measure's intent to add victim safety as a new mandatory consideration for bail determinations, the Legislative Analyst offered no view that the measure would completely eliminate the historic

right to bail which has existed in the California Constitution since 1849. Nor did the arguments for and against Proposition 9 suggest that the measure would expand judicial discretion to deny bail release beyond the exceptions in section 12(b) and (c). (Voter Information Guide, Gen. Elec., *supra*, arguments in favor of Prop. 9 and rebuttal to argument in favor of Prop. 9, pp. 62–63.)

Moreover, where, as here, a later law contains no terms explicitly providing for repeal of existing law, we must contend with the strong presumption against repeal by implication. (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419–420.) To overcome this presumption, the bail provisions of sections 12 and 28(f)(3) " 'must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.' " (*Western Oil & Gas*, at pp. 419–420.) Put another way, " '[t]here must be '*no possibility* of concurrent operation.' " (*Ibid.*, italics added.)

As discussed, sections 28(f)(3) and 12 are easily reconciled by giving a natural reading to the first sentence of section 28(f)(3) and understanding its meaning as a declarative statement of existing law. Such construction respects the longstanding constitutional right to bail as embodied in section 12, while also fully effectuating Proposition 9's constitutionally mandated considerations of public and victim safety in all bail and OR release determinations. Consequently, there appears no basis for finding a repeal by implication.

In reaching this conclusion, we acknowledge that in *Standish*, *supra*, 38 Cal.4th 858, our Supreme Court determined that the bail provisions previously approved in Proposition 8—which were nearly identical to those in section 28(f)(3)—were in direct conflict with the bail provisions approved in Proposition 4—which amended section 12 with the language existing today.

(*Standish*, at pp. 877–878.) That finding of conflict, however, is neither dispositive nor persuasive in the present matter.

Significantly, the *Standish* court was faced with the circumstance that section 28(e), as proposed in Proposition 8, explicitly called for the repeal and substitution of section 12. (*Standish*, *supra*, 38 Cal.4th at p. 877.) Because the repeal clause would eliminate the constitutional right to bail enshrined in section 12, then by necessity section 28(e) had to articulate its own constitutional parameters for the availability of bail. Thus, section 28(e)'s use of the permissive term "may" was properly understood as rendering "bail discretionary in all cases." (*Standish*, at p. 877.) In stark contrast, Proposition 9 had no repeal clause and thus presented the voters with bail release provisions that, presumably, would have to operate concurrently with the existing constitutional provision recognizing the right to bail in most noncapital cases. For the reasons discussed, our reading of section 28(f)(3) is the most natural one given the operative provisions of section 12.

In sum, we interpret the first sentence of section 28(f)(3) as a declarative statement recognizing that bail may or may not be denied under existing law. Under this construction, section 12's general right to bail remains intact, while full effect is accorded to section 28(f)(3)'s mandate that the rights of crime victims be respected in bail and OR release determinations.

3. Bail and OR release after Humphrey

As indicated, section 12 provides that a person "shall be released on bail by sufficient sureties" except for capital crimes and specific felony offenses. Having concluded that sections 12 and 28(f)(3) must be given concurrent effect, we turn to petitioner's contention that section 12 guarantees an "absolute right to pretrial release" and requires courts to set

bail at an amount a defendant can afford. For the reasons below, we reject petitioner's expansive and novel reading of section 12.

First, petitioner's contention finds no support in the plain language of section 12. The phrase "released on bail by sufficient sureties" as used in both sections 12 and 28(f)(3) generally refers to the state of being released from custody after the posting of some sufficient security such as "cash, property, or (more often) a commercial bail bond—which is forfeited if the arrestee later fails to appear in court." (*Humphrey*, *supra*, 11 Cal.5th at p. 142; Pen. Code, §§ 1268, 1269; accord *Stack v. Boyle* (1951) 342 U.S. 1, 5.) A "surety" is: "1. Someone who is primarily liable for paying another's debt or performing another's obligation" or "2. A formal assurance; esp., a pledge, bond, guarantee, or security given for the fulfillment of an undertaking." (Black's Law Dict. (11th ed. 2019) p. 1742, col. 2; Civ. Code, § 2787 [enacted in 1872 and defining a surety as "one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor"].)

Although we have found no California case expressly interpreting the phrase "sufficient sureties," the phrase must be construed in conjunction with section 12's requirement that trial courts fix the amount of bail upon consideration of "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." When viewed as a whole, and with reference to section 28(f)(3)'s additional considerations of public and victim safety, the most natural reading of section 12 is that a person has a right to be released upon the posting of a sufficient security which a court, in its discretion, determines is adequate to accomplish the purposes of bail, i.e., to protect public and victim safety and to ensure a defendant's presence in court.

(§§ 12; 28(b)(3), (f)(3).) This construction clearly promotes the constitutionally-based policy purposes of bail, while a contrary construction that categorically requires release on affordable bail does not.

Indeed, our construction comports with the long history of section 12, which has never been understood as mandating affordable bail. At the time our state Constitution was drafted in 1879, people were routinely confined in jail for want of bail. (1 Willis & Stockton, Debates and Proceedings, Cal. Const. Convention 1878–1879 (1880), p. 310 ["the vast majority of those who are committed for various offenses under felonies are persons who are unable to give bail"]; *id.* at p. 317 ["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"]; 3 Willis & Stockton, *supra*, at p. 1188 ["Sometimes we lock men up because they cannot give bail"].) Section 12 and its predecessors sought to curtail this all-too-common situation by expressly recognizing a right to bail in most cases, and by prohibiting the imposition of excessive bail. But neither of these constitutional provisions has ever been construed as imposing an absolute requirement that bail be affordable.[7]

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[7] The language of section 12 is materially identical to clauses in the Constitutions of our sister states. (E.g., Iowa Const., art. I, § 12 ["All persons shall, before conviction, be bailable, by sufficient sureties, except for capital offences where the proof is evident, or the presumption great."]; N.M. Const., art. II, § 13 ["All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section"]; Ariz. Const., art. II, § 22 ["All persons charged with crime shall be bailable by sufficient sureties, except . . ."]; Ill. Const., art. I, § 9 ["All persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great . . ."].)

Our interpretation of section 12 is in line with the case law interpreting these sister state Constitutions. (E.g., *State v. Briggs* (Iowa 2003) 666

Notably, petitioner's position that bail must be affordable was essentially rejected well over a century ago in the cases of *Ex parte Duncan* (1879) 53 Cal. 410 (*Duncan I*) and *Ex parte Duncan* (1879) 54 Cal. 75 (*Duncan II*), in which a prisoner twice sought relief by habeas corpus to have his bail amount lowered, and twice the high court denied relief. (*Duncan I*, at pp. 411–412; *Duncan II*, at pp. 76, 80.) In *Duncan I*, the court indicated that the setting of the amount of bail was a matter of judicial discretion, to be interfered with on review only when the amount was excessive, i.e., " '*per se* unreasonably great and clearly disproportionate to the offense involved,' etc." (*Duncan I*, at p. 411.)

More significantly, in *Duncan II*, the court confronted and rejected the argument that a bail amount is excessive simply because a prisoner is unable to procure it. (*Duncan II*, *supra*, 54 Cal. at pp. 77–78.) As *Duncan II* explained, "Undoubtedly the extent of the pecuniary ability of a prisoner to furnish bail is a circumstance among other circumstances to be considered in fixing the amount in which it is to be required, but it is not in itself controlling. *If the position of the counsel were correct, then the fact that the prisoner had no means of his own, and no friends who were able or willing to become sureties for him, even in the smallest sum, would constitute a case of*

N.W.2d 573, 582; *People ex rel. Gendron v. Ingram* (1966) 34 Ill. 2d 623, 626 ["Sufficient, as used in the [Illinois] constitution, means sufficient to accomplish the purpose of bail, not just the ability to pay in the event of a 'skip']; *State v. Gutierrez* (N.M.Ct.App. 2006) 140 N.M. 157, 162; *Fragoso v. Fell* (Ariz.Ct.App. 2005) 210 Ariz. 427, 433; see also *State v. Brooks* (Minn. 2000) 604 N.W.2d 345, 350 [explaining that Pennsylvania's law—which permitted all prisoners to be " 'Bailable by Sufficient Sureties' "—"became the model for almost every state constitution adopted after 1776" and two-thirds of state constitutions contain similar or identical language], italics omitted.)

excessive bail, and would entitle him to go at large upon his own recognizance." (*Duncan II*, at p. 78, italics added.)

Taken together, the *Duncan* cases implicitly recognized that unaffordable bail is not per se excessive and that, aside from prohibiting a bail amount disproportionate to the circumstances, the California Constitution's bail provision—now in section 12—did not require bail in an affordable amount.

We now address the extent to which the California Supreme Court's decision in *Humphrey* affects the historical understanding and operation of section 12's bail provisions. In holding that the denial of bail must comport with due process and equal protection principles, the *Humphrey* court carefully explained that "where a financial condition is . . . necessary, the court must consider the arrestee's ability to pay the stated amount of bail—and may not effectively detain the arrestee '*solely* because' the arrestee 'lacked the resources' to post bail." (*Humphrey*, *supra*, 11 Cal.5th at p. 143, italics added.)

Although the *Humphrey* court made clear that a trial court must consider a defendant's ability to pay in making a bail determination, *Humphrey* did not suggest that a court is precluded from setting bail at an amount beyond a defendant's means when necessitated by the circumstances presented. To the contrary, *Humphrey* explicitly recognized that "[i]n unusual circumstances, the need to protect community safety may conflict with the arrestee's fundamental right to pretrial liberty—a right that also generally protects an arrestee from being subject to a monetary condition of release the arrestee can't satisfy—to such an extent that no option other than refusing pretrial release can reasonably vindicate the state's compelling interests. In order to detain an arrestee under those circumstances, a court

must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements. [Citation.] [¶] *Detention in these narrow circumstances doesn't depend on the arrestee's financial condition. Rather, it depends on the insufficiency of less restrictive conditions to vindicate compelling government interests: the safety of the victim and the public more generally or the integrity of the criminal proceedings*. Allowing the government to detain an arrestee without such procedural protections would violate state and federal principles of equal protection and due process that must be honored in practice, not just in principle." (*Ibid.*, italics added.)

Reasonably read, the foregoing passage in *Humphrey* meaningfully restricts, but does not purport to eliminate, the traditional power of a court to set bail at an amount that may prove unaffordable, so long as the court—after undertaking an individualized consideration of all relevant factors including the defendant's ability to pay—makes the necessary findings to support a detention. That is, the court must find clear and convincing evidence that no other conditions of release, including affordable bail, can reasonably protect the state's interests in assuring public and victim safety and the arrestee's appearance in court. (*Humphrey*, *supra*, 11 Cal.5th at pp. 143, 152–154.)

Thus, when a court sets bail at an amount higher than a person can likely afford after finding clear and convincing evidence that no conditions short of detention can vindicate these compelling state interests, it cannot be said that the court "effectively detain[ed]" the person " '*solely* because' " the person " 'lacked the resources' to post bail." (*Humphrey*, *supra*, 11 Cal.5th at p. 143, italics added.) Though the person's inability to post the court-ordered bail amount necessarily results in the person's

financial condition is not the determinate cause of detention. Rather, the determinate cause of the detention is the court's finding that no other conditions short of detention are sufficient to vindicate the state's interests. (See *United States v. Fidler* (9th Cir. 2005) 419 F.3d 1026, 1028 ["de facto detention" when defendant is unable to comply with a financial condition does not violate the federal Bail Reform Act if the record shows "the detention is not based solely on the defendant's inability to meet the financial condition, but rather on the district court's determination that the amount of the bond is necessary to reasonably assure the defendant's attendance at trial or the safety of the community"]; *United States v. McConnell* (5th Cir. 1988) 842 F.2d 105, 108–110.)

We acknowledge the recent decision in *In re Brown* (2022) 76 Cal.App.5th 296 (*Brown*) offers an alternative interpretation of *Humphrey*. As a preliminary matter, we observe the *Brown* court summarizes *Humphrey* as follows: "Having considered potential nonfinancial conditions, if the trial court nonetheless concludes money bail is 'reasonably necessary' to protect the public and ensure the arrestee's presence at trial, then bail must be set 'at a level the arrestee can reasonably afford' unless the court concludes, by clear and convincing evidence, that no nonfinancial condition in conjunction with affordable money bail can reasonably protect public safety or arrestee appearance. (*Humphrey*, *supra*, 11 Cal.5th at p. 154.)" (*Brown*, at pp. 305–306.)

While we concur in the foregoing summary, we cannot agree with the *Brown* court's conclusion that, when a trial court makes the required finding above, then *Humphrey* leaves a court with no option other than to formally order pretrial detention. For one thing, such a conclusion appears at odds with the historical understanding of section 12's general right to release on

bail by sufficient sureties, and *Humphrey* did not disavow that understanding. Moreover, *Humphrey* repeatedly acknowledged that an outright pretrial detention order would not offend the due process clause in those rare instances in which a court concludes, by clear and convincing evidence, that no nonfinancial condition in conjunction with affordable money bail can reasonably protect the state's compelling interests in public safety or arrestee appearance. (*Humphrey*, *supra*, 11 Cal.5th at pp. 143, 154, 156.) If, in balancing the liberty interest of an accused with the state's compelling interests, an outright pretrial detention order would be appropriate, then *a fortiori* a bail order in an amount higher than a defendant can afford would also be appropriate.[8]

CONCLUSION

In closing, we summarize our answer to the California Supreme Court's question and explain our view of the framework governing bail determinations as informed by the principles in *Humphrey*.

Section 28(f)(3) became fully operative when the voters approved Proposition 9 in 2008, and its bail provisions can be fully reconciled with those in section 12, as follows. When a defendant's case falls outside the circumstances specified in section 12, subdivisions (a) through (c), the

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[8] We note it can be difficult to know with any certainty what a defendant might in good faith be able to afford in terms of bail. But if a defendant truly cannot afford to post any bail, then arguably all that remains, in effect, is OR release. (Black's Law Dict. (11th ed. 2019) p. 1543, col. 2 ["release on recognizance" means "[t]he pretrial release of an arrested person who promises, usually in writing but without supplying a surety or posting bond, to appear for trial at a later date"]; Pen. Code, §§ 1270, 1318.) Both sections 12 and 28(f)(3) contain OR release provisions that are separate and distinct from their bail provisions and that clearly provide for judicial discretion. (See *Humphrey*, *supra*, 11 Cal.5th at p. 147; *York*, *supra*, 9 Cal.4th at pp. 1139–1141.)

defendant has a general right under sections 12 and 28(f)(3) to be released on bail by sufficient sureties, or to be released on OR in the court's discretion, subject to the considerations below.

In fixing the amount of bail and release conditions, or in exercising its discretion to release a person on OR, courts must consider 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 the defendant appearing at the trial or hearing of the case. (§§ 12, 28(b)(3) & (f)(3).) Public safety and the safety of the victim shall be the primary considerations. (§ 28(f)(3).)

"In those cases where the arrestee poses little or no risk of flight or harm to others, the court may offer OR release with appropriate conditions. [Citation.] Where the record reflects the risk of flight or a risk to public or victim safety, the court should consider whether nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial. If the court concludes that money bail is reasonably necessary, then the court must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and—unless there is a valid basis for detention—set bail at a level the arrestee can reasonably afford. And if a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect those interests." (*Humphrey*, *supra*, 11 Cal.5th at p. 154.) Though excessive bail cannot be imposed, courts are not required to set bail at an amount a defendant will necessarily be able to afford. Before a court sets bail at an amount higher

than a person can likely afford, it must make the aforementioned findings necessary to support a detention.

Finally, we reiterate the fundamental principle that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*United States v. Salerno* (1987) 481 U.S. 739, 755.) While section 12 does not prohibit courts from fixing bail at an amount a defendant likely cannot meet, it will be the rare case where such a monetary condition is truly necessary to sufficiently protect the state's compelling interests in public and victim safety and in ensuring appearances in court.

DISPOSITION

Having answered the question posed to us by the California Supreme Court, we dismiss the petition for writ of habeas corpus as moot.

_____
Fujisaki, J.

WE CONCUR:

_____
Tucher, P.J.

_____
Rodríguez, J.

Trial Court:	San Mateo County Superior Court
Trial Judge:	Hon. Susan Greenbert
Counsel:	Law Offices of Marsanne Weese, Marsanne Weese, Rose Mishaan; Civil Rights Corps, Carson White, Katherine Hubbard, Salil Dudani, and Alec Karakatsanis for Petitioner
	ACLU Foundation of Northern California, Avram Frey, Mica Doctoroff, Emi Young; ACLU Foundation of Southern California, Summer Lacey for American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, California Public Defenders Association, Crime Survivors for Safety and Justice, and Claudia Y. Bautista, Ventura County Public Defender as Amicus Curiae on behalf of Petitioner
	Stephen M. Wagstaffe, District Attorney of San Mateo County, Lechelle Mercier, Law Clerk, Bryan Abanto and Joshua Martin, Deputy District Attorneys for Real Party in Interest

In re Kowalczyk (A162977)

S277910

PROOF OF SERVICE

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.

On December 30, 2022, I served a true copy of the attached:

PETITION FOR REVIEW

On each of the following, by electronic service to the following addresses:

Superior Court of San Mateo County
The Honorable Susan Greenberg
Dept3@sanmateocourt.org

Superior Court of San Mateo County
The Honorable Elizabeth K. Lee
Dept17@sanmateocourt.org

Superior Court of San Mateo County
The Honorable Jeffrey R. Finigan
Dept24@sanmateocourt.org

The District Attorney of San Mateo County
smda@smcgov.org

Office of the Attorney General
sfagdocketing@doj.ca.gov

Executed in San Francisco, California on December 30, 2022.

MARSANNE WEESE

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **TEMP-G0WCMKV8**
Lower Court Case Number:

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Rose Mishaan	rose@marsannelaw.com	e-Serve	12/30/2022 4:25:36 PM
Attorney General of California	sfagdocketing@doj.ca.gov	e-Serve	12/30/2022 4:25:36 PM
Honorable Susan Greenberg	dept3@sanmateocourt.org	e-Serve	12/30/2022 4:25:36 PM
Honorable Elizabeth Lee	dept17@sanmateocourt.org	e-Serve	12/30/2022 4:25:36 PM
Honorable Jeffrey Finigan	dept24@sanmatecourt.org	e-Serve	12/30/2022 4:25:36 PM
District Attorney of San Mateo	da_efiles@smcgov.org	e-Serve	12/30/2022 4:25:36 PM
District Attorney of San Mateo	smda@smcgov.org	e-Serve	12/30/2022 4:25:36 PM
Carson White 323535	carson@civilrightscorps.org	e-Serve	12/30/2022 4:25:36 PM
Katherine Hubbard 302729	katherine@civilrightscorps.org	e-Serve	12/30/2022 4:25:36 PM
Alec Karakatsanis	alec@civilrightscorps.org	e-Serve	12/30/2022 4:25:36 PM
Salil Dudani 330244	salil@civilrightscorps.org	e-Serve	12/30/2022 4:25:36 PM

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/s/Marsanne Weese

Signature

Weese, Marsanne (232167)

Last Name, First Name (PNum)

Law Offices of Marsanne Weese, Inc.

Law Firm