In the Supreme Court of the State of California

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

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

AMICUS CURIAE BRIEF OF ATTORNEY GENERAL XAVIER BECERRA

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ISSUES PRESENTED

This Court has specified three issues for review:

(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.

INTERESTS OF AMICUS CURIAE

The Attorney General is the state's chief law officer, with a duty to see that state law is uniformly and adequately enforced. (Cal. Const., art. V, § 13.) In fulfilling that duty, he seeks to ensure respect for the law, promote fairness and equity in the administration of our criminal justice system, and defend legitimate choices made by the People and the Legislature in establishing rules to protect both defendants' rights and public safety. (See, e.g., Cal. Const., art. I, § 28(f); Stats. 2018, ch. 244 (Sen. Bill No. 10 (2017-2018 Reg. Sess.)) ("S.B. 10").)[1]

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[1] Unless otherwise noted, section 28(f) and § 28(f) refer to article I, section 28, subdivision (f) of the California Constitution, and section 12(b) and § 12(b) refer to article I, section 12, subdivision (b). OBM and Reply Br. refer to the Opening Brief on the Merits and Reply Brief on the Merits filed by the petitioner in this Court, the District Attorney of the City and

(continued...)

The Attorney General participates in hearings regarding bail and detention when the state Department of Justice undertakes individual prosecutions. The Attorney General also typically represents the interests of the People in appellate or writ proceedings regarding bail and detention determinations made in certain counties, even in cases prosecuted at the trial level by District Attorneys. The Department briefed and argued this case in the Court of Appeal.

The Attorney General did not seek review of the decision below in this case. In granting review on its own motion, this Court directed that the San Francisco District Attorney be deemed the petitioner for purposes of briefing and argument. The District Attorney is capably discharging that responsibility. The Attorney General's perspective and conclusions on the legal and policy issues raised by the traditional system of money bail are similar to those of the parties in some respects, but they differ in others. The Attorney General hopes that this separate submission will assist the Court in its consideration of this unusual, difficult, and exceptionally important case.

ARGUMENT

For many years, article I, section 12 of the California Constitution and its predecessors were interpreted to require state courts to permit almost any criminal defendant to secure pretrial release by posting some amount of money bail. (See *In re Underwood* (1973) 9 Cal.3d 345, 349-350; *People v. Tinder* (1862) 19 Cal. 539, 542, abrogation on other grounds recognized by *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1028.) On the other hand, it was also settled that the fact that a defendant could not afford

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County of San Francisco. ABM refers to the Answering Brief on the Merits filed by the respondent in this Court, Mr. Humphrey.

to post the required amount did not, by itself, make that amount constitutionally "excessive." (See *Ex parte Duncan* (1879) 54 Cal. 75, 78.)[2] In practice, the result was that many defendants were in effect detained before trial by the setting of a bail amount that they could not afford.[3] Others were able to secure release, but only on terms that could be viewed as unfair or oppressive in light of their economic circumstances and given the likelihood that public interests could have been adequately served by reasonably available alternatives to money bail. At the same time, defendants with financial means might secure pretrial release even if they presented clear risks to public, victim, or witness safety. Such a defendant could be detained on public safety grounds only based on a showing of narrow circumstances defined by article I, section 12(b) and (c), such as the defendant having made an express threat to cause "great bodily harm" to a

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[2] See also, e.g., *In re York* (1995) 9 Cal.4th 1133, 1149 ["a defendant who is unable to post reasonable bail has no constitutional right to be free from confinement prior to trial"]; *In re Smith* (1980) 112 Cal.App.3d 956, 966-967; *People v. Gilliam* (1974) 41 Cal.App.3d 181, 191, narrowed on other grounds by *People v. McGaughran* (1979) 25 Cal.3d 577, 584 fn. 6; *Ex Parte Ruef* (1908) 7 Cal.App. 750, 752.

[3] See Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendation to the Chief Justice (Oct. 2017) p. 25 & fn. 71 [discussing three counties in which between 15% and 59% of the presentence inmates in custody were eligible for bail]; Human Rights Watch, *Not In It For Justice: How California's Pretrial Detention and Bail System Unfairly Punishes Poor People* (Apr. 2017) p. 21 [discussing six counties, in which the proportion of defendants who were held through sentencing despite their eligibility for bail ranged from 18% to 53%]; 1 Willis & Stockton, Debates and Proceedings, Cal. Const. Convention 1878-1879 (1880), p. 310 ["the vast majority of those who are committed for various offenses under felonies are persons who are unable to give bail"]; 3 Willis & Stockton, *supra*, at p. 1188 ["Sometimes we lock men up because they cannot give bail."].

specific person. The net result was a system that has been properly criticized as neither fair nor safe.

As the parties' briefs make clear, there is now a widespread consensus that core aspects of this system are not consistent with a contemporary understanding of equal protection and due process. (See, e.g., OBM 15-26; ABM 16-30.) There is likewise broad consensus that, as a matter of good policy, an effective pretrial system can and should provide for release on appropriate nonmonetary conditions in most cases, rather than relying on money bail.[4] At the same time, it is clear that risks to public safety (or of flight) that cannot be managed effectively by other means should result in pretrial detention of some defendants—without regard to their financial means.[5] Courts should be able to make such detention decisions through proceedings that are fair but also practical and efficient. And they should be able to detain a defendant on public safety grounds based on legislative guidance and judicial evaluation of what the facts reveal about the actual risks in a given case.

This broad policy consensus highlights the principal contested legal issue in this case, reflected in the Court's third question: What limits, if any, do the bail-specific provisions of the state Constitution impose on when a court may order a particular defendant detained before trial in order to prevent flight or protect public safety? As discussed below, that question is an exceptionally complex one, turning on a history of constitutional evolution that is unique to this case. On balance, however, the cardinal interpretive principle of honoring voter intent is best implemented by giving full effect to the 2008 initiative amendment of article I, section 28. That provision, applied together with applicable principles of due process

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[4] See Pretrial Detention Reform, *supra*, p. 51.

[5] *Id.* at p. 52.

and equal protection, continues a long tradition of favoring pretrial release where it is possible. At the same time, it allows detention, without regard to financial means, in any case where it is truly warranted by the public or victim safety considerations that the People have declared to be paramount. It also leaves the Legislature free to frame a modern system of pretrial release—one based not on a defendant's financial resources, but on policy judgments made by the People and the Legislature and individual assessments made by the courts.

I. MODERN EQUAL PROTECTION AND DUE PROCESS PRINCIPLES RESTRICT A COURT'S ABILITY TO SET BAIL IN AN AMOUNT THE DEFENDANT CANNOT PAY OR TO USE HIGH BAIL TO ADDRESS PUBLIC SAFETY

In response to the Court's first question in this case, the Attorney General agrees with both parties that a court must "consider a criminal defendant's ability to pay in setting or reviewing the amount of monetary bail." (OBM 18; see ABM 19.) For many years, most courts gave little weight to arguments about the disparate effect of a money-bail system on the fundamental liberty interests of defendants of limited means. (See, e.g., *In re York*, *supra*, 9 Cal.4th at p. 1152 [summarily rejecting related argument]; *In re Smith*, *supra*, 112 Cal.App.3d at pp. 966-967 & fn. 7.) Recently, however, courts have increasingly recognized the substantial tension between fundamental due process and equal protection principles and bail systems that can be viewed as allowing wealth to determine, as a practical matter, whether a defendant is released or detained pending trial. (See, e.g., *ODonnell v. Harris County* (5th Cir. 2018) 892 F.3d 147, 163; *Brangan v. Commonwealth of Massachusetts* (2017) 477 Mass. 691, 707-710.)

Basic due process and equal protection requirements apply to bail and detention decisions, notwithstanding the existence of separate constitutional provisions referring specifically to bail, detention, and release. (See, e.g.,

United States v. Salerno (1987) 481 U.S. 739, 746-752 [analyzing federal pretrial detention statute for consistency with due process]; *Van Atta v. Scott* (1980) 27 Cal.3d 424, 434-446 [applying due process requirements to decisions on bail and own-recognizance release], superseded on other grounds as stated in *In re York*, *supra*, 9 Cal.4th at p. 1143 fn. 7.) And in the context of defendants who have already been convicted of crimes, this Court and the U.S. Supreme Court have held that requiring a person who would otherwise be set free to remain in custody solely because of an inability to pay money is inconsistent with "fundamental fairness." (*Bearden v. Georgia* (1983) 461 U.S. 660, 673; see, e.g., *Williams v. Illinois* (1970) 399 U.S. 235, 240-241 [convicted defendant may not be required to serve jail time beyond an offense's statutory maximum because of inability to pay an associated fine]; *Tate v. Short* (1971) 401 U.S. 395, 397-398 [person who cannot pay fine may not be forced to serve substitute jail term]; *In re Antazo* (1970) 3 Cal.3d 100, 103-104 [similar]; *Charles S. v. Superior Court* (1982) 32 Cal.3d 741, 749-751 [concluding, based in part on *Williams* and *Antazo*, that court may not deny probation to juvenile defendant based only on inability to pay restitution].)

The Attorney General agrees with the parties that the same principles apply to pretrial detention. (See OBM 18-19; ABM 18; *United States v. Salerno*, *supra*, 481 U.S. at p. 755 ["In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."].) A person's inability to meet a financial condition is a permissible basis for detention only if "alternate measures are not adequate to meet the State's interests." (*Bearden v. Georgia*, *supra*, 461 U.S. at p. 672.) And the criminal justice system should not treat one defendant more harshly than another based on lack of wealth. At a minimum, these principles reinforce existing requirements that a court consider a defendant's ability to pay when setting an amount of money bail. (*Ex parte Duncan*, *supra*, 54 Cal. at

p. 78.) More broadly, they strongly suggest the impermissibility of imposing unaffordable money bail. The availability of personal freedom should not turn solely on a defendant's ability to pay a particular amount.

Similar principles dictate at least the current answer to the Court's second question, which asks whether courts may or must consider public and victim safety in setting the amount of any "monetary bail." On the face of the state constitutional provisions specifically addressing bail, a court would be required to consider some such factors. (See Cal. Const. art. I, § 12 [requiring consideration of "the seriousness of the offense charged" and "the previous criminal record of the defendant"]; Cal. Const. art I, § 28(f)(3) [specifying that "[p]ublic safety and the safety of the victim shall be the primary considerations"].)[6] As the parties point out, however, current state statutory law makes monetary bail forfeitable only based on failure to appear, not based on the commission of a new offense or other breach of public safety. (See OBM 23; ABM 28; Pen. Code, § 1305, subd. (a).) Given that limitation, the Attorney General agrees with the parties that the amount of any money bail currently bears no rational relationship to protecting public safety. The only exception might be an amount set so high as to be unaffordable to a particular defendant, thus resulting in detention (see, e.g., ABM 29); but in that situation it is unfair and ineffective, as discussed above, to use a high bail amount as a de facto detention order that in practice affects only those without financial means.

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[6] See also, e.g., *People v. Standish* (2006) 38 Cal.4th 858, 975 ["the proponents of the [1982 measure adding the language quoted in the text to section 12] made it clear they intended that public safety should be a consideration in bail decisions]; *In re Williams* (1889) 82 Cal. 183, 184 [refusing to overturn bail amount as an abuse of discretion, in light of "the moral turpitude of the crime, the danger resulting to the public from the commission of such offenses, and the punishment imposed or authorized by law therefor"].

Under these circumstances, equal protection and due process principles preclude the setting of a high bail amount as a purported method of protecting public safety.[7]

II. THE STATE CONSTITUTION PERMITS A COURT TO ORDER PRETRIAL DETENTION WHERE JUSTIFIED BY AN INDIVIDUALIZED, COMPELLING NEED

The Court's third question, concerning when the state Constitution permits pretrial detention in noncapital cases, has far-reaching implications. The unique history of the two provisions specifically addressing bail—Article I, section 12 and Article I, section 28—makes it unusually difficult to answer. Because the parties have already discussed this history, we summarize it only briefly. We then discuss the parties' proposed answers to the Court's question, and finally offer the Attorney General's own assessment of how best to apply established principles of interpretation to the unusual situation here.

A. The History of Section 12 and Section 28(f)(3)

Article I, section 12 has traditionally been understood as conferring a right to money bail save for specifically enumerated exceptions. (See, e.g., *People v. Standish*, *supra*, 38 Cal.4th at pp. 875, 877-878; *In re*

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[7] Even if current statutory law were changed to allow forfeiture of money bail based on new conduct threatening public or victim safety, that would be an unsatisfactory way of seeking to control safety threats. Disparities in the likely practical impact of such orders based on wealth would remain; and the law should not seek to control real threats to victim or public safety by putting a price on them. Where such a threat is real it is better to seek to prevent future harm using nonmonetary means such as more active supervision or, if necessary, detention. (See generally Pretrial Detention Reform, *supra*, p. 52.)

Underwood, *supra*, 9 Cal.3d at pp. 349-350.)[8] At first, the only exception was for "capital crimes when the facts are evident or the presumption great." In 1982, Proposition 4 added two more exceptions: felony offenses "involving acts of violence on another person" if the court "finds based upon clear and convincing evidence that there is a substantial likelihood the [defendant's] release would result in great bodily harm to others," and all felony offenses if "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." (Ballot Pamp., Primary Elec. (June 8, 1982) p. 17.)[9] In 1994, Proposition 189 added "felony sexual assault offenses on another person" to the exception covering felonies "involving acts of violence on another person." (Supp. Ballot Pamp., General Elec. (Nov. 8, 1994) p. 18.)

The bail provisions of article I, section 28 were originally considered as part of a comprehensive victims' rights initiative, Proposition 8, during the same 1982 election that added limited exceptions to section 12. With respect to bail, Proposition 8 would have repealed section 12 and replaced it with a "Public Safety Bail" provision stating that in noncapital cases a defendant "*may* be released on bail by sufficient sureties." (Ballot Pamp., Primary Elec. (June 8, 1982) p. 33, italics added.) It further specified that "[i]n setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the seriousness of the

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[8] Article I, section 12 derives from Article I, section 6 of the Constitution of 1879, and before that from Article I, sections 6 and 7 of the Constitution of 1849.

[9] Proposition 4 also added language specifying that "[i]n 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." (*Ibid.*)

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," but that "[p]ublic safety shall be the primary consideration." (*Ibid.*)

Proposition 8 passed, but it received fewer votes than Proposition 4. (See *In re York*, *supra*, 9 Cal.4th at p. 1140, fn. 4.) This Court concluded that the two measures "contained competing measures respecting bail ... that could not both be given effect." (*People v. Standish*, *supra*, 38 Cal.4th at p. 877.) Accordingly, the bail provisions of Proposition 4 "prevailed over those of Proposition 8." (*Ibid.*; see also *York*, *supra*, 9 Cal.4th at p. 1140 fn. 4; Cal. Const., art. II, § 10, subd. (b).)

In 2008, voters enacted Proposition 9, known as Marsy's Law. Marsy's Law included a preliminary finding and declaration that "the 'broad reform' of the criminal justice system intended to grant the[] basic rights mandated in the Victims' Bill of Rights initiative measure passed by the electorate as Proposition 8 in 1982 has not occurred as envisioned by the people." (Ballot Pamp., General Elec. (Nov. 4, 2008) p. 128.) With respect to bail, Proposition 9 amended section 28 as follows, with new language in italics and deletions indicated by strike-through text:

> SECTION 4.1. Section 28 of Article I of the California Constitution is amended to read:
>
> (a) The People of the State of California find and declare *all of the following:*
>
> * * *
>
> *(4) The rights of victims also include broader shared collective rights that are held in common with all of the People of the State of California and that are enforceable through the enactment of laws and through good-faith efforts and actions of California's elected, appointed, and publicly employed officials. These rights encompass the expectation shared with all of the people of California* that persons who commit felonious acts causing injury to innocent victims will be appropriately *and thoroughly investigated, appropriately* detained in custody, *brought before the courts of California even if arrested outside the State,* tried by the courts *in a*

timely manner, sentenced, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.

* * *

(b) *In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights:*

* * *

(3) To have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant.

* * *

(8) To be heard, upon request, at any proceeding ... involving a post-arrest release decision ... or any proceeding in which a right of the victim is at issue.

* * *

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

* * *

~~(c)~~*(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.

(*Id.* at p. 129.)

Nothing in Proposition 9 or the accompanying voter materials mentioned article I, section 12, or purported to repeal it, as Proposition 8 would have done in 1982. Nor did anything in the materials alert voters that the pre-existing bail provisions of section 28, which they were being asked to amend, had never taken effect.

B. Ordinary Principles of Constitutional Interpretation Point in Different Directions in This Case

Familiar principles normally guide this Court in construing constitutional provisions enacted by initiative, including when different provisions may be in apparent conflict or tension.[10] The Court's "'primary purpose'" is to "'effectuate the intent of the voters who passed [an] initiative measure.'" (*People v. Briceno* (2004) 34 Cal.4th 451, 459, quoting *In re Littlefield* (1993) 5 Cal.4th 122, 130.) In discerning that intent, "[i]mplied repeals are disfavored." (*City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563.) The Court will strive, where possible, "to reconcile conflicts between ... constitutional provisions to avoid implying that a later enacted provision repeals another existing ... constitutional provision." (*In re Lance W.* (1985) 37 Cal.3d 873, 886.) "'[C]ourts are bound, if possible, to maintain the integrity of both [provisions] if the two may stand together,'" and "'[w]here a

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[10] See generally *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 265 [court should apply to constitutional interpretation the same principles that govern statutory construction].

modification will suffice, a repeal will not be presumed.'" (*California Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 292, superseded on other grounds as stated in *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 599.) "As a means of avoiding conflict, a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 371.) "Because the doctrine of implied repeal provides that the most recently enacted statute expresses the will of the Legislature [citation]," an implied repeal should be recognized "in those limited situations where it is necessary to effectuate the intent of drafters of the newly enacted statute"—for example, where "the two acts are so inconsistent that there is no possibility of concurrent operation ... [citation]," or where the new law "constitute[s] a revision of the entire subject, so that the court may say it was intended to be a substitute for the [earlier one]. [Citations.]" (*Professional Engineers in Cal. Government v. Kempton* (2007) 40 Cal.4th 1016, 1038, internal quotation marks omitted.)[11]

What appears, however, to be a matter of first impression is what to do when, as in 2008, voters are asked to make additions and deletions to a constitutional provision that was previously declared inoperative because of a conflict with another provision, without being expressly asked to repeal or modify the conflicting provision.

Faced with this anomalous situation, petitioner submits that the 2008 electorate intended "to reenact the bail and detention provisions of Proposition 8 previously held inoperative by the Court." (OBM 41; cf. Pretrial Detention Reform, *supra*, p. 23 ["[a]lthough [Proposition 9] did not

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[11] Such a voter revision of particular subject matter within the Constitution is not the same as a prohibited revision of the Constitution as a whole. (Cf. generally *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 350.)

directly address article I, section 12 of the Constitution, it did reenact, as section 28(f)(3), [Proposition] 8's provisions addressing bail"].) He contends this does not require concluding that Proposition 9 impliedly repealed section 12, because sections 12 and 28 are not in irreconcilable conflict: "Ultimately, both provisions delineate exceptions to the general rule providing for bail and own recognizance release and permit courts to preventatively detain those defendants that pose serious safety risks." (OBM 36.) He urges the Court to reconcile the two provisions by holding that section 12 still provides a right to bail, but now subject to more exceptions. (Reply Br. 33.) He argues that courts may detain defendants without bail either (i) under the existing section 12 exceptions or (ii) under section 28 if the defendant "is arrested for: 1) felonious offenses causing victims to suffer direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a crime or delinquent act; 2) felonious offenses where the defendant poses a serious danger to the safety of the victim or public safety; [or] 3) felonious offenses where the defendant poses a serious flight risk." (OBM 38-39.)

In contrast, respondent argues that Proposition 9 had little or no effect on the state constitutional provisions governing bail. (ABM 30-36.) He contends that the measure was presented to the voters as making only "minor changes" to existing language in section 28 regarding bail, and "cannot be interpreted as reenacting" the language that this Court had declared inoperative. (*Id.* at p. 31.) He stresses Proposition 9's omission (in contrast to Proposition 8 in 1982) of any express language repealing section 12, which he characterizes as enshrining a longstanding and "'absolute'" right to bail. (*Id.* at pp. 41-42, quoting *In re Law* (1973) 10 Cal.3d 21, 25.) He further argues that giving effect to section 28 would permit courts to order detention in cases where detention is prohibited under the Due Process Clause. (*Id.* at p. 43.) Under these circumstances,

he urges the Court at most to "give effect to the genuinely new material" enacted in 2008—"that is, the language italicized in Proposition 9—by reading those additions into section 12, which covers the same subject matter." (*Id.* at p. 35.) The italicized new language he focuses on consists of the phrase "the safety of the victim" (which Proposition 9 inserted in two places into preexisting language enumerating factors relating to setting, reducing, or denying bail) and the phrase "and the victim" (which the proposition inserted into preexisting language regarding a right to notice and a hearing). Respondent explains that, under his interpretation, the state Constitution would "requir[e] that victims receive notice and an opportunity to be heard before anyone arrested for a serious felony is released on bail," and "mak[e] victim safety the primary consideration when determining conditions of release [under section 12]," but "the rest of [section] 28(f)(3) [would] remain[] inoperative[.]" (*Id.* at pp. 35-36.)

Neither of these proposals is entirely satisfying as a matter of standard legal analysis. To take respondent's position first, his argument against an implied repeal of section 12 has considerable force. On the other hand, his resulting position that Proposition 9 had essentially no effect with respect to bail is hard to accept as legally proper.

The interpretive presumption against implied repeals is a strong one. The Attorney General, public agencies, and the courts rely on it routinely in determining the effect of new constitutional enactments, especially in the context of initiative measures. And it is reinforced here by the related points that the 2008 election materials never mentioned repeal of section 12, or even any possible conflict between the new measure and that existing provision; never advised voters that the bail language of section 28 had been held inoperative by the courts in light of the history of competing initiatives in 1982; and never explained exactly what effect the amendments to the then-inoperative language were intended to have. (Cf. *People v.*

Valencia (2017) 3 Cal.5th 347, 384 (conc. opn. of Kruger, J.) [Legislative Analyst's failure to discuss enactment's effect on another law was neither "dispositive" nor "irrelevant"].)

This leaves respondent contending, however, that with respect to bail the voters who enacted Proposition 9 were asked to enact or repeal only isolated words or phrases, and at most accomplished only that. That is not tenable. As petitioner points out, the specific additions and deletions were "presented ... to the electorate as part of a logical and coherent whole," and indeed "could not be understood without the remaining provisions." (OBM 38.)[12] The addition of a phrase such as "and the safety of the victim," or the substitution of the plural for the singular in the phrase "shall be the primary considerations," has no meaning without the surrounding words. (See generally *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54 ["In construing the words of a ... constitutional provision to discern its purpose, ... every word should be given some significance, leaving no part useless or devoid of meaning."].)

The relevant portion of Proposition 9 began with the introductory clause "Section 28 of Article I of the California Constitution is amended to read:", followed by the full text of the proposed section as amended. (Ballot Pamp., General Elec. (Nov. 4, 2008) p. 129.) The amendment also placed section 28's entire provision on Public Safety Bail, both existing language and proposed additions and deletions, after new prefatory language stating that what followed described "rights that are shared with all of the People of the State of California." (*Id.* at p. 130.) It added to the

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[12] Cf. *Coblentz, Patch, Duffy & Bass, LLP v. City and County of San Francisco* (2014) 233 Cal.App.4th 691, 698, 705, as modified on denial of rehearing Jan. 9, 2015 [reasoning that new provision of ordinance was submitted to and approved by voters in its entirety, although some of the new language erroneously appeared in roman type rather than italics].

Constitution a statement, in section 28(a)(4), that the "collective right[]" of victims and the People to have "persons who commit felonious acts causing injury to innocent victims ... appropriately detained in custody" was "enforceable through the enactment of laws and through good-faith efforts and actions of California's elected, appointed, and publicly employed officials." (*Id.* at p. 129.) And the proposition expressed dissatisfaction that certain reforms intended by "the Victims' Bill of Rights initiative measure passed by the electorate as Proposition 8 in 1982" had "not occurred as envisioned by the people." (*Id.* at p. 128.)[13] Under these circumstances, treating Proposition 9's bail provisions as either a nullity or something very close to it would be inconsistent with the court's "primary purpose": "effectuat[ing] the intent of the voters." (*People v. Briceno*, *supra*, 34 Cal.4th at p. 459, internal quotation marks omitted; see, e.g., *In re Lance W.*, *supra*, 37 Cal.3d at p. 887 [rejecting an application of the presumption against implied repeal that would not have "maintain[ed] the integrity of" the newer enactment]; *Professional Engineers in California Government v. Kempton*, *supra*, 40 Cal.4th at p. 1038 ["Because 'the doctrine of implied repeal provides that the most recently enacted statute expresses the will of the Legislature' [citation], application of the doctrine is appropriate in those limited situations where it is necessary to effectuate the intent of drafters of the newly enacted statute."].)

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[13] A preamble's general statement of intent does not justify expansion of an enactment's "'clearly defined'" operative provisions. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119; see *id.* at p. 1118 ["Of course, 'legislative intent is not gleaned solely from the preamble of a statute; it is gleaned from the statute as a whole, which includes the particular directives.' [Citation.]"].) But a preamble may "be used to resolve ambiguity" in an enactment's operative provisions. (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 926.)

Conversely, petitioner's position gives effect to the voters' most recent action. It recognizes that Proposition 9 presented the bail provisions of section 28 as a coherent whole, and that in enacting amendments to (and a reframing of) existing language the voters must have intended that the overall provision would be given effect in accordance with its terms. On the other hand, petitioner's description of how sections 12 and 28 can be reconciled (see OBM 38-39), while attractive as a means of avoiding a conclusion of implied repeal, in the end also misses the mark.

For example, petitioner frames his proposed reconciliation of the provisions as a matter of retaining "a general right to release on bail in noncapital cases" under section 12, but subject to an expanded set of exceptions under section 28. (Reply Br. 33; see, e.g., OBM 38-40.) But petitioner's proposed exception for "felonious offenses where the defendant poses a serious danger to the safety of the victim or public safety" (OBM 39) would amount to a general authorization to detain, on public safety grounds, any felony defendant, subject only to appropriate findings in the individual case. Though described as a reconciliation, it in fact leaves in place little of the previously narrow boundaries of the detention provisions of section 12. The limitation it does maintain—authorizing detention only for felony offenses—is a material restriction on what section 28 would otherwise authorize, and one that is not necessarily desirable or well founded. Indeed, the comprehensive bail reform measure recently enacted by the Legislature specifically provides for the possibility of detention in certain misdemeanor cases, such as some crimes of domestic violence. (See S.B. 10 § 4, enacting Pen. Code, §§ 1320.10, subd. (e)(3), 1320.18, subd. (a).) Meanwhile, petitioner's proposed reconciliation would continue to recognize a state constitutional right to money bail in cases not covered by any exception. That fails to give effect to the most fundamental difference between section 28 and section 12, which is the substitution of

"may" for "shall" in the phrase "[a] person may be released on bail." (See *People v. Standish*, *supra*, 38 Cal.4th at p. 877.) Moreover, it is the constitutionally problematic aspects of money bail that underlie this entire case.

Our point is not to cavil about imperfections in the parties' proposals. The problem here is difficult. Established principles of construction do not point to one clear answer in this case. In seeking the best legal solution, the Attorney General accordingly urges the Court to focus on adopting a practical construction of the state constitutional bail provisions, in light of the voters' most recent action speaking to the precise issues at hand. Such a construction can best honor voter intent and accommodate due process and equal protection principles. It will also leave the Legislature flexibility to make reasonable policy judgments in this complex and evolving area.

C. The Best Resolution Here Gives Effect to Section 28(f)(3)

In proposing such a construction, we start with the observation that any realistic application of the normal presumption against implied repeal in this case must take into account how section 12 was understood in 2008. As discussed above, under that traditional understanding a right to the setting of money bail under section 12 was far from a right to release. Rather, the bail amount set could easily result in de facto pretrial detention. (See *Ex parte Duncan*, *supra*, 54 Cal. 75, 77-78; p. 10 & fn. 3, *supra*.) That was especially true after 1982, when Proposition 4—expressly presented in competition with the more sweeping bail provisions of Proposition 8—amended section 12 to direct that "[i]n fixing the amount of bail, the court shall take into consideration" not only "the probability of [the defendant's] appearing at the trial or hearing of the case," but also "the seriousness of the offense charged, [and] the previous criminal record of the defendant." (See p. 16 fn. 9, *supra*.) In light of existing understandings, that new

language, which "permitted courts setting bail to consider factors other than the probability that the defendant would appear at trial" (*People v. Standish*, *supra*, 38 Cal.4th at p. 875), reflected voters' intent and expectation that courts should set bail higher for serious and recidivist offenders even if (and possibly because) the higher bail might result in the person's remaining in custody until trial. (See *ibid.* ["the proponents of the measure made it clear they intended that public safety should be a consideration in bail decisions"].)

This common understanding of what section 12 required and permitted made the practical difference between section 12 and the amended section 28(f) less sharp at the time that Proposition 9 was presented to the voters in 2008. But the evolution since that time in how due process and equal protection principles apply to bail means that any right to the setting of money bail under section 12 would now effectively be a right to *release*, except in the narrow circumstances prescribed by section 12's express detention exceptions. That would be inconsistent with the intent of the voters when they amended section 12 in 1982. And it would entirely undercut the concern for victim- and public-safety reflected in the passage of Proposition 9 in 2008.[14]

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[14] Respondent asserts that risks to public safety could be addressed to a "significant extent" using "non-monetary conditions of release—electronic monitoring, drug or mental-health treatment, and no-contact orders." (ABM 53.) The Attorney General agrees that courts have inherent power to specify reasonable conditions of release, to refuse release if a defendant refuses to agree to conditions, and to respond to violations by revoking release. Those measures may not, however, always be available; a court may conclude they are not sufficient in a particular case; and it is indisputable that they are not always effective. (See, e.g., *People v. Winbush* (2017) 2 Cal.5th 402, 418 [defendant disabled electronic monitoring and committed murder]; *People v. Streeter* (2012) 54 Cal.4th 205, 212-213 [defendant murdered person who had obtained restraining

(continued...)

Under these circumstances, the best way to honor both voter intent and all applicable constitutional requirements as they are now understood is to give effect to the provisions of section 28(f)(3) as presented to the voters in 2008, subject to the independent requirements of equal protection and due process. Thus, the Court should hold that defendants "may" be released pending trial under appropriate conditions—nonmonetary, monetary, or both, as may be provided by the Legislature. (Cal. Const., art. I, § 28(f)(3); see also *id.* § 28(a)(4) [provisions "enforceable through the enactment of laws"].) Given due process requirements on which the parties and the Attorney General agree, there is a strong presumption in favor of release, in all cases, on the least restrictive conditions reasonably available to the trial court that will adequately serve the state's compelling interests in public and victim safety and in ensuring the defendant's appearance at further proceedings. But detention on flight risk or public safety grounds, if permissible as a matter of due process and equal protection, is not limited to the narrow circumstances described in section 12(b) and (c). Rather, as a state constitutional matter, a trial court may order the pretrial detention of a defendant if it finds, based on an individualized consideration of the circumstances, that doing so is necessary to protect public or victim safety or to ensure the defendant's appearance in court. (Cf. *United States v. Salerno*, *supra*, 481 U.S. at p. 751.)

Giving effect to section 28(f)(3) also best respects the role of the Legislature in making the many more detailed policy decisions involved in bringing California's bail system into conformity with contemporary equal protection and due process standards. Proposition 9 reflects the voters'

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order]; *People v. Farley* (2009) 46 Cal.4th 1053, 1060 [mass-murder despite restraining order].)

broad choice to give public and victim safety the primary role in pretrial release decisions. And the language of section 28(a)(4) confirms the electorate's expectation that the Legislature would have the power to ensure that dangerous defendants are "appropriately ... detained" "through the enactment [of applicable] laws." The choice of particular means to achieve that goal, consistent with other constitutional requirements, properly rests with elected policymakers in the first instance; and the flexible provisions of section 28(f) enable the legislative choices needed to modernize the current system. Indeed, the Legislature has recently enacted new provisions, intended to take effect in October 2019, comprehensively reforming the state's pretrial system and entirely eliminating reliance on money bail. (See S.B. 10, *supra*.)[15] That complex set of legislative policy choices, responding directly to the equal protection and due process concerns raised by respondent and others (including the Attorney General and the District Attorney as petitioner here), is fully consistent with section 28—but not with the limited detention provisions of section 12. Where possible, this Court's construction of the state Constitution should facilitate, not impede, such a landmark legislative reform. And, indeed, the Legislature's implicit judgment that the state Constitution permits what it has enacted deserves substantial weight. (See generally *People* v. *Standish*, *supra*, 38 Cal.4th at p. 879 [noting, in considering constitutional and statutory pretrial release provisions, "the significant interrelationship

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[15] There is widespread agreement on the superiority of this sort of system, providing for release in most cases without regard to the defendant's finances, but allowing detention when necessary. (See, e.g., Pretrial Detention Reform, *supra*, p. 52.) The federal government and several states have adopted systems with these features. (See *id.* at pp. 17-18, 83-93; 18 U.S.C. § 3142.) If S.B. 10 takes effect, California will be the first state to completely eliminate money bail.

and mutual dependency among the three branches of government"]; *Property Reserve Inc. v. Superior Court* (2016) 1 Cal.5th 151, 192 ["[W]hen the Legislature has enacted a statute with constitutional constraints in mind '[t]here is a "strong presumption in favor of the Legislature's interpretation of a provision of the Constitution."' [Citations.]"]; *id.* at p. 193 ["'Although the ultimate constitutional interpretation must rest, of course, with the judiciary [citation], a focused legislative judgment on the question enjoys significant weight and deference by the courts.'"].)

It is true that giving full effect to section 28(f)(3) may be characterized as impliedly repealing the limitations on pretrial detention that were previously imposed by section 12. Put differently, the provisions of section 28(f)(3) would now "prevail[] over" those of section 12, rather than the other way around. (See *People v. Standish*, *supra*, 38 Cal.4th at p. 877.) That is not an outcome to be embraced lightly. But it is the outcome that best applies established interpretive principles, starting with the primacy of honoring voter intent, under the unique circumstances of this case. It best accommodates the due process and equal protection principles that initially prompted the current—and extremely important—rethinking of California's traditional money bail system. And it best construes the Constitution to facilitate, rather than complicate, historic state legislative reforms.[16]

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[16] On September 12, this Court invited the parties and amici to submit supplemental briefing addressing the question of S.B. 10's "effect, if any, ... on the resolution of the issues presented by this case." The passage of S.B. 10 does not render this case moot. By its own terms the new law will not go into effect until October 2019. Until then, current statutory law continues to govern, and the issues presented here remain important. In addition, the Secretary of State has approved for circulation a petition proposing a referendum to overturn S.B. 10. (See https://www.sos.

(continued...)

CONCLUSION

The Court of Appeal's judgment granting a writ of habeas corpus should be affirmed.

Dated: October 9, 2018

Respectfully submitted,

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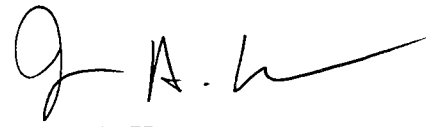

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ca.gov/elections/ballot-measures/initiative-and-referendum-status/initiatives-referenda-cleared-circulation/.) If the required signatures are obtained, S.B. 10 will be inoperative at least until the referendum is voted on in November 2020, and perhaps permanently. For the moment, S.B. 10's relevance to this case lies mainly in its demonstration of the Legislature's ability and willingness to address the complex legal and policy issues involved in comprehensive bail reform.

CERTIFICATE OF COMPLIANCE

I certify that the attached Amicus Curiae Brief of Attorney General Xavier Becerra uses a 13 point Times New Roman font and contains 7,322 words.

Dated: October 9, 2018

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Kenneth Humphrey on Habeas Corpus**
Case No.: **S247278**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 9, 2018, I served the attached **AMICUS CURIAE BRIEF OF ATTORNEY GENERAL XAVIER BECERRA** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 9, 2018, at San Francisco, California.

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