CASE NO. S247278

IN THE SUPREME COURT OF CALIFORNIA

In Re KENNETH HUMPHREY,

on Habeas Corpus.

RESPONDENT'S BRIEF ON THE MERITS

Court of Appeal Case No. A152056 (First Appellate District)
Superior Court Case No. 17007715 (County of San Francisco),
Hon. Joseph M. Quinn

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ISSUES PRESENTED

This Court's order granting review limited the issues to:

1. Did the Court of Appeal err in holding that principles of constitutional due process and equal protection require consideration of a criminal defendant's ability to pay in setting or reviewing the amount of monetary bail?

2. In setting the amount of monetary bail, may a trial court consider public and victim safety? Must it do so?

3. Under what circumstances does the California Constitution permit bail to be denied in noncapital cases? Included is the question of what constitutional provision governs the denial of bail in noncapital cases—article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution—or, in the alternative, whether these provisions may be reconciled.[1]

[1] The Court's distinct use in these questions of "monetary bail" and "bail" is consistent with historical practice, under which the unadorned term "bail" referred to both monetary and non-monetary conditions of a defendant's release. This brief takes the same approach.

INTRODUCTION

I. Because of the fundamental importance of personal liberty, the U.S. Constitution mandates that an arrestee cannot be detained pretrial absent a compelling government interest and narrow tailoring. Similarly, absent such an interest (and tailoring), a person cannot be detained, at any time, solely because of his or her indigence. These two rights, to pretrial liberty and against wealth-based detention, are fundamental to a just society. And as petitioner agrees, both rights were violated in this case when the trial court set money bail for respondent Kenneth Humphrey at several hundred thousand dollars, without inquiring into his ability to pay and without finding—by clear and convincing evidence, as U.S. Supreme Court precedent requires—that no alternative conditions of release (i.e., non-monetary conditions) could serve the government's legitimate interests.

II. As petitioner also agrees, a California court that requires a financial condition of pretrial release cannot constitutionally set the amount based on victim safety or public safety. Doing so does not survive even rational-basis review, because California law provides for forfeiture of bail only if the defendant fails to make a scheduled court appearance, not if he or she commits a crime or otherwise harms public or victim safety while out on bail.

III. The California Constitution permits denial of bail in non-capital cases only as provided in article I, section 12. Article I, section 28(f)(3) does not govern denials of bail, for either of two reasons. First, the vast majority of it never went into effect. Virtually all of section 28(f)(3) is left over from a 1982 proposition that this Court has twice held did not take effect because it received fewer votes than a competing proposition in the same election. And the 2008 proposition that made minor amendments to the left-over text erroneously presented that text as operative law. Because voters were thus not asked whether to enact the provision in full, their approval of the proposition cannot be deemed to have done so.

Second, even if the 2008 proposition did enact all of section 28(f)(3), construing that provision to control the bail analysis would function as an implied repeal of section 12, because that section states that bail "shall" be granted save in three enumerated circumstances, whereas section 28(f)(3) states only that release on bail "may" be granted in all non-capital cases. The strong presumption against implied repeals is not rebutted here, given: (a) that the 2008 proposition that enacted section 28(f)(3) made no reference to repealing section 12, (b) the importance and age of the right to bail in California, and (c) that such repeal would raise significant due process concerns. The Court should thus hold (again assuming that 28(f)(3) was fully enacted in 2008) that bail can be denied in non-capital cases only as provided in section 12.

STATEMENT

A. Relevant Bail Law

1. The right to release on bail has been preserved in the California Constitution "since its adoption in 1849." *In re Humphrey*, 19 Cal. App. 5th 1006, 1047 n.28 (2018), *review granted and de-publication denied*, 233 Cal. Rptr. 3d 129 (May 23, 2018). That right is now enshrined in article I, section 12 of the California Constitution, which provides that:

> A person shall be released on bail by sufficient sureties, except for:
>
> (a) Capital crimes when the facts are evident or the presumption great;
>
> (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or
>
> (c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.
>
> Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.
>
> A person may be released on his or her own recognizance in the court's discretion.

Clauses (b) and (c) were added to section 12 in 1982, via proposition. *Humphrey*, 19 Cal. App. 5th at 1047 n.28. In that same election:

> A competing initiative ..., Proposition 8 (the "Victims' Bill of Rights"), would have repealed section 12, made release on bail permissive rather than mandatory and enacted the language that is presently found in section 28, including making public safety "the primary consideration" in "setting, reducing or denying bail." After both initiatives passed, the Supreme Court concluded that the provisions of proposed section 28 were preempted by the proposed amendments to section 12, because Proposition 4 received more votes than Proposition 8.

Id. (citations omitted). The decisions alluded to in the last sentence of this passage are *In re York*, 9 Cal. 4th 1133 (1995), and *People v. Standish*, 38 Cal. 4th 858 (2006).

2. In 2008, voters approved Proposition 9 (also known as Marsy's Law), which expanded the rights of crime victims and their families, restricted early release of prisoners, and changed the procedures for granting and revoking parole. *See* Voter Information Guide for 2008, General Election at 58, *available at* https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2265&context=ca_ballot_props (visited Aug. 6, 2018). Proposition 9 also addressed bail, including by making changes to article I, section 28 of the state constitution. One part of section 28—specifically, 28(e)—is the provision that was approved in 1982 but that this Court held preempted in *York* and *Standish*.

The voter information guide for Proposition 9 presented that provision to the voters as follows, with proposed new language in italics,

proposed language to be deleted in strikethrough, and the rest (i.e., the language at issue in *York* and *Standish*) in plain font:

> ~~(e)~~ *(3)* Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, *the safety of the victim,* the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety *and the safety of the victim* shall be the primary ~~consideration~~ *considerations*.
>
> A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. ~~However, no person charged with the commission of any serious felony shall be released on his or her own recognizance.~~
>
> Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney *and the victim* shall be given notice and reasonable opportunity to be heard on the matter.
>
> When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

Voter Information Guide for 2008, General Election, *supra*, at 130.

"[U]nlike the 1982 Victims' Bill of Rights," which this Court addressed in *York* and *Standish*, "Proposition 9 did *not* repeal section 12." *Humphrey*, 19 Cal. App. 5th at 1047 n.28.

B. Factual And Procedural Background

1. Respondent Kenneth Humphrey, "a retired shipyard laborer, is 6[4] years of age and a lifelong resident of San Francisco." *Humphrey*,

19 Cal. App. 5th at 1016. In 2017, a 79-year-old man who lived in the same senior living home as Humphrey told police that he had been robbed in his apartment, and he later identified Humphrey as the perpetrator. *Id.* at 1016-1017. Humphrey was charged with robbery, residential burglary, inflicting injury on an elder and dependent adult, and theft from an elder or dependent adult. *Id.* at 1017.

At the arraignment, the trial court declined Humphrey's request to be released on his own recognizance, requiring a financial condition of release (i.e., money bail) in the amount of $600,000—the amount prescribed by the money-bail schedule—and ordering Humphrey to stay off the floor of the building where the victim's apartment was located. *Humphrey*, 19 Cal. App. 5th at 1017-1018. Humphrey subsequently moved for a bail hearing, arguing that he had a constitutional right to "individualized" findings regarding the appropriate conditions of release (if any). *Id.* at 1018. At the hearing, the court lowered the financial condition of release to $350,000 and ordered Humphrey to participate in a residential drug-treatment program that had accepted him. *Id.* at 1021. As his counsel pointed out, however, Humphrey could not afford $350,000, and thus would not be able to participate in the program because he would remain in jail. *Id.*

2. Humphrey petitioned the Court of Appeal for a writ of habeas corpus. *Humphrey*, 19 Cal. App. 5th at 1015. As summarized by that court, Humphrey argued that:

> requiring money bail as a condition of pretrial release at an amount ... impossible for the defendant to pay is the functional equivalent of a pretrial detention order. Because the liberty interest of an arrestee is a fundamental constitutional right entitled to heightened judicial protection, such an order can be constitutionally justified ... only if the state "first establish[es] that it has a compelling interest which justifies the [order] and then demonstrate[s] that the [order is] necessary to further that purpose." ... [T]o do this, the ... court must find that no condition or combination of conditions of release could satisfy the purposes of bail, which are to assure defendants' appearance at trial and protect victim and public safety.

Id. (first four alterations in original) (citations omitted). Consistent with these arguments, Humphrey asked the Court of Appeal to:

> either order his immediate release on his own recognizance or remand the matter to the superior court for an expedited hearing, with instructions to (1) conduct a detention hearing consistent with ... the California Constitution and the procedural safeguards discussed in [*United States v. Salerno*, 481 U.S. 739 (1987)]; and (2) set whatever least restrictive, nonmonetary conditions of release will protect public safety; or (3) if necessary to assure his appearance at trial or future hearings, impose a financial condition of release after making inquiry into and findings concerning [Humphrey's] ability to pay.

Id. at 1015-1016.

After initially opposing the petition, "the Attorney General filed a return ... agree[ing] with [Humphrey] that a writ of habeas corpus should issue for the purpose of providing [Humphrey] with a new bail hearing." *Humphrey*, 19 Cal. App. 5th at 1016. The Attorney General stated that he would "not defend any application of the bail law that does not take into

consideration a person's ability to pay, or alternative methods of ensuring a person's appearance at trial." *Id.*

The Court of Appeal reversed the bail determination and remanded. Applying the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution, as interpreted in two lines of U.S. Supreme Court case law, the Court of Appeal held that:

> a court may not order pretrial detention unless it finds either that the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably necessary to ensure his or her appearance at future court proceedings; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and the community.

Humphrey, 19 Cal. App. 5th at 1026. Because none of these findings was made in this case, the Court of Appeal directed the trial court to hold "a new bail hearing at which the court ... determines his ability to pay, considers nonmonetary alternatives to money bail, and, if it determines [Humphrey] is unable to afford the amount of bail the court finds necessary, follows the procedures and makes the findings necessary for a valid order of detention." *Id.* at 1014.[2]

[2] Having resolved these federal constitutional issues, the court declined to address the state-law question of which arrestees may be detained pretrial under California's Constitution. *See* 19 Cal. App. 5th at 1047.

3. On remand, the superior court ordered Humphrey's release on various non-financial conditions, including his admittance to a residential program for seniors. Several weeks later, this Court granted review of the Court of Appeal's decision on its own motion. In doing so, the Court designated the San Francisco District Attorney as the petitioner, denied requests to de-publish the Court of Appeal's decision, and directed briefing on the three questions reproduced at the outset of this brief.

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY HELD THAT DUE-PROCESS AND EQUAL-PROTECTION PRINCIPLES REQUIRE CONSIDERATION OF ABILITY TO PAY WHEN IMPOSING MONEY BAIL

A. "In our society," the U.S. Supreme Court has explained, "liberty is the norm and detention prior to trial ... is the carefully limited exception." *Salerno*, 481 U.S. at 755. Pretrial liberty cannot be the norm, however, if trial courts can impose secured money bail (meaning money that must be paid upfront) without considering the defendant's ability to pay. Recognizing this, the Court of Appeal here held, as a constitutional matter, that "a court which has not followed the procedures and made the findings required for an order of detention must, in setting money bail, consider the defendant's ability to pay and refrain from setting an amount so beyond the defendant's means as to result in detention." *Humphrey*, 19 Cal. App. 5th at 1037. As petitioner agrees (*see, e.g.*, Br. 12), that holding is correct.

Imposing money bail without considering ability to pay implicates two fundamental constitutional rights: (1) the right against wealth-based detention (meaning detention solely due to indigence), a right that is grounded in both equal-protection and due-process principles, and (2) the substantive-due-process right to pretrial liberty. Each right is discussed in turn.

Wealth-based detention. The U.S. Supreme Court recognized the right against wealth-based detention decades ago, holding in *Tate v. Short*, 401 U.S. 395 (1971), that a person may not be "subjected to imprisonment solely because of his indigency," *id.* at 397-398. This principle led the Court to strike down state and local practices that effected such imprisonment not only in *Tate* but also in *Williams v. Illinois*, 399 U.S. 235 (1970), and *Bearden v. Georgia*, 461 U.S. 660 (1983). In *Bearden*, the Court reiterated the core principle on which the right rests, namely the "impermissibility of imprisoning a defendant solely because of his lack of financial resources." *Id.* at 661; *accord In re Antazo*, 3 Cal. 3d 100, 110-111 (1970); *Charles S. v. Superior Court*, 32 Cal. 3d 741, 750-751 (1982).

The right against wealth-based detention is unusual because it "reflect[s] both equal protection and due process concerns." *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996). Hence, when the U.S. Supreme Court held that the indigent are not a suspect class for equal-protection purposes, it expressly exempted the *Williams-Tate-Bearden* line of cases because they

involved an "absolute deprivation" of liberty to a "class ... composed only of persons who were totally unable to pay the demanded sum." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 21-22 (1973). Similarly, such cases are not limited by the ordinary equal-protection rule excluding disparate-impact liability. *See M.L.B.*, 519 U.S. at 125-127 (distinguishing *Washington v. Davis*, 426 U.S. 229 (1976), which adopted that rule).

Though *Williams*, *Tate*, and *Bearden* involved penal fines (fines imposed on those already convicted), courts have extended those cases' holdings to the pretrial context. The en banc Fifth Circuit did so, for example, in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978). The court there recognized (as did the Court of Appeal here) that the core holding of *Williams*, *Tate*, and *Bearden*—that post-conviction imprisonment "solely because of indigent status is invidious discrimination and not constitutionally permissible"—has even "broader ... implications" with pretrial arrestees, that is, individuals "accused but not convicted of crime." *Id.* at 1056; *accord Humphrey*, 19 Cal. App. 5th at 1033 ("The liberty interest of the defendant, who is presumed innocent, is even greater [in the bail context]."). That conclusion accords with the U.S. Supreme Court's explanation that bail "serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the

presumption of innocence ... would lose its meaning." *Stack v. Boyle*, 341 U.S. 1, 4 (1951).

In sum, a court must inquire into a defendant's ability to pay before imposing a financial condition of release because otherwise it cannot know whether such a condition would result in wealth-based detention.

Pretrial liberty. Imposing money bail also implicates the constitutional right to pretrial liberty. As the U.S. Supreme Court explained in *Salerno*, an "individual's ... interest in liberty" is "fundamental," and it is therefore a "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt." 481 U.S. at 749, 750. The Court has similarly explained that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Under this precedent, judicial orders of pretrial detention are subject to strict scrutiny. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780-781 (9th Cir. 2014) (en banc).[3]

Strict scrutiny applies to the imposition of monetary bail whenever it results in detention due to indigence. That is because unaffordable money bail "is the functional equivalent of an order for pretrial detention." *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017);

[3] *Salerno* upheld preventive detention under the 1984 Bail Reform Act in "extremely serious" felony cases. 481 U.S. at 750. This case does not present the question of how serious an offense must be under federal law to justify the deprivation of a defendant's pretrial liberty.

accord State v. Brown, 338 P.3d 1276, 1292 (N.M. 2014); *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (per curiam); *United States v. Leisure*, 710 F.2d 422, 425 (8th Cir. 1983); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) (per curiam). Courts in this state have likewise recognized that an order to pay secured money bail in an amount the defendant cannot pay is a de facto detention order, that is, an order depriving the defendant of his right to pretrial liberty. *E.g.*, *In re Christie*, 92 Cal. App. 4th 1105, 1109 (2001).

Consistent with the foregoing arguments, the Court of Appeal explained here that both the *Salerno* and *Williams-Tate-Bearden* lines of cases "compel the conclusion" that a court, in imposing money bail, must make a finding concerning the defendant's ability to pay. 19 Cal. App. 5th at 1037; *see also id.* at 1041. If a court does not make that inquiry, it cannot know whether requiring money bail of a particular amount would result in pretrial detention, implicating the defendant's rights against wealth-based detention and to pretrial liberty.

Consideration of bail alternatives is likewise constitutionally required, as the Court of Appeal also held, *see* 19 Cal. App. 5th at 1048, and as petitioner agrees (Br. 12). *Bearden* leaves no doubt about this, stating that if a statutorily required fine is unaffordable, then "the court must consider alternative measures of punishment other than imprisonment." 461 U.S. at 672. And, the Court continued, "[o]nly if

alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay." *Id.* Similarly, *Salerno* upheld pretrial-detention orders where the government proved there was no feasible alternative, i.e., that "no conditions of release c[ould] reasonably assure the safety of the community or any person." 481 U.S. at 750; *see also Humphrey*, 19 Cal. App. 5th at 1037; *Lopez-Valenzuela*, 770 F.3d at 780; *Brangan*, 80 N.E.3d at 962. Applied to this context, these holdings mean that a court can impose an unaffordable financial condition of release only if it concludes that no other conditions will satisfy the government's compelling interests. *Humphrey*, 19 Cal. App. 5th at 1037. And again, a court cannot know whether a particular amount of money bail would be unaffordable unless it inquires into the defendant's ability to pay. Such an inquiry is thus required by due process and equal protection.

B. The cases cited above do not hold that the U.S. Constitution never permits money bail to be imposed in an amount the defendant cannot pay. As the Court of Appeal explained, if a court concludes that "an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances" (or serve another compelling government interest), then it "may impose that amount," but only "upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose." 19 Cal. App. 5th at 1037. The Court of Appeal was

correct to conclude that clear and convincing evidence (the same standard mandated by article I, section 12) is the minimum standard of proof allowed on this point under the Due Process Clause.[4]

"The function of a standard of proof ... is [partly] to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quotation marks omitted). In addition (and relatedly), "[t]he standard serves ... to indicate the relative importance attached to the ultimate decision." *Id.*

Given these functions, the U.S. Supreme Court has "mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (quoting *Addington*, 441 U.S. at 424). Of particular relevance here, "the Court has deemed this level of certainty necessary ... in a variety of ... proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'" *Id.* (citing cases). When a person might be detained, a heightened "standard of proof

[4] Petitioner appears to agree with that conclusion (*see* Br. 46-47), although he addresses it only in discussing the third issue presented. Respondent submits that the proper standard of proof is, as the Court of Appeal's opinion indicates, also central to the first issue presented, because it dictates when money bail can be imposed even if the defendant is unable to pay.

... reflects the value society places on individual liberty." *Addington*, 441 U.S. at 425.

This precedent leaves no doubt that clear and convincing evidence is required before a court can detain an arrestee pretrial (either transparently or by requiring an unaffordable financial condition of release). There is no reasonable basis to dispute that the "individual interests at stake" in those circumstances are "particularly important." *Santosky*, 455 U.S. at 756. This Court has held that personal liberty is "a fundamental interest second only to life itself in terms of constitutional importance." *Van Atta v. Scott*, 27 Cal. 3d 424, 435 (1980); *accord Salerno*, 481 U.S. at 750 (describing "the individual's ... interest in liberty" as "fundamental"). This Court has therefore required clear and convincing evidence in other cases implicating similar liberty interests, such as *In re Manuel L.*, 7 Cal. 4th 229 (1994), where the issue was whether a minor understood the wrongfulness of his criminal actions and thus could be prosecuted for them (with the concomitant risk of loss of liberty). The U.S. Supreme Court has likewise held that a heightened standard is constitutionally mandated in cases involving potential denials of individual liberty. For example, *Addington* required clear and convincing evidence in order to detain an intellectually disabled individual based on the possibility of future dangerousness. *See* 441 U.S. at 432; *accord Foucha*, 504 U.S. at 80 (citing *Jones v. United States*, 463 U.S. 354, 362 (1983)). "[T]he individual's interest in the

outcome of a civil commitment proceeding," the *Addington* Court wrote, "is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." 441 U.S. at 427. The same is true here.

In fact, the U.S. Supreme Court has addressed the heightened standard of proof in this very context (denials of the right to pretrial liberty). In rejecting a facial challenge to the 1984 Bail Reform Act, the Court in *Salerno* repeatedly relied on the fact that the statute authorized pretrial detention only if the government proved by clear and convincing evidence that no conditions of release could reasonably assure public safety. *See Kleinbart v. United States*, 604 A.2d 861, 869 (D.C. 1992) (noting *Salerno*'s repeated reliance on that fact). Indeed, the *Salerno* Court referred to the clear-and-convincing requirement half a dozen times, including in the first sentence of the opinion. *See* 481 U.S. at 741, 742, 744, 750, 751. Though the Court was not presented with whether clear and convincing evidence was constitutionally required, its pervasive references to the heightened standard strongly suggest that it is. So does the fact that the Court, in subsequently striking down Louisiana's system for "detention of insanity acquittees who are no longer mentally ill," *Foucha*, 504 U.S. at 81, repeatedly emphasized the clear-and-convincing standard, *see id.* at 80-81 (citing *Salerno*).

That a heightened evidentiary standard is required in this context is particularly clear given that the liberty interest is typically even greater here than with civil commitments, where *Addington* mandated a clear-and-convincing standard. Although a period of civil commitment sometimes lasts longer than a period of pretrial detention, a "detainee's ability to adequately prepare a defense is greatly curtailed," not only because "consultation with an attorney is severely impaired," but also because "[i]mprisonment severely hinders the detainee's ability to gather evidence and interview witnesses." *Van Atta*, 27 Cal. 3d at 435-436; *accord Humphrey*, 19 Cal. App. 5th at 1032. This handicapping increases the risk of conviction, which can lead to a much lengthier period of detention than a civil commitment—and the many collateral consequences that accompany a criminal conviction. Empirical research also indicates that those who are convicted after being detained pretrial receive longer sentences than those who are convicted after being free pretrial. *See, e.g.*, Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 747, 748 tbl. 3 (2017); Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 18 (2017), *available at* https://ssrn.com/abstract=2777615 (visited Aug. 6, 2018). This additional impact on personal liberty further confirms that pretrial detention demands clear and convincing evidence (as California's Constitution has also long required).

Petitioner notes (Br. 47 n.7) that some federal courts have, despite the foregoing, applied a preponderance standard when the issue is detention based on flight risk rather than (as in *Salerno*) detention based on possible dangerousness. Those courts, however, did so as a matter of statutory interpretation, reasoning that the Bail Reform Act imposes a clear-and-convincing standard for dangerousness-based detention while remaining "silent with regard to the burden of proof governing the finding that a person poses a risk of flight." *United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985); *accord United States v. Fortna*, 769 F.2d 243, 250 (5th Cir. 1985); *United States v. Medina*, 775 F.2d 1398, 1402 (11th Cir. 1985); *United States v. Chimurenga*, 760 F.2d 400, 405-406 (2d Cir. 1985). None of the cases "analyze[d] the *constitutional* ramifications of its decision." *Motamedi*, 767 F.2d at 1412 (Boochever, J., concurring in part and dissenting in part). And as a matter of due process, there is no reason that the standard should vary based on why a defendant is detained. Whatever the basis, the deprivation of the individual's liberty—which is the rationale for the heightened standard—is the same. *See Kleinbart*, 604 A.2d at 870.

In short, due process requires a heightened standard of proof when sufficiently important interests are at stake. And as both this Court and the U.S. Supreme Court have recognized, hardly any interest is more important than personal liberty. This Court should therefore hold that pretrial liberty

cannot constitutionally be denied, including by imposing unaffordable money bail, unless the trial court makes the necessary findings by clear and convincing evidence.[5]

II. A CALIFORNIA COURT MAY NOT CONSIDER PUBLIC OR VICTIM SAFETY IN SETTING MONETARY BAIL

As with the first question presented, respondent agrees with petitioner's answer (Br. 26) to this Court's second question: It is unconstitutional for a court in California to consider public safety, including victim safety, when imposing monetary bail.

The use of money bail discriminates against poor defendants, who unlike other defendants frequently cannot afford to secure their freedom. To justify such wealth-based differential treatment, the government's action—here, imposing a financial condition of release—must be rationally related to a legitimate government interest (unless the action results in detention, in which case, as explained, it must satisfy strict scrutiny). Protecting public safety is certainly a legitimate government interest; in fact, it is compelling. *Salerno*, 481 U.S. at 749. But money bail, and the

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[5] The discussion in this section (as in the next one) rests on the Fourteenth Amendment to the U.S. Constitution. Respondent's habeas petition expressly disavowed the separate argument "that unaffordable money bail is excessive" in violation of the Eighth Amendment (or the state constitution). Pet. 22. That separate argument, having not been raised in the petition, is not before this Court—and for clarity the Court may deem it appropriate to note that in its opinion. To the extent the Court wishes to address the issue, it should await a case in which the parties have presented it with full briefing.

wealth-based classification that its use creates, is not rationally related to that interest. That is because no provision of California law provides for the forfeiture of money bail if the defendant harms public or victim safety, even by committing a crime, while out on bail. California law instead provides that money bail is forfeited "only … when a defendant fails to appear at a scheduled court appearance without sufficient excuse." *People v. National Automobile & Casualty Insurance Company*, 98 Cal. App. 4th 277, 285 (2002); *see also* Cal. Penal Code §1305(a) (providing for forfeiture if "a defendant fails to appear" for a required judicial proceeding), *cited in* Pet. Br. 20. Given the absence of any provision for forfeiture of money bail based on the commission of a crime, imposing such bail does nothing to protect public safety or victim safety, because it creates no incentive for the defendant to refrain from criminal behavior. *See Reem v. Hennessy*, 2017 U.S. Dist. LEXIS 210430, *8 (N.D. Cal. Dec. 21, 2017); *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1109 (S.D. Tex. 2017) (where money bail is "not subject to forfeiture for new criminal activity," "requiring secured money bail provides no incentive to lawabiding behavior during pretrial release"), *aff'd in relevant part*, 892 F.3d 147, 166 (5th Cir. 2018) (op. on reh'g).

As mentioned, moreover, if the imposition of money bail results in a defendant's detention, the government must satisfy not rational-basis scrutiny but strict scrutiny, because the wealth-based classification is then

denying the defendant's "fundamental" right to pretrial liberty. *People v. Olivas*, 17 Cal. 3d 236, 251 (1976); *see also Serrano v. Priest*, 5 Cal. 3d 584, 597 (1971) (strict scrutiny applies when a wealth-based classification denies a fundamental right or interest). For the same reason just discussed regarding rational-basis review, the use of money bail to further the government's interest in protecting safety does not survive strict scrutiny.

To be sure, the imposition of unaffordable money bail could conceivably promote safety, by engendering the defendant's pretrial detention. But that detention occurs (by definition) only because the defendant is indigent. *See ODonnell*, 251 F. Supp. 3d at 1109. An otherwise identically situated defendant with access to funds would not be detained—in which case, as discussed, neither victim safety nor public safety would be advanced. Such use of money bail therefore does not survive strict scrutiny. That is because the government has no legitimate, let alone compelling, interest in ensuring the safety of victims and the public *only from poor defendants*. Or, put another way, using money bail is not sufficiently tailored to further the government's compelling interest in ensuring safety, because it does nothing to further that interest when the defendant can pay. Under either framing, the bottom line is the same: "The state cannot detain the indigent person based on public safety concerns while letting the wealthy person walk only because he has money." *Reem*, 2017 U.S. Dist. LEXIS 210430, at *13.

In sum, the Court of Appeal correctly held that public and victim safety can be considered only (1) when determining whether pretrial detention is required, or (2) in setting *non-monetary* conditions of release, which not only do not suffer the same equal-protection infirmity but also can be rationally related to safety. *See* 19 Cal. App. 5th at 1044. If a court considers *money* bail, the sole question is "the amount necessary to secure the defendant's appearance at trial or a court-ordered hearing," if any. *Id.*

III. UNDER THE CALIFORNIA CONSTITUTION, BAIL MAY BE DENIED IN NON-CAPITAL CASES ONLY AS PROVIDED IN ARTICLE I, SECTION 12(b)-(c)

The third question on which this Court directed briefing asks when the state constitution permits bail to be denied in non-capital cases. This question includes the subsidiary issue of whether denials of bail are governed by one or both of two provisions: article I, section 12(b)-(c) and article I, section 28(f)(3). The answer to this Court's third question is that the California Constitution authorizes bail to be denied in non-capital cases only under the circumstances stated in section 12(b)-(c), because that section alone governs the issue.

A. Article I, Section 28(f)(3) Remains Inoperative

Section 28(f)(3) does not govern the denial of bail in non-capital cases for the simple reason that the provision is inoperative. As elaborated below, this Court twice held before 2008 that the virtually identical

predecessor to that provision never took effect, and a proposition adopted by the voters that year did not put it into effect.

1. In *In re York*, and again in *People v. Standish*, this Court held that section 28(f)(3) (then denominated 28(e)) was inoperative. The reason, this Court explained, is that in the same 1982 election in which the voters adopted 28(e) by proposition, they also approved a proposition amending article I, section 12—and those amendments conflicted with section 28(e). *See York*, 9 Cal. 4th at 1140 n.4; *Standish*, 38 Cal. 4th at 874-878. Because the proposition approving section 28(e) received fewer votes than the proposition amending section 12, the latter prevailed and section 28(e) never took effect. *See* Cal. Const. art. II, §10(b) ("If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.").

2. In 2008, California voters approved Proposition 9, which expanded the rights of crime victims, restricted early release, and changed the procedures for granting and revoking parole. It also made minor changes to section 28(e) (including re-numbering it 28(f)(3)) and to section 28 more generally. Those changes, however, cannot be interpreted as re-enacting the provisions declared inoperative in *York* and *Standish*.

A review of the proposed text presented to the voters in 2008 makes this clear. As shown in the Statement, the proposed changes to 28(e) appeared in the voter information guide as follows, with proposed new

language in italics, proposed language to be deleted in strikethrough, and the rest (i.e., the language at issue in *Standish* and *York*) in plain font:

> ~~(e)~~ *(3)* Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, *the safety of the victim,* the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety *and the safety of the victim* shall be the primary ~~consideration~~ *considerations*.
>
> A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. ~~However, no person charged with the commission of any serious felony shall be released on his or her own recognizance.~~
>
> Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney *and the victim* shall be given notice and reasonable opportunity to be heard on the matter.
>
> When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

Voter Information Guide, *supra*, at 130; *see also id.* at 128 (confirming that "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"). Proposition 9 was thus presented as making only a few changes to a pre-existing "Public Safety Bail" provision, i.e., section 28(e). Nothing about the proposed text informed voters that this pre-existing provision had been declared inoperative by this Court, let alone suggested

that the voters were being asked to enact (that is, re-enact) the entire provision.

In fact, the proposed text affirmatively suggested otherwise, by putting most of 28(f)(3) in plain font rather than the italicized font used to denote proposed new language. That presentation told voters that 28(f)(3) was largely already operative, because California law requires that "provisions of [a] proposed measure differing from the *existing laws* affected shall be distinguished in print, so as to facilitate comparison." Cal. Elec. Code §9086(f) (emphasis added).[6]

Other relevant election materials likewise did not inform voters about the defunct status of section 28(e), let alone hint that a complete re-enactment was being proposed. Everything in the voter information guide—the official title and summary, the legislative analyst's discussion, and the arguments for and against the proposition—took the same approach as the proposed text, i.e., treating the defunct language as operative and the proposition as making only a few changes to that operative language. *See* Voter Information Guide, *supra*, at 58-63. For example, the official title and summary stated that Proposition 9 "[e]stablishes victim safety as [a]

[6] The other bail-related change that Proposition 9 proposed was adding a new section 28(b)(3), which provides that crime victims have 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." Voter Information Guide, *supra*, at 129. That the voter information guide presented this provision in italics—unlike most of the proposed 28(f)(3)—further shows the message voters were given about 28(f)(3).

consideration in determining bail." *Id.* at 58. That would indeed have been the sole consideration the proposition would "establish" *if* voters were being asked to approve just the italicized additions and struck-through deletions to the text block-quoted above. But if instead they were being asked to enact 28(f)(3) in its entirety, then Proposition 9 also would have established "protection of the public" as a consideration, because that phrase was not already in the constitution as a bail consideration (save in the defunct 28(e)). In addition, of course, if voters were being asked to enact all of 28(f)(3), then the proposition would also "establish" entirely new categories of offenses eligible for pretrial detention.

Given the uniform message that the Proposition 9 ballot materials presented—that the only changes to the existing bail law were a notice requirement and consideration of victim safety—the voters cannot be deemed to have revived those portions of section 28(e) held inoperative in *York* and *Standish*. As petitioner himself says (Br. 37-38), this Court has repeatedly explained that in construing initiatives, "the voters should get what they enacted, not more and not less." *People v. Valencia*, 3 Cal. 5th 347, 375 (2017); *Robert L. v. Superior Court*, 30 Cal. 4th 894, 909 (2003); *Hodges v. Superior Court*, 21 Cal. 4th 109, 114 (1999). Holding that Proposition 9 re-enacted all of 28(e) would give the voters "more" (indeed, substantially more) than they enacted, because as explained the proposed

textual changes did not identify all of 28(f)(3) as new. It instead showed only a discrete few changes as new.[7]

To be clear, respondent is not arguing that the voters in 2008 were *precluded*, whether by *York* and *Standish* or otherwise, from re-enacting the defunct 28(e) in its entirety. They certainly could have done so (subject, of course, to any federal constitutional challenge). The point is that they did not do so, because the question was not put to them.

That does not mean that the changes approved in Proposition 9 are entirely void. The changes that the proposition made to parts of section 28 other than the re-numbered (f)(3), including the many provisions about victims' rights (a topic petitioner discusses at length), unquestionably took effect, because *York* and *Standish* held only that section 28(e), i.e., the bail provision, was inoperative. This Court can also give effect to the genuinely new material in section 28(f)(3)—that is, the language italicized in Proposition 9—by reading those additions into section 12, which covers the same subject matter. Those two additions were: (1) requiring that victims receive notice and an opportunity to be heard before anyone arrested for a serious felony is released on bail, and (2) making victim safety the primary consideration when determining conditions of release. *See supra* p.32.

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[7] There is no reason the ballot materials could not have given voters a complete and accurate picture, including about this Court's decisions in *Standish* and *York*. Other initiatives have done so. *See People v. Frierson*, 25 Cal. 3d 142, 185 (1979).

Even if those are now in effect, however, the rest of 28(f)(3) remains inoperative (although as petitioner says (Br. 29-30), parts of the inoperative language have been codified in Penal Code §1275 and thus would remain in effect).[8]

3. Petitioner offers two arguments for why all of section 28(f)(3) is operative. He first says (Br. 32) that "[w]hen amending section 28 in 2008, the electorate was deemed to know existing laws and any judicial construction, which included the prior enactment of section 28 in 1982 and *Standish*." That argument lacks merit for two related reasons.

First, a voter "deemed to know existing laws," Pet. Br. 32, would know the section of California law (cited earlier) requiring that "provisions of [a] proposed measure differing from the existing laws affected shall be distinguished in print, so as to facilitate comparison," Cal. Elec. Code §9086(f). And knowing that law, voters reading the proposed text of 28(f)(3) would reasonably believe the text was not being proposed for

[8] They would remain in effect, of course, to the extent they are not otherwise unconstitutional. For example, one part of section 1275—subsection (c)—conflicts with the federal due process requirement (discussed in Part I) that a court find the absence of adequate alternatives before imposing unaffordable money bail. Section 1275(c) requires a court to find "unusual circumstances" in order to *reduce* money bail below the amount established by a predetermined schedule for serious or violent felonies. The provision thus impermissibly shifts the burden from the government to the arrestee, and allows the imposition of unaffordable money bail (and hence detention) even if alternative conditions of release would satisfy the government's interests.

enactment in its entirety (because it was in plain text) but rather that only a few discrete additions and deletions were being proposed.

Second, an equally weighty presumption confirms that voters would recognize the actual meaning of Proposition 9 as it was presented. That presumption provides that "the voters thoroughly study and understand the content of ... initiative measures." *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*, 51 Cal. 3d 744, 768 (1990), *quoted in Valencia*, 3 Cal. 5th at 370. As explained, voters who thoroughly studied and understood the text of the proposed 28(f)(3) would have seen that they were not being asked to enact all of that section—because most of that section was not in italicized text—but to approve only the few additions and deletions denoted in the proposed text by italics and strikethrough.

This second presumption, moreover, is reinforced by the complete absence in the 2008 ballot materials of any reference to section 28(e) being inoperative or to its being proposed for re-enactment as 28(f)(3). That is critical because this Court does not presume that voters knew about an issue (or had any intent regarding it) when that issue was "apparently opaque to the Attorney General and the Legislative Analyst." *Valencia*, 3 Cal. 5th at 372. In other words, "[i]t is not reasonable to apply a presumption of voter awareness when the text of the initiative and the voter information guide supporting it make no reference whatsoever" to the relevant matter. *Id.* That is the situation here.

Petitioner's other re-enactment argument (Br. 41) is that "[t]he timing of Proposition 9—two years after ... *Standish*—further solidifies the electorate's intent to reenact the bail and detention provisions ... held inoperative by the Court." Petitioner contends, that is, that Proposition 9's timing shows it was a reaction to Standish's invalidation of section 28(e). That argument is likewise without merit.

To begin with, petitioner's view of *Standish* as the driving force behind Proposition 9 is implausible given that the case was never mentioned in the ballot materials. In fact, bail in general was a minor part of Proposition 9, so minor that the "overview" offered by the legislative analyst did not mention it. The overview instead described the proposition's effects as "(1) expand[ing] the legal rights of crime victims and the payment of restitution by criminal offenders, (2) restrict[ing] the early release of inmates, and (3) chang[ing] the procedures for granting and revoking parole." Voter Information Guide, *supra*, at 58. It is highly unlikely, to say the least, that voters' approval of Proposition 9 rested on a desire to overrule *Standish* (and thereby abolish the longstanding right to bail) when that decision was never mentioned—and bail received scant attention—in the voting materials.

More fundamentally, *Standish* is not the case in which section 28(e) was first declared inoperative. Rather, "a series of [earlier] opinions concluded that the relevant provision of Proposition 8 never became

effective, because a competing initiative measure on the same ballot (Proposition 4) garnered more votes than Proposition 8." *Standish*, 38 Cal. 4th at 874-875. The first of those cases, *People v. Barrow*, 233 Cal. App. 3d 721 (1991), was decided 17 years before the vote on Proposition 9. Nor was *Standish* even the first decision of this Court holding section 28(e) inoperative. That case was *York*—decided in 1995, 13 years before Proposition 9 passed. *See Standish*, 38 Cal. 4th at 875 (citing *York*). That is why the *Standish* Court said that it was "adher[ing] to the view that ... the provisions of article I, section 28, subdivision (e) proposed by Proposition 8 did not take effect." *Id.* at 877-878. If anything, then, the timing of Proposition 9 refutes petitioner's claim that the voters intended the proposition to address this Court's precedent by enacting section 28(f)(3) in its entirety. Had that been the voters' desire, they would not have waited well over a decade after *York* to do so.[9]

[9] In making this argument, petitioner quotes (Br. 41) an assertion by the Pretrial Detention Working Group that "[a]lthough Marsy's Law did not directly address article I, section 12 ..., it did reenact, as section 28(f)(3), [the invalidated] provisions addressing bail and [own recognizance] release," Pretrial Detention Reform Workgroup, *Pretrial Detention Reform, Recommendations to the Chief Justice* 23 (Oct. 2017), *available at* http://www.courts.ca.gov/documents/PDRReport-20171023.pdf (visited Aug. 6, 2018). The report offered no support or rationale for that assertion, nor addressed any of the arguments herein for why the assertion is wrong.

B. Even If Operative, Section 28(f)(3) Does Not Govern When Bail May Be Denied In Non-Capital Cases

If this Court concludes that section 28(f)(3) was enacted in full in 2008, it should still hold that bail may be denied in non-capital cases only as provided in section 12(b)-(c).

1. Only one part of section 28(f)(3) could be read to speak to the third question presented, i.e., "[u]nder what circumstances ... the California Constitution permit[s] bail to be denied in noncapital cases." That one part is the first sentence of 28(f)(3), which states: "A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great." Read literally, this sentence provides that (1) there is no right to bail in California in *any* case—because the sentence says only that a defendant "may" be released—and (2) bail is categorically unavailable in the specified capital cases. As even petitioner recognizes, however, *see infra* p.45, that reading cannot be correct.

Article I, section 12 expressly confers a right to bail in most cases, providing (with certain enumerated exceptions) that "[a] person *shall* be released on bail by sufficient sureties." (emphasis added). Reading the first sentence of 28(f)(3) literally, therefore, would mean that 28(f)(3) repealed that portion of section 12. But neither Proposition 9 itself nor the relevant ballot materials stated that the proposition would do so. *See Humphrey*, 19 Cal. App. 5th at 1047 n.28; Pet. Br. 35. Indeed, neither the proposition nor the ballot materials even *mentioned* section 12. Repeal would thus have

been implicit. For decades, however, this Court has consistently held that there is a "strong" presumption against implied repeal of one constitutional provision by another. *City & County of San Francisco v. County of San Mateo*, 10 Cal. 4th 554, 567 (1995); *Western Oil & Gas Association v. Monterey Bay Unified Air Pollution Control District*, 49 Cal. 3d 408, 420 (1989); *Board of Supervisors v. Lonergan*, 27 Cal. 3d 855, 868 (1980). That presumption is not rebutted here, for three reasons.

a. When the voters adopted section 28(e) via proposition in 1982, the proposition included language explicitly repealing section 12. *See, e.g.*, *Standish*, 38 Cal. 4th at 874, 877. That repeal language, however, was omitted from Proposition 9 in 2008. *See Humphrey*, 19 Cal. App. 5th at 1047 n.28; *accord* Pet. Br. 40 ("[S]ection 28 in 1982 specifically sought to repeal section 12, while the 2008 amendment to section 28 made no mention of repeal or section 12."). This conspicuous omission strongly suggests that the proposition—which for purposes of this argument is assumed to have otherwise re-enacted almost the same language as in 1982—was affirmatively *not* intended to repeal any of section 12. *Cf., e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded[.]"); *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill

but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

b. Implied repeal is also particularly improbable here given the age and importance of the constitutional right to bail in California (which, as explained, would be abrogated if the first sentence of 28(f)(3) were read literally). "The right to bail has been part of the California Constitution since its adoption in 1849." *Humphrey*, 19 Cal. App. 5th at 1047 n.28 (citing *People v. Turner*, 39 Cal. App. 3d 682, 684 (1974)). And that right, save for the enumerated exceptions, is "absolute." *In re Law*, 10 Cal. 3d 21, 25 (1973). This absolute nature reflects the right's importance. As explained, this Court has recognized that personal liberty is "a fundamental interest second only to life itself in terms of constitutional importance." *Van Atta*, 27 Cal. 3d at 435. The right to release on bail is a critical safeguard of that interest. Repealing the right would therefore severely undermine the fundamental interest in personal liberty.

It is exceedingly unlikely that such a critical right—one enshrined in California's Constitution for almost 170 years—would be repealed implicitly. As the U.S. Supreme Court has observed, those who make the laws "do[] not … hide elephants in mouseholes." *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001). Relying on that observation, this Court has concluded that "[i]t would be unusual in the extreme for the people, exercising legislative power by way of initiative, to

adopt ... a fundamental change only by way of implication." *California Redevelopment Association v. Matosantos*, 53 Cal. 4th 231, 260-261 (2011); *see also In re Christian S.*, 7 Cal. 4th 768, 782 (1994) (similar reasoning regarding the state legislature). The Court of Appeal has likewise rejected a claim that a proposition had implicitly repealed a "fundamental part of our system of jurisprudence." *Wiseman Park, LLC v. Southern Glazer's Wine & Spirits, LLC*, 16 Cal. App. 5th 110, 122 (2017). The same result is warranted here.

c. Lastly, petitioner has not rebutted the strong presumption against implied repeal because such repeal would raise serious due process concerns. Indeed, holding that section 28(f)(3) repealed the section 12 right to bail would likely engender due process violations in tens of thousands of criminal cases, in two different ways.

First, if section 28(f)(3) repealed the section 12 right to bail, then as explained, the California Constitution would authorize bail to be denied in *any* case. But because there is a "fundamental" right to pretrial liberty, *Salerno*, 481 U.S. at 750, due process precludes bail from being denied unless doing so is necessary to further a compelling government interest, *see, e.g.*, *Lopez-Valenzuela*, 770 F.3d at 780-781. In other words, denial of bail is constitutional only if a court finds by clear and convincing evidence that no conditions of release would serve the government's compelling interests. That is not the case for the vast majority of arrestees. Hence,

implied repeal of the section 12 right to bail would mean that the California Constitution authorizes the denial of bail in many cases where denial would violate due process.

Second, as discussed, neither Proposition 9 nor the supporting ballot materials conveyed that the proposition would re-enact section 28(e) in its entirety, let alone that it would repeal section 12 (a section that the proposition, as noted, never mentioned). The proposition's text showed that only minor amendments to 28(e) were being proposed, and the supporting materials—by scarcely mentioning bail—indicated that it was a minor part of the proposition. *See supra* Part III.A. Such "omissions, inaccuracies or misleading statements in the ballot materials" violate due process if "the materials, in light of other circumstances of the election, were so inaccurate or misleading as to prevent the voters from making informed choices." *Horwath v. City of East Palo Alto*, 212 Cal. App. 3d 766, 777 (1989), *cited in Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal. 4th 165, 180-181 (2001). That is a demanding standard. Yet given the complete absence of any reference to section 12 in the text or the ballot materials, it is hard to see how voters could have possibly made an "informed choice[]" about a repeal of that section's right to bail. And if they could not, then repeal would violate the due process rights of any defendant who was denied bail under section 28(f)(3) but would have been entitled to release on bail under section 12.

This Court need not definitively conclude that construing Proposition 9 to implicitly repeal the section 12 right to bail would violate due process in order to reject that construction. The Court need only conclude that the construction would raise "serious constitutional problems." *DeBartolo Corporation v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988), *cited in People v. Gutierrez*, 58 Cal. 4th 1354, 1373 (2014). In that event, the proper interpretation is dictated by the canon of constitutional avoidance, under which "the court will adopt the construction which ... will render [the law] valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable." *Conservatorship of Wendland*, 26 Cal. 4th 519, 548 (2001).

In short, the first sentence of section 28(f)(3) should not be read literally, that is, as implicitly repealing the section 12 right to bail and thus allowing bail to be denied in every case (and requiring it to be denied in every capital case). It should instead should be read as simply reiterating, albeit imprecisely, the right to bail conferred by section 12.

2. Petitioner agrees that the first sentence of section 28(f)(3) should not be read literally, stating (Br. 39-40) that after the approval of Proposition 9, "section 28 ... did not completely repeal the right to bail." Once that concession is accepted—as it should be, for all the reasons given above—there is no doubt that section 12, and not section 28(f)(3), governs

the denial of bail in non-capital cases. That is because no other language in 28(f)(3) address such denials. The remaining language instead:

- prohibits excessive bail;
- enumerates factors that must be considered as part of bail determinations (including specifying the primacy of two factors);
- authorizes release on recognizance;
- requires a hearing—including giving prosecutors and victims notice and an opportunity to be heard—before anyone charged with a serious felony is released on bail; and
- requires that a court state its reasons for decisions regarding release.

Though each of these provisions *relates* to the bail decision, none specifies circumstances in which bail may be denied. That is particularly clear when section 28(f)(3) is compared with section 12. That section does specify—explicitly—when bail may be denied, enumerating three classes of cases (one capital and two non-capital) in which the court may deny bail. The balance of section 28(f)(3) has no comparable language. That should end the inquiry.

Petitioner claims, however (Br. 39), that section 28 authorizes the denial of bail in three circumstances: (1) alleged felonies that caused the victim actual or threatened harm (be it "physical, psychological, or financial"), (2) alleged felonies "where the defendant poses a serious danger" to public safety (including victim safety), and (3) alleged felonies "where the defendant poses a serious flight risk." Petitioner points to no

language stating that bail may be denied in any of these circumstances, because there is none. Petitioner instead points to language—not only in 28(f)(3) but also other portions of section 28—that addresses points *related* to bail decisions, and then infers the existence of his three exceptions to the right to release on bail from that related language. This highly attenuated reasoning does not withstand scrutiny.

For example, petitioner's basis for his second and third exceptions (*see* Pet. Br. 38-39) is that flight risk and public/victim safety are two of the factors that 28(f)(3) says must be considered in making bail determinations. But requiring a judge to consider certain factors as part of a discretionary decision is different than authorizing the judge to make particular decisions when that discretion is exercised. The former specifies points that *bear* on the outcome; the latter speaks to the *outcome itself*, in other words, to what the outcome is (or can be) in particular situations. Both section 12 and section 28(f)(3) itself illustrate this difference. Section 12 makes clear that no matter what information is considered, the court may not order pretrial detention unless it finds the case falls within one of the enumerated categories. Similarly, the first sentence of section 28(f)(3) speaks directly to the bail decision itself (although as noted, petitioner rightly does not rely on that sentence), while the remaining sentences do not. They address other topics, including points that bear on the bail decision.

The atextual gap-filling that petitioner's exceptions require him to engage in confirms that they appear nowhere in section 28. For instance, petitioner's third exception (Br. 39) is any felony when the defendant poses a serious flight risk. But even indulging petitioner's erroneous premise—that section 28(f)(3)'s designation of flight risk as a bail *consideration* means flight risk is an actual *exception* to the right to bail—nothing in section 28 supports limiting the exception to "serious" flight risks. To the contrary, 28(f)(3) requires a court to consider any flight risk in making bail determinations. Petitioner appears to justify his "serious" limitation by saying (Br. 39) that "[i]f a defendant poses an unreasonable and unmanageable flight risk, but the court cannot detain that defendant, the court cannot ensure an expeditious enforcement of the victim's rights or honor the victim's right to a speedy trial." That is equally true, however, when the risk of flight is not serious. Petitioner is simply making a policy judgment that the infringement on the defendant's liberty is justified only if the flight risk is "serious." But that is not his judgment to make, and the point is that the reason he needs to make it is because section 28, though making flight risk a factor in bail determinations (as does section 12), does not speak to when bail may be denied based on that factor.

Similarly, petitioner offers no basis for limiting his second exception to cases in which there is a "serious" risk to public safety or victim safety. Again, section 28(f)(3) refers without further qualification to "protection of

the public," yet petitioner is making a policy judgment that a defendant's right to pretrial liberty should not be infringed absent a "serious" risk to public safety. But here too, he has to make that policy judgment because the text of section 28, though making public safety the primary factor in bail determinations, does not speak to when bail may be denied based on that factor.

If petitioner's response to these points is that he imported the "serious" limitation from section 12—which make a threat of "great bodily harm" a prerequisite to a denial of bail—that only underscores the infirmity of his argument. Section 12's "great bodily harm" language, like the section's provisions for denying bail more generally (including specifying the substantive and procedural requirements for doing so), shows what a provision that actually authorizes the denial of bail looks like. As discussed, section 28(f)(3) (save for its first sentence) has no such language.[10]

Petitioner's decision to limit his exceptions to felonies likewise has no basis in the text of section 28(f)(3)—and is inconsistent with the position petitioner himself has been advancing in the lower courts. Apparently recognizing the lack of a textual basis, petitioner reaches beyond subsection

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[10] Petitioner at one point (Br. 45) describes his exceptions as limited to certain "serious felony crimes." The exceptions, however, are broader than the definition of "serious felony" that appears in California law. *See* Cal. Penal Code §§1192.7(c); 1192.8. Petitioner does not acknowledge this, let alone justify a departure from the legislature's definition.

(f)(3), citing (Br. 38) section 28(a)(4)'s reference to detaining "persons who commit felonious acts causing injury to innocent victims." But section 28(a) is not operative language; it instead recites findings and declarations. This Court has declined to import restrictions from a statutory preamble into the operative provisions, explaining that the fact "that the Legislature ... expressed in the statute's preamble a desire 'to encourage continued participation in matters of public significance' does not imply the Legislature intended to impose, in the statute's operative sections, an across-the-board 'issue of public interest' pleading requirement." *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1118 (1999) (citation omitted)). Moreover, if the "felonious acts" language did limit the rest of section 28's language—and petitioner offers no reason it would do so only with 28(f)(3)—then the numerous rights conferred on crime victims by section 28(b) (including confidentiality of potentially harassing information and restitution, among others) would be limited to victims of felonies. That could not have been the people's intent in approving Proposition 9. *See People v. Hannon*, 5 Cal. App. 5th 94, 101 (2016) (holding that one right conferred by section 28(b), the right to restitution, extended to the victim of a misdemeanor).

The point here is not that the Court should merely excise petitioner's "serious" and "felony" limitations, and thereby adopt even more expansive categories of pretrial detention than he proposes. The point is that the

limitations—and more importantly petitioner's exceptions more broadly—are atextual. The exceptions should therefore be rejected entirely.[11]

Petitioner argues, however (Br. 42), that if the Court does not adopt his exceptions, then "courts could not effectuate the intent behind section 28's amendment." That argument simply begs the question of what the intent was. While petitioner assumes that the intent is embodied by his atextual exceptions, this Court has repeatedly held—as petitioner acknowledges (Br. 36-37)—that with a proposition (as with a contract or a statutory or constitutional provision), "the text [i]s the best indicator of intent," *California Redevelopment Association*, 53 Cal. 4th at 265 (citing *Professional Engineers in California Government v. Kempton*, 40 Cal. 4th 1016, 1037 (2007)). And as explained, the text neither supports petitioner's

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[11] Petitioner also cites section 7 of proposition 9, which provides that if anything in the proposition "conflicts with an existing provision of law which provides for greater rights of victims of crime, the latter provision shall apply." Voter Information Guide, *supra*, at 132. Petitioner asserts (Br. 41) that "[b]y incorporating this provision, the electorate surely did not intend that ... section 12 would prevail in detention determinations at the expense of [public or victim] safety." Petitioner, in other words, is claiming that because Proposition 9 says it does not override any already-existing law that provides even *greater* protection for victims, that means section 12 yields to section 28(f)(3) because it (section 12) supposedly provides *less* protection for victims. With respect, that makes no sense. The conflict-of-law provision plays a role only when there is an assertion that section 28(f)(3) "conflicts with an existing provision of law which provides for greater rights of victims of crime." No such claim has been made in this case. The provision is simply irrelevant.

exceptions nor authorizes (save in the first sentence) the denial of bail in any category of non-capital cases.[12]

Finally, this Court should not overlook the breathtaking sweep of petitioner's proposed interpretation of section 28. His first exception to the right to bail, for example, is for any felony that involves *any* physical, psychological, or financial harm to a "victim" (a term that section 28(e), as enacted in 2008, defines to include the spouse, children, parents, siblings, and guardians of anyone directly harmed by a crime). Few felonies would fall outside meet that definition. And taken together, petitioner's three exceptions to the right to bail would effectively allow bail to be denied for any felony charge. Petitioner claims (Br. 44-48) that this approach would satisfy federal constitutional requirements. But that assertion—while dubious given *Salerno*'s emphasis on the fact that the law at issue there applied on permitted detention only for "extremely serious" felony charges, 481 U.S. at 750—is irrelevant. What matters is that petitioner's reading of

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[12] Petitioner apparently recognizes the problems with his proposed atextual exceptions to the right to bail, because he offers the fallback argument (Br. 43-44) that section 28(f)(3) is more specific than section 12 and therefore prevails. That argument fails because section 12 is in fact the more specific provision regarding denials of bail in non-capital cases. In particular, section 12, unlike section 28(f)(3), specifically requires a finding that anything short of detention would endanger the public. It also specifies the standard of proof for the facts that support those findings. And it requires a type of harm to public safety, "bodily harm," more specific than section 28(f)(3)'s protection-of-the-public language. Petitioner's contrary argument—that section 28(f)(3) allows denials of bail in more non-capital cases than section 12 (Br. 44)—shows only that section 28(f)(3) is *broader*, not more specific.

section 28 would dramatically curtail the historic *state* right to bail, authorizing the denial of bail in hundreds of thousands of cases every year. The Court should not embrace a drastic diminution of a fundamental protection unless it concludes that that outcome was both intended by the voters and properly approved by them. For the reasons given above, that conclusion is precluded. Hence, if the Court decides that section 28(f)(3) was enacted in its entirety in 2008, it should hold that that section nevertheless does not govern denials of bail in non-capital cases.

Petitioner argues (Br. 42) that such a holding would bar preventive detention for certain offenses that he thinks should allow for such detention. In making this argument, however, petitioner ignores the significant extent to which non-monetary conditions of release—electronic monitoring, drug or mental-health treatment, and no-contact orders, to name a few—and other judicial tools can address his concerns about public safety or flight risk. Moreover, petitioner's argument (really a thinly disguised scare tactic) does nothing to show what the law is, i.e., how section 28 is properly construed. It instead shows what petitioner thinks the law *should* be, that is, which charges he believes warrant preventive detention. Such pure policy arguments must be brought to elected officials or to the people, not to the courts.

CONCLUSION

The judgment of the Court of Appeal should be affirmed, and this Court should adopt the answers given above to the questions on which the Court directed briefing.

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CERTIFICATE OF COMPLIANCE

According to the word-count function of the computer program used to prepare the foregoing brief, the brief contains 11,828 words, excluding the portions exempted by California Rule of Court 8.520(c)(3).

Thomas G. Sprankling

DECLARATION OF SERVICE

I, Armando Miranda, 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 this action. My business address is 555 Seventh Street, San Francisco, California 94103. I am familiar with the business practice at the Office of the San Francisco Public Defender for collecting electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system 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. Participants who are registered with TrueFiling will be served electronically. Participants who are not registered will receive hard copies through the mail via the United States Postal Service.

That on August 6, 2018, I electronically served the attached Respondent's Brief on the Merits by transmitting a true copy through this Court's TrueFiling system. Because one or more of the participants has not registered with the Court's system or are unable to receive electronic correspondence, on August 6, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at Office of the San Francisco Public Defender at 555 Seventh Street, 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 August 6, 2018, at San Francisco, California.

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