S247278

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

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

Petitioner, the People of the State of California, respectfully submits this Reply Brief on the Merits.

INTRODUCTION

Existing provisions of our Constitution, specifically sections 12 and 28, subdivision (f)(3) as harmonized, provide Californians with the means to move safely away from monetary bail. Pretrial preventative detention under both sections serves not only the compelling government interests of protecting safety and ensuring that a defendant appears in court, but does so in a narrowly limited manner, under the confines of due process. Respondent's attempts to chip away at section 28, subdivision (f)(3)'s operability and effectiveness do not succeed because Respondent ignores the fundamental presumptions in favor of both the initiative process and section 28, subdivision (f)(3)'s constitutionality. Nor does Respondent truly address how sections 12 and 28, subdivision (f)(3) can be harmonized while giving full effect to both.

ARGUMENT

I. IN FAILING TO ADDRESS THE FUNDAMENTAL PRESUMPTIONS IN FAVOR OF THE INITIATIVE POWER OF THE PEOPLE, RESPONDENT CANNOT SHOW THAT SECTION 28, SUBDIVISION (F)(3) IS INOPERATIVE

Respondent boldly asserts that part of an initiative enacted under the constitutional power reserved by the people (Cal. Const., art. II, § 8, subd. (a); Cal. Const., art. IV, § 1; Cal. Const., art. XVIII, § 3) did not take effect. In reaching this conclusion, however, Respondent fails to recognize, let alone address, the fundamental presumptions related to initiative power reserved by the people.

In describing the origins of constitutional initiative power of the electorate, Justice Tobriner stated:

> Drafted in light of the theory that all power of government ultimately resides in the people, the amendment [of the California Constitution in 1911] speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' [citation], the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]. '[It] has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled.'

(*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 (fn. omitted); accord *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241 (*Brosnahan*); *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219-220 (*Amador*); see also *People v. Valencia* (2017) 3 Cal.5th 405, 419 ["Lawmaking by ballot initiative is so fundamental to California's democracy that our state Constitution speaks of the power of initiative 'not as a right granted the people, but as a power reserved by them.'"] (dis. opn. of Cuéllar, J.).)

To protect the electorate's fundamental right to enact legislation by initiative, courts will presume "'*that the voters who approved a constitutional amendment " . . . have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered.*'" (*Brosnahan, supra*, 32 Cal.3d at p. 252 (italics added by *Brosnahan*) quoting *Amador, supra*, 22 Cal.3d at pp. 243-244.) Ultimately, courts must solemnly guard "the sovereign people's initiative power" and resolve "*any reasonable doubts in favor of the exercise of this precious right.*" (*Brosnahan, supra*, 32 Cal.3d at p. 241 citing *Amador, supra*, 22 Cal.3d at p. 248 (italics in original).)

A. Respondent's Hyper-technical but Inaccurate Approach to the Proposed Law in the Ballot Pamphlet Fails to Consider the Presumptions in Favor of Section 28, Subdivision (f)(3)

Respondent suggests that the use of plain font as opposed to italicized font in part of the then-existing provision so deceived the electorate that section 28, subdivision (f)(3) is inoperative and fatal to Petitioner's argument. (Answer Brief on the Merits (ABM), pp. 31-32.) Respondent's hyper-technical view of the then-existing provision as it appeared in the ballot pamphlet is not only inaccurate, but it also fails to consider the presumptions in favor of section 28, subdivision (f)(3).

As a preliminary matter, former section 28, subdivision (e)—as it stood in 2008 before the election—in fact contained the text listed in plain font in the ballot pamphlet. (Cal. Const., art. I, former § 28, subd. (e) (Thomson West 2008).) Thus, the ballot pamphlet accurately listed the then-existing provisions of section 28, subdivision (e) in plain font, notwithstanding the fact that the provision was inoperative. (See Elec. Code § 9086, subd. (f) [the differing provisions of the proposed measure shall be distinguished "from the *existing* provisions of law"] (italics

added).) Listing the then-existing provisions of section 28, subdivision (e) in plain font was also consistent with the advisement that preceded the proposed law:

> This initiative measure amends a section of the California Constitution [. . .]; therefore existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

(Ballot Pamp., Gen. Elec., (Nov. 4, 2008) Prop. 9, text of Proposed Laws, p. 129 (Ballot Pamp. Prop. 9).) Thus, a distinguishing font was to be used for additions and deletions, not for the existing provisions themselves.

Nor did the use of plain font in the proposed law conflict with Election Code section 9086, as Respondent argues. (ABM, pp. 33, 36.) First, Election Code section 9086 uses the word "existing" in describing the provisions of law, not "operative." The use of the word "existing" reasonably meant those provisions then-present in the Constitution. (Elec. Code § 9086, subd. (f).) Second, as stated above, former section 28, subdivision (e) was an "existing" provision within the Constitution, even though it had been ruled inoperative.

Respondent's argument also fails to accord due weight to the presumption that the electorate was "aware of existing laws when enacting a ballot initiative." (*People v. Gonzalez* (2018) 2018 Cal. LEXIS 6304, *9 (*Gonzalez*) citing *In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11 (*Lance W.*).) Even before the 2008 election, the California Constitution itself would have informed voters that section 12 prevailed over former section 28, subdivision (e) because section 12 received more votes during the same election. (Cal. Const., art. II, § 10, subd. (b).) Furthermore, the notes following the 2008 published copies of the California Constitution (which included former section 28, subdivision (e)) noted that section 12 prevailed over former section 28, subdivision (e) because section 12 received more

votes in the same election. (See "Operative Effect" foll. Cal. Const., art. I, § 28 (Thomson West 2008); see also "1983 Note" foll. Cal. Const., art. I, § 28 (Matthew Bender 2008).)

Further, this Court held in 2006 that the provisions of section 12 prevailed over those in former section 28, subdivision (e) because the two provisions conflicted and section 12 received more votes during the same election. (*People v. Standish* (2006) 38 Cal.4th 858, 877.) Based on the Constitution and this judicial construction, the electorate was presumed to know that section 12 prevailed over former section 28, subdivision (e).

This presumption becomes even stronger because *four* separate decisions informed voters that section 12 prevailed over former section 28, subdivision (e). (See, e.g., *Brosnahan*, *supra*, 32 Cal.3d at p. 255; *In re York* (1995) 9 Cal.4th 1133, 1140, fn. 4; see also *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1211; *People v. Barrow* (1991) 233 Cal.App.3d 721, 723.) In light of this authority, it is not reasonable to conclude that voters would not have understood that the pre-existing provision, section 28, subdivision (e), had been declared inoperative by the courts prior to the election in 2008. Therefore, Respondent's challenge to the font type used in the ballot pamphlet is without merit.

Respondent further alleges that the lack of italicized font did not suggest to the voters that they were being asked to "enact the entire provision" of section 28. (ABM, pp. 32-33.) But that was precisely what an affirmative vote meant. If a majority of the voters approved section 28, the entirety of the provision, including its subdivisions, would immediately become effective. (See Cal. Const., art. II, § 10, subd. (a) [an approved initiative takes effect the day after the election, unless otherwise provided].) An affirmative vote could not be understood otherwise.

Nor would invalidation of section 28, subdivision (f)(3) be appropriate in light of the electorate's express intent. (*Ross v. RagingWire*

Telecommunications, Inc. (2008) 42 Cal.4th 920, 930 ["[T]he initiative power is strongest when courts give effect to the voters' formally expressed intent[.]"].) The express intent included enacting the "broad reform" that had not occurred under the Victim's Bill of Rights of 1982, which, of course, included the public safety release and bail provision of former section 28, subdivision (e). Section 28 also expressly intended to provide for pretrial detention. (Cal. Const., art. I, § 28, subd. (a)(4).) Thus, holding section 28, subdivision (f)(3) inoperative would contravene the electorate's formally expressed intent, not uphold it.

B. The Plain Language of Section 28, Subdivision (f)(3) and Its Historical Context, Individually and Collectively, Informed Voters that Enacting Section 28, Subdivision (f)(3) Would Provide for the Denial of Bail in Noncapital Cases

In arguing that voters did not know section 28, subdivision (f)(3) would be enacted in its entirety, Respondent points to the summary by the Attorney General, which stated that section 28 "[e]stablishes victim safety as [a] consideration in determining bail or release on parole[.]" (ABM, pp. 33-34; Ballot Pamp. Prop. 9, *supra*, p. 58; see also Ballot Pamp. Prop. 9, *supra*, Quick-Reference Guide, p. 10 ["Establishes victim safety as consideration for bail or parole."].) Respondent points to this same summary to posit that the ballot pamphlet did not inform voters that the proposition would establish new categories of eligible offenses for pretrial detention. (ABM, p. 34.) In reaching these conclusions, Respondent first discounts the presumption that the electorate, when provided the whole text of the proposed law, duly considered the entirety of the law and voted intelligently upon it. (*Brosnahan*, *supra*, 32 Cal.3d at p. 252; *Amador, supra*, 22 Cal.3d at pp. 243-244.)

Respondent's argument also defies common sense in light of the text of section 28, subdivision (f)(3) itself. One would reasonably understand

that the amendment would enact victim safety as an *additional* consideration for a court when "determining bail[,]" i.e., "setting, reducing or denying bail[.]" (*Carman v. Alvord* (1982) 31 Cal.3d 318, 327-328 [construe phrases in constitution liberally and practically] (*Carman*).) The safety of the victim, along with the protection of the public, were to be the primary considerations—plural noun—in setting, reducing, or denying release on bail. The use of the plural noun "considerations" also reasonably indicated to voters that the *two* considerations—not just the safety of the victim—were to be considered in denying bail, particularly when the amendments included the conjunction "and." Furthermore, the safety of the victim appears in the middle of a list of other considerations, which also reasonably indicated that the amendments would be enacted along with the remainder of the subdivision.

Moreover, subdivision (f)(3) included the phrase "denying bail" to indicate that courts could refuse to grant bail (Merriam-Webster's Collegiate Dictionary (11th ed. 2014) p. 334, col. 1 [deny; denied; denying [. . .] 3:b: "to refuse to grant <~ a request>]), which would result in pretrial detention. Listing public and victim safety as the primary considerations in denying bail also reasonably informed voters that section 28, subdivision (f)(3) established categories of eligible offenses for pretrial detention. (See also section II, below.)

Additionally, the fact that the proposed law contained amendments throughout the former version of section 28 alerted the voters that the provision would be enacted as a whole. So, too, did the sentence preceding and modifying subdivision (f)(3):

> *In addition to the enumerated rights provided in subdivision (b) that are personally enforceable by victims as provided in subdivision (c), victims of crime have additional rights that are shared with all of the People of the State of*

California. These collectively held rights include, but are not limited to, the following:

(Ballot Pamp. Prop. 9, *supra*, p. 130 (italics in original, underline added); Cal. Const., art. I, § 28, subd. (f)(3).) The six numbered rights that immediately follow this sentence include: safe schools; truth-in-evidence; public safety bail; use of prior convictions; truth in sentencing; and reform to the parole process. By using the adjective "additional," the adverb "collectively," and the plural noun "rights" to modify the six rights that follow in succession, including "public safety bail," the electorate reasonably knew that an affirmative vote would enact section 28, subdivision (f)(3) as a whole. The fact that the public safety bail subdivision itself contained substantive changes and was bookended by other major amendments also clearly indicated to the voters that section 28, subdivision (f)(3) would be enacted in its entirety.

Respondent's restrictive view of section 28, subdivision (f)(3) also overlooks the express intent stated in 2008, the language of former section 28, subdivision (e), and the enactment and purpose of section 1275. As set forth in section 28 itself, the proposed amended law codified a victim's rights to include the right "[t]o have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant[]" and the right "[t]o be heard [. . . at hearing] involving a post-arrest decision[.]" (Cal. Const., art. I, § 28, subds. (b)(3) & (b)(8).) These express rights would be meaningless unless the corresponding subdivision (f)(3) was also to be enacted in its entirety. (See Cal. Const., art. I, § 28, subd. (b)(3) & (b)(8).) The same holds true for the codified findings and declarations of section 28, which expressly referenced pretrial detention, in that persons who committed felonious acts causing injury to innocent victims would be appropriately detained in custody. (Cal. Const., art. I, § 28, subd. (a)(4).) Without subdivision (f)(3), this

codified, expressed intent would become surplusage. Not only did the express findings and declarations of section 28, as codified, reference detention, but the uncodified portion did as well, illustrating how the family of Marsy Nichols had no opportunity to state their opposition to her killer's release. (Ballot Pamp. Prop. 9, *supra*, p. 129.)

The 2008 proposed law and ballot pamphlet also made repeated references to the related issues of bail and detention—a fact swept aside by Respondent. The Attorney General's summary emphasized bail and detention by listing the establishment of victim safety in the bail determination as the second out of six items. The Legislative Analyst too referenced the change to include victim safety as a consideration in the bail analysis as part of the expansion of victims' legal rights. (Ballot Pamp. Prop. 9, *supra*, p. 59.) These summaries, in turn, corresponded with the language used in subdivision (f)(3). Thus, contrary to Respondent's claim, the proposed law, its expressly stated intent, and the accompanying ballot pamphlet all informed voters that section 28, subdivision (f)(3) would provide for detention.

Respondent, though, takes issue with the fact that the ballot pamphlet made no specific reference to *Standish* and *York* or their holdings. (See ABM, pp. 34-35, 35, fn. 7, 37.) True, the ballot materials could have done so, but such a reference or lack thereof was not necessary, dispositive, or even fatal. Again, it was not just *Standish* and *York* that informed voters, but a total of *five* cases. Being aware of these cases, it was not necessary to include such a reference for the voters.[1]

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[1] Respondent also argues that the *Standish* decision could not have been the "driving force" behind Proposition 9 because *Standish* had not been the first case to conclude that section 12 prevailed over former section 28, subdivision (e) by operation of the Constitution. (ABM, pp. 38-39.) While several other cases recognized the effect of two conflicting

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Nor was the lack of any reference to *Standish* and *York* by the Legislative Analyst dispositive. The comments by the Legislative Analyst do not necessarily reflect "the full intent of the drafters or the understanding of the electorate." (*Carman, supra,* 31 Cal.3d at p. 331; see also *Amador, supra*, 22 Cal.3d at p. 243 [Attorney General summary need not contain comprehensive analysis].) That the comments did not include a comprehensive and detailed analysis, including a reference to *Standish* and *York*, did not conflict with the requirements under the Elections Code. (Elec. Code § 9087, subd. (b) ["the analysis *may* contain...."] (italics added).) This, too, the electorate is deemed to know.

Even before the 2008 election, the language of former section 28 informed voters that the amended provision would allow courts to deny bail in noncapital cases based upon public safety risk, the seriousness of the offense charged, the defendant's prior criminal record, and the defendant's flight risk. (Cal. Const., art. I, former § 28, subd. (e); see also Cal. Const., art. I, former § 28, subd. (a) ["The rights of victims [include . . .] the more basic expectation that persons who commit felonious acts causing injury to

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constitutional provisions passed in the same election, as Petitioner outlines above, *Standish* was the first decision to engage in a detailed analysis, comparing sections 12 and 28 side by side. Nevertheless, that Proposition 9 followed *Standish* by just two years is indicative of the electorate's intent to enact the entirety of section 28, subdivision (f)(3), contrary to Respondent's claim. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1120 [timing alone supports inference that provision prompted by judicial decisions] (*Eden Council*).) Furthermore, Proposition 9 also referenced the "broad reform" that had not occurred as a result of the original Victim's Bill of Rights. Again, public safety bail and detention were some of the reforms that had not occurred by operation of the Constitution and as recognized by judicial decisions.

innocent victims will be appropriately *detained* in custody[.]"] (italics added).)[2]

Following in the footsteps of former section 28, subdivision (e) in 1987, the Legislature enacted section 1275, which the electorate is also deemed to know. (*Gonzalez, supra*, 2018 Cal. LEXIS at p. *9.) Again, the language in section 1275 was drawn verbatim from the "Public Safety Bail" provisions of Proposition 8. (Conc. Sen. Amend. to Assem. Bill No. 630 (1987-1988 Reg. Sess.) Aug. 27, 1987.) The amendment to section 1275 initially included the use of the same introductory phrase as before, i.e., "[i]n fixing the amount of bail[,]" but the introductory phrase was later amended to state "[*i*]*n setting, reducing, or denying bail*[.]" (Compare Assem. Bill No. 630 (1987-1988 Reg. Sess.) as introduced Feb. 13, 1987 with Assem. Amend. to Bill No. 630 (1987-1988 Reg. Sess.) May 11, 1987 (italics in original); see also Legis. Counsel's Dig., Assem. Bill No. 630 (1987-1988 Reg. Sess.) p. 2 ["This bill would provide that in *setting, reducing, or denying bail, rather than fixing bail*[.]"] (italics in orig., underline added).)[3]

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[2] Petitioner recognizes that unpassed constitutional amendments have little value in determining intent. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 238.) Proposition 8, however, received a majority of affirmative votes. Section 12, though, prevailed over former subdivision (e) of section 28 by operation of the Constitution. Nevertheless, former section 28 assists in determining what voters knew in 2008, particularly when Proposition 9 specifically referenced the Victim's Bill of Rights by name.

[3] Respondent recognizes that section 1275 remains in effect, to the extent that the statute is not otherwise unconstitutional. (ABM, p. 36, fn. 8.) Respondent notes that section 1275, subdivision (c) conflicts with federal due process because the provision does not require a finding that nonmonetary alternatives are insufficient before imposing bail beyond a defendant's ability to pay. Rather, Respondent adds that the statute only requires "unusual circumstances" to reduce bail. It bears noting that the

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Given this historical and legislative context, voters would reasonably understand that an affirmative vote would enact section 28 in its *entirety*, particularly when the electorate received the whole text of the proposed law. The 2008 ballot pamphlet did not indicate otherwise.

C. No Due Process Violation Occurred Based on Allegedly Misleading or Inaccurate Ballot Information

Elsewhere, Respondent claims a due process violation because neither the proposed law nor the ballot pamphlet informed voters that the proposed law would re-enact section 28, subdivision (e). (ABM, p. 44.) As argued above, the entire proposed law, its codified and uncodified findings and declarations, and the ballot pamphlet reasonably informed voters that an affirmative vote would enact the pretrial detention provisions of section 28, subdivision (f)(3). A finding to the contrary would be unreasonable.

Moreover, Respondent's charge does not come close to satisfying his heavy burden in lodging a postelection due process challenge. (ABM, p. 44.)[4] Courts have set a "'very high' bar [cit. om.] for litigants to successfully mount a postelection due process challenge to a ballot measure[.]" (*Owens, supra,* 220 Cal.App.4th at p. 123.) Any such

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(...continued)
Court of Appeal did not find any of the statutory bail provisions, including section 1275, unconstitutional. The court necessarily construed those statutes in favor of their constitutionality (see, e.g., *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373 (*Gutierrez*); *People v. Leiva* (2013) 56 Cal.4th 498, 506-507 (*Leiva*)) and had the authority to reform those provisions in a manner that avoids constitutional problems (see, e.g., *People v. Sandoval* (2007) 41 Cal.4th 825, 844 (*Sandoval*) citing *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 626-662 (*Kopp*); see also *Briggs v. Brown* (2017) 3 Cal.5th 808, 857 (*Briggs*) [A court exercises its authority of reformation to "preserve a statute's constitutionality, not to threaten it."]).

[4] As a preliminary matter, due process challenges to ballot materials must be made before the election, not post-election. (*Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 123 (*Owens*).)

challenge "'depend[s] on whether the materials in light of other circumstances of the election, were so inaccurate or misleading as to prevent the voters from making informed choices.'" (*Owens*, *supra*, 220 Cal.App.4th at p. 124 [examining pre-election publicity, text of ordinance, ballot information, and materiality of omission] quoting *Horwath v. City of East Palo Alto* (1989) 212 Cal.App.3d 766, 777-778.)

To mount a constitutional due process challenge, the party must show "that the impartial analysis profoundly misled the electorate, not that it just [did not] educate the electorate as to all the legal nuances of the measure." (*People ex rel. Kerr v. County of Orange* (2003) 106 Cal.App.4th 914, 934 (*Kerr*).) "[A]ll reasonable doubts should be resolved in favor of upholding the analysis." (*Kerr*, *supra*, 106 Cal.App.4th at p. 936.)

First and foremost, voters received the whole text of the proposed law. "Where, as here, the voters are provided the whole text of a proposed law [, . . .] or ordinance, we ordinarily assume the voters voted intelligently on the matter." (*Owens*, *supra*, 220 Cal.App.4th at p. 126 citing *Amador*, *supra*, 22 Cal.3d at pp. 243-244.)

Second, Proposition 9, like Proposition 8, received extensive pre-election publicity. (California Proposition 9, Marsy's Law Crime Victims Rights Amendment (2008) <http://www.ballotpedia.org/California_Proposition_9,_Marsh%27s_Law_Crime_Victims_Rights_Amendment_(2008)> (as of Sept. 6, 2018) (Ballotpedia, California Proposition 9); see also *Brosnahan*, *supra*, 32 Cal.3d at p. 252 [Proposition 8 received widespread publicity].) Most editorials urged voters to reject Proposition 9. (Ballotpedia, California Proposition 9, *supra*.) Yet, nearly 7 million California voters affirmed Proposition 9 in 2008, which was almost as

many votes for Propositions 4 and 8 *combined*.[5] Third, as stated above, the whole text of the proposed law, its codified and uncodified intent, and the accompanying ballot pamphlet informed the voters that the proposed law would include provisions related to bail and detention. (*Amador*, *supra*, 22 Cal.3d at p. 243.)

Ultimately, Respondent's argument regarding the inoperative nature of section 28, subdivision (f)(3) of the California Constitution fails. The challenges raised by Respondent do not succeed in light of the language used in the proposed law, the information in the ballot pamphlet, and the presumption that the electorate knows existing law and understands judicial interpretations of those laws. There is no good reason to reject this presumption in favor of section 28, subdivision (f)(3) when five cases interpreted the result of the 1982 election and in light of the history of the proposed law. Nor can this Court lightly presume that the electorate did not understand that section 28, subdivision (f)(3) would be enacted in its entirety and that it would provide for pretrial detention as outlined under these circumstances. (*Brosnahan*, *supra*, 32 Cal.3d at p. 252.) To invalidate subdivision (f)(3), as Respondent proposes, would undermine the will of almost 7 million voters.

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[5] 6,682,465 voters approved Proposition 9 in 2008; 4,278,709 voters approved Proposition 4 in 1982; 2,826,081 voters approved Proposition 8 in 1982. (See Ballotpedia, California Proposition 9, *supra*; compare with California Proposition 4, Rules Governing Bail <https://www.ballotpedia.org/California_Proposition_4,_Rules_Governing_Bail_(June_1982)> (as of Sept. 6, 2018); California Proposition 8, Victim's Bill of Rights <https://ballotpedia.org/California_Proposition_8,_Victims%27_Bill_of_Rights_(June_1982)> (as of Sept. 6, 2018).)

II. IN LODGING A FACIAL DUE PROCESS CHALLENGE TO SECTION 28, SUBDIVISION (F)(3), RESPONDENT CANNOT SATISFY HIS HEAVY BURDEN

In challenging section 28, subdivision (f)(3), Respondent argues that the provision violates due process. (ABM, pp. 43-53.) Respondent asserts that giving effect to section 28, subdivision (f)(3) would impliedly repeal section 12 and section 28, subdivision (f)(3)—standing alone—"would raise serious due process concerns." (ABM, p. 43; see also pp. 44-53; see section III, below.) In pursuing this argument, Respondent lodges a facial due process challenge to section 28, subdivision (f)(3). Respondent, however, cannot sustain his heavy burden. [6]

A. Respondent Cannot Show that Section 28, Subdivision (f)(3) Presents a Total and Fatal Conflict with Due Process

"A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to

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[6] Respondent also redirects his argument as one of constitutional avoidance, but only as a saving measure to section 12. (ABM, p. 45.) Respondent further dismisses the analysis in *United States v. Salerno* (1987) 481 U.S. 739 (*Salerno*) as "irrelevant." (ABM, p. 52, see also p. 19, fn. 3.) Respondent likewise argues that Petitioner's interpretation of section 28, subdivision (f)(3) "would dramatically curtail the historic *state* right to bail[]" in an effort to frame his argument otherwise. (ABM, pp. 52-53.)

At its core, though, Respondent's argument challenges the deprivation of the fundamental right to liberty under section 28, subdivision (f)(3), which requires a due process analysis, particularly when the term "bail" is broadly understood to mean "release." (ABM, pp. 52-53; see also Cal. Const., art. I, § 1 [inalienable right to liberty], art. I, § 7 [no deprivation of liberty without due process]; U.S. Const., 5th & 14th Amends. [no deprivation of liberty without due process of law]; *Salerno, supra,* 481 U.S. 739; see also *United States v. O'Donnell* (S.D. Tex. 2017) 251 F.Supp.3d 1052, 1068-1010 [bail mechanism for pretrial release] revd. on other grounds (5th Cir. 2018) 892 F.3d 147 (opn. on rehg.).)

the particular circumstances of an individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 (*Tobe*).) With a facial challenge, Respondent "'must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.'" (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267 (*Arcadia*) quoting *Pac. Legal Found. v. Brown* (1981) 29 Cal.3d 168, 180-181; see also *Tobe*, *supra*, 9 Cal.4th at p. 1084.) Indeed, a provision must be upheld unless its unconstitutionality is "clear and unquestionable." (*Arcadia*, *supra*, 2 Cal.4th at p. 265; see also *Legislature v. Eu* (1991) 54 Cal.3d 492, 501 [same].)

In the context of pretrial detention itself, the United States Supreme Court has recognized the difficult burden facing Respondent. A facial challenge "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." (*Salerno, supra,* 481 U.S. at p. 745 [that Bail Reform Act may operate unconstitutionally under some circumstances is insufficient to render wholly invalid].)

Whether section 28, subdivision (f)(3) can be interpreted in a constitutional manner depends, first, on the language itself, taken in the context of the whole. (See *Gonzalez*, *supra*, 2018 Cal. LEXIS at p. *8; *People v. Canty* (2004) 32 Cal.4th 1266, 1276 (*Canty*) [must give significance to every word, phrase, and sentence in overall scheme].) Where an ambiguity exists, courts will adopt the interpretation that leads to the more reasonable result. (*Canty*, *supra*, 32 Cal.4th at p. 1277.) When the task of interpretation involves constitutional issues, a court must adopt the construction that will render the provision constitutionally valid, even if other equally reasonable interpretations of the language raise serious and doubtful constitutional questions. (*Gutierrez*, *supra*, 58 Cal.4th at p. 1373.)

In raising his challenge, Respondent errs by focusing on the first sentence of section 28, subdivision (f)(3) in isolation. (ABM, p. 40 ["*Only one part*" of section 28, subdivision (f)(3) "could be read to speak to the third question presented"]; ["That *one part* is the first sentence" of section 28, subdivision (f)(3)] (italics added).) By limiting his analysis to the first sentence in section 28, subdivision (f)(3), Respondent violates the fundamental rule that words and sentences must not be read in isolation, but in the context of the scheme as a whole. (*Gonzalez, supra,* 2018 Cal. LEXIS at p. *8.)

While the first sentence of section 28, subdivision (f)(3) categorically denies release for *capital* cases when the facts are evident and the presumption great, this first sentence alone does not address the focus of this Court's question: the ability to deny bail in *noncapital* cases, as provided by our Constitution. The remainder of section 28, subdivision (f)(3), however, provides guidance as to when courts are authorized to deny bail in *noncapital* cases when read in conjunction with the first sentence. After explaining that a person may be released on bail, except in capital cases as provided, section 28, subdivision (f)(3) further allows courts to deny release on bail in other cases, i.e., noncapital cases. The third sentence of section 28, subdivision (f)(3) specifically uses the words "denying bail," which conveys the meaning that courts are authorized to deny release in noncapital cases. Respondent, however, ignores these key words. (See ABM, p. 46.) Thus, the plain language of section 28, subdivision (f)(3) clearly provides that courts may deny bail in noncapital cases.

B. Section 28, Subdivision (f)(3) Satisfies Due Process

Respondent also challenges the scope of applicable offenses or the circumstances under which the court may deny bail under section 28, subdivision (f)(3). (ABM, pp. 46-51.) At first blush, the plain language of

section 28 may indicate that all offenses would qualify for pretrial detention. Such a construction, however, fails to consider the scheme as a whole and the requirement that courts must construe provisions in favor of their constitutionality.

Like the Bail Reform Act addressed by the United States Supreme Court in *Salerno*, the words used in section 28, subdivision (f)(3) can be construed to limit detention to the most serious offenses. (See Opening Brief on the Merits (OBM), pp. 39, 45.) Section 28, subdivision (f)(3) specifically states that the protection of the public and the safety of the victim are to be the "primary" considerations in denying bail. The word "primary" means "of first rank, importance, or value: principal <the ~ purpose>." (Merriam-Webster's Collegiate Dictionary (11th ed. 2014) p. 986, col. 1.) By their very nature, the most serious of offenses present the highest risk to public safety and the safety of the victim. Section 1275 also sets forth factors quantifying the seriousness of the offense, including any alleged injury to the victim, any alleged threats made to victims or witnesses, or the alleged used of a firearm or other deadly weapon. (Pen. Code § 1275, subd. (a)(2); *People v. Globe Grain & Milling Co.* (1930) 211 Cal. 121, 127 [constitutional provisions and statutes may be construed together to uphold validity].) Thus, on its face, section 28, subdivision (f)(3), along with the factors listed in section 1275, narrowly limits detention to those serious offenses where public safety and the safety of the victim are the primary considerations. This limitation squarely serves a legitimate regulatory goal: preventing danger to the community—not a policy judgment as Respondent argues. (*Salerno*, *supra*, 481 U.S. at p. 747; see ABM, p. 49.)

Respondent further challenges another category of offenses identified by Petitioner: felony offenses where the defendant poses a serious flight risk. (ABM, p. 48; OBM, pp. 39, 45.) *Salerno* specifically recognized that

a defendant may be incarcerated prior to trial if the defendant poses a flight risk. (481 U.S. at p. 749 citing *Bell v. Wolfish* (1979) 441 U.S. 520, 534.) Section 28, subdivision (f)(3) also specifically lists flight risk as a consideration in denying bail by referencing the probability of the defendant's appearance in court. (See also 18 U.S.C. § 3142, subd. (f)(2)(A) [detention available for a case that involves "a serious risk that such person will flee"].) Like protecting victim and public safety, ensuring the defendant's appearance in court as required also serves a legitimate regulatory goal, not a policy judgment as Respondent contends. (See *Stack v. Boyle* (1951) 342 U.S. 1, 5; ABM, p. 48.) Section 28, subdivision (f)(3) could be construed in a similar constitutional and narrowly limited manner, like *Salerno*.[7] (See OBM, pp. 39, 45.)

Respondent also takes issue with Petitioner's use of the language from the preamble to interpret section 28, subdivision (f)(3)'s application. (ABM, pp. 49-50.) The language of section 28's codified preamble, however, is relevant should the Court determine that section 28, subdivision (f)(3) is ambiguous as to whether the section provides for detention and, if so, its scope. With any ambiguity, courts may look to the preamble of a provision to inform the interpretation of its operative provisions, particularly when the preamble is consistent with the provision's overall intent or if the Court is constitutionally compelled to do so. (See, e.g., *People v. Valencia* (2017) 3 Cal.5th 347, 362 (*Valencia*) [uncodified preamble inconsistent and beyond scope of intention]; *Canty, supra,* 32

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[7] In an effort to construe section 28, subdivision (f)(3) in favor of its constitutionality, Petitioner limited section 28, subdivision (f)(3)'s application to "felony" offenses involving either a serious safety or flight risk, particularly in light of the phrasing used in the preamble. The constitutional floor for due process purposes, however, does not necessarily limit section 28, subdivision (f)(3)'s application to felony offenses.

Cal.4th at p. 1280 [uncodified preamble used as an aid in construing ambiguous statute]; *Lance W.*, *supra*, 37 Cal.3d at p. 890 & fn. 10 [preamble of Proposition 8]; see also *Gutierrez*, *supra*, 28 Cal.4th at p. 1373 [adopt construction which renders provision valid]; see also *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 59-64 [plaintiff failed to show construction informed by preamble was constitutionally compelled].)

If the drafters intended that section 28, subdivision (f)(3) would provide for an additional mechanism for courts to detain defendants, one would expect that the drafters would have referred to such an intent in the preamble. (See *Valencia*, *supra*, 3 Cal.5th at p. 374.) They did. The codified preamble of section 28 specifically states that defendants who commit felonious acts that cause injury to innocent victims should be appropriately detained pretrial. (Cal. Const., art. I, § 28, subd. (a)(4).) This express, codified statement of intent corresponds with the language of section 28, subdivision (f)(3) in that public safety and the safety of the victim are the primary considerations in denying bail—which results in detention. (See *Valencia*, *supra*, 3 Cal.5th at p. 374.) The electorate's intent is best served by interpreting section 28, subdivision (f)(3) to allow for pretrial detention. The codified preamble can also be used to interpret how section 28, subdivision (f)(3)'s detention provision is to be applied.[8]

Respondent cites to *Eden Council, supra,* 19 Cal.4th 1106, but that case is distinguishable. (ABM, p. 50.) In *Eden Council*, the plaintiff

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[8] Respondent's concern regarding the "breathtaking sweep" of a construction informed by the preamble and the corresponding operative language defining "victim" (ABM, p. 52) is also misplaced because Respondent, once again, fails to recognize that section 28, subdivision (f)(3) must be construed in a manner consistent with its constitutionality when possible. (*Gutierrez*, *supra*, 58 Cal.4th at p. 1373; *Leiva, supra,* 56 Cal.4th at pp. 506-507.)

challenged the dismissal of the complaint under the anti-SLAPP statute. (19 Cal.4th at p. 1111.) The plaintiff there sought to engraft an additional element of a "public issue" from the codified preamble onto all of the operative provisions of the statute, when two of the four provisions made no mention of public issues. (*Id.* at p. 1111 & fn. 3.) This Court rejected the plaintiff's construction for two reasons: 1) the plain language of the statute made no specific reference to a "public issue" in two of the provisions, whereas the two remaining provisions had; and 2) the application of such an element would conflict with the overall legislative intent. (*Id.* at pp. 1113-1121.) Here, however, the language of the codified preamble to section 28 does not conflict with the overall intent, which is to protect public safety.

The remaining requirements listed in section 28, subdivision (f)(3) settle the provision squarely within constitutional confines. Section 28, subdivision (f)(3) requires notice and a record of the court's decision in denying bail, none of which appear in section 12. A detention under section 28 is also limited in duration by other constitutional and statutory provisions. (See, e.g., Cal. Const., art. I, § 15; Pen. Code §§ 859b, 1382.) While section 28, subdivision (f)(3) does not specifically provide for a standard of proof, decisional law and California's evidentiary provisions provide for a clear and convincing evidence standard.

Detention, of course, impacts the fundamental right to liberty. (*People v. Olivas* (1976) 17 Cal.3d 236, 243-244.) Evidence Code section 115 sets forth the burden of proof as preponderance of evidence, "*except as otherwise provided by law*[.]" (Evid. Code § 115 (italics added).) Evidence Code section 160, in turn, states that "'law' includes constitutional, statutory, and decisional law." (Evid. Code § 160.) Well-established decisions have held that the clear and convincing evidence standard applies when a fundamental right is implicated. (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; OBM, pp. 46-47; ABM, pp. 22-27.) Accordingly, proof by clear and convincing evidence applies to section 28 as well. Since a finding by clear and convincing evidence inherently includes a finding that no other means are sufficient to ensure safety or flight risk, section 28, subdivision (f)(3), as construed, is narrowly tailored to satisfy legitimate and compelling government interests.

Lastly, Respondent challenges Petitioner's construction as "atextual." (ABM, pp. 48, 51, 52, fn. 12.) Petitioner's construction, however, relies on the express text of section 28, subdivision (f)(3) and the applicable statutory provisions, as set forth above. To the extent that Respondent questions the use of such modifiers as "serious," Respondent ignores not only the obligation to construe provisions in favor of their constitutionality where possible (*Gutierrez, supra*, 58 Cal.4th at p. 1373; *Leiva, supra,* 56 Cal.4th at pp. 506-507), but also the authority to reform laws where necessary to preserve the constitutionality of a provision, so long as doing so is consistent with intent and the electorate would have preferred such a reform over an invalid provision (*Sandoval, supra,* 41 Cal.4th at p. 844; *Kopp, supra,* 11 Cal.4th at pp. 626-662; see also *Briggs, supra*, 3 Cal.5th at p. 857). "[C]ourts may legitimately employ the power to reform in order to effectuate policy judgment clearly articulated by the Legislature or electorate, when invalidating a statute would be far more destructive of the electorate's will." (*Kopp, supra,* 11 Cal.4th at p. 661 paraphrasing from Ginsburg, SOME THOUGHTS ON JUDICIAL AUTHORITY TO REPAIR UNCONSTITUTIONAL LEGISLATION (1979) 23 Clev. St. L.Rev. 301, 324.) Section 28, subdivision (f)(3) can be reformed, if necessary, to comply with due process without invalidating the electorate's will.

III. SECTION 28, SUBDIVISION (F)(3) CAN BE RECONCILED WITH SECTION 12 TO ALLOW COURTS TO DETAIN BASED ON SERIOUS SAFETY AND FLIGHT RISKS

Respondent repeatedly attempts to pigeonhole Petitioner's position into one of implied repeal, when it is Respondent who argues that giving effect to section 28, subdivision (f)(3) would impliedly repeal section 12. Thus, it is Respondent who relies primarily on an argument of implied repeal, when Petitioner has not. (ABM, pp. 40-44.)

A. Sections 12 and 28 Are Not So Irreconcilable, Clearly Repugnant, or So Inconsistent Such that Section 28, Subdivision (f)(3) Impliedly Repealed Section 12

As Respondent recognizes, "one constitutional provision 'should not be construed to effect the implied repeal of another constitutional provision.'" (*City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 567 (*City and County of San Francisco*) quoting *ITT World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 865.) "Only if they are in irreconcilable conflict must [the Court] decide which constitutional provision prevails." (*City and County of San Francisco, supra*, 10 Cal.4th at p. 567.)

An irreconcilable conflict exists when the two provisions are so "*irreconcilable, clearly repugnant, and so inconsistent*" that the two cannot operate in tandem. (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2013) 55 Cal.4th 783, 805 (internal quotations omitted; italics added).) Stated otherwise, an irreconcilable conflict exists when there is "no possibility" that the two provisions can operate together and the latter provision provides "undebatable evidence of an intent to supersede the earlier[.]" (*Hays v. Wood* (1979) 25 Cal.3d 772, 784.)

Once more, Respondent seizes on the first sentence of section 28, subdivision (f)(3) at the expense of all others and focuses on the word "may" versus the word as "shall" used in section 12. "The word 'shall,'

however, depending on the context in which it is used, is not necessarily mandatory." (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 257.) In the context of section 12, the use of the word "shall" in section 12 does not necessarily mean "mandatory." (Compare, Pen. Code § 1271 [for noncapital offenses, a defendant "*may* be admitted to bail before conviction, as a matter of right."] (italics added); Cal. Const., art. I, § 12 [a defendant "*may* be released" on own recognizance] (italics added).)

Prior to the 1982 amendment, section 12 provided an *absolute* right to release on bail for noncapital cases (*In re Law* (1973) 10 Cal.3d 21, 25 (*Law*)), providing no discretion to the court. The 1982 amendment, however, provided "public safety limitations" on the general right to bail in noncapital cases. (*Standish*, *supra*, 38 Cal.4th at pp. 892-893 (conc. & dis. opn. of Chin, J.); see OBM, pp. 39-40.) In this context, the word "shall" is not mandatory because the right to release on bail it is now limited by the exceptions that follow. That the right to release on bail in section 12 is now limited by public safety exceptions corresponds with the public safety exception to release on bail in section 28, subdivision (f)(3). Respondent, however, neglects to mention, let alone address, the effect of the 1982 amendment to section 12. Furthermore, the remaining sources of conflict identified by this Court in *Standish* no longer existed in 2008. (*Standish*, *supra*, 38 Cal.4th at p. 877.)

Thus, there remains a general right to release on bail in noncapital cases, but not an absolute one, as the right is limited to the exceptions in both sections 12 and 28. (See *Standish*, *supra*, 38 Cal.4th at pp. 892-893 (conc. & dis. opn. of Chin, J.).) Under this construction, sections 12 and 28

are not so irreconcilable, clearly repugnant, or inconsistent that they cannot operate together.[9]

Respondent's limited view of section 28, subdivision (f)(3) *presumes* an irreconcilable conflict, without considering the remaining text of the subdivision. Section 28, subdivision (f)(3), as constitutionally construed, narrowly limits preventative detention not only to cases involving serious safety or flight risks, but also by a showing of clear and convincing evidence. A showing of clear and convincing evidence, again, necessarily includes the finding that the alternatives, such as electronic monitoring, residential treatment, search conditions, or stay-away orders, are simply insufficient to protect against the safety and flight risks involved in the case. While there may be some overlap between the two provisions (i.e., felony offenses involving violence or felony sexual assault offenses under section 12 as compared to offenses where public and victim safety are the primary considerations under section 28, subdivision (f)(3)), the two provisions complement each other rather than conflict because both require clear and convincing evidence that defendant would pose a safety risk. Section 28, subdivision (f)(3) provides at least one additional category of offense—those where the defendant poses a serious flight risk—which does not appear in section 12. Under these circumstances, both provisions can operate harmoniously and are not so clearly repugnant as to effectuate an implied repeal.

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[9] Respondent's reliance on *Law, supra,* 10 Cal.3d at p. 25 for the proposition that the right to release on bail is "absolute" has been taken out of context. (ABM, p. 42.) The *Law* decision did so hold, but the decision preceded the 1982 amendment to section 12, which limited the right to release on bail in noncapital cases based on public safety exceptions. (*Standish, supra,* 38 Cal.4th at pp. 888, 892 (conc. & dis. opn. of Chin, J.).) Section 28 did the same in 2008 and did not, contrary to Respondent's claim, repeal the general right to release.

Nor is there any "undebatable evidence" of an intent by section 28 to supersede section 12. Section 28, as amended in 2008, did not specifically state an intent to repeal section 12, while former section 28 had explicitly done so in 1982. The absence of any repeal language in 2008 where there had been before provides the plainest evidence of no intent to repeal. (*Barker v. Brown & Williamson Tobacco Corp.* (2001) 88 Cal.App.4th 42, 48 [no language reflects intent to repeal].) Additionally, the ballot measure did not include a copy of section 12, further indicating no intent to repeal. (Elec. Code § 9084, subd. (b) [ballot pamphlet shall contain a copy of the specific constitutional provision that the measure would repeal].)

In sum, sections 12 and 28 can be reconciled because both provisions provide exceptions to the general right to release on bail in noncapital cases. Harmonizing the two provisions in this manner jealously guards the initiative process and gives full effect to section 28, subdivision (f)(3) (contra ABM, p. 35), all without undermining the electorate's will.[10]

B. A Proffer of Evidence Does Not Violate Due Process

Lastly, it bears noting that Respondent does not challenge the use of a proffer of evidence in the pretrial detention context, with good reason. Long ago, the United States Court of Appeals for the District of Columbia Circuit rejected any due process claims related to the use of a proffer of evidence. (*United States v. Smith* (D.C. Cir. 1996) 79 F.3d 1208.) In *Smith*, the defendant was represented by appointed counsel, allowed to testify, and given the right to proffer evidence himself. (*Smith, supra*, 79 F.3d at p. 1210.) The court held that the detention hearing based on a

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[10] Even if giving effect to section 28, subdivision (f)(3) impliedly repeals section 12, section 28, as the later enacted provision, would prevail. (See OBM, pp. 43-44.) Neither section 12 nor section 28, subdivision (f)(3) is more specific. They both apply to the denial of bail in noncapital cases and are both equally specific on their face, as set forth above.

proffer by the government satisfied the constitutional mandates and procedural safeguards. (*Id.*)

CONCLUSION

Respondent's attack on section 28, subdivision (f)(3) of the California Constitution misses the mark and attempts to upend the will of millions of voters. This Court, as the ultimate arbiter of our Constitution, must reject Respondent's attack and hold that section 28, subdivision (f)(3), like section 12, provides for pretrial detention in California.

Dated: September 7, 2018

Respectfully submitted,

GEORGE GASCÓN
District Attorney
County of San Francisco

By: ALLISON G. MACBETH
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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13-point Times New Roman font and contains 7,978 words. (Cal. Rules of Court, rule 8.520(c)(1).)

Dated: September 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 September 7, 2018, I electronically served the **REPLY BRIEF ON THE MERITS** 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 September 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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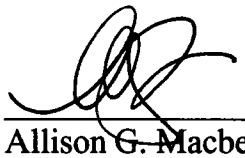
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed September 7, 2018, at San Francisco, California.



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