In the Supreme Court of the State of California

In re

KENNETH HUMPHREY,

On Habeas Corpus.

Case No. S247278

First Appellate District, Division Two, Case No. A152056
San Francisco County Superior Court, Case No. 17007715
The Honorable Joseph M. Quinn, Judge

CONSOLIDATED ANSWER TO MULTIPLE AMICUS CURIAE BRIEFS

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In the Supreme Court of the State of California

In re **KENNETH HUMPHREY,** On Habeas Corpus.	Case No. S247278

CONSOLIDATED ANSWER TO MULTIPLE AMICUS CURIAE BRIEFS

INTRODUCTION

For decades, courts have set monetary bail, at the request of the prosecution and defense alike, to achieve the legitimate regulatory interests of protecting public safety and ensuring a defendant's appearance in court. Our Constitution, as amended in 1982 and 2008, dictated as much.

Recently, we have sharpened our focus and now understand that, as a matter of equal protection, monetary bail cannot be set to protect victim or public safety. Victim and public safety, though, are not left vulnerable because voters have always intended that our constitutional mechanisms would protect against any such risks by denying bail altogether. Therefore, pretrial preventative detention under *both* sections 12 and 28, subdivision (f)(3) has always been available to protect public and victim safety where necessary without implicating wealth-based inequities.

For erroneous or inapposite reasons, some Amici seek to strike down the viability of a duly amended constitutional provision, section 28, subdivision (f)(3), at the expense of voter intent. The plain language of section 28, subdivision (f)(3), however, demonstrates that voters intended

that the provision would allow courts to deny bail in noncapital cases and would be operative in all respects.

ARGUMENT

I. SECTION 28, SUBDIVISION (F)(3), IN NO UNCERTAIN TERMS, ALLOWS COURTS TO DENY BAIL IN NONCAPITAL CASES

A. The Plain, Unambiguous Language of Section 28, Subdivision (f)(3) Allows Courts to Deny Bail

Section 28, subdivision (f)(3) plainly states that victim safety must be considered when a court decides whether to set or deny bail. Amici ACLU of Northern California, ACLU of Southern California, ACLU of San Diego and Imperial Counties and California law professors, academics and clinical instructors (ACLU or Amici) argue that section 28, subdivision (f)(3) requires courts to consider victim safety only "in making pretrial release determinations[.]" (ACLU Brief, pp. 12-13; see also pp. 24, 26-28, 31, 44, 54, 55 [referencing pretrial release decisions].) ACLU's construction limits section 28, subdivision (f)(3) to a defendant's release from custody or release conditions.

To reach its conclusion, however, ACLU misses the first fundamental step in determining voter intent. Before addressing the text of section 28, subdivision (f)(3) itself, ACLU instead jumps to extrinsic sources, including the ballot pamphlet. ACLU thus fails to adhere to well-established principles of interpretation that courts must first review the text of the provision, give significance to every word, phrase, and sentence, and give those words their ordinary meaning in the context of the provision as a whole. (See, e.g., *People v. Gonzalez* (2018) 6 Cal.5th 44, 49-50 (*Gonzalez*); *People v. Valencia* (2017) 3 Cal.5th 347, 357 (*Valencia*); *Cal. Redevelopment Ass'n v. Matosantos* (2011) 53 Cal.4th 231, 265; *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.)

The plain meaning of the text can only be disregarded "if the text contains a clear drafting error or if the consequences would be unrealistic or absurd." (*Valencia, supra*, 3 Cal.5th at p. 391 (dis. opn. of Liu, J.) citing *People v. Broussard* (1993) 5 Cal.4th 1067, 1071; *People v. Skinner* (1985) 39 Cal.3d 765, 775 (*Skinner*); accord, *Valencia, supra*, 3 Cal.5th at p. 410-411 (dis. opn. of Cuéllar, J.) citing *Skinner, supra*, 39 Cal.3d at pp. 775-779 [drafting error reflects that word was erroneously used and absurdity doctrine must be invoked sparingly] and *Gorham Co., Inc. v. First Financial Ins. Co.* (2006) 139 Cal.App.4th 1532, 1544.) Here, there are no drafting errors, and no one has alleged as much. Nor does denying bail when necessary to protect public or victim safety or to ensure a defendant's appearance lead to absurd results. Therefore, the plain language of section 28, subdivision (f)(3) cannot be disregarded. Because Amici ignore the plain language despite the absence of any drafting error or absurd results, they unnecessarily and unreasonably restrict section 28's application and arrive at a result contrary to the intent of the voters.

The words "denying bail" could not more clearly refer to pretrial detention. (Merriam-Webster's Collegiate Dict. (11th ed. 2014) p. 334, col. 1 (Merriam-Webster) [deny; denied; denying], p. 92 col. 2 [bail: "the temporary release of a prisoner in exchange for security given for the due appearance of the prisoner"]; see also Webster's Concise Dict. (Internat. Encyclopedic ed. 2002) p. 53, col. 2 (Webster's Concise) [bail: "Money or security given to a court to secure the release of an arrested person on the proviso that the person will be present later to stand trial."]; accord Webster's New Internat. Dict. (2d) p. 204, col. 3 (Webster's New Internat.) [bail: "The custody of a prisoner or person under arrest by a person who procures his release from imprisonment by giving surety for his due appearance;" "The security given for the due appearance of a prisoner in order to obtain his release from imprisonment[.]"].) Thus, the plain

language of section 28, subdivision (f)(3) authorizes courts to refuse to release defendants from custody when necessary to protect public or victim safety. (Cal. Const., art. I, § 28, subd. (f)(3).) While these safety risks are to be the court's primary considerations, section 28, subdivision (f)(3) also permits courts to deny bail based on a defendant's prior criminal record and flight risk. Therefore, section 28, subdivision (f)(3) authorizes courts to deny bail and preventatively detain a defendant before trial in noncapital cases.

If Amici were correct that section 28, subdivision (f)(3) is limited to the release of a defendant and any conditions placed on that release, section 28, subdivision (f)(3) would have contained limiting language, but it does not. Nor would the word "denying" even appear in the text of section 28, subdivision (f)(3) were the provision to be construed as ACLU suggests. ACLU's interpretation therefore renders the word "denying" as mere surplusage, failing to give independent significance to the operative language within subdivision (f)(3). (*City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th 707, 724 [courts, where possible, must avoid construction that renders certain provisions superfluous or unnecessary]; see also *Valencia*, *supra*, 3 Cal.5th at pp. 389-390 (dis. opn. of Liu, J.) [courts should not fail to give "independent significance to operative language that cannot be construed as redundant of anything else in the statute."].)

Alternatively, ACLU may have simply seized on the language of section 28, subdivision (b)(3), i.e., "[t]o have safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant[,]" in order to limit section 28, subdivision (f)(3)'s application to release conditions rather than to the denial of bail. (See ACLU, pp. 24-25.) Doing so, though, isolates the language of subdivision (b)(3) at the expense of the provisions under subdivisions (f)

and (f)(3), which provide additional, collective obligations that courts must consider victim and public safety in setting, reducing or denying bail. Ultimately, ACLU's interpretation is incomplete because it gives full effect to some, but not all of the plain language of section 28, subdivision (f)(3).[1]

1. Beyond the plain language of section 28, subdivision (f)(3), the preamble and ballot materials for Proposition 9 both informed voters and showed that voters intended that section 28 would broaden victims' rights to include victim safety in pretrial release decisions including the denial of bail

ACLU presumes that the text of section 28, subdivision (f)(3) is ambiguous – which it is not – and, relying on the ballot materials, argues that the materials did not notify voters or show a voter intent to expand a court's authority to preventatively detain defendants before trial. (ACLU, p. 28.) This argument fails in several respects.

Not only did the ballot materials contain the text of the entire constitutional provision, including the plain, unambiguous language relating to "denying bail," but other measures within the provision, including the codified and uncodified preamble and the accompanying

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[1] To further support its argument, Amici point to the Legislative Analyst's analysis for Proposition 4, which amended section 12 in 1982. (See ACLU, p. 32.) The text of section 28, subdivision (f)(3), however, used the very same words – "deny[ing] bail" – that the Legislative Analyst used in 1982 to signify a court's authority to preventatively detain defendants before trial. (ACLU, p. 32.) Amici also point to the ballot pamphlets in favor of 1982's Proposition 4 to argue that the pamphlet there contained language explaining that the provision would provide for pretrial detention. (ACLU, p. 32.) Arguments in favor of Proposition 4, too, used the very same language that section 28, subdivision (f)(3) used to signify preventative detention, i.e., "deny bail" to prevent release. (Ballot Pamp., Primary Elec., (June 8, 1982) Prop. 4, p. 18 (Ballot Pamp. Prop. 4).) Thus, section 28, subdivision (f)(3), like section 12, contained unmistakable language providing for pretrial preventative detention.

ballot materials reference the denial of bail, i.e., pretrial preventative detention. For example, Proposition 9's codified preamble specifically referenced pretrial detention. (Cal. Const., art. I, § 28, subd. (a)(4) [the rights of victims include the expectation that "persons who commit felonious acts causing injury to innocent victims will be [. . .] appropriately detained in custody"].) When this codified preamble is considered in light of the uncodified preamble – which referenced the desired broad reform that had not occurred under the Victim's Bill of Rights – a clear intent emerges to broaden the authority to deny bail before trial. (Ballot Pamp., Gen. Elec., (Nov. 4, 2008) Prop. 9, p. 128 (Ballot Pamp. Prop. 9).)

Furthermore, Proposition 9 sought to guarantee victims due process and justice, placing victims on equal footing with those accused of a crime. (See Ballot Pamp. Prop. 9, *supra*, p. 62 (arguments in favor of Prop. 9) [PROPOSITION 9 LEVELS THE PLAYING FIELD, GUARANTEEING CRIME VICTIMS THE RIGHT TO JUSTICE AND DUE PROCESS].) The ballot materials also alerted voters, in ALL CAPS, that the measure would "REQUIRE THAT A VICTIM AND THEIR [sic] FAMILY'S SAFETY MUST BE CONSIDERED BY JUDGES MAKING BAIL DECISIONS." (Ballot Pamp. Prop. 9, *supra*, p. 62 (arguments in favor of Prop. 9).) Bail decisions under Proposition 9, of course, included setting, reducing or denying bail. Thus, the motivating force behind Proposition 9 was to broaden victims' rights to protect them from dangerous defendants. (See also, Cal. Const., art. I, § 28, subd. (b)(2) [victim's right to be protected from defendant].) The voters' desire to expand victims' rights and incorporating statutes (including Penal Code section 1275) that protect those rights into the Constitution are at odds with the idea that the same voters did not intend to allow a court to deny bail when necessary to protect victim or public safety or to ensure a defendant's appearance in court.

Contrary to Amici's claim, voters knew and intended that Proposition 9 would expand a court's authority to deny bail as set forth in section 28, subdivision (f)(3).

Moreover, the Attorney General's summary emphasized the expansion to include victim safety in a court's bail determinations. (Ballot Pamp. Prop. 9, *supra*, p. 58.)[2] The phrase "bail determinations" corresponded to the text of section 28, subdivision (f)(3), which permitted setting, reducing, or denying bail, not just the setting of release conditions. The Legislative Analyst also focused voters on the proposed change to the Constitution "to specify that the safety of a crime victim must be taken into consideration by judges in setting bail for persons arrested for crimes." (Ballot Pamp. Prop. 9, *supra*, p. 59.)

Amici also take issue with the lack of a cost analysis in the ballot materials. The Legislative Analyst, however, made specific reference to "pretrial detention," which could have only referenced section 28, subdivision (f)(3). Although section 28, subdivision (f)(3) would enable courts to preventatively detain defendants before trial, the Legislative Analyst provided a cost analysis in the context of the circumstances then facing the courts – population limits in county jail facilities imposed by federal courts. (See Ballot Pamp. Prop. 9, *supra*, pp. 61-62.) Recognizing the authority to detain pretrial at a time when there had been a federally-imposed limit on that authority, the Legislative Analyst opined that courts could limit or decrease pretrial detention in order to satisfy these competing concerns. Faced with these different goals, the Legislative Analyst stated that the overall cost to counties was unknown. (Ballot Pamp. Prop. 9,

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[2] ACLU limits Proposition 9 to "pretrial release determinations" (ACLU, p. 26), when the Attorney General's summary noticed the change in "determining bail," which included setting, reducing or denying bail under subdivision (f)(3).

supra, p. 61.) Therefore, the ballot materials did reflect a cost analysis and demonstrated as a whole an intent to expand a court's authority to deny bail in noncapital cases, contrary to Amici's claim.

2. Failed initiatives that did not appear on the ballot do not reflect voter intent and thus are irrelevant to this Court's analysis

ACLU focuses on the failed initiatives that preceded Proposition 9 to support its argument that voters did not intend to allow courts to detain under section 28, subdivision (f)(3) or repeal section 12. (ACLU, pp. 27, 41-43; ACLU Request for Judicial Notice, p. 6 (ACLU RJN).) Well-established law, however, holds that courts must consider only those materials presented to voters to ascertain a measure's purpose or intent. (*Valencia, supra,* 3 Cal.5th at p. 364; see also *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 238 (*Guardino*); *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 990, fn. 7 (*Yoshisato*) [unpassed initiatives have little value in determining voter intent]; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 742-743 (*Lungren*) [reports not included in voter pamphlet do not assist in ascertaining voter intent].) "The opinion of drafters or of legislators who sponsor an initiative is not relevant since such opinion does not represent the intent of the electorate and we cannot say with assurance that the voters were aware of the drafters' intent." (*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 764, fn. 10 (*Taxpayers*) citing *Lungren*, *supra*, 45 Cal.3d at p. 743; see also *Taxpayers*, *supra*, 51 Cal.3d at p. 764, fn. 10 citing *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699-700 ["The motive or purpose of the drafters of a statute is not relevant to its construction, absent reason to

conclude that the body which adopted the statute was aware of that purpose and believed the language of the proposal would accomplish it."].)

Likewise, the primary goal when construing a constitutional provision focuses on the intent of the enacting party, not those who drafted the measure. (See, e.g., *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037 (italics added) (*Kempton*) quoting *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122 [paramount task in interpreting a constitutional provision is to "'ascertain the intent *of those who enacted it*[;]'" first discern voter intent from the text of the constitution; if ambiguous, look to extrinsic sources as "'evidence *of the enacting body's intent*[.]'"]; see also *Kempton, supra*, 40 Cal.4th at p. 1037 quoting *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673, fn. 14 [if ambiguous look to ballot summaries and arguments in order to determine "'voters' intent and understanding of a ballot measure.'"]; compare *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1169 (*Jones*) [looking to materials that would have been considered by the enacting body to discern intent].) Thus, failed initiatives that never appeared on the ballot surely cannot be indicative of voter intent and are not relevant.[3]

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[3] Even the cases cited by ACLU in its request for judicial notice support the conclusion that courts must only assess the materials *considered* by the enacting body. (See, e.g., *Jones, supra,* 42 Cal.4th at pp. 1169-1170 and *Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1223-1224 (*Rea*); ACLU RJN, p. 8.) In both *Jones* and *Rea*, this Court and the Second Appellate District of the Court of Appeal took judicial notice only of those materials considered by the enacting body in order to ascertain the intent of the enacting body. (*Jones*, *supra*, 42 Cal.4th at pp. 1163, 1169-1170 [legislative history]; *Rea*, *supra*, 226 Cal.App.4th at pp. 1223-1224.) Therefore, failed initiatives that were never even considered by voters because they did not appear on the ballot cannot be indicative of voter intent and must not be considered.

B. The Electorate Lawfully Enacted the Entirety of Section 28, Subdivision (f)(3) – Not Just Discrete, Italicized Words – When It Amended our Constitution by Means of Its Sovereign Constitutional Right

Pointing to the dissent in *Brown v. Superior Court* (1982) 33 Cal.3d 242, 255 (dis. opn. of Richardson, J.) (*Brown*), ACLU argues that former section 28, subdivision (e) could have only been lawfully re-enacted with the new amendments through the appropriate legal procedures. (ACLU, pp. 33-34.) The electorate did just that through its constitutionally conferred initiative power (Cal. Const., art. II, § 8, subd. (a) [initiative power of electors to propose amendments to Constitution]; Cal. Const., art. XVIII, § 3 [electors may amend Constitution by initiative]) and Proposition 9 received the necessary majority of affirmative votes cast to become effective as amended (Cal. Const., art. XVIII, § 4 [amendment to Constitution effective once approved by majority vote of electorate]; see also Cal. Const., art. II, § 10, subd. (a) [initiative statute effective once approved by majority vote of electorate]; see also *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 250 (*Kennedy*) [initiative requires only a simple majority for passage].).

In addition, the text of section 28, subdivision (f)(3) and the surrounding provisions clearly notified voters that section 28, subdivision (f)(3) would be enacted in its entirety. The plural and conjunctive language within section 28, subdivision (f)(3) notified voters that Proposition 9, if enacted, would add victim safety to the list of considerations within subdivision (f)(3). The text as a whole also indicated that victim safety would not stand alone because the concluding sentence of the first paragraph emphasized that "[p]ublic safety *and the safety of the victim* shall be the primary ~~consideration~~ *considerations*." (Ballot Pamp. Prop. 9, *supra*, p. 130.) The italicized language simply had no meaning in isolation

and could not be understood without the remaining language of subdivision (f)(3).

Moreover, the rights listed in section 28, subdivision (f)(3) fell under the umbrella of subdivision (f), which further demonstrated to voters that each and every right that followed would be enacted in its entirety:

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

(Ballot Pamp. Prop. 9, *supra*, p. 130 (underline added).) Thus, the language of section 28, subdivision (f)(3) and the umbrella it fell under provided a clear indication that subdivision (f)(3) would be enacted as a whole, contrary to ACLU's claim. Not only did the language used in section 28, subdivision (f)(3) notify voters that it would be enacted in its entirety, but voters also knew that section 28, subdivision (f)(3) – if approved – would read as presented in the ballot. (See *Coblentz, Patch, Duffy & Bass LLP v. City and County of San Francisco* (2014) 233 Cal.App.4th 691, 705; see Amicus Curiae Brief of Attorney General (AG), p. 23, fn. 12.) Thus, contrary to Amici's claim, section 28, subdivision (f)(3) was enacted in full by constitutionally required procedures and after sufficient notice.

Separately, Amici erroneously argue that voters in 2008 did not re-enact former section 28, subdivision (e) and use inapposite cases to suggest that voters only intended to make discrete amendments, as reflected by the italics in the ballot pamphlet. (ACLU, p. 36, fn. 7; Amici Bar Association of San Francisco, the Los Angeles Bar Association, and the Santa Clara Bar Association (BASF), p. 29, 31 [Proposition 9 made, at most, discrete amendments to subdivision (f)(3)].) Relying on *Yoshisato, supra,* 2 Cal.4th

978, ACLU argues that the discrete amendments made in 2008 did not reflect an intent to enact the remaining non-italicized language of section 28, subdivision (f)(3). (ACLU, pp. 35-37.) *Yoshisato*, however, does not compel ACLU's conclusion and is distinguishable on several grounds.

In *Yoshisato*, this Court addressed two propositions, Propositions 114 and 115, enacted in the *same* election that sought to amend the *same* statute, Penal Code section 190.2. (2 Cal.4th at p. 981.) Proposition 114 sought to overhaul the classification and treatment of peace officers and made one substantive change to section 190.2 by adding new categories of peace officer victims whose homicide could trigger a death penalty sentence. (*Id.* at pp. 982-984.)

Proposition 115, on the other hand, sought to make comprehensive reforms in the criminal justice system, which included amendments to the constitution and several statutory provisions, including Penal Code section 190.2. (*Yoshisato*, *supra*, 2 Cal.4th at p. 984.) While Proposition 115 made no changes to the categories of peace officers listed in section 190.2 (as Proposition 114 had), it made a number of other substantive changes to Penal Code section 190.2. (*Id.* at pp. 984-987.) Notably, neither the proponents nor opponents of Proposition 115 focused on the changes made to section 190.2 and did not indicate that another proposition on the same ballot proposed to amend section 190.2 as well. (*Id.* at p. 987.)

The petitioner in *Yoshisato* urged the Court to render inoperative the provisions of Proposition 115 because Propositions 114 and 115 provided competing versions of section 190.2, both measures created a comprehensive regulatory scheme, and Proposition 114 received more affirmative votes in the same election. (*Yoshisato*, *supra*, 2 Cal.4th at pp. 987-992.) To address petitioner's claim, the Court considered whether constitutionally compelled reenactment under Article IV, section 9 served to create a comprehensive regulatory scheme for Proposition 114, which

would render Proposition 115 inoperative under Article II, section 10, subdivision (b).[4] (*Ibid.*)

The *Yoshisato* Court ultimately concluded that constitutionally compelled reenactment "does not, in and of itself, reflect intent of the voters to adopt a 'comprehensive scheme' that would prevail over all other provisions of any other measure enacted by a lesser affirmative vote at the same election." (*Yoshisato, supra*, 2 Cal.4th at p. 990.) Because the ballot materials did not persuasively demonstrate that the voters intended the preclusive result set forth by the petitioner, the Court concluded that both propositions discretely amended section 190.2 as indicated. (*Id.* at p. 990.)

Yoshisato presented an entirely different set of circumstances from those presented here. ACLU admits as much. (ACLU, p. 36.) While the Court in *Yoshisato* evaluated *two* propositions that passed in the *same* election that sought to amend the *same* statutory provision, Proposition 9 here stood alone on the 2008 ballot and sought to amend only section 28 of the Constitution. Furthermore, Proposition 9 sought to make substantive amendments throughout section 28, including subdivision (f)(3) itself. The

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[4] Article II, section 10, subdivision (b) applies to initiative statutes and provides: "If provisions of two or more measures approved at the same election conflict, those of the measure receiving the highest number of affirmative votes shall prevail." (Cal. Const., art. II, § 10, subd. (b).) Article XVIII, section 4 applies to initiatives that amend the constitution and provides, in part: "If provisions of two or more measures approved at the same election conflict, those of the measure receiving the highest number of affirmative votes shall prevail." (Cal. Const., art. XVIII, § 4.) The *Yoshisato* Court specifically concluded that the amendments to section 190.2 under Propositions 114 and 115 did not conflict, but rather stood as complementary or supplementary measures to amend the same statutory provision. (*Yoshisato, supra*, 2 Cal.4th at pp. 988-989.) Because the Court concluded that the propositions there did not conflict, the Court analyzed whether Article II, section 10 still applied under the comprehensive scheme doctrine.

text of section 28, subdivision (f)(3) further reflected an intent to enact the subdivision in its entirety, as detailed above, not to make discrete amendments as Amici urge. Moreover, even if compelled re-enactment applied to constitutional provisions – which it does not[5] – compelled re-enactment here is consistent with voter intent based on the text alone. Indeed, the text of section 28, subdivision (f)(3) reflected an intent to enact all of subdivision (f)(3), including both the italicized and non-italicized words, again rendering *Yoshisato* distinguishable.

BASF, relying upon *Alejo v. Torlakson* (2013) 212 Cal.App.4th 768 (*Alejo*), argues that the amendments in section 28, subdivision (f)(3) did not serve to re-enact the inoperative language of former subdivision (e). (BASF, p. 29.) *Alejo*, like *Yoshisato*, is distinguishable. In *Alejo*, the plaintiffs alleged that amendments to a statutory provision subsequent to its sunset date served to re-enact the statute. (*Id.* at pp. 792-796.) The post-sunset amendments in *Alejo*, however, merely removed outdated requirements, renumbered subsections, or deleted an irrelevant subdivision – all nonsubstantive changes. (*Id.* at p. 792.)

The Court of Appeal in *Alejo* held that the amendments did not defeat the sunset because those amendments only intended "to remove requirements for which the specified date of completion had passed, to revise subdivision designators following that removal, and to make other nonsubstantive changes in wording." (*Alejo, supra,* 212 Cal.App.4th at pp. 795-796.) From this, the court concluded there existed no intent by the Legislature to overcome the sunset of the provision. (*Id.* at pp. 795-796.) Unlike the nonsubstantive changes in *Alejo*, the electorate here made substantive amendments within subdivision (f)(3) itself, which could only be understood in light of the remaining language of the subdivision.

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[5] (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 255 (*Brosnahan*).)

Therefore, unlike *Alejo*, there existed an intent to enact section 28, subdivision (f)(3) in its entirety.[6]

In sum, voters simply did not intend to make discrete, singular amendments to section 28, subdivision (f)(3) that gave effect to only the italicized words in the ballot materials. Such a reading defies both common sense and the language of section 28, subdivision (f)(3). Instead, grammar, logic, and the plain meaning of the words used within section 28 notified voters that subdivision (f)(3) would be enacted in its entirety. (See also, § I.B., above.)

C. Amici Cannot Show that Proposition 9 "Profoundly Misled" the Electorate

Amici ACLU and BASF argue that both the text of section 28 in Proposition 9 and the accompanying ballot materials misled the electorate. (ACLU, pp. 33-44; BASF, pp. 28-31.) First and foremost, these challenges must be viewed through this Court's duty to jealously guard the sovereign right of the people to enact Proposition 9, resolving "any reasonable doubts in favor of the exercise of this precious right." (*Brosnahan, supra,* 32 Cal.3d at p. 241 citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 248.) Since the voters received the full text of section 28 in the 2008 ballot materials, the Court must also presume that the electorate, who approved a constitutional amendment in

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[6] ACLU's reliance on *People v. Barros* (2012) 209 Cal.App.4th 1581, 1590 (*Barros*) is misplaced for the same reason. (ACLU, p. 36, fn. 7.) In *Barros*, the court found it doubtful that technical, non-substantive amendments (i.e., changing "such a" to "the" and re-numbering) to an invalid provision "served to reenact the substantive portions" of that invalid statute. (*Barros, supra,* 209 Cal.App.4th at p. 1590.) Here, in contrast, the amendments to section 28 in 2008 included numerous substantive amendments, including those within subdivision (f)(3) itself.

2008, voted intelligently upon it. (See *Brosnahan*, *supra*, 32 Cal.3d at p. 252 citing *Amador*, *supra*, 22 Cal.3d at pp. 243-244.) Through this lens, the challenges lodged by ACLU and BASF fail to demonstrate that the text and the accompanying ballot materials "profoundly misled" the electorate. (*Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 123 (*Owens*); see also *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 697 ["an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure[] tends to denigrate the legitimate use of the initiative procedure.'"].)

1. The lack of italics could not have misled the voters, particularly when voters are reasonably presumed to know the law

ACLU takes the position that the failure to italicize fooled voters into believing former section 28, subdivision (e) operative. (See ACLU, pp. 33-35.) Similarly, BASF argues that section 28, subdivision (f)(3) cannot be operative because the ballot materials did not inform the voters that former section 28, subdivision (e) had not taken effect. (BASF, pp. 28-29.) Judicial decisions, however, notified voters no less than *five times* that section 12 had prevailed over section 28, subdivision (f)(3) after the 1982 election. (*People v. Standish* (2006) 38 Cal.4th 858, 877 (*Standish*); *In re York* (1995) 9 Cal.4th 1133, 1140, fn. 4; *Brosnahan, supra,* 32 Cal.3d at p. 255; *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1211; *People v. Barrow* (1991) 233 Cal.App.3d 721, 723.)

With at least five judicial decisions notifying voters that section 12 prevailed over section 28, subdivision (f)(3), it is reasonable to presume that voters knew this fact before the 2008 election. (See *Gonzalez, supra,* 6 Cal.5th at p. 50 citing *In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11 (*Lance W.*).) Any remaining doubts must be resolved in favor of section

28, subdivision (f)(3). (*Brosnahan, supra,* 32 Cal.3d at p. 241 citing *Amador, supra,* 22 Cal.3d at p. 248.) Thus, the lack of italics cannot contravene the will of the electorate when voters reasonably knew that section 12 prevailed over former section 28, subdivision (e) before the 2008 election.

2. Failed initiatives could not have misled the electorate because they did not appear on the ballot

In addition to arguing that the failed initiative reflected voter intent, ACLU also argues that the failed initiatives caused Proposition 9 to mislead voters, and thus section 28, subdivision (f)(3) should be inoperative. (See ACLU, pp. 33, 41-43.) As stated above, whether any failed initiatives contained italics or sought to explicitly repeal section 12 is irrelevant. Unpassed constitutional amendments have little value in determining intent. (See *Guardino, supra,* 11 Cal.4th at p. 238; accord, *Yoshisato, supra,* 2 Cal.4th at p. 990, fn. 7.) Furthermore, measures that were never even presented to the voters are "wholly unpersuasive evidence of the voters' intent in enacting the proposition[] at issue here." (See *Yoshisato, supra,* 2 Cal.4th at p. 990, fn. 7 [unpassed bills are wholly unpersuasive evidence of voter intent]; see also *Valencia, supra,* 3 Cal.5th at p. 364 [examining materials that were before the voters to ascertain voter intent]; *Taxpayers, supra,* 51 Cal.3d at p. 764, fn. 10; *Lungren, supra,* 45 Cal.3d at pp. 742-743.) While prior amendments by a legislative body may be relevant to determine legislative intent, failed initiatives that never appeared on the ballot cannot be relevant in determining voter intent. By that same logic, these failed initiatives could not have misled the electorate because they never appeared on the ballot and thus were not considered by the electorate.

Nor does *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1149, fn. 2, 1151, fn. 5 (*Senate*), offer the assistance claimed. (ACLU, p.

43.) While this Court in *Senate* took note of the alternative measures the proponents had submitted, those alternative measures played no role in the Court's analysis in concluding that the initiative violated the single-subject rule. Rather, this Court focused on the text of the initiative itself, not the failed initiatives previously offered by the proponents. (*Senate*, *supra*, 21 Cal.4th at pp. 1160-1161 ["after reviewing the *specific provisions of Proposition 24*, we agree that the measure at issue" violates the single-subject rule; reviewing the language of sections 3 through 6 of Proposition 24; "*the provisions of Proposition 24* appear to embrace at least two distinct subjects—state officers' compensation and reapportionment."].)

3. Proposition 9 could not have misled voters because even the opponents of the proposition recognized that the provision would allow courts to deny bail

ACLU challenges Petitioner's reference to pre-election publicity, arguing that the publicity did not mention "any proposed change in the state's bail or detention procedures[.]" (ACLU, p. 38.) The *opponents* of Proposition 9, however, were acutely aware of the proposition's reach into pretrial preventative detention and notified the public of such. Opponents urged voters to reject Proposition 9 by arguing that the provision was "an ineffective, redundant and costly attempt at reforming the California Justice System." (*Reasons Why Not to Vote for Prop 9,* retrieved from <http://digital.library.ucla.edu/websites/2008_993_112/facts_facts.html> (as of Dec. 6, 2018) (*Reasons Why Not*); link available on California Proposition 9, Marsy's Law Crime Victims Rights Amendment (2008) <https://ballotpedia.org/California_Proposition_9,Marsy%27s_Law_Crime_Victims_Rights_Amendment (2008)> (as of Dec. 6, 2018); see also Internet Archive <https://web.archive.org/web/20081006012244/

http://www.votenoprop9.com:80/facts_facts.html> (as of Dec. 6, 2018).) The opponents also noted that Proposition 9 duplicated much of 1982's Victim's Bill of Rights or "other existing laws already enacted by the state[,]" meaning the Legislature. (*Reasons Why Not, supra.*) The opponents also emphasized Proposition 9's impact on pretrial bail and detention procedures by noting that Proposition 9 duplicated existing law that required courts to consider public safety (which includes the victim) when a court "sets or *denies bail.*" (*Id.* (italics added).) Of course, the language "sets or denies bail" mirrors the text in Penal Code section 1275, which requires courts to take public safety into consideration when setting, reducing or denying bail. (Pen. Code § 1275 (West 1988).) Thus, because it was clear to the *opponents* of Proposition 9 that section 28, subdivision (f)(3) would provide for pretrial preventative detention it is inaccurate to say that the publicity surrounding the measure was misleading.

Furthermore, editorials, including those identified by ACLU, urged voters to reject Proposition 9 and noted the expansion of victim's rights in bail-setting hearings (which under section 28, subdivision (f)(3) would include the denial of bail).[7] Indeed, the Chico Enterprise-Record honed in on Proposition 9's expansion of victim's rights in the pretrial context: "Proposition 9 is an expansion of victim's rights, but goes a bit too far. It allows victims to comment during all phases of the criminal justice system, including events like bail-setting hearings, before a suspect has even been

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[7] (ACLU RJN, Exh. M [Sacramento Bee specifically referenced victim input in bail decisions and the experience suffered by Marsy's family when they encountered the defendant after he had been released after posting bail]; Exh. N [Los Angeles Times urged voters to reject Proposition 9 and noting at the outset that the proposition would allow victim input in bail decisions]; compare Exh. O [advocates for Proposition 9 emphasized the importance of bail decisions by listing victim safety considerations as the first constitutional right bestowed by the measure].)

convicted of a crime and is, under the law, innocent." (*Editorial: Flawed Measures Should Be Rejected*, Chico Enterprise-Record (Oct. 16, 2008).) Many editorials also featured a court's consideration of victim safety in bail decisions as one of the changes included by Proposition 9.[8] Others, like the opponents of Proposition 9, noted that the proposition duplicated many of the victim's rights laws from the Victim's Bill of Rights, enacted 26 years earlier, or moved statutory provisions, which would have included section 1275, into the Constitution.[9] Additionally, the proponents of Proposition 9

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[8] (ACLU RJN, Exh. K [San Francisco Chronicle notified voters that Proposition 9 "expands the victims' rights that were approved in 1982[.]"]; Exh O [BusinessWire emphasized the importance of victim safety as a consideration in bail decisions by listing victim safety first, even before the parole hearing and notification procedures enacted by Proposition 9]; see also *Editorial: Proposition Endorsements*, Monterey County Herald (Oct. 17, 2008) <https://www.montereyherald.com/2008/10/17/editorial-proposition-endorsements/> (as of December 6, 2018) ["Victims' safety would have to be taken into account when deciding bail or parole."]; *Vote "No" on Proposition 9, an Ill-Considered Crime Victims Bill*, Fresno Bee (Oct. 13, 2008) ["Proposition 9 is an ill-considered measure that would require that crime victims be notified and have a say in all phases of the criminal justice process, including bail, pleas, sentencing and parole."]; *California Prop. 9 Editorial: Unnecessary tinkering with constitution*, Orange County Register (Oct. 2, 2008) <https://www.ocregister.com/2008/10/02/california-prop-9-editorial-unnecessary-tinkering-with-constitution/> (as of December 6, 2018) (*California Prop. 9 Editorial*) ["The constitution would be changed to require judges to take the safety of victims into consideration when granting bail."]; *Say 'No' to All Propositions Except 11*, Sacramento Bee (Oct. 9, 2008), p. A16 ["Summary: Would amend the constitution to require victims to be notified and have input on phases of the criminal justice process, including bail, pleas, sentencing and parole."].)

[9] (See, e.g., *Ballot-Box Budgeting: Vote NO on Props 6 and 9*, The Bakersfield Californian (Oct. 8, 2008) <https://www.bakersfield.com/archives/ballot-box-budgeting-vote-no-on-props-and/article_c36d5e03-4b59-5308-a3c6-dd44c03fb344.html> (as of December 6, 2018) ["Proposition 9 duplicates many of the victims' rights laws voters approved decades ago and simply moves them into the state constitution."]; *No on*

(continued...)

alerted voters of the provision's impact on bail decisions.[10] Editorials also highlighted how Proposition 9 would expand the constitutional rights of crime victims by requiring judges to consider the safety of victims when making bail decisions, which makes victims "more secure against

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(...continued)
Proposition 9, Long Beach Press Telegram (Oct. 4, 2008) <https://www.presstelegram.com/2008/10/04/no-on-proposition-9/> (as of December 6, 2018) ["Almost everything in Proposition 9 already is covered either by the Victims' Bill of Rights or by other state laws. The measure [. . .] establishes victims' safety as a consideration in granting bail or parole[.]"]; *No on Propositions 5, 6, and 9,* Los Angeles Daily News (Oct. 20, 2008) <https://www.dailynews.com/2008/10/20/no-on-propositions-5-6-and-9/> (as of December 6, 2018) ["Proposition 9 would take the familiar Victims' Bill of Rights, approved by voters 26 years ago, and enshrine it in the state's constitution."]; *California Prop. 9 Editorial, supra,* [most reasonable protections for victims of crimes are already in place by statute]; *Voters should turn down Props. 5, 6, and 9*, Woodland Daily Democrat (Oct. 14, 2008) <https://www.dailydemocrat.com /2008/10/14/voters-should-turn-down-props-5-6-and-9/> (as of December 6, 2018) ["Many of the provisions of Prop. 9 already exist under the Victim's Bill of Rights, which passed in 1982."].)

[10] (See, e.g., Ramos, *Victims Suffer Injustice by System Meant to Protect Them*, The Sun (Oct. 29, 2008) retrieved from <http://uchastings. idm.oclc.org/login?url=https://search-proquest-com.uchastings.idm. oclc.org/docview/369712554?accountid=33497> (as of December 6, 2018) ["The measure requires that a victim and their family's safety be considered by judges in making bail decisions for accused criminals and that crime victims be notified if their offender is released[;]" it also ensures "that victims are notified and allowed to participate in critical proceedings related to the crime, including bail, plea bargain, sentencing and parole hearings."]; Hawkins, *Victims Deserve Rights – Yes on Prop 9*, The Los Angeles Times (Oct. 2, 2008) <http://www.latimes.com/opinion/la-oew-hawkins2-2008oct02-story.html> (as of December 6, 2018) ["Proposition 9 would require that victims' and their families' safety be considered by judges making bail decisions, and that crime victims be notified if their offenders are released."].)

retributive acts" by the accused.[11] Under the weight of this publicity and the text itself, Amici cannot show that the text and the accompanying ballot materials "profoundly misled" the electorate. (*Owens, supra,* 220 Cal.App.4th at p. 123.)

D. Voters Understood and Intended that Sections 12 and 28, Subdivision (f)(3) Would Allow Courts to Prevent the Release of Dangerous Defendants in Order to Protect Against Safety Risks

Thirty-six years ago, voters authorized courts to protect the public from dangerous defendants under Proposition 4 by setting monetary bail in an amount commensurate with the seriousness of the offense (see *Standish, supra,* 38 Cal.4th at p. 875 [public safety to be considered in bail decisions]; see also Ballot Pamp. Prop. 4, *supra*, p. 18 (argument in favor of Prop. 4) [while present law does not allow courts to consider public safety in setting bail, Proposition 4 will "provide judges with a necessary tool to protect the public from repeat violent offenders[]"]) or by denying bail altogether. Ten years ago, voters sought to expand victims' rights and

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[11] (See, e.g., *Give Victims a Voice, Vote YES on Prop 9*, Independent Voter Network (Oct. 2, 2008) <https://ivn.us/2008/10/02/give-victims-voice-vote-yes-prop-9/> (as of December 6, 2018) ["Voting 'yes' on Proposition 9 would expand constitutional rights of crime victims to equal those already granted by the state to criminals. By [. . .] forcing judges to consider the safety of victims and their family's [sic] when making bail decisions for the accused, victims would be more secure against retributive acts by criminals."]; *Marsy's Law: The Crime Victims' Bill of Rights Act of 2008; Crime Victims Advocates and Law Enforcement Leaders Unite in Support of Prop. 9 – Marsy's Law: the Crime Victims' Bill of Rights Act of 2008*, Biotech Business Week (Oct. 9, 2008) retrieved from <https://search-proquest-com.uchastings.idm.oclc.org/docview/236107100?accountid=33497> (as of December 6, 2018) ["Proposition 9 provides crime victims and their families with constitutional rights equal to those of accused and convicted criminals[.]"].)

protect victims against dangerous defendants under Proposition 9 by authorizing courts to set monetary bail commensurate with safety risks or to deny bail altogether. (Cal. Const., art. I, § 28, subd. (f)(3) [deny bail]; § 28, subd. (b)(2) [victims to be reasonably protected from the defendant].) We now understand that setting monetary bail commensurate with any safety risk implicates equal protection concerns.[12] Nevertheless, the alternate means to protect public and victim safety under both sections 12 and section 28, subdivision (f)(3) has remained the same – denying bail.

1. After the 2008 election, sections 12 and 28, subdivision (f)(3) did not conflict in the context of denying bail

As ACLU recognizes, 2008 presented a much different scenario than 1982 had. Most of the conflicts identified by this Court in *Standish*, *supra*, 38 Cal.4th at p. 877 no longer existed. (ACLU, p. 51.) Indeed, the only remaining difference between the two provisions was the use of the word "shall" in section 12 and the word "may" in section 28, subdivision (f)(3).

Although the words "shall" and "may" conflict in isolation relative to release on bail, those words do not conflict in the context of denying bail. Section 12 begins "[a] person shall be released on bail by sufficient sureties [. . . .]" (Cal. Const., art. I, § 12.) Ordinarily the word "shall" is deemed mandatory. (*Standish*, *supra*, 38 Cal.4th at p. 869; see also, Cal. Const., art. I, § 26 [provisions of the Constitution are mandatory, unless expressly stated otherwise].) If section 12 contained only the words listed above, the right to release bail by sufficient sureties would be absolute. Section 12,

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[12] It is not just the illogical way our monetary bail system works, but also the disparate effect it has on wealthy and indigent defendants that creates the equal protection problem. (Opening Brief on the Merits (OBM), pp. 19-26.)

however, continued with the words "except for[.]" By using the preposition "except," section 12 removed the listed offenses that followed from the general rule of release on bail. (Merriam-Webster, *supra*, p. 435, col. 1 [except: "with the exclusion or exception of [. . . .]"]; see also Webster's Concise, *supra*, p. 246, col. 2 [exception: "2. A person or thing different from or not conforming to a general rule, principle, class, etc."]; accord Webster's New Internat., *supra*, p. 888, col. 3 [except: "With exclusion of; leaving or left out [. . . .]"].)

Instead of the word "shall," section 28, subdivision (f)(3) uses the permissive word "may" to describe release on bail: "[a] person may be released on bail by sufficient sureties[.]" (Cal. Const., art. I, § 28, subd. (f)(3); see also *Dean v. Kuchel* (1951) 37 Cal.2d 97, 101-102 ["may" reasonably susceptible to permissive meaning even though the Constitution states that its provisions are mandatory].) Like section 12, section 28, subdivision (f)(3) also excludes capital offenses from the general rule of release on bail when the facts are evident and presumption great. Section 28, subdivision (f)(3) continues, though, to describe how courts must exercise their discretion when denying bail. With capital cases excepted, the discretion to release (or not) and the directive as to how that discretion must be exercised in denying bail under section 28, subdivision (f)(3) applies to the remaining class of cases, noncapital cases. Thus, in this context, the denial of bail under both sections 12 and 28, subdivision (f)(3) was and remains discretionary depending on the respective exceptions.

This construction corresponds with the evident purpose of the 1982 amendment to section 12, which was to give courts discretion to consider public safety and deny bail in noncapital cases, where such authority had not existed before. (See *Standish*, *supra*, 38 Cal.4th at pp. 892-893 (conc. & dis. opn. of Chin, J.); see also Ballot Pamp. Prop. 4, *supra*, p. 16 ["[t]he proposal also would broaden the circumstances under which the courts may

deny bail."]; see also Ballot Pamp., Gen. Elec., (Nov. 8, 1994) Prop. 189, p. 8 ["PROPOSITION 189 WOULD ALLOW COURTS TO DENY BAIL TO SEXUAL PREDATORS[.]"].) The same was true for section 28, subdivision (f)(3). Thus, whether or not sections 12 and 28, subdivision (f)(3) were mandatory or permissive respective to release on bail based on sufficient sureties, both provisions provided exceptions where a court could deny bail in noncapital cases.

2. Section 12 was not intended or understood to provide an absolute right to release from custody

Nor was section 12 was intended or understood to provide an absolute right to release from custody in the first place. (Accord AG, p. 26.) Rather, release was understood to be conditioned upon the satisfaction of a surety, i.e., providing an amount of monetary bail. More significantly, the 1982 amendment required courts to consider the seriousness of the offense and the offender's criminal history – both indicators of a defendant's public safety risk – in fixing the amount of bail. Thus, in 1982, voters intended that when a defendant posed a higher public safety risk, a court could set an amount of monetary bail commensurate with that risk even where such amount resulted in pretrial detention, so long as the amount was not excessive. (See *Standish*, *supra*, 38 Cal.4th at p. 875; see also, Karnow, SETTING BAIL FOR PUBLIC SAFETY (2008) 13 Berkeley J. Crim. L. 1, 7, fn. 43.) Thus, section 12 could not have been intended or understood to confer an absolute right to pretrial release from custody.

Amici's conclusion that section 12 confers an absolute right to release depends, in part, on *In re Law* (1973) 10 Cal.3d 21 (*Law*). (ACLU, pp. 15, 16, 57.) In *Law*, this Court reviewed Article I, section 6 of the California Constitution which then provided: "All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or

the presumption great." (10 Cal.3d at p. 25.) Although *Law* noted that the provision intended to confer an absolute right to bail, the Court also recognized the limitation to that right in capital cases. (*Id.* at pp. 25-26.) Thus, while the right to bail could then be described as absolute in noncapital cases, the right to bail in capital cases could not because of the restriction imposed by section 12.

In 1982, voters then placed restrictions on the right to release on bail in noncapital cases by broadening the circumstances under which courts could deny bail in those cases based on "express public safety limitations[.]" (*Standish, supra,* 38 Cal.4th at pp. 888, 892 (conc. & dis. opn. of Chin, J.).) Thus, as a result of the 1982 amendment, section 12 no longer provided an absolute right to release on bail in all cases. Rather, bail could be denied in noncapital cases, subject to the enumerated exceptions. Section 28, subdivision (f)(3)'s provisions do the same.

3. Sections 12 and 28, subdivision (f)(3) can be harmonized

Sections 12 and 28, subdivision (f)(3) are best harmonized as providing exceptions to the general right to release on bail in noncapital cases, subject to independent equal protection and due process requirements. (Accord AG, p. 28.)[13] As liberty is the norm, pretrial preventative detention must be carefully limited to serve a compelling

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[13] To be clear, Petitioner has never advocated for a "a general authorization to detain" on public safety grounds under section 28, subdivision (f)(3). (See AG, p. 25.) Nor could section 28, subdivision (f)(3) authorize as much because the provision must be construed in favor of its constitutionality to satisfy due process. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373; *People v. Leiva* (2013) 56 Cal.4th 498, 506-507; *People v. Sandoval* (2007) 41 Cal.4th 825, 844; *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 626-662; see also Reply Brief on the Merits, p. 31.)

government interest. (*United States v. Salerno* (1987) 481 U.S. 739, 755 (*Salerno*); see also *Lopez-Valenzuela v. Arpaio* (9th Cir. 2014) 770 F.3d 772, 777 (*Lopez-Valenzuela*).) Although there remains a general, conditional right to release on bail, courts must begin with the presumption in favor of release. No one disagrees. Release, though, may be circumscribed by legitimate regulatory purposes, which have long included protecting public and victim safety and ensuring a defendant's appearance. (*Salerno*, *supra*, 481 U.S. at p. 747; *Lopez-Valenzuela*, *supra*, 770 F.3d at p. 779.) Section 28, subdivision (f)(3) can be carefully limited to serious offenses where public safety or the safety of the victim are the primary considerations or offenses where there is a high probability that the defendant will not appear.[14]

Furthermore, courts as a matter of law (see, e.g., *Santosky v. Kramer* (1982) 455 U.S. 745, 756-757, 769; *Addington v. Texas* (1979) 441 U.S. 418, 425-427, 433) must apply the clear and convincing standard of proof to pretrial preventative detention decisions, which further harmonizes sections 12 and 28, subdivision (f)(3). To satisfy this high standard of proof, courts must necessarily find under either section that no condition or combination of conditions would reasonably assure the safety of the community or the victim or the defendant's appearance in court. It is also reasonable to construe section 28, subdivision (f)(3) to require a showing that the facts are evident and the presumption great in noncapital offenses because the provision requires the same showing for greater capital

[14] Section 28, subdivision (f)(3) also provides the constitutional foundation for the Legislature to further specify under what circumstances courts may deny bail in noncapital cases.

offenses. Therefore, both provisions can be harmonized as exceptions to the general rule of release. [15]

ACLU argues, however, that giving effect to section 28, subdivision (f)(3) would repeal section 12.[16] (ACLU, pp. 54-60.) The authority relied upon by ACLU directs otherwise. As ACLU notes, this Court previously addressed an interpretation of two constitutional provisions to determine whether one constitutional provision impliedly repealed the other. (*Kennedy*, *supra*, 53 Cal.3d at pp. 249-251.) The Court found one provision ambiguous but noted that a strict construction of that provision served to implicitly repeal the other, even though the provision and its accompanying materials demonstrated no intent to repeal or restrict any constitutional powers bestowed to the electorate. (*Id.* at pp. 250-253.) Being bound to harmonize constitutional provisions and resolve any

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[15] ACLU seeks to strike down section 28, subdivision (f)(3) by drawing a comparison to the preventative detention scheme struck down by the Ninth Circuit in *Lopez-Valenzuela*. (ACLU, pp. 49-51.) The statute challenged in *Lopez-Valenzuela*, however, allowed for a *categorical* denial of bail for a specific class of offenders, namely undocumented immigrants, charged with noncapital offenses. (770 F.3d at p. 782.) Specifically, the challenged provision there prohibited state courts from setting bail for defendants, irrespective of the seriousness of the offense or the defendant's flight risk or danger to the community, where the proof is evident or the presumption great and there was probable cause to believe that the defendant entered or remained in the United States illegally. (*Id.* at pp. 775, 791.) No further assessment was required. Section 28, subdivision (f)(3), on the other hand, requires a court to make an individualized assessment of the seriousness of the offense and the defendant's safety or flight risks in denying bail.

[16] ACLU's implied repeal argument is flatly inconsistent with its initial argument that section 28, subdivision (f)(3) does not provide for pretrial preventative detention. For section 28, subdivision (f)(3) to effectuate an implied repeal, as ACLU argues, the plain language of section 28, subdivision (f)(3) must necessarily authorize pretrial preventative detention in the first place. Otherwise, no implied repeal could occur.

reasonable doubts in favor of the initiative power reserved by the people, the Court rejected the interpretation that one constitutional provision served to implicitly repeal the second constitutional provision, particularly when the accompanying ballot materials showed no intent to repeal or limit the initiative power. (*Id.* at pp. 249-250, 253.)

Like *Kennedy*, section 28, subdivision (f)(3) did not reveal an intent to repeal section 12, but it did broaden a court's authority to deny bail, as set forth above. Thus, the Court here should not presume an intent to repeal section 12 when such an effect was not expressed by the electorate. (*Valencia*, *supra*, 3 Cal.5th at p. 364.) Rather, the Court must first harmonize the two constitutional provisions, keeping in mind the duty to resolve reasonable doubts in favor of the electorate's initiative power. (*Kennedy*, *supra*, 53 Cal.3d at pp. 250-253.)

4. The attempts by Amici to harmonize sections 12 and 28, subdivision (f)(3) fail

To harmonize sections 12 and 28, subdivision (f)(3) ACLU argues that the considerations listed in both provisions apply to "pretrial release determinations[,]" in effect eliminating section 28's application to the denial of bail. (ACLU, pp. 54-55.) The prefatory language in sections 12 and 28, subdivision (f)(3), however, differs in significant ways. In particular, the list in section 12 applies to "fixing the amount of bail[.]" (Cal. Const., art. I, § 12.) By using the words "fixing" and "amount," section 12 necessarily refers to setting a dollar amount of monetary bail, not conditions of pretrial release from custody. Section 28, subdivision (f)(3), on the other hand, applies "[i]n setting, reducing or denying bail," a broader yet defined set of circumstances – setting an amount of monetary bail or denying bail altogether. (Cal. Const., art. I, § 12; Cal. Const., art. I, § 28, subd. (f)(3).) Once again, setting monetary bail based on public safety

raises equal protection problems, but section 28, subdivision (f)(3) still contains a constitutionally permissible way to protect public safety – the denial of bail. Therefore, ACLU's interpretation of section 12 is inaccurate and, as a result, its attempt to reconcile the two provisions fail.

BASF attempts to harmonize the two provisions by ignoring the full scope of section 28, subdivision (f)(3) – not a reconciliation by any means. (Compare *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 958 [rejecting harmonization effort that did not give full effect to statute].) For example, BASF argues that the two provisions can only be reconciled by giving effect to the discrete words added in 2008. (BASF, p. 31.) The 2008 amendment, though, served to render all of section 28, subdivision (f)(3) operable, as argued above. As a result, subdivision (f)(3) provided for the denial of bail for a broader set of serious offenses (beyond those listed in section 12) and based on flight risk, none of which are present in section 12. Thus, BASF's construction writes out preventative pretrial detention under section 28, subdivision (f)(3) where no conflict with 12 exists. Moreover, BASF's argument renders section 28, subdivision (f)(3) superfluous, inasmuch as nothing broader than section 12 is in effect. If this is correct, what remains of section 28, subdivision (f)(3) is completely coextensive with section 12 and therefore meaningless.

To further limit section 28, subdivision (f)(3)'s application, BASF claims that subdivision (f)(3) alone suffers from a constitutional infirmity. BASF fails to recognize, however, that section 12 also requires courts to consider the seriousness of the offense in fixing the amount of monetary bail. (See also Amici California DUI Lawyers Association, p. 18.) Thus, both sections suffer from the same constitutional infirmity asserted by BASF. (See also OBM, pp. 23, 26.)

5. If section 28, subdivision (f)(3) cannot be reconciled with section 12, section 28, subdivision (f)(3) prevails

Should the Court find that there is no way to reconcile sections 12 and 28, subdivision (f)(3) in a way that gives full effect to both, section 28, subdivision (f)(3) prevails over section 12, even if the text and ballot materials did not alert the electorate of such a result. (See, e.g., *Valencia, supra*, 3 Cal.5th at pp. 403-404 (dis. opn. of Liu, J.) [Prop. 8 applied "in accordance with the full sweep of its plain language, even if the text or ballot materials did not alert the electorate to particular applications."] citing *People v. Alvarez* (2002) 27 Cal.4th 1161, 1174-1175 and *Lance W., supra,* 37 Cal.3d at pp. 885-888.) Overall, section 28 lists 23 detailed rights, evidencing an expansion of victims' rights in specific ways. By its own language, section 28, subdivision (f)(3) also limits itself to serious offenses where safety risks are the primary considerations. Further, section 28, subdivision (f)(3) provides procedural protections that are absent from section 12, i.e., notice, hearing, and record for review. Section 28, subdivision (f)(3) also specifies what courts must consider in releasing a defendant on his or her recognizance, unlike section 12, which generally leaves release on one's own recognizance to a court's discretion. (Cal. Const., art. I, § 12.) Since both sections 12 and 28, subdivision (f)(3) are equally specific as to release or denial of release, section 28, subdivision (f)(3) prevails as the later enacted provision.

CONCLUSION

California's understanding of how courts can protect victims and the public against dangerous defendants before trial has evolved, and, as a result, Petitioner agrees that monetary bail cannot equitably serve to protect those interests. Remaining provisions of our Constitution, though, have been available to authorize pretrial preventative detention, consistent with

voter intent. Amici, however, seek to either to invalidate or weaken the authority vested within section 28, subdivision (f)(3), upending the will of millions of voters. This Court must reject Amici's attempts and hold that section 28, subdivision (f)(3), subject to independent constitutional requirements, authorizes courts to deny bail in noncapital cases.

Dated: December 7, 2018

Respectfully submitted,

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By: ALLISON G. MACBETH
Assistant District Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached **CONSOLIDATED ANSWER TO MULTIPLE AMICUS CURIAE BRIEFS** uses a 13-point Times New Roman font and contains 9,612 words. (Cal. Rules of Court, rule 8.520(c)(1).)

Dated: December 7, 2018

ALLISON G. MACBETH
Assistant District Attorney

DECLARATION OF SERVICE

I, Allison G. Macbeth, state:

That I am a citizen of the United States, over eighteen years of age, an employee of the City and County of San Francisco, and not a party to the within action; that my business address is 850 Bryant Street, Rm. 322, San Francisco, California 94103. I am familiar with the business practice at the San Francisco District Attorney's Office (SFDA) for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the SFDA is deposited in the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic system, FileAndServeXpress electronic system, or electronic mail. Participants who are registered with either TrueFiling or FileAndServeXpress will be served through electronic mail at the email addresses listed below. Participants who are not registered with either TrueFiling or FileAndServeXpress will receive hard copies through the mail via the United States Postal Service.

That on December 7, 2018, I electronically served the **CONSOLIDATED ANSWER TO MULTIPLE AMICUS CURIAE BRIEFS** by transmitting a true copy of through TrueFiling, FileAndServeXpress, or through electronic mail. Because one or more of the participants have not registered with the Court's system or are unable to receive electronic correspondence, on December 7, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the San Francisco District Attorney's Office at 850 Bryant Street, Room 322, San Francisco, California 94103, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed December 7, 2018, at San Francisco, California.

Allison G. Macbeth