IN THE SUPREME COURT OF CALIFORNIA

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

REPLY BRIEF ON THE MERITS

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

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INTRODUCTION

California's two constitutional provisions regarding bail—article I, section 12 (hereinafter "section 12") and article I, section 28, subdivision (f)(3) (hereinafter "section 28(f)(3)"—may be easily reconciled in the manner provided by the Court of Appeal. In arguing to the contrary, respondent attempts to characterize the tension between sections 12 and 28(f)(3) as a fundamental clash of priorities, with the two provisions representing opposing value systems—a "detainee-centric" versus a "victim-centric" framework. (Answer Brief on the Merits [hereinafter "Answer"], p. 28.) This false dichotomy is not rooted in the text, history, or application of the two sections.

Rather, respondent is attempting to force a conflict where none exists as a means to do by judicial order what opponents of pretrial release have been unable to do through the ballot box—repeal the right to pretrial

release. However, the high standard for implied repeal is not met here and reconciliation is the only option. This Court should reject this attempt and affirm the *Kowalczyk* Court's holding that section 12 is fully operative and easily harmonized with section 28(f)(3). (*In re Kowalczyk* (2022) 85 Cal.App.5th 667, 682-686.)

In addressing whether a trial court may detain through the use of unaffordable bail, respondent similarly asks this Court to reject the weight of the law and historical precedent to ensure the outcome of allowing for pretrial detention of any arrestee. (See Answer, pp. 59, 62-63.) In so arguing, respondent fails to substantively address any of petitioner's arguments and instead makes a fear-based appeal to this Court based on erroneous assumptions.

The long history of due process and equal protection jurisprudence culminating in *In re Humphrey* (2021) 11 Cal.5th 135 and *In re Brown* (2022) 76 Cal.App.5th 296, in conjunction with section 12, compel a finding that bail may never be set in excess of an arrestee's ability to pay. As such, this Court should reverse the *Kowalczyk* Court's holding that trial courts may detain through the use of unaffordable bail. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 691.)

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ARGUMENT

I. SECTION 12 REMAINS FULLY OPERATIVE AND MAY BE HARMONIZED WITH SECTION 28(f)(3).

Respondent ignores the law on implied repeal entirely, focusing instead on inapplicable canons of statutory interpretation. (Answer, pp. 23-26.) In so doing, respondent misunderstands the principles this Court must employ in evaluating whether and how the two constitutional provisions at issue may be harmonized and does not properly analyze the issue under the relevant standards. Ultimately, respondent's argument is not consistent with the law. There is not "undebatable evidence" of an intent to repeal section 12 with the enactment of Proposition 9—the initiative establishing section 28(f)(3)—and there is a possibility of reconciliation.

The law on implied repeal is well-established. The presumption against implied repeal is "the principle of paramount importance" in statutory construction. (*Conway v. City of Imperial Beach* (1997) 52 Cal.App.4th 78, 84.) The presumption must be followed even where a later enacted statute might otherwise take precedence over a previous one. (See *Tuolomne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1039 *(Tuolomne Jobs)*.) Further, this presumption is particularly strong "where the prior act has been generally understood and acted upon" or where the provision serves an important public purpose. (*Western Oil & Gas Assn. v. Monterey Bay United Air Pollution Control*

Dist. (1989) 49 Cal.3d 408, 419 *(Western Oil & Gas)*, quoting *Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, 176.) For a court to find an implied repeal, two prongs must be met: there must be "*undebatable evidence* of an intent to supersede" and "*no possibility*" of reconciliation. (*Western Oil & Gas, supra,* 49 Cal.3d at p. 420, quoting *Hays v. Wood* (1979) 25 Cal.3d 772, 784, *emphasis in original*.) This creates quite a high bar that is rarely, if ever, met.

A. There Is Not "Undebatable Evidence" of an Intent to Repeal Section 12.

Regarding the first prong of the implied repeal analysis, repeal "can only be based on an *express* declaration of legislative intent or other *undebatable* evidence of legislative intent to repeal the older statute. [Citations.] The intent to repeal must be 'clearly expressed or *necessarily* implied.'" (*People v. Superior Court (Ortiz)* (2022) 81 Cal.App.5th 851, 877, quoting *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199, *emphasis added*.) Case law demonstrates the difficulty in meeting this standard.

The standard for "undebatable evidence" of intent to repeal was not met in *Tuolomne Jobs, supra,* 59 Cal.4th 1029. In that case, this Court considered the potential conflict between a state election law and the California Environmental Quality Act ("CEQA"). (*Id*. at pp. 1033-1034.) In harmonizing the provisions and finding that CEQA did not apply to the

land use initiative at issue, the court noted:

> When the Legislature enacted CEQA in 1970, the statutory procedures for enacting voter initiatives were firmly in place, having been codified at section 9214(a) for nearly 60 years. If the Legislature had intended to require CEQA review before direct adoption, despite the section 9214(a) deadlines, it could have easily said so. It did not.

(*Tuolomne Jobs, supra,* 59 Cal.4th at p. 1039.)

Similarly, in *New York Times Co. v. Superior Court* (1990) 51 Cal.3d 453 *(New York Times Co.)*, this Court considered whether the California newspersons' shield law provided immunity for monetary sanctions authorized by section 1992 of the Code of Civil Procedure. In holding that it did not, this Court stated:

> Section 1992 was enacted in 1872, long before the shield law came into existence. We must presume the Legislature was well aware of section 1992 when it first enacted the shield law. To construe the shield law as restricting the operation of section 1992 would be tantamount to finding a repeal of the latter by implication. There is no indication the Legislature intended that result.

(*New York Times Co.*, *supra*, 51 Cal.3d at p. 463; see also *People v. Hazelton* (1996) 14 Cal.4th 101, 124, concurring opinion, Mosk, J. [no "undebatable evidence" supporting implied repeal based on an initiative statute where there was no evidence of voter intent to repeal.]

Likewise, no such evidence of intent to repeal section 12 exists here.

The plain language of the initiative, the ballot materials for it, and the circumstances of its enactment are contrary to a finding of implied repeal.

In analyzing the intent of a voter initiative, "a court first looks to the language in which it is framed." (*Sanford v. Garamendi* (1991) 233 Cal.App.3d 1109, 1117.) As with any statutory interpretation, if the language is clear and unambiguous "there is no need for construction, and courts should not indulge in it." (*Ibid*, quoting *In re Lance W.* (1985) 37 Cal.3d 873, 886.) Where there is ambiguity in the language of the measure, the court should consider ballot summaries and arguments in determining voter intent. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037 *(Professional Engineers)*.) Further, "[i]t is not reasonable to apply a presumption of voter awareness when the text of the initiative and the voter information guide supporting it make no reference whatsoever to any effect on a different law." (*People v. Valencia* (2017) 3 Cal.5th 347, 372.)

In *Sanford*, the court considered whether an initiative statute intended to remove restrictions on banks and their subsidiaries engaging in the insurance business. (*Sanford, supra,* 233 Cal.App.3d at p. 1117.) The initiative expressly repealed an Insurance Code statute prohibiting banks from acting as insurance agents and expressly stated that the purpose of the initiative was to "encourage a competitive insurance marketplace . . ."

(*Ibid*.) Nonetheless, the court held the initiative did *not* impliedly repeal a provision of the Financial Code which prohibited bank subsidiaries from involvement in the insurance industry. (*Id.* at pp. 1121-1122.) The express repeal of the Insurance Code provision "does not provide the undebatable evidence necessary to conclude both banks and their subsidiaries were to be allowed to enter the insurance business." (*Id*. at p. 1122.) The court noted the lack of any mention of bank subsidiaries in the ballot materials. (*Id*. at p. 1123.) In the absence of "undebatable evidence" of intent to repeal, the court "may not venture beyond the plain meaning of the initiative." (*Ibid*.)

Here, the plain language of Proposition 9 is silent as to any intention to repeal section 12. (Pet. Supp. Exh. C, pp. 41-45.) In arguing to the contrary, respondent relies on *People v. Standish* (2006) 38 Cal.4th 858. (Answer, pp. 23-24.) *Standish* held that Proposition 9's 1982 predecessor, Proposition 8, was irreconcilably in conflict with Proposition 4, which amended section 12. (*Standish, supra*, 38 Cal.4th at pp. 877-878.) However, respondent fails to acknowledge the primary distinction between Proposition 8 and Proposition 9: Proposition 8 *explicitly* sought to repeal section 12: "Section 12 of Article I of the Constitution is repealed." (Pet. Supp. Exh. A, p. 11.) While largely tracking the same language as Proposition 8, Proposition 9 makes one fundamental change: it omits the language repealing section 12. (Pet. Supp. Exh. C, pp. 41-45.) The

Kowalczyk Court recognized this distinction between Propositions 8 and 9. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 686.) Yet respondent fails to address the *Kowalczyk* Court's holding on this point.

Additionally, Proposition 9's ballot materials provide no evidence of intent to repeal. They make no reference to release on bail being rendered discretionary, contrary to Proposition 8. (Pet. Supp. Exh. A, p. 14; Exh. C, pp. 34-40; *Standish, supra,* 38 Cal.4th at p. 877.) Bail is referenced only once in the section entitled "Changes Made by This Measure" in the Legislative Analyst's analysis and twice in the Attorney General's Office Title and Summary. (Pet. Supp Exh. C, pp. 35-36.) None of these three mentions refer to bail being rendered discretionary. (*Ibid*.) "If the Attorney General had omitted a key provision from [the] title and summary, the initiative's drafters should have brought this to her attention during the measure's public review period. [Citation.] Their failure to do so suggests no such change was contemplated." (*Valencia, supra,* 3 Cal.5th at p. 371.) Therefore, respondent asks this Court to find an implied repeal of section 12 based on *silence*.

Importantly, implied repeals based on silence are strongly disfavored. (*Ortiz, supra*, 81 Cal.App.5th at p. 883.)

> The problem with implied repeals based on silence is that they allow Legislatures to repeal older statutes enacted by majorities of prior Legislatures without necessarily having majority

> support in the current Legislature for repealing the older statutes. The presumption against implied repeals, and the showing of unequivocal evidence of legislative intent required to rebut it, serves the salutary purpose of preventing implied repeals based on less-than-majority support in the current Legislature to repeal the earlier enactment. Implied repeals based on silence allow such unauthorized repeals.

(*Ortiz, supra*, 81 Cal.App.5th at p. 883.)

Here, Proposition 4 affirming and amending section 12 received overwhelming support from the electorate—approximately 83 percent. (California Proposition 4, Rules Governing Bail (June 1982), Ballotpedia.) Finding an implied repeal of section 12 based on the silence in Proposition 9, would strip this overwhelming majority of its decision to maintain section 12. This is precisely the type of "unauthorized repeal[]" based on "less-than-majority support" that *Ortiz* cautioned against.

Respondent's reliance on *Professional Engineers, supra*, 40 Cal.4th 1016, is misplaced. (Answer, pp. 25-26.) In *Professional Engineers*, the court considered whether a constitutional initiative that expressly repealed a constitutional provision regulating private contracting also impliedly repealed sections of the Government Code that contained similar regulations. (*Professional Engineers, supra,* 40 Cal.4th at p. 1023.) In finding that it did, the court noted that the "unambiguous" intent was stated expressly in the statute and the initiative's statement of purpose. (*Id*. at pp.

1037-1038.) The court found this to be "undebatable evidence of an intent to supersede." (*Ibid*.) No such express intent for section 28 to "revis[e] the entire subject" of bail release exists here. (*Id*. at p. 1038.) There is no evidence of voter intent to repeal section 12, let alone the "undebatable evidence" required for implied repeal. As such, this Court may not find an implied repeal of section 12.

B. Reconciliation of Sections 12 and 28(f)(3) Is Possible.

The second prong of the implied repeal analysis requires that there be "no possibility" of reconciliation between the conflicting provisions. Where reconciliation is possible, "[t]he courts are *bound* . . . to maintain the integrity of both statutes if the two may stand together." (*Western Oil & Gas, supra*, 49 Cal.3d at pp. 419-420, *emphasis added*.) When choosing "between an interpretation of [one provision and another] that results in a conflict between the two provisions, requiring [it] to choose one over the other, and an interpretation that harmonizes them," a court *must* choose the harmonizing interpretation. (*City & Cty. of San Francisco v. Cty. of San Mateo* (1995) 10 Cal.4th 554, 563.)

This duty to harmonize exists even where there *is* evidence of intent to supersede. In *Ortiz*, the Court of Appeal considered whether the newly enacted misdemeanor diversion program codified in Penal Code section 1001.95 impliedly repealed Vehicle Code section 23640's prohibition on

diversion for driving under the influence offenses. (*Ortiz, supra,* 81 Cal.App.5th at pp. 857-858.) After an exhaustive review of the legislative history, the court concluded that the history "suggests that the Legislature intended to permit diversion for misdemeanor DUI charges under section 1001.95." (*Id*. at p. 881.) The court acknowledged that this showing of intent "*might* be sufficient to establish that Penal Code section 1001.95 was intended to prevail over Vehicle Code section 23640, *if the statutes irreconcilably conflicted*." (*Ibid, emphasis added*.) However, the statutes *could* be harmonized and operate concurrently, thus making the presumption against implied repeal applicable. (*Ibid*.)

Moreover, if the statute permits competing inferences, there cannot be an implied repeal. (*Ortiz, supra,* 81 Cal.App.5th at p. 882.) This is the case even where there is difficulty in implementing the harmonized provisions. (See *RLI Ins. Co. Group v. Superior Court* (1996) 51 Cal.App.4th 415, 432, ["While the resulting review scheme is admittedly awkward, the administrative and judicial remedies are not mutually exclusive."]) As the court held in *Fernandez v. California Dept. of Pesticide Regulation* (2008) 164 Cal.App.4th 1214, 1234, "difficulty of operation is not the same thing as undebatable evidence of an intent to supersede."

Here, the Court of Appeal held that sections 12 and 28(f)(3) can be

"easily reconciled," understanding section 28(f)(3) as making "a declarative statement of existing law." (*Kowalczyk, supra*, 85 Cal.App.5th at p. 685.) Respondent disagrees with this interpretation, instead positing sections 12 and 28(f)(3) as representing diametrically opposed value systems, with section 12's "detainee-centric" provisions and section 28(f)(3)'s "victim-centric" focus. (Answer, p. 28.) However, this is a false dichotomy, not rooted in either the text or history of the two provisions.

Respondent is correct that a court must harmonize the various provisions of a statutory scheme. (See *People v. Vidana* (2016) 1 Cal.5th 632, 637 ["We are required to harmonize the various parts of a statutory enactment by considering [them] in the context of the statutory framework as a whole."]) However, respondent fails to establish *how* the Court of Appeal's holding fails to honor section 28's "comprehensive focus on victims." (Answer, p. 30.) Holding that section 28(f)(3)'s first sentence is a declarative statement of existing law in no way creates disharmony with section 28's enumeration of victims' rights. The primary foci of these rights are on keeping victims informed regarding criminal proceedings, allowing them to be heard in criminal proceedings, and to have their safety be considered at various stages of a criminal case. (Cal. Const., art. I, § 28, subd. (b).) These provisions are entirely consistent with section 12 and the Court of Appeal's reading of section 28(f)(3).

Both sections 12 and 28(f)(3) facilitate pretrial detention, particularly where there is a genuine public safety concern. What respondent is arguing is that victims have an *implied* right to increased detention of defendants—even in nonviolent, nonserious, or victimless cases. By conflating "victims' rights" with increased pretrial detention, respondent again makes assumptions about voter intent that are not supported by the historical record. Neither a victim nor anyone else has a *right* to someone else's detention, nor can such a right be implied by the language of section 28. Sections 12 and 28(f)(3) are reconcilable, as the Court of Appeal demonstrated, and the high standard for implied repeal is not met here.

C. This Court Should Disregard Respondent's Erroneous Claims About Voter Intent, the Meaning of Proposition 9's Provisions, and *Humphrey*'s Applicability.

In arguing for implied repeal, respondent makes wild claims about voter intent and Proposition 9 that are not supported by the text or any extrinsic evidence. (Answer, pp. 31-39.) In particular, respondent misinterprets Proposition 9 as a direct response to *Standish*, *supra*, 38 Cal.4th 858; misunderstands Proposition 9's "conflicts with existing laws" and flight risk provisions; and misapplies *Humphrey*.

1. Proposition 9 Was Not Enacted As a Response to **Standish.**

Respondent claims that Proposition 9 was a direct response to *Standish*, *supra*, 38 Cal.4th 858, as it was enacted two years after the decision. (Answer, pp. 31-34.) However, nothing in Proposition 9's ballot materials mentioned *Standish* or that the initiative was put forth as a response to that case. (See *Ortiz, supra*, 81 Cal.App.5th at p. 882 ["the failure to even mention section 23640 hardly evidences clear legislative intent that the new legislation would override its existing ban on diversion for DUIs."]) Rather, the arguments in support of Proposition 9 and the findings and declarations of the initiative focus on victim notification and participation in criminal proceedings. (See Pet. Supp. Exh. C, p. 34 ["Requires *notification* to victim and opportunity for input during phases of criminal justice process, including bail, plea, sentencing and parole"], *emphasis added*; p. 39 ["Proposition 9 creates California's Crime Victim's Bill of Rights to: . . . Mandate that crime victims be notified if their offender is released."])

The initiative was named for Marsy Nicholas who was killed in 1983—23 years before *Standish* and one year after Proposition 8 was enacted. (Pet. Supp. Exh. C, pp. 39, 41-42.) Thus, the declaration in section two of the initiative that "the 'broad reform' of the criminal justice system intended to grant these basic rights mandated in the Victim's Bill of

Rights initiative measure passed by the electorate as Proposition 8 in 1982 has not occurred as envisioned by the people . . .” can best be understood as a response to the lack of notification that Ms. Nicholas’ family received regarding her alleged killer’s release in 1983, after Proposition 8 was supposed to take effect. (Pet. Supp. Exh. C, p. 41.) Reference to *Standish* is nowhere to be found. (See, in contrast, enactments expressly intended to respond to judicial interpretations: Pen. Code, § 1054.3, subd. (b)(2), noting that “[t]he purpose of this subdivision is to respond to Verdin v. Superior Court 43 Cal.4th 1096 . . .”; Sen. Bill No. 725, approved by Gov., Aug. 7, 2017 (2017-2018 Reg. Sess.), amending Pen. Code, § 1001.80 “[i]n order to resolve conflicting interpretations of existing law at issue in pending cases . . .”)

Further, “it is unreasonable to presume that the voters had such a ‘degree of thoroughness’ that they ‘“‘attentively studied’”’ the measure and analyzed various provisions using the acumen of a legal professional.” (*Valencia, supra,* 3 Cal.5th at p. 371.) *Standish*, while affirming that Proposition 4 took precedence over Proposition 8, was a case primarily dealing with interpreting Penal Code section 859b. (*Standish, supra*, 38 Cal.4th at p. 863.) The relevant section encompasses a four-page discussion in a 25-page opinion. (*Id*. at pp. 874-878.) There is no indication that the majority of the electorate was even aware of *Standish*, let

alone motivated by it in enacting Proposition 9.

2. Respondent Misinterprets the Text of Proposition 9.

Respondent next claims that the Court of Appeal's holding would obstruct specific provisions of Proposition 9. (Answer, p. 32.) First, they argue that Proposition 9's "conflicts with existing law" provision "indicate[s] [section 28] was intended to be the controlling provision" when conflicts arise. (Answer, p. 32.) However, respondent utterly misunderstands the language of the Proposition. A careful reading of the conflicts provision states not that section 28 should prevail in any conflict with existing law, but rather that section 28 will be *superseded by* any provision of law that provides greater rights for victims than it does. (Pet. Supp. Exh. C, p. 45.) The drafters clearly considered potential conflicts with existing law and chose *not* to address section 12.

Additionally, respondent claims that the Court of Appeal's reading of section 28(f)(3) would prevent courts from detaining based on flight risk. (Answer, p. 32.) However, nothing in section 28(f)(3) permits detention based on flight risk *alone*. Rather, the provision merely mentions flight risk as one consideration in determining bail. (Cal. Const., art. I, § 28, subd. (f)(3).) That same consideration is mentioned in section 12 in nearly identical language. (Cal. Const., art. I, § 12.) Therefore, the Court of Appeal's holding is consistent with the text of Proposition 9.

3. **Humphrey** *Is Not Relevant to Reconciling Sections 12 and 28(f)(3).*

Finally, respondent claims *Humphrey*'s potential interactions with sections 12 and 28(f)(3) would frustrate the true voter intent at the time Propositions 4 and 9 were enacted. (Answer, pp. 34, 38, 39.) However, this is pure conjecture and *Humphrey* is irrelevant to reconciling sections 12 and 28(f)(3).

Respondent acknowledges that "it matters not whether the drafters, voters, or legislators consciously considered all the effects and interrelationships of the provisions they wrote and enacted. [This Court] must take the language of [the initiative] as it was passed into law . . ." (Answer, p. 25, citing *People v. Garcia* (1999) 21 Cal.4th 1, 14.) However, respondent then asks this Court to do precisely the opposite: interpret section 28(f)(3) according to what respondent perceives the intent of the voters *would have been*, had the electorate been aware of how *Humphrey, supra,* 11 Cal.5th 135, would be decided. (Answer, pp. 34-35, 37-39.) Such guesswork as to how the electorate would choose to respond to a future court case is well beyond the province of the courts. As *Garcia* concluded, "[the courts] must limit [themselves] to interpreting the law as written and leave for the People and the Legislature the task of revising it as they deem wise." (*Garcia, supra*, 21 Cal.4th at p. 15.)

Moreover, *Humphrey* is irrelevant to reconciling sections 12 and

28(f)(3). *Humphrey* was rooted in constitutional principles of due process and equal protection and specifically did not address any potential conflict between 12 and 28(f)(3)—a fact recognized by respondent. (*Humphrey, supra*, 11 Cal.5th at pp. 150-151, 155, fn. 7; Answer, p. 61.) Whether this Court determines that section 12 or 28(f)(3) or both prevail as the controlling law on pretrial detention, *Humphrey*'s holding and analysis remain unchanged.

Overall, respondent puts forth these unsupported arguments as a means to distract from the legal conclusion that must be drawn: section 12 remains fully operative and may be harmonized with the provisions of section 28(f)(3). There is not undebatable evidence of intent to repeal and the sections may be harmonized in a way that preserves the integrity of both provisions. Therefore, this Court should affirm the Court of Appeal's harmonization of sections 12 and 28(f)(3).

II. RESPONDENT RELIES ON ASSUMPTIONS AND FEAR, RATHER THAN LAW, IN SUPPORT OF UNAFFORDABLE BAIL.

In his opening brief on the merits, Mr. Kowalczyk argued that the use of unaffordable bail to intentionally detain is prohibited for several reasons: it violates *Humphrey*'s requirement that pretrial detention comply with constitutional provisions addressing bail and its focus on fairness and transparency; it violates section 12's prohibition on the intentional and

strategic use of bail as an order of pretrial detention; it violates the constitutional guarantee of equal protection under the law; and it violates the foundational principle that liberty is the norm and pretrial detention the carefully limited exception. Respondent fails to substantively address any of these arguments. Instead, respondent again relies on baseless assumptions about the electorate's intent.

A. Respondent Mischaracterizes *Humphrey.*

Respondent attempts to draw an arbitrary line between pre- and post-*Humphrey* due process and equal protection analyses. (Answer, pp. 44-45.) However, this is an artificial distinction. *Humphrey* follows a long history of jurisprudence recognizing due process protections where an individual's liberty is at stake as well as a long trajectory of equal protection analysis regarding wealth-based distinctions in criminal proceedings. (*Humphrey, supra*, 11 Cal.5th at pp. 149-152.)

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action." (*Foucha v. Lousiana* (1992) 504 U.S. 71, 80; see also *Zadvydas v. Davis* (2001) 533 U.S. 678, 690.) The United States Supreme Court affirmed that restrictions on liberty require heightened scrutiny. (*Lopez-Valenzuela v. Arpaio* (2014 9th Cir.) 770 F.3d 772, 779, citing *United States v. Salerno* (1987) 481 U.S. 739, 755.) Therefore, restrictions on

liberty "will satisfy substantive due process only if they are 'narrowly tailored to serve a compelling state interest.'" (*Lopez-Valenzuela, supra,* 770 F.3d at p. 781, quoting *Reno v. Flores* (1993) 507 U.S. 292, 302.)

The limits of such restrictions on liberty have been well-litigated under the Due Process clause. (See *In re Winship* (1970) 397 U.S. 358 [applying a due process analysis to the detention of juveniles]; *Korematsu v. United States* (1944) 323 U.S. 214 (Jackson, J., dissenting) [decrying the majority's affirmation of preventive detention of citizens of Japanese ancestry as a violation of due process—a position that has since been adopted by a majority of the Court (*Trump v. Hawaii* (2018) __ U.S. __ [138 S.Ct. 2392, 2423])]; *Schall v. Martin* (1984) 467 U.S. 253 [analyzing pretrial detention of juveniles under the due process clause]; *Ludecke v. Watkins* (1948) 335 U.S. 160 [analyzing the lawfulness of executive power to detain "enemy aliens" in times of war under the due process clause]; *Addington v. Texas* (1979) 441 U.S. 418 [allowing for detention of "mentally unstable" individuals who pose a danger to the public]; *Morrissey v. Brewer* (1972) 408 U.S. 471 [holding that due process requires notice of alleged violations before revocation of a parolee's conditional liberty]; *Turner v. Rogers* (2011) 564 U.S. 431 [applying a due process analysis to incarceration for civil contempt for failure to pay a child-support order]; and *Foucha, supra*, 504 U.S. 71 [considering the lawfulness of civil

commitment under the due process clause.]) Disparate treatment based on wealth status in criminal proceedings has also been thoroughly considered by the judiciary. (See *In re Antazo* (1970) 3 Cal.3d 100; *People v. Dueñas* (2019) 30 Cal.App.5th 1157; *Williams v. Illinois* (1970) 399 U.S. 235; *Douglas v. California* (1963) 372 U.S. 353; *Tate v. Short* (1971) 401 U.S. 395; *Bearden v. Georgia* (1983) 461 U.S. 660.)

Therefore, *Humphrey*'s relevance is not that it articulates a *new* due process and equal protection analysis, but rather that it applies these constitutional principles to the money bail context. In essence, *Humphrey* recognized that the *effect* of an order setting bail must also be considered, not only the *intention* in setting that order. (*Humphrey, supra*, 11 Cal.5th at p. 151 ["if a court does not consider an arrestee's ability to pay, it cannot know whether requiring money bail in a particular amount is likely to operate as the functional equivalent of a pretrial detention order."]) This principle hardly represents a fundamental shift in the trajectory of due process and equal protection jurisprudence.

B. The Interaction Between the Constitutional Principles Articulated in *Humphrey* and Sections 12 and 28(f)(3) Is Not "Uncontemplated."

Respondent repeatedly characterizes *Humphrey* as facilitating an "uncontemplated" right to pretrial release. (Answer, pp. 38-41, 43, 61.) This rests on an assumption that in limiting pretrial detention to the

circumstances enumerated in section 12, the electorate *really* meant to make detention available for *all* defendants. (Answer, p. 59.) However, this, again, is pure speculation.

This also assumes that the interaction between the due process and equal protection framework articulated in *Humphrey* and California's provisions regarding bail was not considered. However, the *Humphrey* Court referenced sections 12 and 28(f)(3) extensively. (*Humphrey, supra*, 11 Cal.5th at pp. 150, 152-153, 155, fns. 5 & 7.) It explicitly held that pretrial detention must be consistent with the state's constitutional provisions regarding bail. (*Id.* at p. 155.) While *Humphrey* did not decide the issue of whether section 12 or 28(f)(3) controlled denials of bail, the court clearly *contemplated* that such provisions would interact with the constitutional protections *Humphrey* articulated. (*Id.* at p. 155, fn. 7.)

Respondent applies the same erroneous analysis to *In re Brown, supra,* 76 Cal.App.5th 296, suggesting it would lead to "an uncontemplated expansion of section 12's application." (Answer, p. 61.) However, respondent fails to support this claim with law or facts. (*Ibid*.) Rather than analyze *Brown* substantively, respondent opts for a fear-based argument. (Answer, p. 59 ["*Brown*'s approach would disrupt California's current pre-trial detention framework . . ."]; p. 60 ["*Brown*'s approach would transform section 12 into an absolute mandate of release for all detainees not accused

of capital crimes and the most violent felonies."]) This fear-based argument is couched in advocating for a more "recognizable" approach to pretrial detention. (Answer, pp. 39, 63.)

While respondent speaks of this "recognizable pre-trial detention framework" as a positive, *Humphrey* acknowledged the truth of what this framework consisted of: the "immense and profound" disadvantages of pretrial detention, including an arrestee's impaired ability to prepare a defense, heightened risk of losing a job, a home, or custody of a child, and potentially a higher likelihood of reoffending, in addition to the costs borne by the state. (*Humphrey, supra*, 11 Cal.5th at p. 147.) Respondent's argument is not based on a thoughtful legal analysis but rather a desire to return to a status quo where the de facto detention of virtually any defendant is possible, particularly those of limited means.

Further, respondent uses fear to push their preferred outcomes. For example, respondent relies on "what if" scenarios with no evidence of how often these circumstances arise, how often pretrial detentions is sought for alleged misdemeanor or non-violent felony offenders, or how successful nonfinancial conditions of release are in these circumstances. (Answer, pp. 33-34.) Even respondent's example of the perpetrator of "extreme child neglect" is misplaced. (Answer, p. 32.) "Extreme child neglect" is likely a section 12(b) offense eligible for detention. (See *In re O'Connor* (2022) 87

Cal.App.5th 90.) Also, respondent ignores that there are various nonfinancial conditions of release that would address public safety concerns, such as removal of the child from the home of the defendant, a restraining order, a prohibition on the defendant caring for or living with any minor children, counseling, etc. By listing these hypothetical doomsday scenarios, respondent implores this Court to decide the issues before it based on fear.

Brown's approach is based on law. It affirms and abides by *Humphrey*'s focus on fairness and transparency in pretrial detention decisions and its holding that detention not be conditioned on financial resources. (*Brown, supra*, 76 Cal.App.5th at pp. 299, 308.) Respondent fails to present any argument as to why this result is legally incorrect as opposed to just undesirable. (Answer pp. 59-63.) Therefore, this Court should hold that a trial court may not order bail in an amount that an arrestee cannot reasonably afford.

III. IT IS NOT THE ROLE OF THE COURTS TO CONSIDER POLICY OUTCOMES IN DECIDING ISSUES OF LAW.

Respondent argues that whether section 12 should be interpreted to mean what it says—that a defendant "shall be released on bail . . ."—is an issue "better conducted at the ballot box . . ." (Answer, p. 38.) However, the resolution of the issue *was* conducted at the ballot box. Voters repeatedly rejected attempts to repeal section 12 or significantly expand

pretrial detention beyond violent felony offenses. (See Pet. Supp. Exh. D, pp. 60-102.)

Respondent cites the oft-quoted, yet poorly understood refrain repeated in *Underwood*: "[i]f the constitutional guarantees are wrong, let the people change them—not judges or legislatures." (Answer, p. 17; *In re Underwood* (1973) 9 Cal.3d 345, 350.) However, respondent omits the context of that quote:

> No individual or public official is above, beyond or exempt from the mandates of the Constitutions, state and federal. If judicial officers do not abide by their solemn pledge to protect and defend the Constitution, as well as to observe the limitations prescribed thereby, we must expect from the average citizen only contempt for our most cherished institutions and legal concepts. If such an event should occur the inevitable result will be decay of the republic, and government by men—not law—will result. Then, democracy will be abased and totalitarianism will drench the land. If the constitutional guarantees are wrong, let the people change them—not judges or legislators. Two wrongs cannot make a right.
>
> History has demonstrated beyond a doubt that such a guaranty as is set forth in article I, section 6 [now codified in section 12], of the Constitution is necessary for the protection of the citizen, and that it should be preserved at all hazards. Any judicial official who refuses to give his loyalty to this ideal because of his feeling of revulsion at the nature of the offense charged against the accused either does not conceive the doctrine in its full meaning or he profanes the hallowed words of the patriots who

convened in Philadelphia in 1787.

(*In re Keddy* (1951) 105 Cal.App.2d 215, 220.)

Respondent asks this Court to do precisely what is lamented in *Keddy*—declare a fundamental right enshrined in California's constitution for nearly two centuries repealed by implication because of discomfort with how that right must be applied.

Having failed at making a legal case for either implied repeal or the use of unaffordable bail as a means to detain, respondent instead resorts to making a case for their preferred policy outcome: the possibility of detention for *any* arrestee. (See Answer, p. 32.) Respondent asks this Court to avoid following *Brown* on the issue of unaffordable bail as, "[s]uch a disruptive interpretation is uncalled for at this time" in favor of their "preferred alternative." (Answer, p. 59.) Respondent implores the Court to avoid "problematic" outcomes by "endorsing the Court of Appeal's application of *Humphrey*." (Answer, p. 63.) However, these are not factors the Court should consider in deciding the issues before it.

It is not the role of the courts to evaluate the wisdom or policy implications of the provisions at issue. In *Sanford*, the court made clear:

> The courts "'"must follow the language used and give to it its plain meaning, whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature."' [Citation.]" Accordingly, this court is in no

> position to expand upon the express terms of the initiative in order to further some hidden but assertedly wise objective of the voters.

(*Sanford, supra,* 233 Cal.App.3d 1109, 1124-1125; see also *New York Times Co., supra,* 51 Cal.3d at p. 463 ["What the shield law *should* do is beyond our authority . . ."])

Courts "do not rewrite statutes whenever we might perceive some part of the Legislature's policy choices to be arbitrary." (*Michaels v. State Personnel Bd*. (2022) 76 Cal.App.5th 560, 573.) Accordingly, the *Michaels* Court advised that a party's arguments regarding the policy behind a statutory scheme "should be directed to the Legislature." (*Id*. at pp. 573-574.) It is "a legislative, and not a judicial, prerogative to assess the competing interests and to determine public policy." (*Willis v. State of California* (1994) 22 Cal.App.4th 287, 293.)

This Court should reject respondent's appeal for a decision based on fear and assumption rather than law and evidence. The law compels the conclusion that pretrial detention is limited to the circumtances allowed for in section 12 and that courts may not use unaffordable bail as a means to detain. To borrow Justice Brennan's famous words, avoiding this necessary legal conclusion would be to succumb to "a fear of too much justice." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 339, J. Brennan, dissenting.)

CONCLUSION

Section 12 guarantees to all arrestees "release on bail by sufficient sureties" and provides for limited circumstances in which release may be denied. Despite repeated opportunities to do so, the California electorate has not inidicated any intent—express or implied—to repeal the provisions of section 12. Thus, section 12 remains fully operative and provides the exclusive circumstances in which pretrial detention may be ordered. Section 28(f)(3) provides additional mandatory criteria for courts to consider in making bail and detention determinations but does not expand the categories of defendants eligible for detention.

Section 12's requirement that all persons are entitled to release on bail unless subject to an enumerated exception combined with the due process requirement that any pretrial detention be intentional prohibits a trial court from ordering bail in an amount in excess of an arrestee's ability to reasonably afford. This Court's directive in *Humphrey* that any order of pretrial detention further comply with constitutional provisions regarding bail indicates that such limits on bail were contemplated, if not decided, by this Court.

As such, petitioner asks this Court to affirm the Court of Appeal's holding that sections 12 and 28(f)(3) may be harmonized and reverse the holding that trial courts may detain through the use of unaffordable bail.

Dated: October 9, 2023

Respectfully Submitted,

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WORD COUNT CERTIFICATE

I, Marsanne Weese, declare and certify under penalty of perjury that I am an attorney licensed to practice law in the State of California (SBN 232167.) I certify that the brief contains 7,160 words, according to the word count produced by the Microsoft Word program used to produce this document and that the brief uses a Times New Roman size 13 font.

Dated: October 9, 2023

MARSANNE WEESE
Attorney for Petitioner

PROOF OF SERVICE

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Executed in San Francisco, California on October 9, 2023.

ROSE MISHAAN

STATE OF CALIFORNIA
Supreme Court of California

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