No. S277910

In the Supreme Court of the State of California

IN RE GERALD JOHN KOWALCZYK,

Petitioner,

On Habeas Corpus

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

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

ISSUES PRESENTED

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

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

INTRODUCTION

Prior to 2021, the constitutional parameters of California's pretrial detention framework were set forth in article I, section 12, and Article 1, section 28(f)(3). Although each provision is generally consistent with respect to the primary considerations for setting bail, they differ with respect to the criteria for denying bail. Section 12 reserves bail denial for the express exceptions set forth in subsections (a), (b), and (c), and section 28, by its plain language, provides the trial court with broader discretion. Then, in 2021, this Court's landmark opinion in *In Re Humphrey* (2021) 11 Cal. 5th 135 reshaped California's pre-trial detention landscape. For the first time, this Court held fundamental principles of equal protection and due process prohibit the arbitrary setting of unaffordable bail.

This Court now faces the novel issue of resolving the lingering conflict between sections 12 and 28 in a post-*Humphrey* landscape entirely distinct from that within which each section was last amended. With this in mind, when the plain language of section 28 is considered alongside the legislative intent underlying Proposition 9, as well as section 12's unanticipated

interaction with the fundamental principles set forth in *Humphrey*, section 28's prevailing application is revealed as the most appropriate resolution of a tangled conflict with no obvious answer. Section 28(f)(3)'s prevailing application, subject to the constitutional constraints set forth in *Humphrey*, best honors the electorate's understanding of California's constitutional restrictions on bail in a pre-*Humphrey* landscape. Further, this resolution helps to facilitate, rather than impede, the crafting and enactment of comprehensive legislation addressing pre-trial detention as California continues a historic transition away from a cash bail system.

In the alternative, should this Court choose to adopt the Court of Appeal's reconciled application of sections 12 and 28(f)(3)—also a reasonable outcome given the uncharted nature of this conflict—this Court should make clear that neither *Humphrey*, nor the reconciled application of sections 12 and 28(f)(3) prohibit the setting of unaffordable bail. A holding that gives full effect to section 12's provisions in combination with a complete prohibition on unaffordable bail, regardless of a proper *Humphrey* analysis, would result in a constitutional right to release not contemplated by section 12, section 28(f)(3), or the fundamental protections of *Humphrey*.

STATEMENT OF THE CASE

I. FACTS OF THE CASE

On January 27, 2021, Petitioner, Mr. Gerald Kowalczyk, entered the Five Guys restaurant in Burlingame and ordered a cheeseburger. (Petition for Writ of Habeas Corpus [hereinafter "Pet."] Exh. H, pp. 68-69.) Petitioner attempted to pay for his

food with a series of six credit cards. (*Id.* at p. 69.) After each failed attempt, Petitioner discarded the declined credit card on the ground. (*Id.*) Upon using the sixth and final credit card, the transaction was approved. (*Id.*)

After completing his purchase, Petitioner left the restaurant briefly without collecting his food. (*Id.*) Petitioner then returned to the restaurant and stated he wanted a refund for his purchase. (*Id.*) The employee at the register declined to refund his purchase. (*Id.* at p. 79.) Petitioner then left the restaurant leaving the six credit cards and his cheeseburger behind. (*Id.*)

The manager of Five Guys reported she was very familiar with Petitioner. (*Id.* at p. 70.) She stated Petitioner had been to the restaurant numerous times before. (*Id.*) Petitioner's attempted payment was captured on restaurant surveillance. (*Id.* at p. 72.)

Burlingame police officers responded to Five Guys to investigate the fraudulent purchase. (*Id.* at p. 68.) Officers successfully identified and contacted three of the credit card owners. (*Id.* at pp. 73-74.) All three victims described losing credit cards in the months prior. (*Id.* at pp. 78-79.)

On February 13, 2021, Belmont police officers contacted Petitioner at a Safeway grocery store. (*Id.* at pp. 84-85.) Officers detained Petitioner and searched his person and belongings. (*Id.* at p. 85.) Officers located a California driver's license in Petitioner's backpack bearing the name and image of victim, Mya Figueroa. (*Id.* at pp. 85-86.) Ms. Figueroa owned one of the

credit cards used and discarded during Petitioner's fraudulent purchase at Five Guys. (*Id.* at p. 74.)

II. TRIAL COURT PROCEEDINGS

On April 8, 2021, the San Mateo County District Attorney charged Petitioner with three felony counts of identity theft under Penal Code section 530.5(a), one felony count of vandalism under Penal Code section 594(b)(1), one misdemeanor count of identity theft under Penal Code section 530.5(c)(1), and one misdemeanor count of petty theft under Penal Code section 485. (Pet. Exh. B, pp. 7-9.) The court signed an accompanying arrest warrant and set Petitioner's bail in the amount of $75,000. (Pet. Exh. F, p. 30.)

On April 16, 2021, the trial court arraigned Petitioner on the felony Complaint. (Pet. Exh. C, pp. 12-13.) On May 6, 2021, the trial court heard argument on Petitioner's motion for release. (Pet. Exh. D, p. 15.) Petitioner represented he could not afford $75,000 bail and requested the court release him on his own recognizance or reduce bail to an amount he could afford. (Pet. Exh. F, p. 31.) The People contended Petitioner's motion should be denied and bail should remain as set at $75,000. The People noted the felony complaint alleged multiple offenses occurring on three separate offense dates, all with different victims and all occurring while Petitioner remained on felony probation. (*Id.* at p. 28.) The People also pointed out Petitioner's extensive criminal history. (*Id.* at p. 29.)

Following argument, the trial court denied Petitioner's motion for release. (*Id.* at p. 36.) The trial court found by clear

and convincing evidence that no nonfinancial conditions of release could reasonably accomplish the court's objectives of protecting the public and ensuring Petitioner returned to court. (*Id.* at p. 35.) Specifically, with respect to the latter objective, the trial court highlighted Petitioner's 64 prior criminal convictions. (*Id.*) The trial court noted the offenses alleged in the felony complaint, as well as many of Petitioner's prior offenses, occurred while Petitioner was on probation. (*Id.* at p. 34.) The trial court noted Petitioner failed to comply with supervised release conditions within the last five years and received the worst possible score on the court's "VPRAI" (Virginia Pre-trial Risk Assessment Instrument) tool. (*Id.* at p. 35.) Further, in examining Petitioner's criminal history, the trial court noted Petitioner had convictions from at least three states and at least five counties within California, suggesting there was very little tethering Petitioner to San Mateo County. (*Id.* at p. 36.) Ultimately, "the court [did] not see any conditions upon which the public can be protected or assured the defendant will appear [in court]." (*Id.*)

Upon denying Petitioner's motion, the trial court ordered Petitioner detained without bail despite Petitioner's request to have bail maintained at $75,000. (Pet. Exh. E, pp. 36-37.) The trial court interpreted *In Re Humphrey* (2021) 11 Cal. 5th 135 to require such a denial based on the court's findings. (Pet. Exh. E, pp. 36-37.)

On May 11, 2021, the trial court heard the preliminary hearing in Petitioner's case. (Pet. Exh. H, p. 43.) At the

conclusion of the hearing, the court declined to change Petitioner's bail status. (*Id.* at pp. 96-97.) The court cited insufficient change in circumstances to disturb the court's ruling from just two weeks prior. (*Id.*)

On June 15, 2021, Petitioner once again moved the trial court for a reduction in bail or release on supervised conditions. (Pet. Exh. K, p. 118.) As occurred at preliminary hearing, the trial court denied the motion. (*Id.* at p. 129.)

On July 6, 2021, Petitioner filed a habeas petition with the First District Court of Appeal challenging his detention. (*In re Kowalczyk* (2022) 85 Cal.App.5th 667, 674.) With the petition still pending, Petitioner resolved his criminal case with a no contest plea to one count of misdemeanor identify theft, in violation of Penal Code section 530.5(c)(1), in exchange for a credit-for-time-served sentence. (Petitioner's Supplemental Traverse, Exh. Y, pp. 3-6.)

III. APPELLATE PROCEEDINGS

On March 11, 2022, with Petitioner now released from custody following the resolution of this case, the Court of Appeal dismissed Petitioner's habeas petition as moot. (Order Dismissing Pet. (March 11, 2022) *In re Kowalczyk*, A162977.) Following the dismissal, Petitioner sought review in this Court citing unresolved issues of law related to pre-trial detention outside the scope of article 1, section 12 of the California Constitution. (Petition for Review.)

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 non-capital cases – article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution – or, in the alternative, whether these provisions can be reconciled." (Order Granting Pet. for Rev. (June 22, 2022) *Kowalczyk (Gerald John) on H.C.*, S274181.)

The Court of Appeal issued an opinion on November 21, 2022, and found sections 12 and 28(f)(3) could be reconciled with both remaining fully operative. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 686.) The Court of Appeal took the pointed step to clarify that no general right to release exists under section 12; but instead, only a general right to have bail set for those cases falling outside the enumerated exceptions of section 12. (*Id.* at pp. 691-92.) Should that bail amount prove unaffordable, a trial court would then switch paths and engage in the due process and equal protection analysis set forth in *Humphrey*. (*Id.*)

On December 30, 2022, Petitioner filed a Petition for Review in this Court. On March 15, 2023, this Court granted that petition. (Order Granting Pet. for Rev. (Mar, 3, 2023).)

ARGUMENT

I. SECTION 28(F)(3) SHOULD CONTROL THE DENIAL OF BAIL IN NON-CAPITAL CASES.

Prior to 2008, article I, section 12 of the California Constitution[1] was the controlling provision governing pre-trial

[1] Unless otherwise noted, "section 12" refers to Article I, section 12, of the California Constitution.

detention proceedings. In 2008, the electorate altered this landscape with the enactment of Proposition 9, also known as Marsy's Law. (Ballot Pamp., Gen. Elec., (Nov. 4, 2008) Prop. 9 (2008 Ballot Pamp. Prop. 9).) Proposition 9 amended article I, section 28 of the California Constitution[2] with the stated purpose of re-orienting criminal justice proceedings around victims and their families. The initiative was premised upon an understanding "that the 'broad reform' of the criminal justice system intended to grant [] 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." (2008 Ballot Pamp. Prop. 9, p. 128.)

As part of this comprehensive reform, section 28 was amended to add subsection (f)(3), titled, "Public Safety Bail." (*Id.* at p. 130.) Section 28(f)(3) inverted the bail structure, prohibiting the granting of bail for alleged capital crimes and rendering bail discretionary for other offenses. Section 28(f)(3) commanded that "[i]n setting, reducing, or denying bail," the "primary considerations" for a trial judge shall be "[p]ublic safety and the safety of the victim."

Based on the plain language of section 28(f)(3) and the intent of the provision as revealed through the legislative history and timing of Proposition 9, section 28(f)(3)'s bail framework should

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[2] Unless otherwise noted, "section 28" refers to Article I, section 28, of the California Constitution.

be held to prevail over section 12. Such a holding best honors the electorate's understanding of California's constitutional restrictions on bail in a pre-*Humphrey* landscape. Further, this interpretation helps to facilitate, rather than impede, the crafting and enactment of comprehensive legislation addressing pre-trial detention that is much needed as California continues a historic transition away from a cash bail system.

A. History of California Provisions Governing Pretrial Detention

Understanding the current application of section 12 and section 28(f)(3), as well as their interaction with the principles set forth in *Humphrey*, requires a review of the enactment and subsequent amendment of each provision.

1. Early Bail Provisions

Article I, section 7 of the first California Constitution provided: "[A]ll persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption is great." (Cal. Const. of 1849, art. I, section 7.) In contrast to the United States Constitution which included no guaranteed right to bail, section 7 was added to the California Constitution "in order to make clear that, unlike the federal rule, all except the one class of defendants were to be bailable." (*In re Underwood* (1973) 9 Cal.3d 345, 350 superseded by statute as stated in *In re York* (1995) 9 Cal.4th 1133, 1143, fn.7.)

Over time, this near absolute right to bail began to erode as California courts started implying an unwritten "public safety" exception into the rule. (*Underwood*, *supra*, 9 Cal.3d at p. 348, citing *Bean v. County of Los Angeles* (1967) 252 Cal.App.2d 754,

757 [authorizing bail denial "where for the safety of the individual or for the protection of society, it would be proper to deny bail"] ; *Evans v. Municipal Court* (1962) 207 Cal.App.2d 633; *In re Gentry* (1962) 206 Cal.App.2d 723; *In re Henley* (1912) 18 Cal.App.1.) That notion was eventually rejected by this Court in *Underwood.* (*Supra,* 9 Cal.3d at p. 350.) This Court held that no such exceptions existed within Article I, section 6[3], and added, "'[i]f the constitutional guarantees are wrong, let the people change them – not judges or legislators.'" (*Underwood, supra,* 9 Cal.3d at p. 350, citing *In re Keddy* (1951) 105 Cal.App.2d 215, 220.)

2. Public Safety: Propositions 4 and 8

Within the next ten years, the voters of California would codify key changes to the Constitution related to public safety in pretrial detention. First, Proposition 4, appearing on the 1982 Primary Election ballot, sought to amend section 12 to expressly set forth exceptions beyond capital cases in which a trial court may deny the setting of bail. (Ballot Pamp., Primary Elec., (June 8, 1982) text of Prop. 4, p. 17 (1982 Ballot Pamp. Prop. 4).) Specifically, Proposition 4 would create exceptions authorizing bail denial for felony offenses involving acts of violence, as well as felony offenses involving threats of violence, when there is a

[3] Article I, section 7 as written in California's original constitution was redesignated as section 6 in California's Constitution of 1879. Then, in 1974, section 6 was repealed and re-codified in part under Article I, section 12. (Ballot Pamp., Gen. Elec., (Nov. 5, 1974) text of Prop. 7, p. 71.)

substantial likelihood release would result in great bodily injury. (*Id.*; Cal. Const. art. I, section 12, subds. (b) & (c).)

Proposition 4 further proposed to require trial courts, when fixing bail, to consider 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." (1982 Ballot Pamp. Prop. 4, p. 17.) This new language emphasizing the role of the alleged crime and the defendant's criminal history appeared to come as a response to this Court's opinion in *Underwood*. (*Supra,* 9 Cal.3d at p. 350 ["We are compelled to the conclusion that the detention of persons dangerous to themselves or others is not contemplated within our bail system, and if it becomes necessary to detain such persons, authorization must therefore be found elsewhere, either in existing or future provisions of the law."].)

Second, Proposition 8, also appearing on the 1982 ballot and entitled the "Victim's Bill of Rights," sought to achieve similar objectives via a different route. Broadly speaking, Proposition 8 sought to re-orient criminal proceedings around victims and their families through "strengthen[ing] procedural and substantive safeguards for victims in our criminal justice system." (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 247.) Like Proposition 4, Proposition 8 proposed to empower judges with authority to detain those defendants whose release posed a danger to public and victim safety:

> The rights of victims pervade the criminal justice system, including not only the right to restitution from the wrong doers . . . but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.

(Ballot Pamp., Primary Elec., (June 8, 1982) text of Prop. 8, p. 33. (1982 Ballot Pamp. Prop. 8).) Specifically, Proposition 8 would allow judges "to stop extremely dangerous offenders from being released on bail to commit more violent crimes." (*Id.* at p. 34.) The new law provided in relevant part:

> (e) 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 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, 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 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.

(*Id.* at p. 33). In addition to adding the "Public Safety Bail" provision, Proposition 8 proposed a repeal of section 12. (*Id.*)

3. Propositions 4 and 8 in Conflict

The 1982 election saw the electorate pass both Proposition 4 and Proposition 8. (*People v. Standish* (2006) 38 Cal.4th 858, 876-77.) This outcome created a lurking conflict within the California Constitution between section 12 and section 28. This Court first alluded to the conflict in 1995, almost 13 years after both propositions were passed. (*York, supra,* 9 Cal. 4th at p. 1140, fn. 4.) In *York*, this Court addressed the validity of certain OR provisions and clarified the findings required for a trial court to impose such conditions. (*Id.* at p. 1137.) In dicta from the opinion—specifically, one sentence of analysis contained in a footnote—this Court indicated the bail and OR provisions of Proposition 4 were "deemed to prevail over" similar provisions in

Proposition 8 because Proposition 4 received more votes. (*Id.* at p. 1140, fn. 4.)

York's footnote remained this Court's sole comment on the conflict between Propositions 4 and 8 for 11 more years. Then, in 2006, 24 years after the enactment of both Propositions 4 and 8, this Court addressed the conflict between the two provisions head on. (*Standish, supra,* 38 Cal.4th 858.) In *Standish*, this Court conducted a section-by-section analysis of the competing provisions and concluded Propositions 4 and 8 were in "direct conflict" in three keys ways. (*Id.* at p. 877.) First, Proposition 8 would have repealed section 12, whereas Proposition 4 amended section 12. (*Id.*) Second, Proposition 8 sought to bar OR release in serious felony cases, whereas Proposition 4 maintained the court's discretion to grant OR in serious felony cases. (*Id.*) Third, and of great relevance here, this Court found a direct conflict between Proposition 4's mandate that bail "shall" be set in nearly all cases, and Proposition 8's grant of discretion to trial courts in the setting or denying of bail. (*Id.*) Despite arguments that the provisions could be reconciled, this Court resolved the conflict by turning to the vote count. (*Id.* at pp. 877-78.) Because Proposition 4 received more yes votes, "the provisions of article I, section 28, subdivision (e) proposed by proposition 8 did not take effect." (*Id.*)

4. Proposition 9: Victim's Bill of Rights

In 2008, just two years after *Standish*, the voters passed Proposition 9, known as the "Victim's Bill of Rights Act of 2008: Marsy's Law." Proposition 9 significantly amended Article I,

section 28, and in so doing, revived and renumbered the "Public Safety Bail" provision declared inoperative in *Standish*. (2008 Ballot Pamp. Prop. 9, p. 128.)

However, unlike in 1982, the 2008 ballot did not contain a competing provision to amend section 12—Proposition 9 stood as the sole provision on the ballot related to bail and pretrial detention. The text of the proposition revealed a conscious intention to revive the provisions of Proposition 8 declared inoperative in *Standish*:

> 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 Victim's Bill of Rights initiative 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.

(2008 Ballot Pamp. Prop. 9, p. 128.) The new law revived the inoperative section 28, subdivision (e), as section 28, subdivision (f)(3), with limited amendments (italics for additions and strikethroughs for deletions):

> ~~(e)~~*(3)* Public Safety Bail. A person may be released 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.~~

(2008 Ballot Pamp. Prop. 9, p. 130.) In re-emphasizing the central importance of victim rights, Proposition 9's successful revival of section 28's Public Safety Bail provision revived the constitutional conflict underlined by this Court in *Standish*. Once again, section 12's mandate that bail "shall" be set for all but the most violent offenders stood in direct conflict with section 28's grant of discretion to trial courts to set or deny bail. This conflict remains unresolved. (*Humphrey, supra* 11 Cal.5th at p. 155, fn. 7.)

B. Proposition 9's Plain Language and Stated Purpose, In Addition to the Timing of Its Enactment, Indicate Section 28(f)(3)'s Bail Provisions Prevail Over Section 12.

As this Court held in *Standish*, a plain reading of the bail provisions of section 12 and section 28(e)—now codified as section 28(f)(3) following the enactment of Proposition 9—reveals a

conflict between the two laws. (*Standish, supra,* 38 Cal.4th at p. 877.) Resolving this conflict requires the Court to consider traditional principles of statutory interpretation as well as the context within which the legislation was last amended. Such an analysis reveals the bail provisions of section 28(f)(3) prevail over section 12.

1. Principles of Constitutional Interpretation

Proposition 9 amended section 28 of the California Constitution through the initiative referendum procedure. (2008 Ballot Pamp. Prop. 9.) The ballot initiative process is "not a right granted the people, but [] a power reserved by them." (*Brosnahan, supra,* 32 Cal.3d at p. 262.) This Court has described the initiative power as "one of the most precious rights of our democratic process," and further declared it "the duty of the court to jealously guard this right of the people." (*Id.*) Accordingly, "it has long been [this Court's] policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." (*Id.*)

When interpreting a voter initiated constitutional provision, the court applies "the same principles that govern statutory construction, beginning with the text as the best indicator of intent." (*Cal. Redevelopment Assoc. v. Matosantos* (2011) 53 Cal.4th 231, 265; *see also People v. Rizo* (2000) 22 Cal.4th 681, 685 [voter initiatives].) Accordingly, courts must first look to the language of the initiative, "giving the words their ordinary

meaning and construing this language in the context of the statute and initiative as a whole." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.) If the language is unambiguous, the inquiry ends, as courts "presume the voters intended the meaning apparent from the language." (*Id.*)

Where any ambiguity remains, the meaning must be considered in the context of the framework of the initiative in its entirety. (*People v. Vidana* (2016) 1 Cal.5th 632, 637.) "A literal construction of an enactment . . . will not control when such a construction would frustrate the manifest purpose of the enactment as a whole." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 979.) Further, in identifying the manifest purpose of the initiative, "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, and must, if possible, without doing violence to the language and spirit of the law, interpret it so as to harmonize and give effect to all its provisions." (*People v. Garcia* (1999) 21 Cal.4th 1, 14.)

When constitutional provisions conflict, "the doctrine of implied repeal provides that the most recently enacted statue expresses the will of the legislature." (*Professional Engineers in Cal. Government v. Kempton* (2007) 40 Cal. 4th 1016, 1038.) Such a repeal should be recognized "in those limited situations where it is necessary to effectuate the intent of the drafters of the newly enacted statute." (*Id.*) For example, "where the new law

constitutes a revision of the entire subject, so that the court may say it was intended to be a substitute," the new law should "supersede the first." (*Id.*)

2. Sections 12 and 28(f)(3) Conflict

A review of the language of sections 12 and 28(f)(3) reveals conflict between the two provisions. Section 12 mandates that all detainees shall be granted bail with limited and express exceptions set forth. (Cal. Const., art. I, section 12, subds. (a), (b), & (c).) In contrast, section 28(f)(3)'s "Public Safety Bail Provision" as enacted through Proposition 9 provides an inverted framework whereby the granting of bail is permissive subject to a restriction for capital crimes. (Cal. Const., art. I, section 28, subd. (f)(3).)

In *Standish*, this Court confirmed the conflict, stating "it is apparent we believed Propositions 4 and 8 contained competing measures respecting bail and OR release that could not both be given effect." (*Standish, supra,* 38 Cal.4th at p. 877, citing *York, supra*, 9 Cal.4th at p. 1140, fn. 4.) This Court stated, "[a] section-by-section comparison of Propositions 4 and 8 demonstrates the direct conflict between the two measures . . . . Proposition 4 stated that all accused persons 'shall' be admitted to bail, subject to certain limitations, while Proposition 8 would have rendered bail discretionary in all cases." (*Id.*)

Because Proposition 8 proposed to repeal section 12, this Court found a clean mechanism to resolve the conflict through a comparison of vote totals. (*Id.*) Of note, this Court did not find the entirety of section 28 as enacted through Proposition 8

inoperative, but only the directly conflicted bail provisions set forth in then subsection (e). (*Id.* at pp. 877-78.)

Just two years later, in 2008, with the passing of Proposition 9, the conflict in bail provisions between sections 12 and 28 re-emerged. However, Proposition 9 did not contain an express provision to repeal section 12, nor did the 2008 ballot contain competing bail reform measures against which to compare vote totals. (2008 Ballot Pamp., Gen. Elec., (Nov. 4, 2008).)

The Court of Appeal addressed this conflict in the opinion below. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 685-86.) Without a mechanism such as vote counting to resolve the conflict, the Court of Appeal conducted a direct analysis of the text in sections 12 and 28. (*Id.*) The Court of Appeal concluded—contrary to this Court's reasoning in *Standish*—the two bail provisions did not contain a direct conflict and could be resolved with both provisions given full effect. (*Id.* at p. 686.)

In so holding, the Court of Appeal opted to leave section 12 as fully operative without limitation. (*Id.*) The Court of Appeal held section 28(f)(3)'s provisions to essentially be subsumed within section 12. (*Id.*) The Court of Appeal stated, "we interpret the first sentence of section 28(f)(3) as a declarative statement recognizing that bail may be denied under existing law." (*Id.*) Petitioner now advocates for a similar resolution of the conflicting sections. However, this resolution omits essential language from section 28(f)(3) suggesting an inverted framework that may not be compatible with section 12.

3. Sections 28(f)(3)'s Inverted Bail Framework

A careful reading of section 28(f)(3)'s operative sentence reveals the provision contemplated an inversion of the bail analysis set forth in section 12—a victim-centric approach that fits appropriately within Proposition 9's comprehensive scheme. Section 28(f)(3) begins: "Public Safety Bail. A person may be released on bail by sufficient sureties, *except for capital crimes when the facts are evident and the presumption great.*" (Cal. Const., art. I, section 28, subd. (f)(3), *emphasis added*.) Section 28(f)(3) initiates the analysis by setting forth a category of offenses for which release on bail is prohibited. The victim centric framework of Proposition 9 contemplated a starting point of mandatory bail denial for detainees accused of the most serious offenses. From this starting point, moving down in severity from capital crimes for which bail is not authorized, section 28(f)(3) creates a framework within which bail *may* be granted following a series of express considerations. Within that framework, "[p]ublic safety and the safety of the victim shall be the primary considerations." (Cal. Const., art. I, section 28, subd. (f)(3).)

In contrast, section 12's detainee-centric analysis declares a right to release on bail for all defendants. From a starting point of guaranteed bail for all, specified exceptions are carved out for the possible denial of bail to those detainees alleged to have committed capital crimes and certain violent felonies. The two provisions start at opposing ends of the spectrum and move toward the middle—section 12's framework beginning with a declaration of detainee rights, section 28(f)(3)'s flowing from the perspective of the victim.

The Court of Appeal's analysis primarily, and not unreasonably, focused on the terms *may* and *shall* within the respective provisions. The opinion states: "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.'" (*Kowalczyk, supra,* 85 Cal.App.5th at p. 683.) The Court of Appeal flagged the term "may" as "ordinarily and presumptively" permissive. (*Id.*) From here, the Court of Appeal concluded section 28(f)(3)'s first sentence should be read as a declaration of existing law—specifically, that a bail denial "may" occur as set forth in section 12's subsections. (*Id.* at pp. 683-84.) Petitioner advocates for the same interpretation here.

However, when the entirety of section 28(f)(3)'s first sentence is considered, including the clause, "except for capital crimes," it is apparent the term "may" in this context is not permissive, but in fact establishes a *greate*r *restriction* on setting bail. Because section 28(f)(3) begins with a complete prohibition of bail for the most serious crimes, the term, "may," expresses only a possible deviation from that most restrictive position. In essence, the operative clause states that bail is sometimes prohibited and never guaranteed. Such a reading places section 28(f)(3) in conflict with section 12.

4. Section 28(f)(3)'s Focus on Victims

While this distinction in sentence structure may seem small, it finds contextual support in Propositions 9's accompanying provisions and stated intention to re-orient our criminal justice proceedings to ensure victims stand at the center. (2008 Ballot Pamp. Prop. 9, p. 128-29.) For example, section 28(e) defines "victim"—a term that does not appear in section 12— as someone "who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a crime," as well as that person's immediate family. (Cal. Const., art. I, section 28, subd. (e).) Section 28(f)(3) requires that all victims be notified and provided with a reasonable opportunity for a hearing before a person charged with a serious felony may be released on bail. (Cal. Const., art. I, section 28, subd. (f)(3).) Section 28(b)(9) declares a victim's express right to a speedy trial. Section 28(a)(2) dictates the courts are responsible for the expeditious enforcement of victim rights. Section 28(f)(3)'s framework includes flight risk as one of the factors the court "shall" consider when "setting, reducing, or denying bail" to ensure a detainee will return to court and a victim's rights will be enforced. In sum, section 28's comprehensive focus on victims provides a framework within which section 28(f)(3)'s application must be considered. (*See Vidana, supra*, 1 Cal.5th at p. 637.)

In contrast, under section 12's framework, the alleged offense will always be the primary consideration for the court in fixing or denying bail. Section 12's exclusive provisions for deviating from the absolute right to bail are defined by the alleged offense and do not contain the term, "victim." (Cal. Const.,

art. I, section 12, subds. (a)-(c).) Because the analysis defaults to bail for all, considerations of victim safety, public safety, and the express and enforceable rights of victims set forth in Proposition 9, are not considered in bail denial determinations unless a qualifying offense is alleged. While there is great overlap between section 12's express conditions for denial and section 28(f)(3)'s focus on victim safety, that overlap is not complete. Key differences in each provision render them in conflict.

5. Proposition 9 Enacted in Response to this Court's Opinion in *Standish*

The timing of Proposition 9—enacted just two years after this Court's decision in *Standish*—provides further context for interpreting section 28(f)(3)'s text. Proposition 9 followed this Court's definitive holding that Proposition 8's provisions did not take effect. (*Standish, supra,* 38 Cal.4th at pp. 877-78.) This timing should not be viewed as coincidental and supports an interpretation that Proposition 9 "constituted a revision of the entire subject." (*Kempton, supra*, 40 Cal. 4th at p. 1038.)

The "Findings and Declarations" within Proposition 9 suggest the electorate's intention: "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." (2008 Ballot Pamp. Prop. 9, p. 128.) Proposition 9's declaration once again echoes this Court's advice from *Underwood*: "If the constitutional guarantees are wrong, let the people change them." (*Underwood, supra,* 9 Cal.3d at p. 350.)

Specifically, with respect to conflicts of law like those identified in *Standish*, Proposition 9 intended "that if any provision conflicts with an existing provision of law which provides for greater rights of victims of crime, the latter shall apply." (2008 Ballot Pamp. Prop. 9, p. 128.) This type of conflict might best be exemplified in section 28's consideration of flight risk as a basis for denying bail. (Cal. Const., art. I, section 28, subd. (a)(2).) If a defendant accused of a non-qualifying offense under section 12 repeatedly flees the jurisdiction or generally poses an unreasonable risk of flight, but the court is not empowered to detain such a defendant, despite specific authorization by section 28, the court cannot fulfill its constitutional obligation to enforce victim rights. When such a conflict is encountered, the dictates of section 28 indicate it was intended to be the controlling provision.

Beyond concerns of flight risk, consider the common example of the domestic abuser who torments a victim through unrelenting attempts at contact without offering express threats of violence. Or the case of extreme child neglect, an offense that does not necessarily include violence. Or the exceptionally common example of a prior violent offender found in possession of any number of deadly firearms. While these examples do not necessarily justify bail denial as a first resort, section 12 would render such a denial an impossibility, even under the Court of Appeal's resolution of the two provisions. It cannot be said such outcomes are consistent with the electorates pointed decision to prioritize victim rights through the enactment of Proposition 9.

And these examples only touch upon public and victim safety, let alone the example of a felony offender responsible for extreme economic injury who refuses to appear in court and indefinitely extends the life of a criminal case. Such behavior denies victims resolution and restitution, and yet, even the theoretical detention of such an offender is beyond the scope of section 12.

In contending section 12 should control, Petitioner relies heavily on an alleged lack of notice to the electorate regarding the impact of section 28(f)(3)'s Public Safety Bail provision. And yet, Proposition 9's timing—directly following this Court's opinion in *Standish*—and text, reveals a plain intention to generally re-orient criminal justice proceedings around victim and public safety. (Cal. Const., art. I, section 28, subds. (a)(1)-(8).)

In addition to defining personally enforceable victim rights, and generally providing a more expansive definition of "victim," Proposition 9's comprehensive reform included a section setting forth "rights that are shared by all the People of the state of California." (Cal. Const., art. I, section 28, subd. (f).) Amongst only six shared rights set forth within this section, a voter finds subsection (f)(3), properly and transparently titled, "Public Safety Bail." (Cal. Const., art. I, section 28, subd. (f)(3).) This subsection is but three sentences long, fits logically within Proposition 9's stated purpose, and makes bail discretionary for all offenses other than capital crimes for which it is prohibited. It would not seem inappropriate to conclude voters read and understood these basic rights. (*See Raven v. Deukmejian* (1990) 52 Cal. 3d 336, 349 [finding courts should assume voters

considered and understood complete text of proposed measure]; *Pearson, supra,* 48 Cal.4th at p.571 [finding specific provisions should be considered in context of entire initiative]; *People v. Valencia* (2017) 3 Cal.5th 347, 357 [warning against interpretation of initiative rendering words as surplusage].)

Through its direct language, victim-centric bail framework, and stated intention, section 28 as amended by Proposition 9 provides courts with discretion in setting, reducing, or denying bail. Accordingly, section 28(f)(3)'s bail provision should prevail over section 12.

C. Current Due Process and Equal Protection Principles Are Consistent with Section 28(f)(3)'s Pretrial Detention Framework.

In considering how the conflict between sections 12 and 28 can be resolved, this Court faces a dilemma of first impression. Sections 12 and 28 now operate in a pre-trial detention landscape quite distinct from that within which they were last amended. This Court's landmark opinion in *Humphrey* set forth fundamental rights for pre-trial detainees not previously identified in this Court's jurisprudence. *Humphrey*'s framework, while essential, presents a risk of unanticipated interaction with the express provisions set forth in sections 12 and 28.

Beyond standard statutory interpretation principles and considerations of implied repeal, this Court should consider how each provision operates within this new framework. With such considerations in mind, the best way to honor the intent of the electorate is to find section 28's pre-trial detention provisions

prevail, subject to the fundamental and independent constraints of equal protection and due process as set forth in *Humphrey*.

1. Propositions 4, 8 and 9 All Intended Higher Bail for More Serious Offenders

Article I, section 12 has traditionally been understood as conferring a general right to the setting of money bail. Originally codified as article I, section 7, this general right included an exception only for those detainees accused of capital crimes.[4] California's right to bail was an expansion of the 8th Amendment's federal protection against the setting of excessive bail. (*Carlson v. Landon* (1952) 342 U.S. 524, 545-46; *Underwood, supra,* 9 Cal.3d at pp. 349-50; U.S. Const., 8th Amend.) Despite expanding the federal right, California's right to the setting of bail was not understood as a right to release. (*See Ex Parte Duncan* (1879) 54 Cal. 75, 77-78.) The bail amount set could result in *de facto* detention without offending California's constitution. (*Id.*) The Court of Appeal correctly stated as much in the opinion below, and no authority has been offered in opposition. (*Kowalczyk, supra,* 85 Cal.App.5th at p. 688.)

In 1982, the passing of Propositions 4 and 8 further reinforced this understanding. Proposition 4 amended section 12 to add language directing that "[i]n fixing the amount of bail, the court shall take into consideration the seriousness of offense charged, [and] the previous criminal record of the defendant."

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[4] Article I, section 12 derives from Article I, section 6 of the Constitution of 1879, and before that from Article I, sections 6 and 7 of the Constitution of 1849.

(1982 Ballot Pamp. Prop. 4, p. 17.) Similarly, Proposition 8 proposed to add section 28(e), appropriately titled "Public Safety Bail." (1982 Ballot Pamp. Prop. 8, p. 33.) Section 28(e) would instruct courts to consider the same factors set forth in Proposition 4, but "[i]t would also make the protection of the public's safety the primary consideration in all bail determinations." (*Id.* at p. 54.)

Both propositions represented a direct mandate from the electorate that courts consider factors when setting bail other than ensuring a detainee's appearance at future proceedings. (*Standish, supra,* 38 Cal.4th at p. 875.) These constitutional amendments reflected an expectation amongst voters that bail be set higher for serious and repeat offenders. It reasonably follows that higher bail settings may and often do result in a longer period of pre-trial detention. In sum, public safety would be promoted by making it more difficult for serious offenders to bail out.

This understanding was reinforced and endorsed yet again in 2008 when the electorate passed Proposition 9. Through amending section 28 to restate and clarify that the protection of victims and the public should be the primary consideration in fixing bail, the electorate doubled down on the public safety bail provisions originally set forth in Proposition 8. (2008 Ballot Pamp. Prop. 9, p. 128.)

Considered together, the passing of propositions 4, 8 and 9 reveal a uniform intention and expectation amongst the electorate that public safety should be the primary consideration

in setting bail, and therefore, more serious offenders should be subject to higher bail settings. This contention is not in dispute and was not disturbed by this Court in *Humphrey*. (*See, supra,* 11 Cal.5th at p. 152 (stating the "primary considerations" under the constitution are "the safety of the victim" and "public safety").)

2. Altered Pretrial Detention Landscape Post *Humphrey*

Since the passing of Proposition 9 in 2008, California has experienced a substantial evolution in the application of equal protection and due process principles to the setting of cash bail. In *Humphrey*, this Court held it a violation of such principles to hold a detainee in custody on unaffordable bail without first considering all possible non-monetary conditions of release that could reasonably vindicate the state's interests of protecting the public and victim safety and ensuring a detainee's presence at future court proceedings. (*Humphrey, supra,* 11 Cal.5th at p. 156.) Any valid detention order under *Humphrey* would naturally remain subject to all other constitutional restrictions. (*Id.* at p. 155.) Practically speaking, any such detention order would be subject to the constraints of section 12, section 28(f)(3), or some reconciled application of both provisions. (*Id.*)

It is here the unique nature of this situation should be acknowledged. Sections 12 and 28(f)(3) were both enacted in a pre-*Humphrey* legal landscape. As set forth above, neither section can be said to have guaranteed a right to release or a right to affordable bail, and both sections intended higher bail settings for more serious offenders to ensure public safety. And yet, despite their similarities, in light of *Humphrey*'s general

framework, we now see the potential for sharp divergence in the application of each section.

Consider section 12's guarantee that detainees "shall be released on bail by sufficient sureties." Once understood as a right to the setting of bail, regardless of affordability, this mandate could now function as an absolute right to release. If *Humphrey* prohibits the setting of unaffordable bail, and section 12 is held controlling over section 28(f)(3), we see a sudden and uncontemplated *right to release* emerge for all detainees not charged with an offense expressly set forth in section 12's subsections.

For example, section 12 would function to prevent a trial court from ever detaining a defendant based on flight risk concerns alone. A defendant falling outside section 12's limited exceptions could simply ignore future court dates, indefinitely, and the trial court would be constitutionally barred from detaining the defendant to process the case and ensure victim rights are protected. Such a situation should be the exception, of course, but an absolute prohibition on this exception was not contemplated or endorsed by the electorate. Likewise, considerations of public and victim safety would be rendered irrelevant outside the narrow circumstances of section 12's subsections. Whether such an outcome is preferred is a worthy debate, but one that may better be conducted at the ballot box in a future election. For now, a pre-*Humphrey* understanding of section 12 suggests voters never contemplated it applying in such a manner.

In contrast, section 28(f)(3)'s more flexible provisions, subject to the independent constitutional restraints of due process and equal protection, produce a much more recognizable pre-trial detention framework. Section 28(f)(3) would instruct that a trial court "may" release a pre-trial detainee under appropriate monetary or non-monetary conditions, as ultimately defined by the legislature, based on an individualized assessment of the detainee. Should appropriate monetary conditions prove unaffordable, the general framework as set forth in *Humphrey* would apply to ensure any order of detention remains constitutionally justified.

Under such an approach, liberty would remain the norm and detention the exception, but the trial court would have room to consider the factors endorsed by the electorate in Propositions 4, 8 and 9: public safety, victim safety, the seriousness of the offense charged, and flight risk. When the alternative is considered—an unanticipated framework in which section 12 compels release and this court's flight risk analysis as set forth in *Humphrey* is rendered redundant—it becomes clear voter intent is best honored by giving effect to the pre-trial detention provisions of section 28(f)(3).

3. Petitioner Advocates for Section 12's Uncontemplated Right to Release

In pursuit of fairness and transparency in pre-trial detention orders, Petitioner advocates for a holding that would directly result in the aforementioned uncontemplated mandate of release under section 12. Petitioner pursues such an outcome through an endorsement of the Second District's interpretation of *Humphrey*

in *In re Brown* (2022) 76 Cal.App.5th 296. In *Brown*, the Second District considered a trial court's order to maintain unaffordable bail and held the trial court incorrectly interpreted *Humphrey* to be inapplicable to serious or violent felonies. (*Id.* at p. 306.) On remand, the Second District provided clarifying instructions for the lower court, finding *Humphrey* compelled a complete denial of bail when a monetary bail setting proves unaffordable and non-monetary conditions of release are inadequate to vindicate the state's interests. (*Id.* at p. 307.)

The Second District's approach can be viewed in contrast to that of the Court of Appeal in this case. Here, the Court of Appeal considered the trial court's denial of bail and held that a complete denial is not what *Humphrey* instructs. (*Kowalczyk, supra,* 85 Cal.App.5th at pp. 689-90.) In so holding, the Court of Appeal interpreted equal protection and due process principles to allow for the setting of unaffordable bail so long as the analysis set forth in *Humphrey* is properly conducted. (*Id.*)

At first glance, the difference between the Court of Appeal's approach in this case and the Second District's approach in *Brown* might seem academic. Whether a detainee remains in custody on no-bail or unaffordable bail, the detainee will almost certainly remain in custody. And yet, if *Brown*'s approach is adopted with respect to a compelled bail denial, and section 12 is held to prevail in application over section 28(f)(3), section 12 would function to guarantee release for all indigent detainees not charged with a qualifying offense under section 12's exceptions. It goes unsaid that liberty for such an offender should be the

norm. But it also remains clear that such a hard fast rule was not contemplated under section 12 or 28.

In isolation, Petitioner's advocacy before this Court for a complete denial of bail is surprising. One assumes most detainees would prefer *some* setting of bail over a complete denial of bail. Indeed, at Petitioner's bail hearing, upon learning bail would be denied, both Petitioner and his counsel pleaded with the trial court to leave bail at the previously set amount of $75,000 rather than deny bail outright. (Pet. Exh. E, pp. 36-37.) Such a request is natural given the potential that a detainee's financial position might change while they remain in custody. (*See, e.g., Duncan, supra,* 54 Cal. at p. 75 [acknowledging friends may step forward and act as sureties for a detainee].) And yet, when section 12's application is considered alongside the rule in *Brown*, it becomes clear Petitioner is advocating for a combination of rulings that would result in the aforementioned uncontemplated right to release.

Petitioner was detained by the trial court in this case, at least in part, because he posed a flight risk. (Pet. Exh. E, p. 36.) Arguably, there was some basis in reason for the trial court's order when we consider Petitioner's expansive criminal history, poor performance on parole and probation, previous failures on supervised release, limited apparent ties to the community, and poor score on the court's pre-trial release assessment tool. (*Id.* at pp. 35-36.) Nevertheless, if this Court finds section 12 controlling and adopts the approach in *Brown*, section 12 would indefinitely compel Petitioner's release, regardless of past or future OR

violations and failures to appear in court. Such an approach may ultimately be preferred by a substantial number of Californians, but for now, flight risk concerns remain a valid basis for non-monetary conditions of release, higher bail settings, and if necessary, detention. It is unreasonable to argue that a guaranteed right to release is consistent with the intent and understanding of the electorate when they passed judgement on Propositions 4, 8 and 9.

4. Section 28(f)(3) Best Facilitates Further Legislative Amendment in a Post-*Humphrey* Pretrial Detention Landscape

In addition to aligning with voter intent and understanding, section 28(f)(3)'s prevailing application best preserves the role of the legislature in crafting pre-trial detention policies applicable and appropriate in a post-*Humphrey* detention landscape. Consider, for example, recent legislative efforts to set forth comprehensive pre-trial detention provisions in 2018's Senate Bill 10. (Stats. 2018, ch. 244 (Sen. Bill No. 10 (2017-2018 Reg. Sess.)) ("S.B. 10").) Although the legislation did not ultimately take effect, S.B. 10 represented an ambitious attempt by the legislature to modernize California's pre-trial detention framework. Indeed, the legislation would have completely eliminated money bail, providing for release in most cases without regard to a detainee's finances while also allowing for detention when necessary subject to constitutional restraints. (*Id.*) Debate over S.B. 10's specific provisions aside, we should applaud the legislature for attempting such an undertaking. It is indisputably the role of the legislature to craft such a complex

scheme, respecting and working within constitutional constraints defined by this Court.

Nevertheless, section 12's prevailing application would have rendered S.B. 10, or similar legislation, impossible without further constitutional amendment. With an unanticipated guaranteed right to release in place—a right not contemplated by voters passing judgment on Propositions 4, 8 and 9—the electorate would be compelled to first amend the Constitution to undo sections 12's uncontemplated interplay with *Humphrey* before a comprehensive scheme such as S.B. 10 could take effect. In contrast to section 12, the more flexible provisions of section 28(f)(3), in combination with due process and equal protection principles as set forth in *Humphrey*, set appropriate constitutional constraints on any such legislative framework while facilitating California's attempt to move away from a cash bail system.

The need for legislative reform of California's pre-trial detention scheme is natural and expected following this Court's landmark opinion in *Humphrey*. Where possible, the Court's construction of the state Constitution should facilitate such important legislative reform. The state senate's passing of S.B. 10 implies judgement from the legislature and the governor that the state Constitution permitted the enacted framework. This Court has held that such an interpretation deserves strong consideration by the courts. (*See Property Reserve Inc. v. Superior Court* (2016) 1 Cal. 5th 151, 192 ["[W]hen the legislature has enacted a statue with constitutional constraints in mind

'[t]here is a "strong presumption in favor of the legislature's interpretation of a provision of the constitution."'"]; *Id.* at p. 193 ["'Although the ultimate constitutional interpretation must rest, of course, with the judiciary, a focused legislative judgement on the question enjoys significant weight and deference by the courts.'"].)

Giving full effect to section 28(f)(3) could be viewed as a precedent setting implied repeal of section 12. But such a conclusion would disregard the reality that Californians are in the midst of unprecedented comprehensive reform of the state's pre-trial detention framework. With this context in mind, this Court's endorsement of section 28(f)(3) should be viewed as this Court acknowledging and giving full effect to the plain language of legislation the California electorate approved twice. Such an endorsement is in line with voter intent and could well be understood as this Court exercising restraint. Section 28(f)(3)'s more flexible framework is in line with voter intent and draws the most appropriate constitutional path forward.

II. A TRIAL COURT MAY SET UNAFFORDABLE BAIL FOLLOWING A PROPER ANALYSIS ADDRESSING A DETAINEE'S EQUAL PROTECTION AND DUE PROCESS RIGHTS AS SET FORTH IN *HUMPHREY*.

California's bail system is as old as the State. The inaugural constitution expressly provided a guarantee that bail be set in almost all cases. (Cal. Const. of 1849, art. I, section 7.) That right is currently set forth in section 12, and until 1982, remained California's sole constitutional provision governing pre-trial detention. Then, with the passing of Proposition 8 in 1982, and again with the passing of proposition 9 in 2008, the

electorate added section 28(f)(3), California's second constitutional provision governing pre-trial detention. From 2008 to 2022, a combination of sections 12 and 28(f)(3) provided the constitutional boundaries for all bail determinations. This landscape was altered in 2022 with this Court's opinion in *Humphrey*. For the first time, this Court held fundamental principles of due process and equal protection set additional limits on the arbitrary setting of unaffordable bail. (*Humphrey, supra,* 11 Cal.5th at p. 144.)

This Court now asks how these protections should be reconciled, and specifically, whether the setting of unaffordable bail can ever be constitutional in a post-*Humphrey* landscape. A review of the language, application, and legislative history underlying sections 12 and 28(f)(3) reveals neither provision ever contemplated a prohibition on unaffordable bail. Similarly, in *Humphrey*, this Court interpreted fundamental constitutional principles to prohibit the *arbitrary* setting of unaffordable bail, but this Court did not find such a right vindicated through a prohibition on the setting of unaffordable bail. Instead, this Court set forth a due process and equal protection analysis that, when conducted properly by the trial court, ensures the constitutionality of any unaffordable bail setting.

A. Section 28(f)(3) Does Not Prohibit the Setting of Unaffordable Bail

Section 28(f)(3), by its plain language, instructs a trial court "in setting, reducing, or denying bail" to 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 his or her appearing at trial or hearing on the case." The plain language of section 28(f)(3) neither instructs a trial court to consider a detainee's ability to post bail, nor expressly prohibits the setting of unaffordable bail. (*See Pearson, supra*, 48 Cal.4th at p. 571 ("We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole.").)

Moreover, the legislative history underlying the enactment of section 28(f)(3)'s bail provision confirms that affordability was not contemplated as a factor the trial court should consider in setting bail. In 1982, the voters passed proposition 8 and amended the constitution to add section 28(e)'s bail provision, the earliest version of language that would eventually become section 28(f)(3). (1982 Ballot Pamp. Prop. 8, pp. 32 & 54.) A review of the legislative material related to Proposition 8's enactment confirms the amendment was intended to expand the factors a trial court should consider in setting bail to include "the same factors they are [] required by statue to consider"—the seriousness of the offense charged, the defendant's criminal history, and the likelihood he or she will appear in court—and to "make protection of the public's safety the primary consideration in bail determinations." (*Id.*)

Neither the plain language of section 28(e) nor the legislative materials related to Proposition 8 identify affordability of bail as a factor the court can consider in setting bail. Further, section 28(e) made no express or implied guarantee of release. To

the contrary, the plain language of the section contemplates bail denial at the court's discretion. (*Id.* at p. 32.)

Years later, in 2008, Proposition 9 revived the original language from section 28(e), now renumbered as section 28(f)(3), with minor changes related to OR provisions for release. (2008 Ballot Pamp. Prop. 9, p. 130.) The legislative materials related to Proposition 9 confirm, once again, the electorate's intention to place public and victim safety at the forefront of the criminal justice system. (*Id.* at pp. 58-59 & 62.) Bail affordability is not mentioned as a factor the court should consider in setting bail.

Neither the language of section 28(f)(3) nor the history of Propositions 8 and 9 suggest any prohibition against setting unaffordable bail. This Court in *Humphrey* recently held that due process and equal protection provisions are implicated by such a setting; but unlike the fundamental rights implicated in *Humphrey*, the breadth of section 28(f)(3)'s impact is determined through standard statutory interpretation. (*Standish, supra,* 38 Cal. 4th at p. 869.) Under such an analysis, section 28(f)(3) does not prohibit the setting of unaffordable bail.

B. Section 12 Does Not Prohibit the Setting of Unaffordable Bail

As is set forth above, this Court should find section 28(f)(3)'s pre-trial detention provisions prevail over section 12's pre-trial detention provisions. With section 28(f)(3) controlling, there is no need to consider whether section 12 authorizes or prohibits the setting of unaffordable cash bail. However, should this Court adopt the Court of Appeal's approach and find that section 12

controls, this Court should confirm section 12 contains no independent prohibition against the setting of unaffordable bail.

1. Section 12's Language and Intent

Just like section 28(f)(3), the boundaries of section 12's bail provisions are determined through standard statutory interpretation. (*See Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 418.) This Court's inquiry "begins with the language of the statute itself," looking "first to the words the legislature used, giving them their usual ordinary meaning." (*Standish, supra,* 38 Cal. 4th at p. 869.) If the language contains any ambiguity, this Court "considers extrinsic evidence in determining voter intent." (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal. 4th 431, 445-46.) The Court of Appeal conducted just such an analysis in the opinion below and concluded section 12 contains no prohibition against the setting of unaffordable bail. (*Kowalczyk, supra,* 85 Cal.App.5th at pp. 686-87.)

Read plainly, section 12 states that detainees "shall be released on bail by sufficient sureties" subject to express exceptions. The Court of Appeal began its analysis by considering the meaning of the phrase, "shall be released on bail by sufficient sureties." (*Id.*) Citing this Court in *Humphrey*, the Court of Appeal held "[t]he phrase 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." (*Kowalczyk, supra,* 85 Cal.App.5th at p. 686, *citing Humphrey, supra,* 11 Cal.5th at p. 142.) With this definition in

mind, the Court of Appeal reasoned that section 12's guarantees to bail "must be construed in conjunction with section 12's requirement that trial courts fix the amount of bail in 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 in the case." (*Id*. at p. 687.) The Court of Appeal concluded, "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." (*Id*.) Notably, section 12's guidance does not instruct the trial court to consider a detainee's ability to pay, nor mention "affordability," nor imply a guaranteed right to release.

Next, the lower court turned to the long history of jurisprudence interpreting section 12 and concluded the amendment "has never been understood as mandating affordable bail." (*Id*.) The lower court cited to this Court's opinions in *Ex parte Duncan* (1879) 53 Cal. 410 (*Duncan I*) and *Ex parte Duncan* (1879) 54 Cal. 75 (*Duncan II*) noting the "position that bail must be affordable was essentially rejected well over a century ago." (*Kowalczyk, supra,* 85 Cal.App.5th at p. 688.)

In *Duncan I,* this Court stated that bail settings are 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*, *supra* at p. 411.) In *Dunan II*, this Court went further

and specifically rejected the argument that a bail setting is excessive because a detainee cannot afford the amount required. (*Duncan II, supra,* at p. 78.)

The lower court concluded, "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." (*Kowalczyk, supra,* 85 Cal.App.5th at p. 688.) Petitioner cited no authority to the contrary.

The Court of Appeal's interpretation of section 12 is further supported by a brief analysis of the legislative materials related to Proposition 4. In 1982, after this court held in *Underwood* that public safety considerations were not contemplated in section 7's bail provisions (s*upra,* 9 Cal. 3d at p. 349), the electorate passed Proposition 4, recodifying section 7 as section 12, and specifically amending the provision to instruct trial courts, when fixing bail, to consider the "seriousness of the offense charged" and "the previous criminal record of the defendant." (1982 Ballot Pamp. Prop. 4, p. 17.) Such language remains today in sections 12 and 28(f)(3) and is mirrored in Penal Code section 1275. This Court has never held such factors to be constitutionally inappropriate, and indeed, invited the legislature to amend the Constitution to expressly identify public safety as a primary consideration in bail determinations. (*See Underwood, supra,* 9 Cal. 3d at p. 349.) Prior to *Humphrey*, affordability was not a constitutionally relevant factor under section 12.

2. *Humphrey* Did Not Amend Section 12

Petitioner contends the setting of unaffordable bail "expands pre-trial detention beyond the limits of section 12" by undercutting section 12's "strict standards" and making "any defendant eligible for detention." (Opening Brief on the Merits ("OBM") at p. 40.) In so arguing, Petitioner would read this Court's opinion in *Humphrey* to extend beyond fundamental principles of due process and equal protection to actually amend section 12. Such an argument is misplaced and betrayed by the concession that public and victim safety remain the primary considerations in any bail determination under section 12.

A historical reading of section 12 renders any defendant eligible for detention subject to properly set bail in a non-excessive amount. (*See e.g.*, *Duncan I*, *supra* at p. 411; *Dunan II*, *supra,* at p. 78.) Should the defendant be unable to afford that properly set bail, section 12 alone makes no accommodation. This Court in *Humphrey* took no action to amend or modify section 12's application. Instead, this Court found distinct protections against the setting of unaffordable bail flowing from a detainee's fundamental constitutional rights of due process and equal protection. Petitioner's argument implies a reading of *Humphrey* under which this Court reinterpreted section 12 to require affordable bail for all defendants. *Humphrey* offered no such reinterpretation.

Consider, for example, Petitioner's argument centered around this Court's opinion in *In re White* (2020) 9 Cal.5th 455. (OBM at p. 39-40.) Petitioner cites extensively to *White*, for the proposition that section 12 proposes an exacting standard for a

trial court to deny the setting of bail. (OBM at p. 39.) *White* does stand for such a proposition—*denying* bail under one of Section 12's express exceptions requires the trial court to apply an exacting evidentiary standard. (*White, supra,* 9 Cal.5th at pp. 463 & 467.) With *White*'s exacting standard in mind, Petitioner claims the Court of Appeal's approach would undermine *White* and expand pre-trial detention beyond section 12's historical protections. (OBM at p. 40.) But again, this argument depends entirely upon section 12 guaranteeing a right to affordable bail or release, rather than a right to the fixing of bail. In fact, *White* continues to stand for the important proposition that a court may not *deny the setting of bail* without first meeting the high evidentiary standard required under section 12. This protection is distinct from the protections against the arbitrary setting of unaffordable bail as set forth in *Humphrey*.

With a historical understanding of section 12 in place, the Court of Appeal's application of *Humphrey* can only be viewed as an *expansion* of a detainee's comprehensive pretrial rights. Should a trial court attempt to wholly deny any possibility of bail, section 12's express protections ensure the trial court conducts an exacting analysis before issuing such an order. (*White, supra,* 9 Cal.5th at pp. 463 & 467.) On the other hand, should a trial court fix bail in compliance with section 12's plain dictates—prioritizing public and victim safety as the law requires—but do so at an amount beyond that which a detainee can afford, separate due process and equal protection principles set forth in *Humphrey* would apply to ensure a detainee's fundamental

constitutional rights are also protected. (*Humphrey, supra,* 11 Cal.5th at p. 156.)

A more expansive review of this Court's jurisprudence related to section 12 finds no support for an interpretation in which affordability of bail is guaranteed. Consider the following language from *White*:

> Under California's current system of pretrial detention, a felony arrestee's release pending trial is *often conditioned on whether the arrestee posts money bail*. To do so, an arrestee *pays or secures a bond for a certain amount of money, as determined by the court*, which may be forfeited if the arrestee later fails to appear. But an arrestee's "*absolute right to bail*" guaranteed by article I, section 12 of the California Constitution [citations] can be overcome by two exceptions the voters approved in the early 1980s and 1990s. Decades later and well into a new century, we review for the first time a trial court's *denial of bail* under one of these exceptions.

(*White, supra,* 9 Cal.5th at 457, *emphasis added*.) This Court acknowledged the "absolute right to bail" under section 12, but nevertheless confirmed that pre-trial release "is often conditioned on whether" money or bond is posted sufficient to satisfy that bail setting. (*Id.*) With this premise set forth, this Court analyzed section 12's exceptions as applicable to yet a different situation—a trial court's complete denial of any possibility of bail. This

understanding of section 12's application was not disturbed in *Humphrey* and is echoed throughout this Court's jurisprudence related to section 12. (*See e.g. In re Law* (1973) 10 Cal.3d 21, p. 25 [stating section 6, now codified as section 12, "was intended to abrogate the common law rule that bail was a matter of judicial discretion by conferring an absolute right to bail except in a narrow class of cases.]; *Standish, supra,* 38 Cal.4th at p. 878 [section 12's provisions "establish the circumstances under which an accused person possesses a constitutional right to be released on bail pending trial, and authorize a court, *as an alternative to requiring the posting of bail*, to permit an accused to be released on his or her own recognizance" [emphasis added]]; *York, supra,* 9 Cal.4th at p. 1139 ["Article I, section 12 of the California Constitution establishes a person's right to obtain release on bail from pretrial custody [and] identifies certain categories of crimes in which such bail is unavailable."].) Petitioner offers no cases and no legislative history suggesting an alternative interpretation.

As an express provision of the California Constitution, section 12's intended application is understood through the language of the provision, legislative materials related to its amendment, and this Court's jurisprudence considering the provision's application. A comprehensive review of each confirms section 12 has never been understood to prohibit the setting of unaffordable bail. Section 12 provides constitutional protections that are distinct from, and run parallel to, the fundamental constitutional protections set forth in *Humphrey*. Absent

amendment by the electorate or a successful facial constitutional challenge to section 12, this interpretation should remain undisturbed.

C. This Court's Holding in *Humphrey* Does Not Prohibit the Setting of Unaffordable Bail.

This Court's opinion in *Humphrey* plainly sets forth a detainee's right under state and federal due process and equal protection principles to be free from detention based *solely* on the detainee's ability to afford cash bail. (*Humphrey, supra,* 11 Cal.5th at p. 144.) In so holding, this Court provided a "general framework" for the trial court to utilize to ensure detention orders are lawful, and detainees' fundamental constitutional rights are protected. (*Id.* at p. 152.)

In any bail determination, "a superior court must undertake an individualized consideration of the relevant factors. These factors include 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." (*Id.*) When conducting this inquiry, the court shall assume the truth of the criminal charges. (*Id.*) The safety of the victim and the safety of the public shall be the primary factors considered. (*Id.*)

Based on this inquiry, the court will determine whether a setting of money bail is appropriate. (*Id.*) If the detainee has the ability to post the determined amount of money bail, the inquiry ends. (*Id.* at p. 156.) If the detainee is unable to post the amount of bail deemed necessary to vindicate the aforementioned

legitimate state interests, the superior court will consider all non-monetary conditions of release that could serve as an alternative to cash bail in vindicating the state's interests. (*Id.* at 154.) If non-monetary conditions are deemed appropriate, the detainee will be released with those conditions in place. (*Id.*) If non-monetary conditions are deemed insufficient, the detainee will remain in custody. (*Id.*) Such an inquiry protects a detainee's fundamental rights by ensuring "[d]etention in these narrow circumstances doesn't depend on the arrestee's financial condition," but instead, "on the insufficiency of less restrictive conditions to vindicate compelling government interests." (*Id.* at p. 143.)

It is here where the parties' interpretations of *Humphrey* diverge. Petitioner contends that any valid detention order under *Humphrey* must result in a complete denial of bail. (OBM at pp. 37-38.) In contrast, Respondent endorses the Court of Appeal's approach of authorizing unaffordable bail so long as a proper analysis is conducted. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 690.) The Court of Appeal explained, "*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." (*Id.*)

When the Court of Appeal's approach is evaluated exclusively under the umbrella of equal protection and due

process considerations, it is readily preferable to a compelled denial of bail. Whether bail is denied outright or maintained at an unaffordable amount, it is the proper application of *Humphrey*'s framework that ensures a detainee's equal protection and due process rights are protected. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 690; *Brown, supra,* 76 Cal.App.5th at p. 305.) In both scenarios, fundamental constitutional protections are triggered because the accused cannot afford the monetary bail setting deemed necessary to vindicate the state's compelling interests. (*Humphrey, supra,* 11 Cal.5th at p. 143.) Accordingly, it is the *Humphrey* analysis that protects a detainee's fundamental rights, not by guaranteeing release or compelling a bail denial, but by ensuring the trial court meaningful considers the arrestee's financial standing and does "not effectively detain the arrestee 'solely because' the arrestee 'lacked the resources' to post bail." (*Id.*, citing *Beardon v. Georgia* (1983) 461 U.S. 660, pp. 667-68.) The Court of Appeal appropriately concluded, "[i]f, in balancing the liberty interests of the 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." (*Kowalczyk, supra*, 85 Cal.App.5th at p. 690.)

In this case, when the trial court converted Petitioner's bail from $75,000 to a complete denial, both Petitioner and his counsel pleaded with the trial court to at least maintain bail at the previously set amount rather than deny bail outright. (Pet.

Exh. E, pp. 36-37.) Such a request is natural given the potential that a detainee's financial position might change while they remain in custody. One need not imagine anything more than a detainee, or their family, waiting for Friday's paycheck to make bail that was unaffordable on Tuesday.[5] (*See, e.g., Duncan, supra,* 54 Cal. at p. 75 [acknowledging friends may step forward and act as sureties for a detainee].)

This fact is not insignificant in the context of due process and equal protection. In *Humphrey*, this Court cited a long line of equal protection cases prohibiting the differential treatment of indigent defendants within the criminal justice system based only upon a lack of resources. (*Supra,* 11 Cal. 5th at p. 143, citing *See Van Atta v. Scott* (1980) 27 Cal.3d 424, 435; *In re Anzo* (1970) 3 Cal.3d 100, 113-16; *Bearden, supra,* 461 U.S. at pp. 661-62.)

The most basic application of these principles would suggest a detainee facing a compelled denial of bail—the approach adopted by the Second District in *Brown*—suffers a greater plight than a detainee whose unaffordable bail is maintained following a proper *Humphrey* analysis. Although neither detainee can

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[5] Like the lower court, Respondent acknowledges that "affordability" within the bail context has not been precisely defined; and moreover, no procedure has been set forth for determining what a detainee might in good faith be able to afford. (*Kowalczyk, supra,* 85 Cal.App.5th at p. 690, fn. 8.) For the purpose of this case, Respondent will interpret unaffordability in the bail context as any amount the defendant cannot pay at the time of the bail hearing.

afford bail at the time of the bail hearing, the former faces indefinite detention pending trial with no possibility of release prior to resolution while the latter retains the potential to achieve release pending trial should financial circumstances evolve. The former remains in a relatively worse posture as compared to the latter when both are compared to similarly situated detainees possessing sufficient wealth to post the initial setting of bail. Due process principles set forth in *U.S. v. Salerno* (1987) 481 U.S. 739, and relied upon by this court in *Humphrey* lead to the same conclusion. Although such distinctions could be viewed as minimal in this context, fundamental principles of equal protection and due process underlying *Humphrey* undoubtedly authorize, and indeed prefer, the Court of Appeal's approach.

III. RESTRUCTURING OF CALIFORNIA'S PRETRIAL DETENTION FRAMEWORK IS A POWER RESERVED FOR THE LEGISLATURE AND THE PEOPLE OF CALIFORNIA.

The Second District's interpretation of *Humphrey*, as set forth in *Brown*, will expand section 12's application to pretrial detention proceedings in a manner never intended or contemplated by the voters. Further, *Brown*'s approach would disrupt California's current pre-trial detention framework as enacted by the legislature. Such a disruptive interpretation is uncalled for at this time. The preferred alternative—authorizing trial courts to maintain an unaffordable bail setting following a proper *Humphrey* analysis—upholds the integrity of *Humphrey*'s protections while preserving the integrity of pre-trial detention framework enacted in a pre-*Humphrey* legislative landscape.

It is well established that this Court's interpretation of constitutional constraints should facilitate, not disrupt, the legislature's enacted framework. To that end, "when the legislature has enacted a statute with Constitutional constraints in mind '[t]here is a strong presumption in favor of the Legislature's interpretation.'" (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 192, *citing Mt. San Jacinto Community College District v. Superior Court* (2007) 40 Cal.4th 648, 656.) "Although the ultimate constitutional interpretation must rest, of course, with the judiciary [citation], a focused legislative judgement on the question enjoys significant weight and deference by the courts." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180; *see also Methodist Hospital of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 693 [stating "[w]hen the Constitution has a doubtful or obscure meaning or is capable of various interpretations, the construction placed thereon by the Legislature is of very persuasive significance"].)

With respect to *Humphrey*'s application, Petitioner condemns the Court of Appeal's approach of maintaining unaffordable bail and advocates instead for the Second District's approach in *Brown*. (OBM at p. 37.) In *Brown*, the Second District interpreted *Humphrey* to compel the trial court to issue an order denying bail following a proper *Humphrey* analysis, rather than order bail maintained at the original unaffordable amount. (*Brown, supra*, 76 Cal. App. 5th at pp. 308-09.) Petitioner contends *Brown*'s approach maintains the integrity of section 12, while the lower court's approach, in contrast, "would

expand pretrial detention beyond the limits of section 12." (OBM at p. 40.) In practice, it is *Brown*'s approach that would lead to an uncontemplated expansion of section 12's application.

Section 12 guarantees that "[a] person shall be released on bail by sufficient sureties," subject to only three specific exceptions: (1) capital crimes; (2) felony offenses involving sexual assault or violence where the court finds a substantial likelihood that release will result in great bodily harm; and (3) felony offenses when the accused has threatened another person with great bodily harm and the court finds a substantial likelihood that release will result in the accused carrying out the threat.

As set forth above, section 12 has never been understood to guarantee affordable bail or outright release. Section 12's protections guarantee only the *fixing* of bail outside the express exceptions set forth in subsections (a), (b), and (c). This Court, in *Humphrey*, took no action to alter section 12's application, addressing only a detainee's constitutional rights under fundamental principles of due process and equal protection. (*Supra,* 11 Cal. 5th at p. 155, fn. 7.) Section 12 offers parallel and distinct protections in the pre-trial detention context. *Humphrey* declined to address how these parallel constitutional protections might interact. (*Id.*)

Under the Second District's approach, it would be constitutionally required to release all indigent defendants with appropriate non-monetary conditions in place or deny bail outright. (*Brown, supra,* 76 Cal.App.5th at p. 307.) Bail denial would be required when the state's legitimate interests cannot be

vindicated by non-monetary conditions of release. (*Id.*) At first glance, the distinction between maintaining unaffordable bail and ordering bail denied in this context might seem academic—the detainee would remain in custody under either approach. But in *Humphrey*, this Court appropriately required any detention order to "otherwise comply with statutory and constitutional restraints." (*Humphrey, supra,* 11 Cal. 5th at p. 143.) It is here we see *Brown*'s approach unintentionally collide with section 12. Any detention order denying bail under *Brown* would be unconstitutional under section 12 unless the detainee fit squarely within one of section 12's enumerated exceptions. As a result, *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. Under such an approach, *Humphrey*'s reasoned analysis would be rendered entirely redundant.

For example, both section 12 and section 28(f)(3) instruct that ensuring a detainee's return to court is a legitimate state interest in pre-trial detention determinations. This makes sense. Without a defendant present in court, a case cannot proceed toward resolution and a victim's rights cannot be ensured. Nevertheless, a detainee charged with a non-violent felony offense not listed as an exception under section 12, could never be brought into custody. *Humphrey* as interpreted by the Second District would prohibit any setting of unaffordable bail, and section 12 would prohibit the denial of bail. A reasonable trial judge could find an undisputed basis to believe a non-violent

detainee will not return to court; and nevertheless, because *Brown*'s approach completely prohibits the setting of unaffordable bail in favor of a denial, and because such a detainee is not charged with an offense qualifying for bail denial under section 12's limited exceptions, any detention would be rendered unconstitutional. Such an offender could fail to appear for future proceedings and violate court orders time and again, stringing along victims and the community indefinitely. The trial court would be left with no meaningful mechanism to ensure a future appearance.

Brown's approach renders section 12 unrecognizable from the provision the electorate amended with Proposition 4. Further, *Humphrey*'s general framework would become redundant and completely subsumed within section 12. Essential legislation seeking to modernize California's pre-trial detention framework and move away from cash bail would be dead on arrival without a preceding constitutional amendment to reign section 12 back to its intended application. These problematic and unintended outcomes can be avoided, quite practically, by endorsing the Court of Appeal's application of *Humphrey*.

When the electorate enacted Propositions 4, 8 and 9, they understood victim safety, public safety, and concerns over flight risk to be valid constitutional considerations in pre-trial detention determinations. Until and unless sections 12 or 28(f)(3) are held invalid, this Court should apply the principles of *Humphrey* in such a manner so as to facilitate the electorate's intended construction of each provision. (*Saylor, supra*, 5 Cal.3d

at p. 693.) Should the electorate choose to extend constitutional protections in pre-trial detention beyond those fundamental rights found in *Humphrey*, California's initiative process stands ready to facilitate.

CONCLUSION

This Court should hold section 28(f)(3)'s bail provisions prevail in application over section 12. In the alternative, should this court find section 12's bail provisions control, this Court should hold California's Constitution does not prohibit the setting of unaffordable bail following a proper *Humphrey* analysis.

Respectfully submitted,

STEPHEN M. WAGSTAFFE
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/s/
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Attorneys for Respondent

July 7, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached Answering Brief on the Merits uses a 13-point Century Schoolbook font and contains 13,969 words.

STEPHEN M. WAGSTAFFE
District Attorney of San Mateo County

/s/
JOSHUA MARTIN
Deputy District Attorney
Attorneys for Respondent

July 7, 2023

PROOF OF SERVICE BY MAIL

Supreme Court, Case No. S277910
First Appellate District, Case No. A162977
San Mateo County Superior Court, Case No. 21-SF-003700-A

1. I am over 18 years of age and not a party to this action. I am employed in the county where the mailing took place.

2. My main business address is:

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400 County Center, 3rd Floor
Redwood City, CA 94063

☐ Office of the District Attorney
400 County Center, 4th Floor
Redwood City, CA 94063

☐ Office of the District Attorney
1050 Mission Road
South San Francisco, CA 94080

☐ Office of the District Attorney
222 Paul Scannell Drive
San Mateo, CA 94402

3. On July 7, 2023, I mailed from Redwood City, California the following documents (*specify):*

ANSWER BRIEF ON THE MERITS

4. I served the documents by enclosing them in an envelope and (*check one):*

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5. The envelope was addressed and mailed as follows:

Marsanne Weese and Rose Mishaan
255 Kansas Street, Suite 340
San Francisco, CA 94103

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

Holly Sutton

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

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Martin, Joshua (601450)
Last Name, First Name (PNum)

San Mateo County District Attorney's Office
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