S247278

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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FILED

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Jorge Navarrete Clerk

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IN RE KENNETH HUMPHREY,
on Habeas Corpus.

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

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

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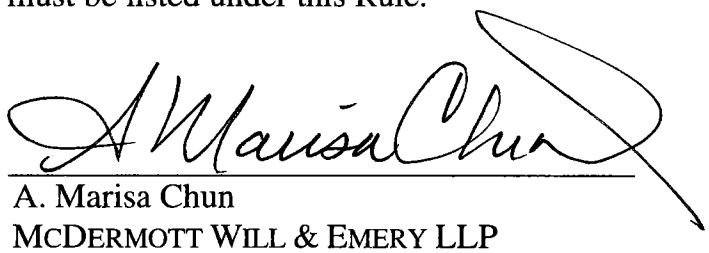
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, rule 8.208, *amici curiae* the Bar Association of San Francisco, the Los Angeles County Bar Association, and the Santa Clara County Bar Association certify that they know of no person or entity that must be listed under this Rule.

Dated: October 9, 2018



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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to California Rules of Court, rule 8.520(f), the Bar Association of San Francisco, the Los Angeles County Bar Association, and the Santa Clara County Bar Association respectfully apply for leave to file the attached brief of *amici curiae* in support of Respondent Kenneth Humphrey.

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

The **Los Angeles County Bar Association** ("LACBA") was founded in 1878 and is one of the largest metropolitan voluntary bar associations in the United States, with nearly 20,000 members. In addition to meeting the professional needs of its members, LACBA actively promotes and advances the fair administration of justice.

The **Santa Clara County Bar Association** ("SCCBA") is a non-profit, non-regulatory professional organization that trains and supports its member attorneys to improve the local administration of justice and to serve the public by fostering improved public understanding of and access to the legal system. Founded in 1917, SCCBA enjoys the support of more than 5,000 attorneys. The SCCBA has a longstanding tradition of advocating for the individual rights of all persons no matter their race, sexual orientation, gender, religion, nationality, or socioeconomic status,

both in the public interest and in the interest of members of the legal profession who may be impacted by unconstitutional governmental actions.

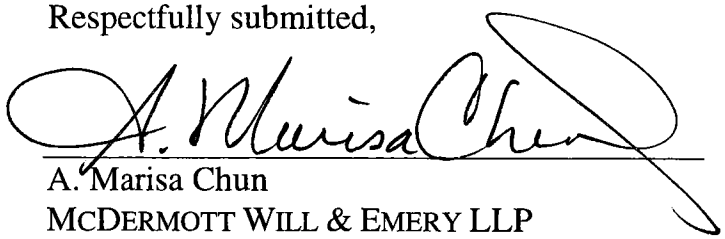
BASF, LACBA, and SCCBA (collectively, "the Bar Associations") bring to this case strong interest in the core values embodied in the California and federal Constitutions and expertise with respect to access-to-justice issues, particularly as they impact low-income residents of our communities. The Bar Associations have worked to protect rights guaranteed by the California and United States Constitutions, including the rights of those accused of crimes.

The Bar Associations submit this brief to assist the Court with its consideration of the constitutional and legal issues presented by California's money bail system by providing data about the consequences of the money bail system on defendants and the public in urban counties, such as San Francisco, Los Angeles, and Santa Clara Counties. Through analysis of empirical data, *amici* seek to enhance this Court's understanding of the current bail system so that California can achieve a pretrial release system that satisfies the California and United States Constitutions.

No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Dated: October 9, 2018

Respectfully submitted,



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INTRODUCTION

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

The Court of Appeal correctly recognized that due process and equal protection require consideration of an accused's ability to pay in setting the amount of bail. Requiring an accused to post bail beyond his or her financial means inevitably results in loss of liberty while awaiting trial, despite a court's decision that the individual could safely re-enter the community, but for his or her inability to pay.

The questions at the heart of this case remain urgent. The undersigned bar associations have seen the real world consequences of the money bail system on defendants, their families, and our greater communities. The unconstitutional bail system has filled our county jails with a large number of presumptively innocent people who are detained simply due to their inability to post bail. The bail system also has a disproportionate impact on minority defendants. Not only do the accused poor lose their liberty while they await trial, but they also face the very real risk of losing their jobs, health, and families. While incarcerated, they cannot as effectively defend themselves, and they are more likely to plead guilty simply to get out of jail. And it is not only the accused poor who suffer the consequences of a constitutionally flawed system. A wealth-based pretrial detention regime correlates with recidivism and costs counties, such as San Francisco, Los Angeles, and Santa Clara Counties, collectively tens of millions of dollars every year.

Contrary to the concerns of certain *amici*, an effective, constitutional pretrial release system that does not unfairly punish the poor is consistent with public and victim safety. Reforms to the bail system in jurisdictions such as San Francisco County, Santa Clara County, New Jersey, and

Washington, D.C., have led to reductions in the percentage of pretrial defendants who are detained due to inability to post bail without impacting public safety and increasing the rate at which defendants appear for court.

Under article I, section 12 of the California Constitution, all Californians have the right to mandatory bail when accused of a noncapital crime other than for three enumerated types of felonies. That provision also reflects the voters' will that, in fixing the amount of bail, public and victim safety be taken into account through, *inter alia,* the court's consideration of the seriousness of the offense charged, the prior criminal record of the defendant, and the probability of his or her appearing at the hearing or trial of the case. Though California voters purported to amend article I, section 28(e) in 2008 by adding "the safety of the victim" as a consideration in setting, reducing, or denying bail, they were not informed that the provision they believed they were amending had, in fact, been held inoperative by this Court. As such, section 12's denial-of-bail provisions continue to control over those set forth in now-section 28(f)(3).

California's recent enactment of Senate Bill No. 10 to abolish the bail system, effective October 1, 2019, is an important step toward eliminating wealth as a determinant of whether one remains free before trial. But the vital work to make our Constitution's promises true for all Californians, regardless of wealth, is not yet complete. This Court's interpretation of the Constitution in this matter can provide crucial guidance to the lower courts as they implement and interpret Senate Bill No. 10 in a manner that upholds due process and equal protection and, ultimately, protects the fundamental interest of all Californians to be free, pending trial, in most non-capital cases—both now and in the new, post-bail regime.

ARGUMENT

I. DUE PROCESS AND EQUAL PROTECTION REQUIRE THAT COURTS CONSIDER A CRIMINAL DEFENDANT'S ABILITY TO PAY IN SETTING THE AMOUNT OF BAIL.

The Court of Appeal correctly held that the federal and California due process and equal protection provisions require an individualized assessment of a criminal defendant's ability to pay in setting or reviewing the amount of bail. (*In re Humphrey* (2018) 19 Cal.App.5th 1006, 1025–1045, review granted and de-publication denied May 23, 2018, S247278.)[1]

Two related lines of cases discussed by the Court of Appeal compel this conclusion. First, a defendant may not be imprisoned solely because he or she cannot make a payment that would allow a wealthier defendant to avoid imprisonment. (*In re Humphrey*, *supra*, 19 Cal.App.5th at pp. 1025–1030 [discussing *Bearden v. Georgia* (1983) 461 U.S. 660 and its progeny].)

Second, unless an offense is constitutionally or statutorily unbailable, a defendant is presumed eligible for release on bail before trial,

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[1] *Amici* respectfully submit that Senate Bill No. 10 has no effect on the resolution of the issues presented by this case. (See Court's Sept. 12, 2018 Order.) On August 28, 2018, Governor Edmund G. Brown Jr. signed into law Senate Bill No. 10. (See Sen. Bill No. 10 (2017–2018 Reg. Sess.).) However, if a referendum on Senate Bill No. 10 is qualified to appear on the November 2020 ballot, Senate Bill No. 10's implementation would be delayed until the election and, potentially, voters could repeal the new law. (See generally Cal. Const., art. II, § 9.)

Therefore, until at least October 1, 2019, the existing bail system will continue to determine whether arrestees will be released or detained. (Cal. Const., art. I, §§ 12, 28; Pen. Code §§ 1268–1276.5.) Further, in enacting Senate Bill No. 10, the Legislature stated its intent that preventive detention would only be permissible in a manner that is consistent with the United States Constitution "and only to the extent permitted by the California Constitution as interpreted by the California courts of review." (Sen. Bill No. 10, *supra*, § 1.) Therefore, the issues presented by this case remain relevant and the Court should resolve them.

consistent with the federal and state constitutional right of pretrial liberty. (*In re Humphrey*, *supra*, 19 Cal.App.5th at pp. 1030–1040 [discussing *United States v. Salerno* (1987) 481 U.S. 739 and its progeny].) Petitioner the People of the State of California (hereafter, "the government") and respondent Kenneth Humphrey agree that the Court of Appeal correctly decided the first issue presented in this Court's order granting review, and they ably discuss why the relevant case law supports the Court of Appeal's analysis. The current state of California's bail system and its inequitable consequences in counties such as San Francisco, Los Angeles, and Santa Clara provide further support for the Court of Appeal's decision that courts must make an individualized consideration of ability to pay in setting or reviewing the amount of bail.

A. The Bail System Disproportionately Deprives Poor Defendants of Their Liberty, Before Trial, With a Disparate Impact on Minority Defendants.

Respondent was not unusual in being detained before trial merely because he was unable to afford bail. Through the first half of 2018, more than 64% of individuals detained in California jails—more than 46,000 men and women—were awaiting either trial or sentencing.[2] These detention rates in California parallel those nationwide. Of the approximately 720,000 men and women who were detained in city and county jails in the United States in 2015, nearly two-thirds were in custody awaiting trial.[3] Many of

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[2] See Cal. Bd. State & Cmty. Corrs., Jail Population Trends: Sentenced and Non-Sentenced ADP (last updated Sept. 18, 2018) <http://www.bscc.ca.gov/downloads/Jail%20Pop%20Trends%20Through%20Q2%202018.pdf> (as of Oct. 5, 2018). The number of unsentenced inmates represents an upper bound estimate of the population that is being detained pretrial.

[3] Minton & Zeng, *Jail Inmates in 2015* (Dec. 2016) Bureau of Justice Statistics, U.S. Dept. of Justice, p. 5.

these pretrial detainees remain in jail because they cannot afford to pay money bail to secure their release.[4]

These high rates of incarceration of individuals who have not been convicted of a crime reflect the reality that California courts often set bail beyond an accused's ability to pay, resulting in, for all practical purposes, a court order of no-bail pretrial detention. Accordingly, thousands of individuals who are eligible for release remain incarcerated in California jails and, in some counties, a majority of the individuals incarcerated in county jails are eligible for release. Estimates in 2015 and 2016 of the numbers of detained individuals eligible for bail ranged from 15% in Fresno County, to 53% in San Francisco County, to 59% in San Mateo County.[5] (Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice (Oct. 2017) p. 25 & fn. 71 <http://www.courts.ca.gov/documents/PDRReport-20171023.pdf> [as of Oct. 5, 2018] (hereafter Pretrial Detention Reform).) Thus, based on the Board of State and Community Corrections estimate of nonsentenced jail inmates in 2018 (46,000) and the range of county estimates of the release-eligible population, there may be anywhere from 6,900 to as many as

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[4] See County of Santa Clara Bail and Release Work Grp., Final Consensus Report on Optimal Pretrial Justice (Aug. 26, 2016) p. 12 <https://www.sccgov.org/sites/ceo/Documents/final-consensus-report-on-optimal-pretrial-justice.pdf> (as of Oct. 5, 2018) (hereafter Santa Clara Bail Report).

[5] By way of example, according to Santa Clara County, in 2014, its pretrial defendants were released or detained in the following numbers:

- approximately 25% were released on their own recognizance;
- approximately 35% of defendants (excluding those cited and released in the field or released on jail citations) were released on money bail; and
- approximately 40% were detained pretrial, either because they were ordered detained or because they did not or could not make bail.

(Santa Clara Bail Report, *supra*, at p. 23.)

27,000 non-sentenced inmates in custody at any given time eligible for release but who nonetheless remain incarcerated because they cannot afford bail. (*Ibid.*; Cal. Bd. State & Cmty. Corrs., *supra.*)

California's jails detain a significant percentage of presumptively innocent individuals for a variety of reasons.[6] A defendant can pay bail by paying the full amount or by using real estate equity as collateral, but these are not viable options for many lower-income defendants, a reality exacerbated by the high cost of home ownership in many parts of California. (Pen. Code §§ 1269, 1295(a), 1298.) Therefore, the vast majority of individuals who are eligible for bail must purchase a bail bond from a bond agent. (Pen. Code §§ 1269, 1278; see also Pretrial Detention Reform, *supra*, at pp. 30–31 [less than 2% of cases use a cash bond and less than 1% use a property bond].) Bail bondsmen charge up to 10% of bail as fees that are non-refundable even if charges are never brought or are dismissed. (See Tafoya, *Assessing the Impact of Bail on California's Jail Population* (June 2013) Public Policy Inst. of California, p. 7 <http://www.ppic.org/content/pubs/report/R_613STR.pdf> [as of Oct. 5, 2018].)[7]

Income data reveals how unrealistic it is to expect many pretrial detainees to pay the funds for a bail bond. "[T]he median bail bond amount . . . represents *eight months* of income for the typical detained defendant."[8] Estimates suggest that "over 60% of the people unable to post

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[6] For a discussion of the reasons for the increase in detained individuals before conviction, see generally Karnow, *Setting Bail for Public Safety* (2008) 13 Berkeley J. Crim. L. 1, 6-10.

[7] The undersigned is a board member of the Public Policy Institute of California.

[8] Rabuy & Kopf, Detaining the Poor (May 2016) Prison Policy Initiative, p. 2 <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf> (as of Oct. 5, 2018) (emphasis added.)

bail bonds fall within the poorest third of society. Eighty percent fall within the bottom half." (Rabuy & Kopf, *supra*, at p. 14 fn. 11; see also Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention* (2017) 69 Stan. L. Rev. 711, 737 ["Only about 30% of defendants from the wealthiest zip codes are detained pretrial, versus 60–70% of defendants from the poorest zip codes."].)

Rising bail schedule amounts are linked to a rising number of arrestees detained due to their inability to pay. In California, the median bail amount of $50,000 is more than five times the median amount of less than $10,000 in the rest of the nation. (See Tafoya, *Pretrial Detention and Jail Capacity in California* (July 2015) Public Policy Inst. of California, p. 4, fn. omitted [hereafter Tafoya, *Pretrial Detention*] [noting that research has shown that pretrial release rates generally decline as bail amounts increase].) Bail schedules in San Francisco, Los Angeles, and Santa Clara Counties reflect bail amounts among the highest in the state. (Pretrial Detention Reform, *supra*, at p. 29.)

Significantly, research has shown that the money bail system has a disproportionate impact on African-American and Hispanic defendants in urban counties. In San Francisco, even though only 6% of its residents are African-American, between 2008 and 2014, 41% of all arrestees were African-American[9] and, in 2015, 53% of all jail beds on a given day were occupied by African-Americans.[10] A study that sampled felony cases

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[9] MacDonald & Raphael, An Analysis of Racial and Ethnic Disparities in Case Dispositions and Sentencing Outcomes for Criminal Cases Presented to and Processed by the Office of the San Francisco District Attorney (Dec. 2017) p. 16 & fn. 5 <https://sfdistrictattorney.org/sites/default/files/MacDonald_Raphael_December42017_FINALREPORT%20(002).pdf> (as of Oct. 5, 2018).

[10] S.F. Work Group to Re-envision the Jail Replacement Project, Final Report (2016) pp. 9–10 <https://www.sfdph.org/dph/files/

nationally between 1990 and 1996 found that 27% of white defendants were detained throughout the pretrial period because they were unable to post bail compared to 36% of African-American defendants and 44% of Hispanic defendants.[11] As professors at the University of Pennsylvania and the University of California, Berkeley observed, to the extent that racial differences in average income lead to disparities in the ability to make bail, even a race-neutral process for determining who is or is not detained pretrial may result in a racially disparate impact on detention and, relatedly, the likelihood of conviction. (MacDonald & Raphael, *supra*, at p. 18.)

For San Franciscans who did pay bail to secure their freedom, they paid approximately ten to fifteen million dollars annually in nonrefundable bail fees for surety bonds between 2011 and 2015 with minority arrestees paying a disproportionate percentage of fees. (The Financial Justice Project, *Do the Math: Money Bail Doesn't Add Up for San Francisco* (June 2017) Off. of the Treasurer & Tax Collector, City and County of S.F., p. 8.) While African-Americans make up only 6% of San Francisco's population, they make up 38% of those paying bail (accounting for approximately $5.7 million annually in non-refundable bail fees or more than $120 per capita per year). (*Ibid.*) In contrast, white individuals make up 41% of San

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jrp/WorkGroupRe-envisionJailReplacement.pdf> (as of Oct. 5, 2018) (citing U.S. Census Bureau, U.S. Census [2010]).

[11] Santa Clara Bail Report, *supra*, at p. 29 & fn. 72 (citing Pepin, 2012-2013 Policy Paper on Evidence-Based Pretrial Release (2013) Conf. of State Ct. Administrators, pp. 4–5 <https://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx> [as of Oct. 5, 2018]). The rates of incarceration of African-Americans nationwide in more recent years are similar. (E.g., MacDonald & Raphael, *supra*, at p. 15 [describing that African-Americans accounted for nearly 27% of arrests, 35% of the population of local jails, and 35% of the prison population even though they make up only 13% of the general population; citing 2015 FBI statistics, U.S. Census data, and other studies].)

Francisco's population but only 26% of those paying bail (accounting for up to $3.7 million annually in non-refundable fees or more than $10 per capita per year). (*Ibid.*) This state of affairs led the Treasurer for the City and County of San Francisco, José Cisneros, to declare:

> I'm the money guy. I'm not a criminal justice expert. But I do consider myself a Treasurer for all San Franciscans. . . .
>
> After learning more about the money bail system, I am concerned that money bail . . . is one of these drivers of inequality. I am concerned that bail creates a two-tiered system of justice. One for the rich, and one for the poor. . . .

(*Id.* at Foreword.)

In sum, pretrial detentions are prevalent throughout California's criminal justice system and, especially, in California's urban counties, despite the constitutional presumption in favor of release (see Cal. Const. art. I, § 12; *Salerno*, *supra*, 481 U.S. at p. 746) and the American Bar Association's standard that judicial officers should not impose *de facto* detention orders. (ABA Standards for Crim. Justice: Pretrial Release (3d ed. 2007) std. 10-1.4(e) [advising that "[t]he judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay"].) The above factual backdrop underscores the critical importance of our trial courts' making pretrial release determinations that include an individualized consideration of a defendant's ability to pay bail in order to prevent the unnecessary detention of individuals.

B. When Bail Is Set Without Regard to Ability to Pay, Defendants Detained Before Trial Suffer Additional Consequences Beyond Loss of Liberty.

This Court has recognized that pretrial detention not only leads to the deprivation of liberty for individuals who have not been convicted of any crime but that such detention can also cause a cascading effect of serious, collateral consequences. (See, e.g., *Van Atta v. Scott* (1980) 27

Cal.3d 424, 436–437; *accord Barker v. Wingo* (1972) 407 U.S. 514, 533.) In setting, reducing, or denying bail, a trial court's understanding of the full spectrum of the following potential consequences of pretrial detention on a defendant may assist it in exercising its discretion fairly.

First, pretrial detainees face potential job loss, eviction, and disruption of familial relationships, ranging from separation from their children and dependents to the inability to pay child support. (See *Van Atta, supra*, 27 Cal.3d at p. 436 ["Pretrial detention also has important consequences for the detainee outside the courtroom. It may imperil his job, interrupt his source of income, and impair his family relationships."]; ABA, Crim. Justice Section, State Policy Implementation Project (2011) p. 5.)[12]

Second, pretrial detention can harm a detainee's physical and mental health. "Jails, traditionally designed for short periods of detention, often provide inadequate healthcare, activities, and programming[,]" and unsafe and unsanitary living and sleeping conditions are not uncommon. [13] (Crim. Justice Policy Program, Harvard Law School, *Moving Beyond Money: A*

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[12] Accord Crim. Justice Policy Program, Harvard Law School, *California Pretrial Reform: The Next Step in Realignment* (Oct. 2017) p. 10 & fn. 115 (hereafter *California Pretrial Reform*) ("'Many people remain in jail awaiting trial simply because they cannot afford bail, often losing their jobs, their housing, and, in some instances, even their families—despite a Court's determination that they are eligible for bail and, therefore, pose only a minimal threat to public safety.'" [quoting L.A. County Bd. of Supervisors, Motion by Supervisors Sheila Kuehl and Hilda Solis, Bail Reform (Mar. 8, 2017) <http://file.lacounty.gov/SDSInter/ bos/supdocs/ 112060.pdf>]); Miller & Gugenheim, *Pretrial Detention and Punishment* (1990) 75 Minn. L. Rev. 335, 424 ("The differences in the ability of the defendant [released pretrial] to work, maintain a family life, and prepare for the defense of criminal charges are substantial.").

[13] For example, a former jail inmate in Baltimore described conditions including "'people that are getting skin bacterial diseases . . . they have measles, scabies, lice, fleas.'" (*Moving Beyond Money*, *supra*, at pp. 6–7, alteration in original.)

Primer on Bail Reform (Oct. 2016) pp. 6–7 [hereafter *Moving Beyond Money*].) Moreover, "83 percent of jail inmates with mental illness did not receive mental health care after admission." (*Ibid.* [quoting Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America* (July 29, 2015) Vera Inst. of Justice, p. 12].) Indeed, a U.S. Department of Justice study found that, in 2014, pretrial detainees were three times more likely to commit suicide in jail than convicted detainees. (Noonan, *Mortality in Local Jails, 2000–14—Statistical Tables* (2016) Bureau of Justice Statistics, U.S. Dept. of Justice, pp. 2, 28 appen. tbl. 4.)

Third, pretrial detention limits a detainee's ability to develop his or her case and to assist in his or her own defense. (See, e.g., *Barker*, *supra*, 407 U.S. at p. 533 ["[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."].)[14] In *Van Atta v. Scott*, this Court recognized that detention can seriously impair "the detainee's ability to adequately prepare a defense," to consult with an attorney, and "to gather evidence and interview witnesses. Consequently, the effectiveness of counsel's assistance and the detainee's right to a fair trial are generally impaired." (See *Van Atta*, *supra*, 27 Cal.3d at pp. 435–436 & fns. 9–10 [collecting studies]; accord Bibas, *Plea Bargaining Outside the Shadow of Trial* (2004) 117 Harv. L.Rev. 2463, 2493 [same].)

Fourth, a growing body of research shows that pretrial detainees are more likely to plead guilty, to be convicted, and to receive longer prison

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[14] Cf. Santa Cruz, *Acquittal for Wealthy Teenager Is Scrutinized*, L. A. Times (Sept. 23, 2018) pp. B1, B5 (discussing white 18-year-old from affluent Palos Verdes Estates arrested for driving the car in a drive-by gang murder who posted a $5 million bail bond requiring $500,000 cash; after the defendant was able to attend his trial dressed in a navy suit and meet his lawyers to prepare for trial, he was found not guilty of murder and two counts of attempted murder).

sentences. Studies in various jurisdictions have found a correlation between pretrial detention and likelihood of conviction, as well as likelihood of a custody sentence and the length of that sentence. (Human Rights Watch, "Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People (2017) p. 51; accord MacDonald & Raphael, *supra*, at p. 18 [discussing research finding that pretrial detention increases the likelihood of conviction and may increase the likelihood of future offending].) Under the pressure of incarceration, some detainees are more likely to "throw in the towel" and to plead guilty—even if they are not guilty or the government's evidence is weak—in order to get out of jail. (E.g., Heaton et al., *supra*, at p. 747 [finding that "detainees plead[ ] at a 25%. . . higher rate than similarly situated release"].) But such short-term decisions, understandably made when a defendant cannot afford bail, can lead to more serious, longer-term consequences, such as a criminal record and sentencing enhancements if the defendant is arrested and convicted of future crimes. (See, e.g., Pen. Code § 1170.12 [prescribing sentencing enhancements and punishments for prior conviction(s)].)

For example, researchers studying cases presented to and prosecuted by the San Francisco District Attorney's Office found that "[b]lack suspects are clearly disadvantaged by pre-trial detention." (MacDonald & Raphael, *supra*, at p. 94.) They conclude that this factor alone decreases by 4.8 percentage points the likelihood (relative to white arrestees) that a case is dropped or dismissed in San Francisco and increases by 2.8 percentage points the likelihood of a new conviction. (*Ibid.*) A sample study of detainees in Philadelphia and Miami-Dade Counties shows that 57.8% of initially detained defendants are found guilty of at least one charge compared to 48.6% of initially released defendants. (*See* Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* (Feb. 2018) 108

Am. Economic Rev. 201, 213–214.) Strikingly, 44% of initially detained defendants plead guilty compared to just 20.7% of initially released defendants. (*Ibid.*) Initially detained defendants are also 15.5% more likely to be incarcerated compared to initially released defendants. (*Ibid.*)

Pretrial detainees are also more likely to receive longer sentences. A study of defendants arrested in 2009 and 2010 estimated that, after controlling for factors such as offense type and demographics, those who were detained for the entire pretrial period not only were over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial, they also received sentences that were nearly three times as long for defendants sentenced to jail and more than twice as long for those sentenced to prison.[15]

In short, the defendant who cannot afford to pay bail is not merely deprived of his or her liberty. In addition, he or she faces a higher likelihood of conviction by pleading guilty, a longer sentence, and an array of harms—such as the loss of his or her job or livelihood or worse—impacts that some members of the Bar Associations who are experienced criminal defense attorneys have observed firsthand. These impacts can lead to further destabilization of the detainee's job prospects, family, and health.

C. Wealth-Based Pretrial Detention Does Not Serve the Public Interest.

Wealth-driven pretrial detentions also impact the public interest. Nearly forty years ago, this Court recognized the high public and societal

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[15] Arnold Foundation, Pretrial Criminal Justice Research (2013) p. 3 <https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf> (as of Oct. 5, 2018) (hereafter Arnold Foundation, Pretrial Criminal Justice Research) (studying arrestees in Kentucky).

costs associated with pretrial detention as described by San Francisco County's then-Chief Deputy Sheriff:

> Beyond the monetary costs, pretrial detention spawns additional, more subtle social burdens. The testimony of Chief Deputy Sheriff Bangston, the person charged with the supervision of the San Francisco County jails, is instructive on this point: "The other reason, and I'm not referring to a prisoner that's in and out, or whatever, but to a person that has been in once or twice, has had very few arrests, that type is susceptible to the influence, if you keep him in jail, and his character and moral standards go by. . . . [Q]uite often the influence that he suffers in jail will turn him to an extent anti-social, and anti-establishment, and anti-so-called accepted system, he will try to buck it. I can't think of anyone coming to jail for the first time, in spite of their moral strength, that will not be influenced."

(Van Atta, supra, 27 Cal.3d at p. 436, citations omitted.)

This Court's observations remain true today. Empirical research shows that pretrial detention correlates with an increased likelihood of new criminal activity pending trial, a decrease in the likelihood of reappearance if the detainee ultimately secures pretrial release, and substantial costs on taxpayers without evidence of increased public safety. Thus, the result is that detaining a poor defendant only because he or she cannot afford bail while releasing the similarly situated wealthy defendant can set back important public safety and public interest goals as well.

For example, in studying data about more than 153,000 Kentucky defendants between 2009 and 2010, researchers controlled for factors such as risk level, offense type and level, supervision status, and demographics, and found that longer pretrial detention is associated with the likelihood of new criminal activity pending trial, especially for defendants deemed to be low-risk. The longer low-risk defendants were detained, the more likely they were to engage in new criminal activity pending trial: defendants detained two to three days were 1.39 times more likely to engage in new

criminal activity than defendants released within 24 hours; defendants detained 31 or more days were 1.74 times more likely to commit new crimes. (Arnold Foundation, Pretrial Criminal Justice Research, *supra*, at pp. 4, 11, 19–20.) Being detained for the entire pretrial period was also found to be related to the likelihood of new criminal activity after disposition of the case. When other relevant statistical controls are considered, pretrial detention had a statistically significant tendency to increase new criminal activity, measured 12 months and 24 months after disposition. (Lowenkamp et al., The Hidden Costs of Pretrial Detention (2013) Arnold Foundation, p. 19.)

Longer periods of pretrial detention, at least up to a certain point, also are associated with an increased likelihood of defendants' failing to appear for court proceedings after securing pretrial release, especially for lower-risk defendants.[16] (Lowenkamp et al., *supra*, at p. 4.) "Studies show that those who remain in pretrial detention for longer than 24 hours and are then released are less likely to reappear as required than otherwise similar defendants who are detained for less than 24 hours." (*Moving Beyond Money*, *supra*, at p. 7.) Low-risk defendants held for two to three days were 22% more likely to fail to appear than defendants with similar criminal histories, charges, backgrounds, and demographics who were held for less than 24 hours. The number jumped to 41% for defendants held 15 to 30 days. For low-risk defendants held for more than 30 days, the study found a 31% increase in failure to appear. (Arnold Foundation, Pretrial Criminal Justice Research, *supra*, at p. 5.)

Finally, the estimated public cost of incarcerating defendants pretrial in the United States ranges from more than $9 billion to $14 billion per

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[16] For high-risk defendants, pretrial detention was found to have no impact on their rates of missing court; for moderate-risk defendants, the effect was minimal. (Lowenkamp et al., *supra*, at p. 13.)

year.[17] In California, the average cost to incarcerate a county jail inmate in 2012 was $41,563 per year or $113.87 per day.[18] The cost to taxpayers in urban counties is higher: in Los Angeles County, estimates are $177 per day per inmate, and in Santa Clara County, $159 per day per inmate.[19] A survey of Alameda, Fresno, Orange, Sacramento, San Bernardino, and San Francisco Counties found that "the total cost of jailing people whom the prosecutor never charged or who had charges dropped or dismissed was $37.5 million over two years." (*California Pretrial Reform*, *supra*, at p. 6 [citing Human Rights Watch, *supra*, at p. 3].)[20]

D. Constitutional Use of Pretrial Risk Assessments, Coupled With a Trial Court's Consideration of the Defendant's Financial Situation and Nonmonetary Conditions of Release in Setting Bail, Can Minimize Detentions.

Validated pretrial risk assessment tools, implemented in a constitutional manner, coupled with setting bail only after a court's careful, individualized consideration of a defendant's ability to pay and non-monetary conditions of release, can better serve bail's objectives of

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[17] Arnold Foundation, Pretrial Criminal Justice Research, *supra*, at p. 1 (more than $9 billion); Pretrial Justice Inst., Pretrial Justice: Problem & Solution (2015) p. 1 <https://www.americanbar.org/content/dam/aba/events/criminal_justice/2016/Pretrial_Justice_Problem_Solution.authcheckdam.pdf> (as of Oct. 5, 2018) (estimating $14 billion) (citing Subramanian et al., *supra*).

[18] See Martin & Grattet, *Alternatives to Incarceration in California* (Apr. 2015) Public Policy Inst. of California, p. 1 & fn. 3 <http://www.ppic.org/content/pubs/report/R_415BMR.pdf> (as of Oct. 5, 2018).

[19] *California Pretrial Reform*, *supra*, at p. 6 (citing L.A. County Bd. of Supervisors, *supra*, and Santa Clara Bail Report, *supra*, at p. 34).

[20] Further, counties under court-ordered jail population caps sometimes must allow thousands of individuals out of jail early. (See Tafoya, *Pretrial Detention*, *supra*, at p. 1.) Reducing the population of individuals who are detained solely due to lack of funds for bail may minimize the risk that convicted defendants are released before serving their full sentences.

securing the accused's freedom while securing public safety.[21] (*In re Humphrey*, *supra*, 19 Cal.App.5th at p. 1014; Opening Brief on the Merits at p. 19 (OB) [agreeing that Court of Appeal correctly held that a trial court must consider the defendant's ability to pay and any available non-monetary alternatives, before setting or reviewing bail]; Respondent's Brief on the Merits at pp. 20–21 (RB) [agreeing with Court of Appeal that consideration of bail alternatives is constitutionally required].)

United States v. Salerno teaches that, under the federal Constitution, the individual's strong interest in liberty requires that only those arrested "for a specific category of extremely serious offenses" can be detained before trial, and only if the government proves "by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." (*Salerno*, *supra*, 481 U.S. at 750 [upholding federal Bail Reform Act and citing 28 U.S.C. § 3142(f)].) San Francisco and Santa Clara Counties have made important progress using risk-based pretrial assessments to reduce the numbers of individuals being detained pretrial and to help tailor appropriate conditions of release while others, such as Los Angeles County, have been studying those reforms.

Jurisdictions that use pretrial risk assessments, court reminders, and/or community-based monitoring, rather than or to supplement a money bail system, have experienced better outcomes, including "reduced pretrial detention of lower-risk defendants, lowered rates of re-offense, lowered

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[21] Article I, section 12 of the California Constitution commands that a person shall be released on bail except in cases involving capital crimes, violent and sexual assault felonies, and offenses involving threats to another of great bodily harm. (See generally Sec. III, *infra*.) Accordingly, pretrial risk assessments can be used to assist the courts in tailoring appropriate conditions of release for the vast majority of arrestees who are not charged with the above offenses and are therefore eligible for bail. (Cal. Const., art. I, § 12.)

rates of failure to appear, and, for some, lowered recidivism rates." (*California Pretrial Reform*, *supra*, at p. 12.)

For example, Santa Clara County's Office of Pretrial Services began piloting a new pretrial risk assessment tool in January 2011. Pretrial Services Officers review criminal history records, interview each defendant who has been booked, and enter each defendant's information into a computerized risk assessment tool that calculates scores reflecting the risk that the defendant will engage in new criminal activity ("Public Safety Scale"), fail to appear in court ("Court Appearance Scale"), and/or engage in technical violations ("Technical Compliance Scale"). (Santa Clara Bail Report, *supra*, at p. 44.) Based on these calculations, a defendant is deemed "low," "medium," or "high" risk and officers recommend to the court "own recognizance" (OR) release without supervision, Supervised OR, or denial of release.[22] (*Ibid.*) With pretrial risk assessment, the number of defendants released on their own recognizance in Santa Clara County rose from about 900 per month in 2000 (before locally validated risk assessments were adopted) to about 1,100 per month in 2011 and to a high of about 1,600 per month in 2014. Now, after the passage of Proposition 47,[23] about 1,400 defendants per month are released while they await trial. Santa Clara County's bail working group concludes that, "throughout each of these periods, the appearance, technical compliance and re-arrest rates have been equal to or better than in previous years," thereby leading it to conclude that

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[22] In domestic violence cases, the Office of Pretrial Services "also conducts a supplemental victim interview to determine the defendant's history of abuse and access to firearms, as well as the victim's sense of safety and other information about the victim's relationship with the defendant." (Santa Clara Bail Report, *supra*, at p. 44.)

[23] Proposition 47 was a measure passed by California voters in November 2014 that converted certain nonviolent felonies, such as drug and property offenses, to misdemeanors.

the use of appropriate risk assessment tools allows "more defendants to be released without increasing FTA [failure to appear] or new arrest rates." (*Id.* at p. 45 & fn. 171.) Indeed, between 2013 and 2016, defendants released on their own recognizance (OR) or on Supervised OR made all court appearances more than 95% of the time and avoided arrest for new offenses approximately 99% of the time. Nearly 93% of defendants made all court appearances, avoided arrests for new offenses, and avoided technical violations of release conditions. (*Id.* at p. 46.)

San Francisco, too, has been an innovative leader with respect to the use of a pretrial risk assessment tool to evaluate individuals for pretrial release. The San Francisco Pretrial Diversion Project (SFPDP), a non-profit organization that completes the pretrial risk assessments and supervises many defendants who are released before trial in San Francisco County,[24] has been effective in reducing the jail population by an average of 47%.[25] In April 2016, SFPDP implemented the Public Safety Assessment (PSA), a validated risk-assessment tool from the Arnold Foundation that removed from consideration the arrestee's demographic information and eliminated in-person interviews of arrestees, thereby minimizing the potential for

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[24] The SFPDP supervises a large proportion of individuals who are released pretrial, namely, defendants who are released on their own recognizance or under supervised OR. The SFPDP typically does not supervise defendants who are released on bail or released to be supervised by San Francisco County's collaborative courts. However, since the *Humphrey* decision was issued in January 2018, the SFPDP has been supervising a significant number of individuals who would have been detained in jail due to their financial inability to post bail: In January 2018, the SFPDP had an average daily caseload of 780 individuals who had been released pretrial. As of October 4, 2018, its daily caseload had increased to 1030 people, a 32% increase. (Interview with A. Alcantar Tomovic, San Francisco Pre-Trial Diversion Project, Director of Programs (Oct. 5, 2018).)

[25] S.F. Work Group to Re-envision the Jail Replacement Project, *supra*, at p. 15. The report does not identify the dates associated with the reduction.

racial or economic bias[26] to affect the outcome. For defendants who are eligible for pre-arraignment release under Penal Code § 1319.5, duty-judge decisions to release defendants before arraignment have increased from 29% to 62% from April 2016 to March 2018.[27] Arraignment-judge decisions to release defendants[28] have increased from 17% to 48% during the same period.[29] These increased rates of defendants released before trial have been accompanied by high re-appearance rates ranging from 84% to 91% and high non-recidivism rates ranging from 91% to 93% for the

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[26] Pretrial risk assessment tools should be free of racial or implicit bias and transparent about the factors and algorithms used. (Pretrial Detention Reform Recommendations, *supra*, at pp. 53–54; see also Bar Assn. of S.F., Racial and Economic Bias in Detention and Release Decisions (InReach Learning Center Mar. 13, 2018) at 34:02-32; 1:11:32-43 <http://learningcenter.inreachce.com/viewer_v9/?eid=67c5bfea-fb79-4899-99c2-ab902445bc28&oid=O-20031125163149123950&uid=0> [remarks of Presiding Judge T. Jackson, San Francisco Superior Court, and member of the Pretrial Detention Reform Workgroup] ["Whatever tool you use . . . needs to be transparent, . . . race neutral, economically neutral, and we must have the full data in order to evaluate if the risk assessment tool is working."].)

[27] San Francisco Pre-Trial Diversion Project Data (Aug. 29, 2018) p.1 (hereafter SFPDP Data). Individuals with probation or parole violations, violations of alternative-sentencing conditions, en-route warrants, and bookings for bench warrants are not eligible for a PSA. (S.F. Work Group to Re-envision the Jail Replacement Project, *supra*, at p. 15.)

[28] Defendants eligible for release at arraignment include those charged with the more serious offenses identified in Penal Code § 1319.5.

[29] SFPDP Data, *supra*, p.2. San Francisco's use of the PSA had led to an increase in the percentage of defendants released at arraignment from 17% in April 2016 to 34% in December 2017. After the *Humphrey* decision was issued, the percentage of defendants released at arraignment has increased further, to 48% as of the end of the first quarter of 2018. (Ibid.) The recent increase in the rate of released defendants is likely due to both the use of the PSA and the implementation of *Humphrey*'s directive to make individualized assessments of a defendant's ability to post bond.

SFPDP's caseload of managed individuals at the end of the first quarter of 2018.[30]

Other jurisdictions have also enjoyed success in increasing the rate of arrestees released pending trial, while protecting public safety, by using effective, pretrial risk-assessment tools. New Jersey abolished its money bail system in January 2017. (See Grant, N.J. Judiciary, Criminal Justice Reform Report to the Governor and Legislature for Calendar Year 2017 (Feb. 2018) pp. 1, 3.) Pretrial services staff prepare a release recommendation for arrestees based on a Public Safety Assessment and other factors. (*Id.* at App'x A.) Within 24 to 48 hours, the court holds a hearing at which the prosecutor must make a motion for detention or the court sets conditions for release. (*Ibid.*) If a detention motion is made, the court holds a detention hearing within three to five business days, requiring the prosecutor to demonstrate that no condition of release can reasonably assure the public's safety or the defendant's reappearance. (*Ibid.*) One year after implementing bail reform, New Jersey's pretrial detention population dropped from 7,173 defendants to 5,743, a 20% decrease. (*Id.* at p. 19.) After a year and eight months, the pretrial detention rate dropped 26.3%.[31]

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[30] Of the released defendants under the SFPDP's supervision, there was a 91% appearance rate for court for individuals not under active supervision, an 87% appearance rate for individuals under minimum supervision, and an 84% appearance rate for individuals under assertive case management. At the same time, there was a 93% "safety rate" (defined as the rate of defendants who have not been arrested and arraigned on a new charge or engaged in a probation or parole violation) for individuals not under active supervision or under minimum supervision and a 91% safety rate for individuals under assertive case management. (SFPDP Data, *supra*, at p. 3.)

[31] See N.J. Courts, Criminal Justice Reform Statistics: Jan 01, 2018 – August 31, 2018, p.5 (Chart C) <https://www.njcourts.gov/courts/assets/criminal/cjrreport2018.pdf?cacheID=wPZSSlI> (as of Oct. 5, 2018).

Between January and August 2018, of the 91,892 individuals charged in New Jersey, 93.7% were released pretrial. (N.J. Courts, *supra*, at p. 8.)[32]

Finally, releasing more individuals on their own recognizance or under supervised release based on pretrial risk assessments produces significant savings for resource-challenged counties. Santa Clara County estimates that it costs only $15 per day per defendant for pretrial supervision and that it saved $31.3 million in detention costs in six months in 2011 by using a risk assessment tool to release individuals, who might otherwise have been detained. (Santa Clara Bail Report, *supra*, at p. 35 & fn. 109.) Los Angeles County operates the largest and most expensive jail system in the United States with an average daily population of 17,362 individuals (as of February 2017) and an annual budget in excess of $800 million. According to the Los Angeles County Board of Supervisors, the County Sheriff estimates that 48% of individuals in its jails are awaiting trial, often due to their inability to pay bail, thereby "impos[ing] a significant financial burden on Los Angeles taxpayers, with little proven public safety benefit." (L.A. County Bd. of Supervisors, *supra*, at p. 2.) Given Los Angeles County's estimate that pretrial services cost $0 to $25.80 per person per day compared to $177 per day to jail a person, it hopes to save "tens of millions of dollars a year and reduce jail overcrowding simply by better utilizing and enhancing its current pretrial release programs." (*Id.* at p. 3.)

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[32] Washington, D.C. is another leading jurisdiction that has made pretrial release and detention decisions without money bail. Eighty percent of defendants are released without financial conditions pending trial and 88% of defendants make all scheduled court appearances and avoid new arrests. (Santa Clara Bail Report, *supra*, at p. 3.)

II. A TRIAL COURT MAY NOT IMPOSE A HIGHER AMOUNT OF MONEY BAIL IN THE INTEREST OF PUBLIC OR VICTIM SAFETY BECAUSE DOING SO IMPLICATES EQUAL PROTECTION CONCERNS.

Amici also concur with both the government and respondent on the second issue presented by the Court: in setting the amount of bail, a trial court's separate consideration of public and victim safety would violate equal protection. (OB, *supra*, at pp. 19–26; RB, *supra*, at pp. 27–30.)

Setting the amount of money bail based on a risk to public or victim safety alone cannot pass constitutional muster because there is no rational connection between the amount of money bail set and public safety, including victim safety. This is so, because under the Penal Code, a defendant forfeits bail only if he or she fails to appear at court and not if he or she commits another crime. (See Pen. Code §§ 1269, 1305, subd. (a)(1); Karnow, *supra*, 13 Berkeley J. Crim. L. at p. 20; see also ABA Standards for Crim. Justice: Pretrial Release, *supra*, std. 10-1.4(d) ["Financial conditions should not be employed to respond to concerns for public safety."].) Bail amounts set forth in the bail schedules typically escalate based upon the seriousness of the offense, yet research shows that the severity of the charged offense is not necessarily linked to whether a defendant will re-offend while released before trial. (Karnow, *supra*, 13 Berkeley J. Crim. L. at pp. 17–18 & fn. 93.)

Therefore, equal protection principles are violated when a wealthy person accused of a crime can pay a higher bail amount, while a similarly situated accused poor person is detained solely due to his inability to pay bail. (See, e.g., *Reem v. Hennessy* (N.D. Cal. Dec. 21, 2017) No. 17-cv-6628-CRB, 2017 WL 6539760 at p. *3; *O'Donnell v. Harris County* (5th Cir. 2018) 892 F.3d 147, 163 [bail procedures for misdemeanor arrestees, which led to detention solely due to inability to post bail, violated equal protection and due process; "with [the] lack of individualized assessment

and mechanical application of the secured bail schedule . . . [,] [o]ne arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart."].)[33]

Notably, California's voters chose to protect public safety by amending article I, section 12 of the state Constitution to expand the types of felony offenses for which preventive detention would be permitted, subject to procedural safeguards. In 1982, voters passed Proposition 4, which added felony offenses involving violence on another and threats of great bodily harm to another as exceptions to section 12's mandatory right to bail for non-capital crimes;[34] further, they required that courts consider, in fixing the amount of bail, the seriousness of the offense charged, the defendant's prior criminal record, and the probability of his or her appearing at trial or hearing. (See Cal. Const., art. I, § 12(b) and (c); see generally *People v. Standish* (2006) 38 Cal.4th 858, 875 ["[P]roponents of [Proposition 4, which added the above language to article I, section 12,] made it clear they intended that public safety should be a consideration in bail decisions."].) Public and victim safety interests, therefore, can be met by nonmonetary alternatives to money bail, such as appropriate conditions

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[33] See also Davis, *Search for Fugitive in 2012 Newport Coast Slaying Adds Podcast and $100,000 Reward*, L.A. Times (Sept. 19, 2018) <http://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-chadwick-murder-20180919-story.html> (authorities announcing a potential $100,000 reward for the capture of Peter Chadwick, a "millionaire real estate investor" charged in the murder of his wife, who posted $1 million bail and then disappeared).

[34] Article I, section 12(b) was further amended in 1994 to include "felony sexual assault offenses on another person" as a third type of noncapital offense for which bail may be denied.

of release (e.g., drug or alcohol treatment programs, stay-away orders, electronic monitoring, or house arrest) or, only if necessary, preventive detention for those accused of the specific, serious felonies for which such detention is permitted, without running afoul of equal protection considerations.

III. THE CALIFORNIA CONSTITUTION PERMITS THE DENIAL OF BAIL IN NON-CAPITAL CASES AS DESCRIBED IN ARTICLE I, SECTION 12.

The California Constitution, article I, section 12 provides all Californians accused of a crime the right to be released on bail for most non-capital offenses, except for the serious felony offenses specifically described in that provision. *Amici* agree with respondent that article I, section 28(f)(3) remains inoperative, notwithstanding the presentation of Proposition 9 to voters in 2008.

A. Article I, Section 12 Controls Over Article I, Section 28(f)(3).

In 1982, California voters passed two competing ballot initiatives: Proposition 4, which amended article I, section 12, [35] and Proposition 8, part of which is now found in article I, section 28(f)(3). (See Ballot Pamp.,

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[35] Proposition 4 stated, in part: "SEC. 12. A person shall be released on bail by sufficient sureties, except for: *(a)* ~~*capital*~~ *Capital* crimes when the facts are evident or the presumption great; *(b) Felony offenses involving acts of violence 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. . . . 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.*" (1982 Ballot Pamp., *supra*, text of Prop. 4, p. 17 [orig. italics and strikethrough].)

Primary Elec. (June 8, 1982) [hereafter 1982 Ballot Pamp.], text of Prop. 4, pp. 16–17; *id.*, text of Prop. 8, p. 33.) Proposition 8 proposed, among other things, to repeal article I, section 12 and substitute article I, section 28, subdivision (e) in its stead, with the proposed subdivision entitled "Public Safety Bail." (*Id.*, text of Prop. 8, p. 33; *Standish, supra*, 38 Cal.4th at p. 874.)[36] Proposition 4 received more votes. (*Standish, supra*, 38 Cal.4th at pp. 874-875.)

Since then, this Court has held, twice—in *In re York* (1995) 9 Cal.4th 1133 and *Standish, supra*, 38 Cal.4th 858—that section 12 controls over now-section 28(f)(3) because the language of section 12 received more votes. In *York,* this Court held that a court has the authority in granting own recognizance (OR) release to require a defendant to comply with all reasonable conditions, even one implicating the defendant's constitutional rights. In doing so, it observed that, "[b]ecause Proposition 4 received more votes than did Proposition 8, the bail and OR release provisions contained in Proposition 4 are deemed to prevail over those set forth in Proposition 8." (*York, supra*, 9 Cal.4th at p. 1141 fn. 4 [citations omitted].)

In *Standish*, the Court held that a defendant was entitled to be released from custody on his own recognizance, subject to reasonable conditions, when his preliminary examination was continued for good cause beyond the 10-day statutory period, but that the trial court's failure to grant OR release pending his preliminary examination did not require

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[36] Proposition 8 stated, in part: "*(e) Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. . . . In setting, reducing or denying bail, the judge . . . shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety shall be the primary consideration.*" (1982 Ballot Pamp., *supra*, text of Prop. 8, p. 33 [orig. italics].)

setting the information aside, absent evidence that the error might have affected the outcome of the hearing. (*Standish*, *supra*, 38 Cal.4th at 863.) The Court carefully compared Proposition 4's and Proposition 8's bail and OR release provisions and, again, concluded that "we adhere to the view that the amendments to article I, section 12 proposed by Proposition 4 took effect, and that the provisions of article I, section 28, subdivision (e) proposed by Proposition 8 did not . . . ." (*Id.* at pp. 877–878; see generally Cal. Const., art. XVIII, § 4 [if provisions of two measures to amend the Constitution approved at the same election conflict, the provisions of the measure receiving more votes prevails]; *cf. Brosnahan v. Brown* (1982) 32 Cal.3d 236, 255 [noting that if Proposition 4 received more votes than Proposition 8, "Proposition 4 would prevail as to those matters inconsistent with the latter measure."].) Therefore, the denial of bail in non-capital cases is governed by section 12 and, specifically, is limited to capital crimes, violent or sexual assault felonies, and felonies involving a threat to another of great bodily harm where the court finds a substantial likelihood that the person would carry out the threat if released. (See Cal. Const., art. I, § 12(a)–(c).)

Two years after this Court's decision in *Standish*, in 2008, Proposition 9, entitled "Victims' Bill of Rights Act of 2008: Marsy's Law," proposed to amend article I, section 28 and various state laws to expand the legal rights of crime victims and the payment of restitution by criminal offenders, restrict the early release of inmates, and change the procedures for granting and revoking parole. (Ballot Pamp., Gen. Elec. (Nov. 4, 2008) [hereafter 2008 Ballot Pamp.], analysis of Prop. 9 by Legislative Analyst, p. 58; *id.*, text of Prop. 9, pp. 128–132.)[37] As a small part of a broader

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[37] Proposition 9 stated, in part: "~~(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. . . . In setting, reducing or

measure, Proposition 9 also proposed to re-number then-section 28(e) and to amend it by adding "the safety of the victim" as a consideration in setting, reducing, or denying bail; making victim safety a primary consideration in such bail decisions; and requiring that before an arrestee for a serious felony may be released on bail, the victim be given notice and a reasonable opportunity to be heard at the bail hearing. (*Id.* at pp. 58–59, 130 [proposed § 28(f)(3)].) Unlike Proposition 8, Proposition 9 did not propose to repeal section 12. (*Ibid.*) Significantly, however, the ballot pamphlet for the 2008 election did not inform voters that the California Supreme Court had held twice that section 28, subdivision (e)'s bail and OR provisions had not taken effect. (2008 Ballot Pamp., *supra*, analysis of Prop. 9 by Legislative Analyst, pp. 58–61; *id.*, argument in favor of Prop. 9, p. 62; *id.*, rebuttal to argument in favor of Prop. 9, p. 62; *id.*, argument against Prop. 9, p. 63; *id.*, rebuttal to argument against Prop. 9, p. 63.) In other words, voters were not informed that they were being asked to amend an inoperative constitutional sub-provision.

In light of the above, section 12's denial-of-bail provisions continue to prevail over those set forth in section 28(f) (3). Proposition 9 could not have re-enacted Section 28(f)(3) *in toto,* as the government urges.

First, Proposition 9's proposed changes to now-section 28(f)(3) were presented to the voters as only a few amendments to add "the safety of the victim" as a consideration in bail decisions and to provide the victim notice and an opportunity to be heard before an arrestee for a serious felony is released on bail. (*See* 2008 Ballot Pamp., *supra*, text of Prop. 9, p. 130.)

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denying bail, the judge . . . 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*." (2008 Ballot Pamp., *supra*, text of Prop. 9, p.130 [orig. italics and strikethrough].)

Voters were not asked to enact the entirety of then-section 28(e) and, thus, could not have possibly done so. (*Ibid.*; see RB, *supra*, at pp. 31–35.)

Second, even as to the limited amendment to section 28(e) that voters approved, they were not informed that they were amending an inoperative provision. This omission of material information to the voters also counsels against a conclusion that section 28(e) was re-enacted in 2008.

Third, as a matter of law, the purported amendments in 2008 to the inoperative section 28(e) could not have "re-enacted" or "resurrected" the underlying sub-provision *in toto*. *Alejo v. Torlakson* (2013) 212 Cal.App.4th 768 is instructive. In *Alejo*, educational organizations filed a petition for writ of mandate to compel the State Superintendent of Public Instruction and state educational agencies to rescind a suspension of onsite reviews of school district compliance with state and federal standards in programs benefitting educationally disadvantaged students. The Court of Appeal affirmed the grant of summary judgment for defendants. In doing so, the Court held that minor, post-sunset amendments to an Education Code provision that, in fact, had been rendered inoperative years earlier due to a sunset provision did not make the provision operative. (*Id.* at p. 796.) While *Alejo* involved the purported amendment of an inoperative statutory provision, its reasoning applies with similar force here to the purported amendment of an inoperative constitutional sub-provision. Therefore, the government's attempt to harmonize section 12 with the inoperative section 28(f)(3) is not persuasive. (OB, *supra*, at pp. 35–42; Reply Brief on the Merits [Reply] at pp. 32-35.)

Proposition 9's amendment of then-section 28(e) in 2008 also could not have implicitly repealed section 12, for the reasons discussed by respondent. (RB at pp. 41–45.) Significantly, in 1982, more Californians voted in favor of preserving the longstanding constitutional right to bail,

subject to carefully identified exceptions, as compared to the competing, proposed discretionary bail scheme. Further, in 2006, this Court affirmed in *Standish* that the voters' chosen constitutional provision, section 12, rather than section 28(e), prevailed. Given the fundamental nature of the right to liberty (*People v. Olivas* (1976) 17 Cal.3d 236, 251; *Salerno*, *supra*, 481 U.S. at p. 750), the 2008 purported amendment of inoperative section 28(e) could not have narrowed Californians' constitutional right to pretrial liberty by implicitly repealing section 12 and expanding the types of offenses for which a defendant may be preventively detained.

B. Even if Sections 12 and 28 Are Reconciled, Only Section 12 Governs When Bail Can Be Denied in Noncapital Cases.

Only article I, section 12 governs the denial of bail in noncapital cases. But even if the Court concludes that sections 12 and 28(f)(3) should be reconciled, the Court nonetheless should hold that only sections 12(b) and (c) govern the denial of bail in noncapital cases, as respondent urges. (RB, *supra*, at pp. 40–45.) At most, only limited parts of section 28(f)(3) that do not conflict with section 12 should be given effect—and, significantly, those parts do *not* address when bail may be denied.

Specifically, Proposition 9's amendment of section 28(f)(3) to add "the safety of the victim" as a primary consideration with respect to bail decisions could be given effect, only (a) if limited to the three types of noncapital offenses enumerated in prevailing section 12 and (b) if limited to decisions to *deny* bail. This is because, as discussed in Section II, *supra*, separate consideration of victim safety in fixing the *amount* of bail is constitutionally suspect. (*Olivas, supra,* 17 Cal.3d at 251; OB at pp. 19-20 [agreeing that money bail scheme "denies equal protection when bail is set to protect public and victim safety"].) In contrast, the *denial* of bail to preventively detain a defendant pursuant to section 12's limitations (i.e., in

the cases of capital offenses, violent and sexual offense felonies, and felonies involving great threat of bodily harm to another) applies equally to defendants regardless of wealth and therefore does not implicate wealth-based equal protection concerns.

Similarly, Proposition 9's amendment of section 28(f)(3) to provide the victim with notice and an opportunity to be heard at the bail hearing before an arrestee for a serious felony is released also can be given effect.[38] The bottom line is that Proposition 9's proposed amendments of then-section 28(e) did not address, let alone change, the types of offenses for which bail may be denied. Therefore, the Court's giving effect to the few words approved by voters in 2008 would not conflict with Section 12's provisions limiting the types of offenses for which bail may be denied.

C. Section 12 Strikes the Balance Between the Accused's Liberty and Public and Victim Safety in a Manner That Is Faithful to Voters and this Court's Precedent

Section 12 correctly balances an accused's fundamental liberty interest and the compelling government interest in public and victim safety. As discussed in Section I, *supra*, California's bail system has led to the over-incarceration of poor arrestees, with a disparate impact on minority arrestees, without evidence of advancing public and victim safety. Such

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[38] Proposition 8 provided valuable hearing-related rights that provide due process to victims and defendants. These last two provisions of then-section 28(e) required that (i) before a person arrested for a serious felony may be released on bail, a hearing may be held, and the prosecutor should be given notice and an opportunity to be heard and (ii) a court state its reasons for granting or denying bail or OR release on the record. These provisions did not conflict with Proposition 4's amendment of Section 12's mandatory bail scheme and were not at issue in *York* or *Standish*. (See *York*, *supra*, 9 Cal.4th at pp. 1140-1141 & fn.4; *Standish*, *supra*, 38 Cal.4th at pp. 874-882.) Accordingly, the Court did not consider them in those cases. This Court may wish to clarify that these two provisions of section 28(f)(3) were not rendered inoperative by *Standish*, especially in light of the valuable due process provided to the victim and the defendant by these provisions.

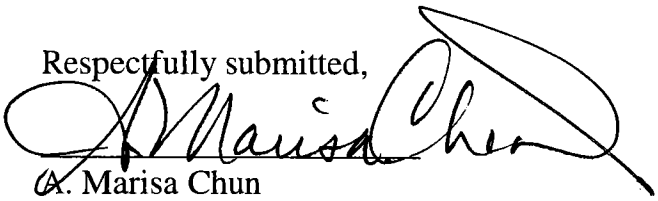
over-incarceration has led to significant, collateral consequences for individuals detained pretrial, for their families, and for their broader communities. By amending section 12 in 1982, Californians voted to maintain the constitutional right to pretrial liberty for the accused, subject to carefully circumscribed exceptions for serious, non-capital felonies in the interest of public safety. In two thoughtful decisions, this Court has agreed with the will of California voters. Maintaining that balance with respect to pretrial release and detention decisions serves effectively the interests of the accused, victims of crime, and the public.

CONCLUSION

"Justice should not be a rich man's luxury." (*Prudential Ins. Co. of America v. Small Claims Ct. of the City and County of S.F.* (1946) 76 Cal.App.2d 379, 383 [Peters, J.].) This Court has the opportunity to honor that promise for all Californians who stand accused of a crime, whether they are rich or poor. For the reasons stated above, *amici curiae* the Bar Association of San Francisco, the Los Angeles County Bar Association, and the Santa Clara County Bar Association respectfully urge this Court to affirm the judgment of the Court of Appeal.

Dated: October 9, 2018

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c), this brief contains 10,374 words, excluding the portions exempted by California Rule of Court 8.520(c)(3), as counted by the computer word processing program used to generate this brief.

Dated: October 9, 2018

A. Marisa Chun

PROOF OF SERVICE

I, Andrew Hanna, declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 275 Middlefield Road, Suite 100, Menlo Park, CA 94025. On October 9, 2018, I served a copy of the within document(s):

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

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

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See Attached List.

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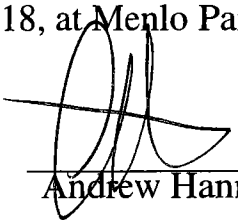
Executed on October 9, 2018, at Menlo Park, California.



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