

**S277910**

**IN THE  
SUPREME COURT OF CALIFORNIA**

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**IN RE GERALD KOWALCZYK,**

**On Habeas Corpus.**

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AFTER A DECISION BY THE COURT OF APPEAL  
FIRST APPELLATE DISTRICT, DIVISION THREE  
CASE No. A162977

SUPERIOR COURT FOR SAN MATEO COUNTY  
HON. SUSAN GREENBERG  
CASE No. 21SF003700A

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**APPLICATION TO FILE AMICI CURIAE BRIEF &  
BRIEF OF AMICI CURIAE THE BAR ASSOCIATION  
OF SAN FRANCISCO, THE LOS ANGELES COUNTY BAR  
ASSOCIATION, AND THE SANTA CLARA COUNTY BAR  
ASSOCIATION IN SUPPORT OF PETITIONER**

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ATTORNEYS FOR AMICI CURIAE  
**THE BAR ASSOCIATION OF SAN FRANCISCO  
THE LOS ANGELES COUNTY BAR ASSOCIATION, AND  
THE SANTA CLARA COUNTY BAR ASSOCIATION**

**Application to File Brief of Amici Curiae the Bar  
Association of San Francisco, the Los Angeles County Bar  
Association, and the Santa Clara County Bar Association  
in Support of Petitioner**

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Pursuant to rule 8.520(f) of the California Rules of Court, the Bar Association of San Francisco (“BASF”), the Los Angeles County Bar Association (“LACBA”), and the Santa Clara County Bar Association (“SCCBA”) respectfully apply for leave to file the accompanying amici curiae brief in support of petitioner Gerald Kowalczyk.

BASF is a non-profit voluntary membership association of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, BASF enjoys the support of approximately 7,500 individuals, law firms, corporate legal departments, and law schools. Its membership includes current or former prosecutors and defense counsel. Through its board of directors, committees, volunteer legal services programs, and other community efforts, BASF works to champion equal access to justice and to pioneer constructive change in society.

LACBA, founded in 1878, is one of the largest voluntary bar associations in the United States. In addition to meeting the professional needs of its members, LACBA actively promotes and advances the fair administration of justice.

SCCBA is a nonprofit, non-regulatory professional organization that trains and supports its member attorneys to improve the local administration of justice and to serve the public

by fostering improved public understanding of and access to the legal system. Founded in 1917, SCCBA enjoys the support of more than 5,000 attorneys. The SCCBA has a longstanding tradition of advocating for the individual rights of all persons no matter their race, sexual orientation, gender, religion, nationality, or socioeconomic status, both in the public interest and in the interest of members of the legal profession who may be impacted by unconstitutional governmental actions.

BASF, LACBA, and SCCBA (collectively, “the Bar Associations”) bring to this case strong interest in the core values embodied in the California and federal Constitutions and expertise with respect to access-to-justice issues, particularly as they impact low-income residents of our communities. The Bar Associations have long histories of working to protect rights guaranteed by the California and United States Constitutions, including the rights of those accused of crimes. The Bar Associations’ members include private, government, and nonprofit attorneys, many of whom work in the criminal justice field and represent indigent criminal defendants in the state and federal courts. As a result, the Bar Associations have seen the real-world consequences of the money bail system on defendants, their families, and our greater communities.

The Bar Associations submit this brief to assist the Court with its consideration of the constitutional and legal issues presented by California’s money bail system by providing data about the consequences of the money bail system on defendants and the public. The Bar Associations filed an amici curiae brief

in *In re Humphrey* (2021) 11 Cal.5th 135, and they seek to enhance this Court's understanding of the impact *Humphrey* has had, or failed to have, on the state's current money bail system so that California can achieve a pretrial release system that satisfies the California and United States Constitutions.

No party or counsel for a party authored the proposed amici brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the amici curiae, their members, or their counsel in the pending appeal funded the preparation and submission of the proposed amici brief. (Cal. Rules of Court, rule 8.520(f)(4).)

Dated: November 7, 2023

Respectfully Submitted,

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By /s/ Kelly A. Woodruff

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*the Santa Clara County Bar Association*

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## Introduction

The California and United States Constitutions promise that an accused may not be deprived of liberty without due process of law or equal protection of the laws.

On March 25, 2021, this Court handed down *In re Humphrey* (2021) 11 Cal.5th 135. Recognizing that people who are “incarcerated pending trial – who have not yet been convicted of a charged crime – unquestionably suffer a ‘direct “grievous loss” ’ of freedom in addition to other potential injuries,” the Court held that the “common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional” and can no longer be done. (*Id.* at pp. 142-143.)

Commentators and news media alike heralded the decision as a landmark, groundbreaking, and a victory for criminal justice reform. No longer would presumptively innocent people be deprived of their liberty pending trial simply because they lack sufficient financial resources to pay monetary bail, avoiding the potentially devastating consequences of incarceration on their jobs, their health, their families, and their ability to mount a defense in court. One newspaper called *Humphrey* a “gigantic momentous decision.” (Savidge and Salonga, ‘*Gigantic momentous decision*’: *California Supreme Court shrinks role of cash bail in jailings*, *The Mercury News* (Mar. 25, 2021).)<sup>1</sup> It should have been.

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<sup>1</sup> <<https://www.mercurynews.com/2021/03/25/supreme-court-cash-bail-ruling/>> (as of Oct. 31, 2023).

However, troubling issues have arisen in the trial courts since *Humphrey* was decided. Despite *Humphrey*'s seemingly clear mandate, trial courts have continued to set monetary bail at amounts the accused cannot pay. This is being done without first taking evidence of the accused's financial condition, without determining whether nonfinancial conditions of release could vindicate the government's interest in protecting public safety and assuring defendant's presence in court, and without finding that the accused otherwise could be constitutionally detained pretrial. This ongoing practice is perhaps the product of confusion over a question left open by *Humphrey*, namely, whether a trial court's authority to order pretrial detention derives solely from article I, section 12 of the California Constitution, or from article I, section 28(f)(3), or from a combination of the two provisions. (*Humphrey, supra*, 11 Cal.5th at p. 155, fn. 7.) Adopting the argument advanced by the San Mateo District Attorney here, trial courts – including the one in this case – have assumed that section 28(f)(3) vests trial courts with discretion to deprive an accused of liberty without making any of the factual findings required by section 12 and *In re White* (2020) 9 Cal.5th 455, 471.

This Court's interpretation of the Constitution in this matter can provide crucial guidance to the lower courts that the analysis of an accused's financial condition and the availability of alternative conditions of release is required in all cases. The Court of Appeal correctly held that sections 12 and 28(f)(3) are reconcilable, and that section 12 sets forth the only exceptions to

pretrial release in noncapital cases. (*In re Kowalczyk* (2022) 85 Cal.App.5th 667, 682-686.) This Court should adopt this analysis and clarify that the only circumstances justifying pretrial detention of noncapital defendants are those set forth in article I, section 12, subdivisions (b) and (c), and that section 28, subdivision (f)(3) provides additional factors a court must consider, together with the due process and equal protection principles set forth in *Humphrey*, when setting conditions of release.

Although the question of whether a trial court can ever impose unaffordable bail was not presented to the Court of Appeal in this case (since the trial court held that Petitioner Kowalczyk's extensive criminal history rendered him ineligible for bail altogether), on remand from this Court, the Court of Appeal stated, in what is effectively dictum, that trial courts *may* intentionally set bail at an amount the accused cannot afford to pay, provided the court also makes the necessary findings supporting pretrial detention. (*Kowalczyk, supra*, Cal.App.5th at p. 689.) The Court should reject this conclusion.

The foundation of *Humphrey* is that an accused's relative poverty is not a fair basis for incarcerating an accused without trial and violates both due process and equal protection. (See *Humphrey, supra*, 11 Cal.5th at p. 151 ["detaining arrestees solely because of their indigency is fundamentally unfair and irreconcilable with constitutional imperatives"].) The state's interest in the bail context is not to punish indigent defendants, but "to ensure the defendant appears at court proceedings and to

protect the victim, as well as the public, from further harm.” (*Id.* at p. 150.) A flight risk or threat to public safety should not be tolerated simply because the accused is wealthy enough to afford to post monetary bail. By the same token, a presumptively innocent person should not be deprived of liberty unless there is clear and convincing evidence the arrestee will inflict great bodily harm to others if released – factual questions with no necessary connection to an accused’s financial means. (*Humphrey*, p. 151.)

This case presents the Court with an opportunity to clarify that an arrestee may only be detained pretrial based on clear and convincing evidence relevant to the state’s interests and the constitutional dictates of article I, section 12, as set forth in *Humphrey* and *White*. In all other cases, the arrestee has a constitutional right to pretrial release upon conditions the court finds reasonably necessary to protect the state’s interests, and if the court finds that one of those conditions must be monetary bail, the bail amount must be set at an amount the arrestee can afford to pay.

## Discussion

### **I. Post-*Humphrey*, trial courts are continuing to set bail at unaffordable levels or denying bail outright, without determining whether the circumstances constitutionally allow for pretrial detention.**

This Court’s decision in *Humphrey* was a landmark decision that found unconstitutional the “common practice” of conditioning pretrial release on whether the accused can afford the amount of bail set. (11 Cal.5th at p. 143.) Commentators expected the *Humphrey* opinion to spark a “‘major sea change’”

with “many more people being released without bail before they go to trial.” (Dolan, *California’s top court ends cash bail for some defendants who can’t afford it*, Los Angeles Times (Mar. 25, 2021).)<sup>2</sup> In practice, however, there has been no sea change and perhaps even some unintended consequences. (See Virani et al., *Coming Up Short: The Unrealized Promise of In re Humphrey* (Oct. 2022) UCLA School of Law Bail Practicum and Berkeley Law Policy Advocacy Clinic (“Coming Up Short”), pp. 7-9, 13-19.)<sup>3</sup>

Unfortunately, however, there has been much confusion in the lower courts about whether setting bail at an amount the arrestee cannot afford to pay, thereby effectively ordering him detained without bail, is ever constitutionally permissible. For example, at David Jackson’s arraignment in Sacramento County Superior Court, bail was initially set at \$1 million. (*People v. David Jackson* (Super. Ct. Sacramento County, 2021, No. 21FE000038); see Barberini, *Judge Attempts to Revoke Bail, Concedes He’s ‘Not Sure What We are Doing in These Post-*

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<sup>2</sup> <<https://www.latimes.com/california/story/2021-03-25/california-supreme-court-nixes-cash-bail-some-defendants>> (as of Oct. 31, 2023).

<sup>3</sup> <<https://www.law.berkeley.edu/wp-content/uploads/2022/10/Coming-Up-Short-Report-2022-WEB.pdf>> (as of Oct. 31, 2023). See also Greenwald, *Judges Uncertain How to Handle New Humphrey Decision, Many Are Simply Treating Cases As No-Bail Cases in Contrast to Explicit Court Ruling*, The Davis Vanguard (May 3, 2021) <<https://www.davisvanguard.org/2021/05/judges-uncertain-how-to-handle-new-humphrey-decision-many-are-simply-treating-cases-as-no-bail-cases-in-contrast-to-explicit-court-ruling/>> (as of Oct. 31, 2023) [sampling a week in Sacramento Superior Court showing judges not understanding the mandate of *Humphrey*].

*Humphrey Times*’ (Requiring Reasonable Bail), The Davis Vanguard (Apr. 26, 2021).<sup>4</sup> After *Humphrey*, Jackson’s public defender filed a motion to have Jackson released on his own recognizance. The judge conceded he was “‘not sure what we are doing in these post-Humphrey times’” and assumed he could “‘set a bail that [defendant] probably won’t be able to make.’” (*Ibid.*) He ultimately set bail at \$250,000, without any evidence that Jackson could pay that amount, effectively ordering him detained. (*Ibid.*)

The confusion perhaps stems from a memorandum written by retired Judge Richard Couzens that the Judicial Council sent to the presiding judges and court executives of all superior courts in the state on April 2, 2021, shortly after *Humphrey* was handed down. (Coming Up Short, pp. 20, 81-92.) Although Judge Couzens advised trial judges that, if monetary bail is set, it must be set at an affordable amount, he also expressly advised judges that section 28 of article I of the California Constitution provides a possible “alternative basis” for pretrial detention based on generalized concerns about “public safety,” even though only section 12 provides the enumerated “no bail” exceptions.<sup>5</sup> (*Id.* at pp. 20-21, 88-89.)

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<sup>4</sup> <<https://www.davisvanguard.org/2021/04/judge-attempts-to-revoke-bail-concedes-hes-not-sure-what-we-are-doing-in-these-post-humphrey-times-requiring-reasonable-bail/>> (as of Oct. 31, 2023).

<sup>5</sup> Judge Couzens has since clarified his view that the only exceptions to an arrested person’s constitutionally guaranteed right “to be released prior to trial on the least restrictive terms

The confusion has led some lower courts to assume that it remains constitutional after *Humphrey* to detain an accused by setting monetary bail at an unaffordable amount on the grounds of protecting “public safety,” without making any of the required findings for pretrial detention under article I, section 12. (See *Coming Up Short*, p. 20.) For example, in Riverside County, Christopher Berthelotte was charged with sexual assault on a minor shortly after *Humphrey* was decided. (*In re Berthelotte* (Cal. Ct. App., Mar. 17, 2023, No. E079251) 2023 WL 2544567, \*1, as modified (Mar. 21, 2023).) Bail was set at \$110,000, which defendant paid. (*Ibid.*) Ten months later, the state filed additional charges that significantly increased defendant’s criminal exposure and asked that bail be increased to \$1 million or that defendant be held without bail. (*Ibid.*) At a bail review hearing, the trial court set bail at \$1 million and remanded defendant to custody. (*Id.* at \*2.) Notwithstanding *Humphrey*, the court did not make any findings about defendant’s ability to pay \$1 million. (*Ibid.*) Nor did the court make any findings that defendant was eligible for pretrial detention under section 12. (*Ibid.*) Nor did the court make any findings by clear and

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and conditions that adequately protect” the state’s interests is when “the court finds by clear and convincing evidence that their release likely will result in great bodily harm to others, or the person has made threats against others they are likely to carry out if released,” or, in other words, the exceptions specified in Section 12. (Alldredge et al., *Opinion: As judges, we’ve made thousands of bail decisions. Here’s the truth about detention and public safety*, Los Angeles Times (Sept. 2, 2023) <<https://www.latimes.com/opinion/story/2023-09-02/california-bail-reform-safety-judges>> (as of Oct. 31, 2023).)

convincing evidence that no nonfinancial conditions short of detention would reasonably protect the government's interests. (*Ibid.*) To the contrary, the trial court stated: "if there's a *Humphrey* argument because of the issues I raised, I'd have him held without bail. So based on *Humphrey*, he will be held without bail; otherwise, it's \$1 million." (*Ibid.*)

Similarly, Kernell Brown was charged in Los Angeles County with sexual assault on a minor. (*In re Brown* (2022) 76 Cal.App.5th 296, 299.) Bail was set at \$2.45 million. (*Id.* at p. 300.) After *Humphrey* was handed down, Brown moved for release on his own recognizance or to have his bail reduced to no more than \$1,000. (*Ibid.*) At a hearing on Brown's motion, the trial court concluded that *Humphrey* did not apply, and that, even if it did apply, defendant had not shown any unusual circumstances justifying a deviation from the bail schedule. (*Id.* at pp. 300-301.) The trial court "made no effort to evaluate [Brown's] ability to secure his release from pretrial custody by posting bail at \$2.45 million." (*Id.* at p. 307.) And, although the trial court stated that "there are no lesser means of protecting the public," the court did not specifically address any of the nonfinancial conditions proposed by defendant or make any findings as to why they were insufficient. (*Id.* at pp. 301, 307)

And while writ petitions can be brought to challenge a bail decision as in *Berthelotte* and *Brown*, in practice, they are often not filed because the issue may become moot, as happened in this case. And even if filed, the defendant remains in custody on unaffordable bail while the writ petition is pending, and the

remedy is remand and new bail hearing. (See, e.g., *Berthelotte, supra*, 2023 WL 2544567, at \*4; *Brown, supra*, 76 Cal.App.5th at p. 309.)<sup>6</sup>

A report by the UCLA School of Law’s Criminal Justice Program and UC Berkeley School of Law’s Policy Advocacy Clinic issued 16 months after *Humphrey* confirms that trial courts have been misinterpreting and misapplying *Humphrey*. (Coming Up Short, pp. 13-24.) The report concludes that “[t]here is no evidence that *Humphrey* has resulted in a net decrease of the pretrial jail population . . . [or] in median bail amounts in California.” (*Id.* at p. 13.) Because nearly 80% of people arrested in California cannot afford to post monetary bail,<sup>7</sup> the authors had expected both that median bail amounts would become lower and that more arrestees would be released on nonfinancial conditions after *Humphrey*, resulting in an overall decrease in the pretrial jail population. (*Id.* at pp. 13, 16.) But those expectations have not materialized. (*Id.* at pp. 13-18.)

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<sup>6</sup> Berthelotte was unconstitutionally held in custody for 10 months before the Court of Appeal granted his writ petition. Brown had been held on unaffordable bail for at least 18 months after the Court of Appeal’s decision in *Humphrey*, and was unconstitutionally held for an additional one year after this Court handed down *Humphrey* before the Court of Appeal granted his writ petition.

<sup>7</sup> Human Rights Watch, “Not in it for Justice”: How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People (Apr. 11, 2017), p. 4 (available at <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly>>).

The report was based on publicly available data, as well as information gathered directly from key actors in the criminal justice system. (Coming Up Short, p. 9.) The report analyzed median bail amounts across 12 counties set after March 2021, and conducted an in-depth analysis on three counties: Merced, San Joaquin, and San Mateo. (*Id.* at pp. 16-17.) The report concluded that judges are setting monetary bail in fewer cases (indicating an increase in either the number of pretrial releases on nonfinancial conditions or an increase in the number of pretrial detentions, or both), but when they are imposing monetary bail, they are still setting it at unaffordable amounts. (*Id.* at pp. 17-18.)

This trend was confirmed by defense attorneys surveyed for the report:

Most defense attorneys stated that prosecutors’ behaviors around requesting increases in bail amounts had not been affected by the *Humphrey* decision. . . . The majority of respondents (80%) also indicated that judges maintain bail at the same amount when requests for pretrial release are denied rather than decrease the bail amount. . . . However, in at least half those cases where bail amounts *are* changed, over half (52%) of respondents said that judges reduce bail to an amount that is still unaffordable.

(*Id.* at p. 18.) In fact, “only 17% of all defense attorneys surveyed said that bail – even when reduced – was set at an amount that was affordable for their clients.” (*Id.* at p. 18; see also Editorial Board, *California still violates the Constitution on bail*, Los Angeles Times (Nov. 29, 2022) [“after *Humphrey*, the bail amounts that judges order have remained steady – exactly the

opposite one should expect after a ruling striking down unaffordable bail.”].)<sup>8</sup>

Pretrial detainees also now face a documented risk that asking the court to reduce monetary bail to an affordable level or to release the accused on nonfinancial conditions may lead to the denial or revocation of bail altogether. The Coming Up Short report notes that defense attorneys reported “that they no longer make *Humphrey* arguments at all – or at least not in certain cases – if they are fearful that a judge will order a no bail hold” since they can no longer order unaffordable bail. (Coming Up Short, p. 25.)

These fears are very justified. For example, in *Yedinak v. Superior Court of Riverside County* (2023) 92 Cal.App.5th 876,

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<sup>8</sup> <<https://www.latimes.com/opinion/story/2022-11-29/editorial-bail-fail-california-style>> (as of Oct. 31, 2023). It is important to note that these results may primarily be based on trial courts’ misunderstanding or misapplication of *Humphrey* rather than their intentionally ignoring its requirements. (See, e.g., *Brown, supra*, 76 Cal.App.5th at p. 306 [“Although aware of *Humphrey*, the trial court *misunderstood its scope* and, accordingly, deprived Brown of his right to a bail determination that complied with the Supreme Court’s decision.”], italics added; *In re Vasquez* (Cal. Ct. App., June 17, 2022, No. F083550) 2022 WL 2186355, at \*3 [remanding to the trial court for new bail hearing because “[i]t is evident the trial court did not fully understand the scope of its discretion, and that its exercise of discretion under *White* and *Humphrey* required any order issued contain evidence of a qualifying offense and the specific reasons supporting the decision to deny bail or a release from custody with conditions”]; see also Coming Up Short, p. 24 [“some defense attorneys wrote that judges are genuinely trying to follow the law, are looking for other alternatives to incarceration, and are releasing more people than before *Humphrey*”].)

881-882, defendant was charged with child abuse relating to injuries he allegedly inflicted on his infant son. At his arraignment, the court set bail at \$75,000 and issued stay-away orders. (*Ibid.*) Defendant posted bail, and for almost three years he complied with all orders and made all court appearances. (*Ibid.*) The prosecutor then filed additional charges significantly increasing defendant’s criminal exposure. (*Ibid.*) At the prosecutor’s request, the court increased bail to \$1 million, which defendant could not pay, and defendant was taken into custody. (*Ibid.*) At the preliminary hearing, defense counsel moved to reduce the bail back to \$75,000. (*Id.* at p. 883.) Not only did the trial court deny the motion, but it also revoked bail altogether, finding “ ‘I do not believe there is an amount [Yedinak] could afford which could probably keep the community safe.’ ” (*Id.* at p. 883.)<sup>9</sup>

Likewise, John Harris Jr. was charged with attempted premeditated murder in San Mateo County Superior Court. (*In re Harris* (2021) 71 Cal.App.5th 1085, 1091, rev. granted Mar. 9, 2022.) The trial court set bail at \$5 million, despite that the probation department had issued a pretrial report indicating that defendant was an appropriate candidate for release on his own recognizance. (*Id.* at p. 1092.) After *Humphrey* was handed

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<sup>9</sup> Again demonstrating the inadequacy of writ relief, Yedinak was taken into custody on November 3, 2022, and although the Fourth District Court of Appeal granted his writ petition and remanded for a new bail hearing, it did not issue the writ until June 23, 2023, almost eight months later. (*Yedinak, supra*, 92 Cal.App.5th at pp. 882, 888.)

down, defendant filed a bail motion asking to be released with nonfinancial conditions. (*Id.* at p. 1092.) The prosecutor opposed the motion and asked the court to keep bail at \$5 million or, alternatively, deny bail. (*Id.* at pp. 1093-1094.) At the hearing, the trial court denied defendant bail altogether. (*Id.* at p. 1094.) More than seven months after he filed his bail motion, the First District Court of Appeal granted his writ petition. (*Id.* at pp. 1091, 1109.)<sup>10</sup>

Similarly, Ohage Newton was charged with first degree residential burglary and related counts, none of which qualified for the denial of bail under section 12. (*Ohage Newton v. Superior Court of Orange County* (Cal. Ct. App., Oct. 5, 2023, No. G062892) 2023 WL 6475928, at \*1.) Bail was set at \$1 million. (*Ibid.*) Newton made a motion to set bail at \$50,000. (*Ibid.*) Not only did the court erroneously deny Newton’s motion, but it compounded the error by “reset[ting] bail at NO BAIL.” (*Ibid.*) The Court of Appeal granted Newton a writ of mandate, holding that the trial court had erred (i) by revoking Newton’s \$1 million bail without finding any change in the circumstances, and, more fundamentally, (ii) by setting Newton’s bail at an unaffordable level, “with no indication in the record that the court identified, considered, or rejected any other possible method, such as GPS monitoring, or any other electronic or tracking services to satisfy

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<sup>10</sup> This Court granted review to address what type of evidence can be used to find clear and convincing evidence of a substantial likelihood defendant will cause great bodily harm if released. (Rev. granted March 9, 2022, S272632.)

the clear and convincing standard” required by *Humphrey*. (*Id.* at \*6.)

And in a similar case, *In re Paige* (Cal. Ct. App., Aug. 3, 2023, No. B325982) 2023 WL 4942990, the trial court also committed the error of increasing a defendant’s bail in response to the defendant’s motion under *Humphrey*. There, after initially setting bail at \$1.2 million, the trial court ordered Paige to be held without bail, erroneously stating: “Under *Humphrey*, I only have three alternatives: [release Paige on his own recognizance], set affordable bail, or detain [with] no bail after making a clear and convincing evidentiary finding.” (*Id.* at \*2.) The trial court then stated, “I don’t have any way of preventing something like that from happening again,” and on that basis found “by clear and convincing evidence” that a “no bail” order was the only means of “ensuring public safety.” (*Ibid.*) The Court of Appeal granted Page’s petition for habeas corpus, finding that the trial court had failed to address “nonfinancial conditions of release, including stay away and no contact orders, relocation to Los Angeles or Palmdale, electronic monitoring, and participation in residential drug treatment.” (*Id.* at \*6.)

In fact, in response to a motion to reduce bail in one case in Sacramento, the judge expressly stated, “I would caution you *Humphrey* is a double-edged sword . . . this \$50,000 can go to no bail very easily on this type of charge.” (Meiners, *Judge Uses ‘Humphrey’ Bail Case to Refuse to Release ‘Good Person’ on No Bail*, *The Davis Vanguard* (Apr. 14, 2021) [discussing *People v. Pajibo* (Super. Ct. Sacramento County, 2021, No.

21FE005880)].<sup>11</sup> The judge went on to find that defendant was not a flight risk but concluded that defendant was a threat to public safety. (*Ibid.*) Because the court was powerless to set bail above defendant's ability to pay, the court revoked her \$50,000 bail entirely. (*Ibid.*; see also Akbari, *Judge Denies Bail Altogether Following Request to Have It Set to Zero Dollars*, *The Davis Vanguard* (Apr. 27, 2021) [discussing *People v. Chipman* (Super. Ct. Sacramento County, 2021, No. 21FE003181)].)<sup>12</sup>

As bar associations representing the interests of their constituent attorney members, the Bar Associations are particularly concerned about the chilling effect of the lower courts' failure to properly apply the teachings of *Humphrey* in making bail determinations. (See *Coming Up Short*, pp. 25-26.) This case provides the opportunity for the Court to dispel the suggestion that the Constitution provides a path around *Humphrey* to allow setting bail at an amount the accused cannot afford to pay – i.e., ordering the real-world equivalent of incarceration without trial. The Court should reject the dicta in *Kowalczyk* and expressly hold that pretrial detention – *however effected* – can only be ordered if all constitutional requirements are met.

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<sup>11</sup> <<https://www.davisvanguard.org/2021/04/judge-uses-humphrey-bail-case-to-refuse-to-release-good-person-on-no-bail/>> (as of Oct. 31, 2023).

<sup>12</sup> <<https://www.davisvanguard.org/2021/04/judge-denies-bail-altogether-following-request-to-have-it-set-to-zero-dollars/>> (as of Oct. 31, 2023).

**II. Article I, section 12 of the California Constitution prohibits pretrial detention – including through imposition of unaffordable bail – except under strictly circumscribed exceptions, and section 28(f)(3) does not expand those exceptions.**

In its order for review, the Court asked the parties to address “[w]hich constitutional provision governs the denial of bail in noncapital cases – article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution – or, in the alternative, can these provisions be reconciled?” (*Kowalczyk on H.C.* (Cal. 2023) 305 Cal.Rptr.3d 440.) Amici agree with Petitioner and the Court of Appeal that sections 12 and 28(f)(3) are easily reconcilable under standard rules of interpretation as applied to successive constitutional ballot initiatives.

The right to be free from detention unless convicted of a crime arises directly from the United States Constitution. “No person shall be . . . deprived of life, liberty, or property, without due process of law,” “nor shall any State deprive any person of life, liberty, or property, without due process of law.” (U.S. Const., 5th & 14th Amends.) And the California Constitution has always conferred a right to pretrial release on “sufficient sureties” while proscribing “excessive bail.” (*Kowalczyk, supra*, 85 Cal.App.5th at p. 674.) These provisions were consolidated in article I, section 12 of the state’s constitution in 1974. (*Ibid.* & fn. 1.)

Ballot initiatives in 1982 and 1994 amended section 12 to create and modify three specific exceptions to a defendant’s right to “be released on bail by sufficient sureties,” such that only in

cases involving capital crimes and certain violent felonies does no constitutional right to pretrial release accrue. (Cal. Const., art. I, § 12, subds. (a)–(c); *Kowalczyk*, pp. 675-676.) But the exceptions are just that – *exceptions* to the guaranteed constitutional right not to be detained without trial that is reflected in section 12 and the U.S. Constitution.

Importantly, section 12 does not include the term “monetary” in connection with the term “bail,” and “sufficient sureties” is not limited to sufficient monetary sureties. Rather, section 12 guarantees all Californians accused of a crime, with very limited exceptions, the right to be released pretrial on conditions that are sufficient to protect the public and to assure the defendant’s presence in court. In other words, “bail” as used in section 12 refers to “a mechanism to bring about conditional release, not to keep a person charged with a crime in custody.” (Allredge et al., *supra*, see *ante*, fn 5.)

Nothing in article I, section 28 changes the fundamental constitutional right to pretrial release in almost all noncapital cases. Section 28 was added to the Constitution in 2008 by a third ballot initiative, Proposition 9, entitled the “Victims’ Bill of Rights Act of 2008: Marsy’s Law.” Section 28 recognizes certain rights held by victims of crime, and by the People generally. (*Kowalczyk*, *supra*, 85 Cal.App.5th at pp. 677-678.) These include a victim’s right to receive notice and an opportunity to be heard at a bail hearing, and the right to have the Court consider “the safety of the victim” in setting bail. (*Ibid.*)

As noted by the Court of Appeal, neither the language of Proposition 9 nor the materials accompanying the ballot initiative expressed any intention to repeal and replace section 12, and the two sections can be harmonized by interpreting the term “may” in section 28 as a word of possibility rather than permission. (*Kowalczyk, supra*, 85 Cal.App.5th at pp. 683-684.) Stated differently, because in almost all cases a court may release an arrestee pretrial with certain conditions, the court must consider the victim’s and the state’s interests as reflected in sections 12 and 28(f)(3) in determining what conditions are reasonably necessary.

The Supreme Court of Illinois very recently harmonized two very similar constitutional provisions in upholding the elimination of monetary bail in Illinois. (*Rowe v. Raoul* (Ill. Supreme Ct. July 18, 2023) \_\_ N.E.3d \_\_, 2023 WL 4566587.) As in California, the Illinois Constitution provides that “[a]ll persons shall be bailable by sufficient sureties,” except under strictly limited circumstances. (*Id.* at \*5.) The Court rejected the argument that the constitutional provision guaranteed the right to be released on *monetary* bail, and expressly noted that monetary bail is not “the only way to assure a defendant’s presence and to protect the public.” (*Id.* at \*6.)

The Illinois Constitution also has a victim’s rights clause that is very similar to Marsy’s Law and includes, inter alia, “[t]he right to have the safety of the victim and the victim’s family considered in denying or fixing the amount of bail, determining whether to release the defendant, and setting

conditions of release after arrest and conviction.’ ” (*Id.* at \*7; see also \*8.) The Court held that the “word ‘amount’ connotes quantity and does not only mean a quantity of money but rather, consonant with the bail clause, a quantity of sufficient sureties.” (*Id.* at \*8.) The Court further held that the two clauses work “in concert” to ensure that the trial court always considers the safety of victims in determining on what conditions a defendant should be released. (*Ibid.*)

This Court should likewise conclude that section 12 provides the *exclusive* circumstances in which a trial court may deny a defendant pretrial release, and in all other cases, both sections 12 and 28(f)(3) articulate factors a court must consider in assessing what “sureties” (i.e., conditions) are sufficient to protect the state’s and the victim’s interests. (*Kowalczyk, supra*, 85 Cal.App.5th at pp. 674-678, 682-686.)

Not only is the harmonizing of sections 12 and 28(f)(3) required by the language of article I of the Constitution itself, but it is also required by the federal and California constitutional guarantees of equal protection and due process. (*Humphrey, supra*, 11 Cal.5th at pp. 151-152.) These separate constitutional rights affect the decision-making process for setting bail and require the trial court to consider the effectiveness of alternative conditions of release and the defendant’s ability to pay if monetary bail is considered reasonably necessary. (See *id.* at p. 150 & fn. 4 [“But the claim that bail is excessive under the Eighth Amendment is not one Humphrey makes in this case – and this opinion does not purport to address or resolve any such

claim. His objection instead targets the *method* by which his bail was determined.”], original italics.)

Reconciling sections 12 and 28(f)(3) and applying the dictates of *Humphrey*, the Court of Appeal of the Fourth District, Division Two, recently summarized the method to be followed in analyzing the People’s request for a pretrial detention order against a defendant awaiting trial:

The judge must: (1) find there is sufficient evidence to sustain a guilty verdict against the arrestee on a qualifying felony [*i.e.*, a felony specified in Article I, section 12, subs. (a)–(c)]; (2) find by clear and convincing evidence a substantial likelihood that the arrestee’s release would result in great bodily harm to others; (3) find by clear and convincing evidence that no less restrictive condition than detention can reasonably protect the interests in public or victim safety, and the arrestee’s appearance in court; and (4) set forth the reasons for their decision on the record and include them in the minute order.

(*Yedinak, supra*, 92 Cal.App.5th at p. 886, citation omitted; see also *Brown, supra*, 76 Cal.App.5th at pp. 306-308 [prescribing similar analysis after lower court failed to correctly apply *Humphrey*].) If the arrestee cannot be detained based on these express findings, the court must then determine the least restrictive conditions of release needed to protect the government’s interests. Amici Bar Associations endorse this analysis and would have the Court adopt it for all cases involving orders for pretrial detention.

**III. Setting bail at an amount the accused cannot afford to pay is equivalent to intentional pretrial detention, subject to the same constitutional restrictions.**

While *Humphrey* does not expressly state that unaffordable bail may never be ordered, this conclusion is implicit in the Court's opinion. *Humphrey* started with the general observation that pretrial detention is commonly accomplished indirectly, by conditioning release on payment of bail beyond the arrestee's reasonable ability to pay. (11 Cal.5th at pp. 142-143.) Those who cannot satisfy the money bail condition have no choice but to remain in jail throughout the criminal proceedings, while more affluent arrestees under similar circumstances can pay the bail and remain at liberty. (*Ibid.*) The Court declared this practice unconstitutional as a violation of an arrestee's equal protection rights against wealth-based detention. (*Id.* at pp. 143, 150-151.)

In setting forth the "general framework" for pretrial release or detention determinations, the Court was explicit that an arrestee may never be detained pretrial based on a risk to public or victim safety, or an arrestee's flight risk, unless those risks are fact-based as shown by clear and convincing evidence. (*Humphrey, supra*, 11 Cal.5th at pp. 151-154.) Even when such a risk is established, the court must also find that no less restrictive conditions of release could reasonably protect those government interests. (*Id.* at pp. 151-152 ["[pretrial] detention is *impermissible* unless no less restrictive conditions of release can adequately vindicate the state's compelling interests"], italics added.)

The Court observed that there may be some “unusual circumstances” where clear and convincing evidence establishes that “no condition short of detention could suffice” “to protect community safety” such that the trial court has “no option other than refusing pretrial release.” (*Id.* at pp. 143, 154, 156; see also *Brown, supra*, 76 Cal.App.5th at p. 308.) But in those cases, the court is justified in ordering pretrial detention because of its finding that *no amount of bail* (monetary or nonfinancial) could reasonably vindicate the state’s interests. (*Humphrey*, pp. 143, 154, 156.)

Detention in these narrow circumstances doesn’t depend on the arrestee’s financial condition. Rather, it depends on the insufficiency of less restrictive conditions to vindicate compelling government interests: the safety of the victim and the public more generally or the integrity of the criminal proceedings. (*Id.* at p. 143.)

What the trial court cannot do is “effectively detain” an arrestee by setting the bail amount at a level the court knows cannot be paid. (*Humphrey, supra*, 11 Cal.5th at p. 143, 151.) If an arrestee cannot afford the amount of money bail set, the bail order “is likely to operate as the functional equivalent of a pretrial detention order.” (*Id.* at p. 151.)

Detaining an arrestee in such circumstances accords insufficient respect to the arrestee’s crucial state and federal equal protection rights against wealth-based detention as well as the arrestee’s state and federal substantive due process rights to pretrial liberty. (*Ibid.*)

As the *Brown* court stated clearly:

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

(*Brown, supra*, 76 Cal.App.5th at p. 306; see *id.* at p. 308 [“setting bail at an amount that is impossible for the defendant to post given his financial condition in order to keep him in custody pending trial” is “precisely the result the *Humphrey* Court held to be unconstitutional”].)

The Court of Appeal in *Brown* correctly interpreted *Humphrey* and held that “the fundamental constitutional principles the [*Humphrey*] Court enunciated clearly mean that setting bail at an amount the court knows cannot be met” is unconstitutional. (*Brown, supra*, 76 Cal.App.5th at p. 308.) The *Kowalczyk* court’s conclusion that “courts are not required to set bail at an amount a defendant will necessarily be able to afford” cannot be reconciled with *Humphrey* and should be rejected. (*Kowalczyk, supra*, 85 Cal.App.5th at pp. 691-692.)<sup>13</sup>

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<sup>13</sup> This Court considered reviewing *Brown* on its own motion but declined on June 22, 2022. (S274290.) On the same day, the Court granted review from the First District Court of Appeal’s dismissal of Mr. Kowalczyk’s habeas corpus petition and transferred the matter back to the court of appeal. (S274181.) Although the Court only asked the Court of Appeal to address the constitutionality of the denial of bail in noncapital cases, the appellate court went further and concluded that *Humphrey* did not prohibit the setting of unaffordable bail in all circumstances, creating a conflict with *Brown*. (*Kowalczyk, supra*,

The requirement that trial courts consider a defendant's financial condition in setting monetary bail is hardly a radical or unreasonable proposition. In the civil context, it has long been the rule that a court may not award punitive damages without considering the defendant's financial condition and ability to pay. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 109 [“[A]n award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition.”].) And the express purpose of punitive damages is to “punish wrongdoing” *proven at trial* by inflicting a financial burden on the wrongdoer. (*Id.* at p. 110.) The purpose of bail, on the other hand, is “not to punish,” but to vindicate other, non-financial interests *prior to trial* of a presumptively innocent individual. (*Humphrey, supra*, 11 Cal.5th at p. 150.)

### **Conclusion**

The Bar Associations believe the only reasonable interpretation of *Humphrey* is that it is unconstitutional to set monetary bail at an amount that is impossible for the accused to pay. (See *Humphrey, supra*, 11 Cal.5th at pp. 143, 150-154.) A presumptively innocent defendant may only be incarcerated without trial under the limited exceptions of article I, section 12, and then only if clear and convincing evidence establishes that no less restrictive conditions of release can vindicate the state's interests. In all other cases, the presumptively innocent

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85 Cal.App.5th at p. 689.) This Court granted review from *Kowalczyk* on this question.

defendant has a constitutional right to liberty and is entitled to be released pending trial under nonfinancial conditions or, if reasonably necessary to vindicate the state's interests, with monetary bail in an amount that provides the individual accused a fair and realistic opportunity to post a bond, based on the accused's individual circumstances. (*Ibid.*) Setting monetary bail at an amount the accused cannot pay should never be allowed as an alternative to accomplish preventative pretrial detention. (*Id.* at p. 151.)

Dated: November 7, 2023

Respectfully Submitted,

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