**No. S277910**

**In The Supreme Court**
**Of The State of California**

***In re* GERALD JOHN KOWALCZYK,**

On Habeas Corpus.

After a Decision of the Court of Appeal, First Appellate District,
Division Two, Case No. A162977
San Mateo County Superior Court Case No. 21-SF-003700-A,
The Honorable Susan Greenberg, Superior Court Judge
The Honorable Elizabeth K. Lee, Superior Court Judge
The Honorable Jeffrey R. Finigan, Superior Court Judge

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# APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE HUMAN RIGHTS WATCH IN SUPPORT OF PETITIONER KOWALCZYK; BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER KOWALCZYK

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ARNOLD & PORTER KAYE SCHOLER LLP
Carmen Lo (Bar No. 280441)
3000 El Camino Real
Five Palo Alto Square, Suite 500
Palo Alto, CA 94306-3807
Telephone: (650) 319-4500
Facsimile: (650) 319-4700

Attorneys for Amicus Curiae
HUMAN RIGHTS WATCH

ARNOLD & PORTER KAYE SCHOLER LLP
Jocelyn Porter (*pro hac vice* application pending)
Steven M. Gentine (*pro hac vice* application pending)
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

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## APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE HUMAN RIGHTS WATCH

Pursuant to California Rule of Court 8.520(f), Amicus Curiae Human Rights Watch respectfully requests leave to file the brief accompanying this application.

Human Rights Watch is a non-profit, independent organization and the largest international human rights organization based in the United States. Since 1978, Human Rights Watch has investigated and exposed human rights violations and challenged governments to protect the human rights of citizens and noncitizens alike. Human Rights Watch investigates allegations of human rights violations in 100 countries around the world, including in the United States, by interviewing witnesses, gathering and analyzing information from a variety of sources, and issuing detailed reports. Where human rights violations have been found, Human Rights Watch advocates for the enforcement of those rights with governments and international organizations and in the court of public opinion. Our U.S. Program has focused on, among other things, human rights compliance within the criminal legal system.

Relevant to the issues presently before this Court, Human Rights Watch for years has investigated the pretrial detention and bail systems in California and in other states. The most recent findings from its investigations were compiled in a report that provided an in-depth perspective of the real-world impacts of pretrial detention. (See Human Rights Watch, "Not in it for Justice: How California's Pretrial Detention and Bail System Unfairly Punishes Poor People" (Apr. 11,

2017) (hereinafter "Not in it For Justice") [1].) The Human Rights Watch report found that California's pretrial system, by setting bail without regard to an individual's ability to pay, systematically detains innocent people, coerces guilty pleas, and arbitrarily punishes the non-wealthy.

As discussed in this brief, the inequity and injustice that plagued California's pretrial detention system at the time of Human Rights Watch's 2017 report are ever present and, in some cases, intensified today. In fact, the status quo before this Court's decision in *In re Humphrey* (2021) 11 Cal. 5th 135 has remained the same two years later. Human Rights Watch seeks to file this brief to provide an accurate and comprehensive picture of the profound harm the pretrial detention system has on the integrity of the criminal justice system and on our communities. This brief demonstrates the urgent need to reaffirm that pretrial detention should be used in specific and narrow circumstances which are bound by constitutional and statutory protections.

No party or counsel for any party authored this brief in whole or in part. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief.

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[1]Available at https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf.

## BRIEF OF AMICUS CURIAE HUMAN RIGHTS WATCH

## INTRODUCTION

The presumption of innocence is a cardinal principle of the criminal justice system, one that is "undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *(Coffin v. United States* (1895) 156 U.S. 432, 453.) As such, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*In re Humphrey* (2021) 11 Cal. 5th 135, 155 [quoting *United States v. Salerno* (1987) 481 U.S. 739, 755].) During the pendency of any criminal proceeding, the accused is legally innocent, and "may not . . . be deprived of life, liberty, or property without due process of law." (Cal. Const., art. I, § 15.) These principles are consistent with international norms and the United States' treaty obligations, which include the presumption of liberty while awaiting trial, due process and equality before the courts, and the elimination of racial discrimination in all its forms. (See U.S. Const. art. VI.; Internat. Covenant on Civil & Political Rights, arts. 9, 14, Dec. 16, 1966, 999 U.N.T.S. 171 [ratified by the U.S. June 8, 1992]; Internat. Convention on the Elimination of All Forms of

Racial Discrimination, art. 2, Dec. 21, 1965, 660 U.N.T.S. 195 [ratified by the U.S. Oct. 21, 1994].)

The basic tenets of equal protection and due process require that pretrial detention only occur in narrow circumstances that are bound by constitutional protections and exacting evidentiary standards. (See *In re Humphrey*, *supra*, 11 Cal. 5th at pp. 155-56.) Article 1, Section 12 of the California Constitution provides a directive that an individual shall be released on bail by sufficient sureties, except for three limited exceptions for capital and limited felony offenses. Article 1, Section 28 directs the court to primarily consider public safety and the safety of the victim when making determinations on pretrial detention. This Court elaborated that in balancing the right to liberty against a state's interest in public safety during pretrial detention decisions, trial courts must hold an individualized determination, find clear and convincing evidence of a flight risk of the arrestee or a specified risk of harm to the public or the victim, and that no other non-financial conditions of release could protect those interests. (*Id.* at pp. 153-54.) Should money bail be reasonably necessary, then the court must consider an arrestee's ability to pay, amongst other factors, and cannot set bail at an amount

the arrestee cannot reasonably afford. (*Id.* at p. 154.) "The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional." (*Id.* at p. 143.)

The Court of Appeal's decision in *In re Kowalczyk* strips away the due process requirements and constitutional protections articulated in *Humphrey* by allowing trial courts to set bail at an unaffordable amount, which results in *de facto* detention. (*In re Kowalczyk* (2022) 85 Cal. App. 5th 667, 688-90 [recognizing that a "person's inability to post the court-ordered bail amount necessarily results in the person's detention," but concluding, contrary to *Humphrey*, that it is justified because "no other conditions short of detention are sufficient to vindicate the state's interest"].) By creating a loophole around these protections, the decision betrays the guiding principles of the criminal justice system of liberty as the norm and individuals having the presumption of innocence.

Human Rights Watch, as *amicus curiae*, respectfully submits this brief to describe the current state of inequity and injustice in California's pretrial detention system and how the Court of Appeal's decision will exacerbate its harms. First, despite this Court's holding in *Humphrey*, the number of people detained awaiting trial continues

to be staggering, confirming that California's use of pretrial detention does not happen only in narrow circumstances. Second, the broad use of pretrial detention and unaffordable cash bail coerces guilty pleas, particularly for those living in poverty. The coercive nature of pretrial detention is a miscarriage of justice and calls into question the integrity of the criminal justice system. Third, contrary to the belief that pretrial detention can be a tool for public or victim safety, its excessive use corresponds to high recidivism rates and increased crime into communities. Finally, the broad use of pretrial detention causes irreparable harm to presumptively innocent people and destabilizes vulnerable communities while also exacerbating racial inequities.

For the reasons described below, this Court should hold that Article 1, Section 12 of the California Constitution sets forth the limited circumstances in which an individual may be detained pretrial and Section 28 merely provides additional considerations for judges in pretrial detention determinations. In bail determinations after an individualized hearing, monetary bail should only be set at a level an arrestee can afford. Only when we limit pretrial detention to

the narrowest of circumstances can we mitigate its harms and uphold the integrity of the criminal justice system.

## ARGUMENT

### I. California's Pretrial Detention and Cash Bail System Continue to Detain Legally Innocent People and Penalize the Poor

This Court's decision in *In re Humphrey* was optimistically viewed as a signal that trial courts and prosecutors would follow a new framework for pretrial detention determinations which would be more consistent with justice, respecting liberty and the presumption of innocence. As a result of this Court's requirement for individualized pretrial detention hearings and its holding that unaffordable bail is unconstitutional, California should have seen a more limited use of pretrial detention; and thus, a decrease in pretrial jail populations, bail amounts, and length of stay in pretrial detention.[2] Instead, the evidence shows the trial courts at best,

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[2] For example, the elimination of secured money bonds in 2020 in Harris County, Texas led to a significant drop in pretrial detention populations and bond amounts of $100 or less were observed in nearly 70% of the cases. (See Virani et al., *Coming Up Short: The Unrealized Promise of In re Humphrey*, UCLA School of Law Bail Practicum & Berkeley Law Policy Advocacy Clinic (Oct. 2022), at p. 7, 13 (hereinafter "Coming Up Short").) Also, in 2019, New York passed bail reforms that prescribed pretrial release with nonmonetary

Footnote continued on next page.

struggled to implement *Humphrey*, and at worse, ignored its requirements altogether.

Despite being a "limited exception," the number of people incarcerated in California awaiting trial is staggering. Each day, tens of thousands of individuals who have not been found guilty of any crime, and are thus legally innocent, continue to languish in county jails awaiting resolution of their cases. In the fourth quarter of 2022, the vast majority – 77% – of people in California's jails were detained pretrial. (Board of State and Cmty. Corr., "Jail Profile Survey" (Mar. 27, 2023), at p. 2[3].) Setting aside other factors such as the COVID-19 pandemic and related case backlogs, there has been a marked increase in the number of people in pretrial detention (people who are necessarily unconvicted and unsentenced) since *Humphrey*. Fifty-nine

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conditions for most misdemeanors and nonviolent felonies along with requiring judges to consider a person's ability to post bail without undue hardship when setting bail. (Kim et al., *A Year of Unprecedented Change: How Bail Reform and COVID-19 Reshaped Court Practices in Five New York Counties*, Vera Institute of Justice (2022), at p. 6.) A study of five counties in New York found that after they implemented the bail reforms, they experienced declines in their pretrial population of at least 12% between October 2019 to December 2019, indicating an effect independent of COVID-19. (*Id.* at p. 8.)

[3] Available at https://www.bscc.ca.gov/wp-content/uploads/Jail-Pop-Trends-Through-Q4-2022_3.20.23.pdf.

percent of counties in the state saw an increase in the unsentenced detained population between January to March 2021 and April to December 2021. ("Coming Up Short," *supra*, at p. 15.) A large percentage of those detained pretrial will *never* be anything other than legally innocent. Of almost 1.5 million felony arrests in California from 2011-2015, nearly one in three were arrested and detained because they could not afford bail or paid a non-refundable portion of their bail to a bail bondsman to get out, but were never found guilty of any crime. ("Not in it for Justice," *supra*, at p. 42.) 273,899 of those people, nearly 20% of all arrested for felonies, were never even charged. (*Id.*) Our research shows that California counties detain pretrial at a far higher rate than the rest of the country. (*Id*. at p. 17.)

A large majority of those in pretrial detention are not released because they lack financial resources to post bail. Nearly 80% of all Californians who are arrested cannot afford monetary bail. ("Coming Up Short," *supra*, at p. 16.) This is unsurprising given that the average person in America cannot pay a "surprise $1,000 bill without borrowing money, and a third would be unable to pay an unexpected $400 bill." (Committee on Revision of the Penal Code, "Annual Report and Recommendation 2022" (2022), at p. 69.) Respondent's assertion

that a detainee merely needs to "wait for Friday's paycheck to make bail" or obtain assistance from friends and family is untethered from reality. (See Answer, at p. 58.) Many detainees have no Friday paycheck, would not be able to cover bail amounts with their paycheck, or would be unlikely to obtain such paycheck if they cannot work while being detained.

Despite *Humphrey* articulating an affirmative obligation to hold individualized hearings on a defendant's ability to pay, there is no evidence that such determinations are made, nor that median bail amounts have decreased. (See *In re Humphrey*, *supra*, 11 Cal. 5th at p. 143; "Coming Up Short," *supra*, at pp. 16-18.) A report of court observations in three California counties from February to March 2022 found that across nearly 250 cases, there was only one case where a judge mentioned and considered a defendant's individualized ability to pay when setting bail. (Silicon Valley De-Bug, *Discord & Inaction: Bail and Detention Decisions One Year After Humphrey* (2022), at p. 6[4].) In San Mateo County during that time period, 79.3% of

[4] Available at https://www.siliconvalleydebug.org/stories/discord-inaction-bail-and-detention-decisions-one-year-after-humphrey.

defendants were ordered to pay cash bail, and 99.1% of those bail hearings did not consider the defendants' ability to pay. (*Id.* at pp. 4-5.) The median bail amount in San Mateo County has also stayed consistent, from $7,500 in 2017 to $7,500 in the first two months of 2022. ("Coming Up Short," *supra*, at p. 18.) Even in some counties where the bail amount is drastically higher, the median bail amount has not changed post-*Humphrey*. For example, in Merced County, the median bail rate for felony charges before 2018 was $72,500, and, after March 2021, the rate increased to $75,000. (*Id.* at p. 17.)

Further, the evidence shows that the length of stay in pretrial detention has not changed since *Humphrey*. Even assuming judges were setting lower bail amounts (they are not), they are still not set at amounts that detainees can afford so they can be released from jail. In 40% of counties, the average pretrial length of stay increased between January to March 2021 and April to December 2021. ("Coming Up Short," *supra*, at p. 19.) Based on data from May 2022 from the Los Angeles County jail system, only 15% of the pretrial population "was ordered to be held without bail – the remainder of people would have been released if they could afford cash bail."

(Comm. on Revision of the Penal Code, *supra*, at p. 69[5].) Those with access to funds are quickly released while those without stay for extended periods of time in jail because judges continue to set bail at unaffordable amounts. Thus, Respondent's conclusory assertion that many individuals will be able to make bail within a few days after their arrest, even if they have to borrow from loved ones, is far from the reality.

## II. California's Pretrial Detention System Coerces Guilty Pleas for Those Living in Poverty, Undermining the Integrity of our Criminal Justice System

Pretrial detention, accomplished systematically through the imposition of unaffordable money bail, coerces guilty pleas regardless of whether the individual committed the crime or whether the evidence alleged against them would have established guilt at trial. In turn, trial courts and prosecutors, faced with the pressure of moving through an overloaded court docket, are incentivized to use pretrial detention as a powerful prosecutorial tool to obtain guilty pleas. Individuals detained pretrial are limited in participating in their own defenses, increasing the likelihood of a conviction.

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[5] Available at http://www.clrc.ca.gov/CRPC/Pub/ Reports/ CRPC_AR2022.pdf.

Dante Johnson's[6] experience illustrates the coercive nature of the system. ("Not in it for Justice," *supra*, at pp. 62-64.) One summer afternoon, Los Angeles County police attempted to arrest a man in Inglewood, California. Unable to catch him, the officers wrote a report, identifying the man with a generic description – young, black, male – but noting a severe case of facial acne. The next day, officers arrested Dante, who the prosecutor charged with serious felony weapons offenses. Dante's lawyer noticed that he had a clear complexion, and, based on the report, the officers' testimony, and Dante's assertion of his innocence, decided with Dante to fight the case. However, the judge set an unaffordable bail of $50,000 and Dante remained in jail while his attorney put together his defense.

While incarcerated and awaiting adjudication of his case, Dante was forced to endure traumatic conditions in custody. He was moved between different jail facilities, constantly navigating new cell mates in an environment plagued with racial and gang tensions and related fights. He was often forced to stay inside all day because the jail was

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[6] Human Rights Watch reports use pseudonyms for the individuals interviewed and their family members to respect their privacy. All names used throughout this brief drawn from the Human Rights Watch's report ("Not in it for Justice") are pseudonyms.

on lockdown or the prisoners lost their outdoor time. He lived in a twelve-by-twelve foot cell with six men and one toilet in the open. After 65 days, Dante could not take it anymore. Knowing the case against Dante was weak, the prosecutor took advantage of his desperation and offered him immediate release from jail if he pled guilty, and accepted probation and a felony conviction. With the judge's approval, Dante pled guilty and went home that day.

Dante is one of countless legally innocent people, who are incarcerated because they cannot afford bail, and are forced to make a near impossible choice – assert your innocence and stay in jail, or plead guilty and go home. Though efficient in producing criminal convictions, the coercive nature of this system erodes the integrity of the criminal justice system.

### A. The Conditions of Pretrial Detention Place Immense Coercive Pressure on Detained Individuals to Plead Guilty

Thousands of incarcerated individuals like Dante understand that being detained while awaiting adjudication of their cases, regardless of actual guilt or innocence, amounts to a real punishment. People detained pretrial face profound pressure from harsh and dangerous jail conditions, the job they will lose if they miss work for

even a few days, the rent or mortgage payments they cannot meet without that job, and the family members who will suffer without them.

The true measure of these harms is evident in the stories of people who were detained pretrial and cannot afford bail. David Gonzalez, when he was 19 years old, spent three months in jail until the victim in a rape case confirmed he was not involved in the crime. ("Not in it for Justice," *supra*, at p. 45.) While incarcerated, he was physically assaulted and would break down in tears whenever his family visited him. He missed his first semester of college. Jason Miller spent a weekend in jail for baseless drug charges. (*Id.* at p. 6.) He was homeless and by the time he was released, all of his personal property was gone. Nelson Perez spent two years in jail trying to fight a fraudulent rape charge because he did not have money to pay bail. (*Id.*) He lost his house and his truck, and his 11-year-old son went into foster care. Jose Alvarez sat in a crowded jail cell for two full days suffering from injuries after being tasered and arrested during a political protest. (*Id.*) He was released because the District Attorney found insufficient evidence to charge him with a crime.

Unlike those who can afford bail, the prospect of ending pretrial detention weighs heavily when individuals are presented with the option of pleading guilty and going home sooner, or staying in jail longer to await an opportunity to defend themselves. Accused people unable to afford bail must stay in jail, at minimum, approximately 30 days for a misdemeanor charge or 90 days for a felony charge, while waiting for their first opportunity to challenge those charges in trial. (See "Not in it for Justice," *supra*, at p. 52.) In that time frame, many simply will choose to get free, often the same day, regardless of the future consequences of a criminal conviction and regardless of actual guilt.

The coercive nature of pretrial detention is statistically proven. A study of Philadelphia criminal courts found that "being in pretrial detention increased likelihood of conviction by 13 percent, primarily through an increase in guilty pleas." ("Not in it for Justice," *supra*, at pp. 52-53.) The study also noted that the impact of pretrial detention on convictions is "largely explained" by the increased likelihood "of pleading guilty among those who would otherwise have been acquitted, diverted, or had their charges dropped." (Stevenson,

*Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (2018) 34 J. of Law, Econ. & Org. 511, 512-13.)

Human Rights Watch analyses of the timing in which accused individuals accept guilty pleas show the coercive nature of pretrial detention as a tool to compel guilty pleas even if those pleas bear no relation to actual guilt. For instance, in Sacramento County, defendants in pretrial detention accept guilty pleas more quickly than those who are released. The median time it took to plead guilty was 20 days for defendants who were in pretrial detention, as opposed to 70 days for defendants out on own recognizance release, and 100 days for defendants out on bail. ("Not in it for Justice," *supra*, at p. 61.) Also, the data from six California counties showed that between 70-90% of those facing misdemeanor or non-serious felony charges pled guilty and were released before their earliest possible trial date and first opportunity to challenge the evidence against them. (*Id.* at p. 56.) Specifically, 80% of detained, non-serious felony defendants in Sacramento County were released on the date of sentencing. (*Id.*) All of those people pled out and gave up their constitutional right to maintain their innocence so they could get out of jail that day. In other

words, they would have had to reject a plea deal that offered them freedom and stay in jail longer if they wanted to assert defenses.

### B. The Criminal Justice System Incentivizes Trial Courts and Prosecutors to Favor Pretrial Detention

Prosecutors and trial courts understand and systematically use the pressure of pretrial detention to obtain guilty pleas. ("Not in it for Justice," *supra*, at p. 38 [noting that the Chief Justice of the California Supreme Court acknowledged that "imposing bail results in preventive detention."].) Given that, *Humphrey* has made little discernible impact on the behavior of judges and prosecutors.

Judges recognize that pretrial incarceration serves as a powerful tool to obtain high conviction rates and to process cases quickly. The California Chief Justice has stated: "I've seen it. A time served offer on a custody defendant on a low-level charge, all they think about is, 'Do I get out today? Can I get out today?' We have to take a look at whether we are contributing to the problem." ("Not in it for Justice," *supra*, at p. 51.)

The imperative to process cases efficiently has led trial courts to continue disregarding the directive that unaffordable bail is unconstitutional and pretrial detention should be used in limited situations. A former Alameda County court administrator explained

that "many judges resist pretrial release because they are concerned that out of custody defendants will clog their calendars. They believe many more defendants will litigate their cases," greatly increasing the number of time and resource consuming trials over which they must preside. ("Not in it for Justice," *supra*, at p. 60.)

Interviews conducted by Human Rights Watch show that judges have recognized that guilty pleas favorable to the prosecution are more likely when bail is set at levels defendants may struggle to afford. ("Not in it for Justice," *supra*, at p. 54.) A judge in Los Angeles County told Human Rights Watch that a supervising judge explained that lowering bail would reduce the number of people pleading on terms that prosecutors favor. (*Id.*) As a result, judges may impose pretrial detention or set unaffordable bail amounts regardless of whether those measures are necessary to ensure the safety of the public or the alleged victim.

Prosecutors understand that pretrial release allows defendants to more effectively raise defenses in their cases and reduces pressure unrelated to the facts of their cases to plead guilty. ("Not in it for Justice," *supra*, at p. 58.) The desperation of defendants in custody means that they may be more willing to accept a plea offer that is on

terms more favorable to the prosecution. In fact, public defenders have observed that prosecutors offer worse plea deals to defendants in custody than to defendants who have been released. (*Id.* at p. 59.)

An unjust pretrial detention system that coerces guilty pleas regardless of actual guilt undermines the integrity of the courts as an arbiter of justice as opposed to an administrator of punishment. A system that pressures those unable to afford bail into accepting criminal convictions by systematically imposing pretrial incarceration through unaffordable bail violates the California Constitution and established norms of fairness and justice.

### C. Pretrial Detention Impedes Defense Development

Pretrial detention for those who cannot afford bail also unfairly interferes with the right to a fair trial because it is more difficult to properly develop a defense while detained. Presenting a strong defense is essential to achieving justice at trial and sentencing. While in custody, defendants cannot communicate with their lawyers whenever they want or help locate witnesses or evidence that may be valuable to demonstrating innocence. ("Not in it for Justice," *supra*, at p. 4.) Even when defendants who are in custody are able to communicate with their lawyers, the tense and distracting jail setting

can make it harder for defendants to form a rapport with their lawyers and freely communicate information. (*Id.* at p. 68.)

Pretrial detention can also undermine how defendants are perceived in court. Defendants who are not in pretrial detention can appear in clothes of their choice, whereas defendants in custody may have to appear in court in their jail uniforms. Though not in jail uniforms during trials, jurors likely can tell if a person they are judging is in custody, which may create further bias against that person. ("Not in it for Justice," *supra*, at p. 4.) Pretrial detention prevents defendants from attending work, school, drug rehabilitation programs, or counseling. (*Id.*) Participation in such activities can show a person's ability to rehabilitate themselves, thus mitigating punishment. (*Id.*) These practical challenges for defense development and presentation reinforce its coercive nature.

## III. The Effects of Pretrial Incarceration Undermine Its Stated Goal of Public Safety

An oft-touted justification for pretrial incarceration and monetary bail is the state's interest in protecting the safety of the victim and public. (Cal. Const., art. 1, § 28(f)(3); *In re Kowalczyk*, *supra*, 85 Cal. App. 5th at p. 687; "Not in it for Justice," *supra*, at p. 78.) The Court of Appeal in *In re Kowalczyk* underscored that the primary

consideration for determining bail amounts should be public safety and the safety of the victim. (*In re Kowalczyk, supra*, 85 Cal. App. 5th at p. 683.)

However, the current systemic imposition of pretrial detention and monetary bail does not accomplish the objective of public safety. As the Chief Justice has recognized: "Over time … the discussion about bail [has become]: Does it really serve its purpose of keeping people safe? Because if you're wealthy and you commit a heinous crime, you can make bail." (The Editorial Board, *Bail, the next frontier of criminal justice reform*, The Sacramento Bee (Mar. 26, 2016).) In practice, pretrial detention is used for many who are deemed too dangerous, but once coerced into a plea deal these "dangerous" detainees are allowed immediately back into society. Further, data shows that pretrial detention actually increases rearrest rates, introduces more crime into communities, and causes irreparable harm to individuals and their communities. (See e.g., Leslie & Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments* (2017) 60 J. of L. & Econ. 529, 550; Gupta et al., *The Heavy Costs of High Bail: Evidence from* Judge *Randomization* (2016) 45 J. of Legal Studies 471, 473.) Pretrial reforms

and limiting or eliminating the use of monetary bail, however, do not negatively impact public safety. (Staudt, *Releasing people pretrial doesn't harm public safety*, Prison Policy Initiative (July 6, 2023)[7].)

This data underscores the need to reign in the use of pretrial detention, where detention for safety concerns is limited to a finding of clear and convincing evidence of an identifiable threat, and there are no other non-financial conditions of release to mitigate that threat. (See *In re Humphrey*, *supra*, 11 Cal. 5th at p. 154.) Aside from those specific circumstances, "liberty is the norm, and detention … is the carefully limited exception" in accordance with state and federal protections, and international norms. (See *United States v. Salerno*, *supra*, 481 U.S. at p. 755.)

### A. The High Rate of Plea Deals and Subsequent Immediate Release Show Pretrial Detention Decisions Are Not About Public Safety

Prosecutors often request – and judges order – pretrial detention or unaffordable bail amounts with the justification that individuals pose a danger to public safety. *Humphrey* has not reduced this practice. Almost 90% of defense attorneys surveyed in 2022

[7] Available at https://www.prisonpolicy.org/blog/2023/07/06/bail-reform/.

found that prosecutors objected to own recognizance release 75-100% of the time, and almost half of the defense attorneys reported that prosecutors were requesting no bail holds more frequently. ("Coming Up Short," *supra*, at p. 30.) The vast majority of in-custody, non-serious felony defendants are released on "time-served" agreements, and are released on the same day of sentencing.[8] (See "Not in it for Justice," *supra*, at p. 56.) In other words, courts and prosecutors take the contradictory position that a person poses a threat to public safety and should be detained, but once they plead guilty they are suddenly safe to be in the community. Under our monetary bail system, those with funds are able to pay high bond amounts and be set free, regardless of whether they pose an actual threat to public safety.

Arthur Charles's story illustrates this hypocrisy. Arthur asked for own recognizance release after he pled not guilty to a misdemeanor domestic battery charge. ("Not in it for Justice," *supra*, at p. 57.) He had no prior criminal history, a job, and a place to live

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[8] Though these statistics pre-date the *Humphrey* decision, nothing indicates that these numbers do not continue to hold true today. (See *infra*, Section I.)

that was away from the complaining witness. However, the prosecutor opposed release because Arthur "was too dangerous to be free, even with a court-imposed stay away order." The judge then set Arthur's bail at a rate he could not afford. Rather than remain in jail while awaiting his trial date, Arthur changed his plea, accepting the prosecutor's offer that he be released within a day or two. A condition of the offer was that Arthur agree to the judge's order to stay away from his partner. The stay away order that the prosecutor did not believe would be enough to protect the complaining witness when Arthur intended to fight the charges at trial, was the same condition that made him safe enough to be released almost immediately after he pled guilty. The circumstances surrounding Arthur's plea deal illustrate that his custody decision was not truly about the alleged danger he posed to the public.

Gerald Kowalczyk's own story highlights the fallacy of the public safety justification. After the court set his bail at a rate he could not afford, Kowalczyk filed a motion for release. The prosecutor opposed the motion, arguing that no less restrictive nonfinancial conditions could protect the public, and the court agreed, so it denied the motion and bail altogether. When considering Kowalczyk's

subsequent motions to reduce bail or for release, two different judges found that Kowalczyk was not a public safety threat, yet they both declined to disturb the no bail order because there were no changed circumstances. After Kowalczyk accepted the prosecutor's plea offer, he was immediately released from custody. That the judge and prosecutor's concern for public safety disappeared once Kowalczyk pled guilty suggests that those were not the true justifications for depriving him of liberty for six months.

### B. Pretrial Detention and Unaffordable Cash Bail Are Ineffective at Promoting Public Safety, and Introduce More Crime Into Communities

Contrary to the claim that pretrial incarceration promotes public safety, the statistics underscore that pretrial release is not associated with an increase of crime. This fact can be seen in counties and cities in California which have implemented pretrial detention reform. In 2020, the then-District Attorney Chesa Boudin of San Francisco announced his office would not ask for cash bail, which added to the existing reforms in place including offering alternatives to fines, and dismissals of charges for certain detainees who complete treatment plans. (Staudt, *supra*, at pp. 3-4.) After the policy reduced the use of cash bail, violent crime fell by over 15% while national

violent crime rates rose by 5%. (*Id.*) In Santa Clara County, courts began sending court date reminders to those released pretrial, and worked with community organizations to send the reminders, provide transportation, and offer other assistance. (*Id.*) As a result, the number of people released without monetary bail increased by 45%, and 99% of people released were not re-arrested. (*Id.*)

The reality of pretrial reforms having no negative impact on public safety can be seen across the country. After New Jersey, New York City, Philadelphia, and Cook County implemented reform efforts to reduce or eliminate the use of monetary bail, thus reducing pretrial detention rates, there was no evidence of an increase of crime or new criminal charges. (Pitter, *Don't Undermine New York State's Reform of Bail*, Human Rights Watch (April 13, 2023)[9]; Stemen & Olson, *Dollars and Sense in Cook County, Examining the Impact of General Order 18.8A on Felony Bond Court Decisions, Pretrial Release, and Crime*, Loyola Univ. of Chicago (2020), at pp. 1, 2, 10[10].) In Harris County,

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[9] Available at https://www.hrw.org/news/2023/04/13/ dont-undermine-new-york-states-reform-bail.

[10] Available at https://www.safetyandjusticechallenge.org/ wp-content/uploads/2020/11/Report-Dollarsand-Sense-in-Cook-County.pdf.

Texas, after bail reform efforts eliminated secured money bonds as a requirement for most misdemeanors in 2020, the county saw a 6% reduction of new cases over three years following arrests. ("Coming Up Short," *supra*, at p. 7.) The statistics in California also support that the likelihood of violent crime during pretrial release is very low. ("Not in it for Justice," *supra*, at p. 80.)

In contrast, pretrial detention and the use of cash bail has the effect of increasing rearrest rates after disposition of the matter. For example, a study looking at the data of nearly a million criminal cases in New York City found that pretrial detention increased the probability of being rearrested within 2 years by 7.5% for felony matters and 11.8% for misdemeanor cases. (Leslie & Pope, *supra*, at p. 550.) A study of a large sample of criminal cases in Philadelphia and Pittsburgh found that imposing money bail led to a 6-9% increase in recidivism. (Gupta et al., *supra*, at p. 473.) Thus, the evidence shows that courts do not need to rely on pretrial detention to ensure public and victim safety, and in fact pretrial detention has the opposite effect of introducing more crime into the community.

## IV. Pretrial Detention and Unaffordable Cash Bail are Detrimental to Presumptively Innocent People and Destabilize Vulnerable Communities

The high pretrial detention rates and the use of unaffordable cash bail leave behind a trail of injustices that not only undermine the credibility of the criminal legal system but also are detrimental to presumptively innocent individuals and contribute to the destabilization of vulnerable communities. By allowing courts to set bail at unaffordable amounts as *de facto* detention, the Court of Appeal's decision creates a two-tiered justice system that penalizes the poor and further damages impoverished communities.

### A. Unaffordable Cash Bail Causes Irreparable Harm to Detained Individuals, Their Families, and Their Communities

The way pretrial incarceration feeds into a cycle of criminal behavior can be explained by the life-altering changes that even short periods of detention can have on people's lives. A few days of detention can cause people to be fired from work, miss caring for their children or elderly relatives, be evicted, or miss car payments. One study found that an individual can lose an average of $29,000 over the course of a working-age lifecycle just from a three-day detention. (Dobbie & Yang, *The Economic Costs of Pretrial Detention*, Brookings

Papers on Econ. Activity (2022), at p. 253.). People lose access to critical benefits such as Social Security, Medicaid, or disability. Conditions in jail are rife with violence from other prisoners and guards in overcrowded conditions. There is little or no access to healthy food or medical treatment. In California, about 80% of jail deaths happen during pretrial detention, and 25% of those deaths are associated with suicide. ("Coming Up Short," *supra*, at p. 6.)

The monetary bond system saddles low-income defendants and family members with crushing debt which has long-term consequences that linger past detention and bear no relationship to actual guilt or innocence. Even if detainees have friends or family act as sureties, as Respondent suggests, the sacrifices can be crippling. Cara Esparza and her son Sean Brown's story is illustrative. ("Not in it for Justice," *supra*, at p. 73.) Cara's son was arrested and accused of felony assault. She was scared for Sean's safety in jail because he had recently been diagnosed with bipolar disorder. To afford the $30,000 bail, Cara borrowed from a family member to pay a bondsman the 1% down payment and $150 monthly payments on a $3,500 premium. Sean was released from jail after 3 days, and eventually pled "no contest" to a greatly reduced charge. Cara had no funds to pay back

her loans, so she repaid her family member with baked goods or other labor, and she made considerable cutbacks on spending for basic necessities. She reduced the amount she paid on her monthly gas bill, bought less food for herself and her son, and reduced her phone plan. Even when she will be able to pay back the bondsman, Cara and Sean still owe court fees. For individuals like Cara and Sean, where courts do not hold a proper individualized hearing and set bail at affordable amounts, the pretrial detention system forces detainees and families into vulnerable situations without the proper lawful showing that the deprivation of liberty was necessary in the first place.

The downstream effects of pretrial detention and crushing debt to pay a monetary bond can be felt throughout already vulnerable communities. If the defendant is a primary wage earner, their entire family is harmed when the individual is forced to plead guilty and acquire a criminal record which is a barrier to employment. (See Comm. on Revision of the Penal Code, *supra*, at p. 65.) Without income, families lose access to critical services, or are evicted after not being able to pay rent. The majority of detained individuals are also parents of children under 18 years of age, some of whom will miss school, be separated from their parents, or be placed into child

custody. (Dobbie, *supra*, at p. 260.) Family bonds are broken and children are harmed from involuntary separation due to parental incarceration.

### B. Pretrial Detention Disproportionately Harms Black, Latinx, and Native American Communities

Years of disinvestment, racial discrimination in policing, and biased laws have led to racial disparities in criminal justice, disproportionately harming Black, Latinx, and Native American communities. This disparity is seen at every stage of the criminal justice system, including in pretrial incarceration. Most people detained pretrial are Black or Latinx. Data from 2002, the last time the government collected national data, revealed that 29% of people in local jails were not convicted and 69% of those detainees were people of color—43% were Black and 19.6% were Latinx. (Sawyer, *How race impacts who is detained pretrial*, Prison Policy Initiative (Oct. 9, 2019) [11].) In San Francisco County, the ratio of Black individuals booked in jails compared to White individuals from 2014-2015 was nine to one when controlling for population size. ("Not in it for Justice," *supra*, at p. 21.)

[11] Available at https://www.prisonpolicy.org/blog/2019/10/09/ pretrial_race/.

The population of Native Americans in local jails increased 85% between 2000 to 2019, far outpacing the 18% growth of the total jail population over the same period. (Wang, *The U.S. criminal justice system disproportionately hurts Native people: the data, visualized*, Prison Policy Initiative (Oct. 8. 2021) [12].)

Once arrested, the research shows that Black and Latinx individuals face harsher treatment in every aspect of the pretrial release determination process. (U.S. Commission on Civil Rights, The Civil Rights Implications of Cash Bail (2022), at p. 35.) "Black and Latinx individuals have higher rates of pretrial detention, are more likely to have financial conditions imposed and set at higher amounts, and lower rates of being released on recognizance bonds or other nonfinancial conditions compared to white defendants." (*Id.* at p. 33-34.) According to data from 1990-2000, being Black increased a defendant's odds of being denied bail by 25% and being Latinx increased the odds of being denied bail by 24%. (Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing* (2005) 22 Just. Q.

[12] Available at https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/.

170, 181.) When bail is granted, the rates for Black and Latinx individuals across the country are twice as high as those set for White individuals. ("Coming Up Short," *supra*, at p. 6.)

Because pretrial detention is correlated with a higher likelihood of conviction, these statistics contribute to higher rates of imprisonment for Black and Latinx people. In 2019, Black and Latinx people made up 56% of the United States' prison population, though they only comprised a combined 32% of the U.S. population at the time. (Fisher et al., *Prison Gerrymandering Undermines Our Democracy*, Brennan Center for Justice (Oct. 22, 2021).) Also, according to data from 2019, Black people are incarcerated in state prisons at nearly 5 times the rate of White people and Latinx people are incarcerated in state prisons at 1.3 times the rate of White people. (Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (2021), at p. 5.)

Like most aspects of the criminal legal system, the ripple effects of pretrial detention are felt disproportionately amongst Black and Latinx communities. A 2019 survey found that 63% of African Americans and 48% of Latinx people had family members who have been in jail or prison. (Katz, *Nearly Half of Americans Have a Close*

*Family Member Who Has Been Incarcerated* (Mar. 6, 2019) Smithsonian Magazine.) Another report also showed that one in every 2.5 Black women had at least one family member in prison. (Lee et al., Racial Inequalities in Connectedness to Imprisoned Individuals in the United States (2015) 12 Du Bois Rev. 269, 275-76.) Job loss and the crushing debt drains wealth and resources from these already vulnerable communities, and prevents their ability to build generational wealth. ("Coming Up Short," *supra*, at p. 6.)

Reforming pretrial detention is thus a key step in addressing racial inequity in the criminal legal system and society as a whole. The example of Harris County, Texas, offers evidence that such reforms do make a difference. Pursuant to a consent decree, the County adopted a rule that required most individuals who had been charged with a misdemeanor to be released on a bond of $100. ("Coming Up Short," *supra*, at p. 7.) Coinciding with those changes, the County saw "an 11% decline in the Black-white gap in pretrial release rates." (*Id.*)

## V. Conclusion

For these reasons, this Court should reaffirm the basic tenet that liberty is the norm and pretrial detention must be a carefully limited

exception. Article 1 Section 12 of the California Constitution sets forth the limited circumstances in which an individual may be detained pretrial, and Section 28 merely provides additional considerations for judges in pretrial detention determinations. Superior Courts may not set bail at a level that the accused individual cannot afford. Only when pretrial detention occurs in the most narrow of circumstances bound by constitutional protections can we maintain the integrity of the criminal justice system and uphold the sanctity of the presumption of innocence.

Dated: November 8, 2023

Respectfully submitted,

ARNOLD & PORTER
KAYE SCHOLER LLP

By: /s/*Carmen Lo*
Carmen Lo
Steven M. Gentine
Jocelyn Porter

Attorneys for Amicus Curiae
HUMAN RIGHTS WATCH

## CERTIFICATE OF COMPLIANCE

In accordance with California Rule of Court 8.520(c)(1), counsel for *Amicus Curiae* HUMAN RIGHTS WATCH hereby certifies that this BRIEF AMICUS CURIAE is proportionately spaced, uses Book Antiqua 13-point typeface, and contains 7,295 words, including footnotes, but excluding the Table of Contents, Table of Authorities, and this Certificate as determined by our law firm's word processing system used to prepare this brief.

Dated: November 8, 2023

Respectfully submitted,

ARNOLD & PORTER
KAYE SCHOLER LLP

By: */s/ Carmen Lo*
Carmen Lo
Steven M. Gentine
Jocelyn Porter

Attorneys for Amicus Curiae
HUMAN RIGHTS WATCH

## PROOF OF SERVICE

I am over eighteen years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Three Embarcadero Center, 10th Floor, San Francisco, California 94111.

On November 8, 2023, I served the following document(s):

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE HUMAN RIGHTS WATCH IN SUPPORT OF PETITIONER KOWALCZYK; BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER KOWALCZYK

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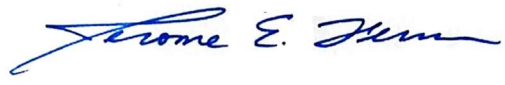
Dated: November 8, 2023. 

Jerome E. Ferrer

## SERVICE LIST

Marsanne Weese
Rose Mishann
Law Offices of Marsanne Weese
255 Kansas Street, Suite 340
San Francisco, CA 94103

*Attorneys for Petitioner Gerald John Kowalczykl*

Stephen Wagstaffe
Office of the District Attorney
400 County Center, 3rd Floor
Redwood City, CA 94063

Joshua Travis Martin
Office of the District Attorney
400 County Center, 4th Floor
Redwood City, CA 94063-1662

*Respondent California Department of Corrections and Rehabilitation*

**STATE OF CALIFORNIA**
Supreme Court of California

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| ADDITIONAL DOCUMENTS | 2023-11-08 Proposed Order re Porter PHV |
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| Holly Sutton<br>San Mateo County District Attorney | hsutton@smcgov.org | e-Serve | 11/8/2023 3:25:42 PM |
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| Rebecca Baum<br>San Mateo County District Attorney<br>212500 | rbaum@smcgov.org | e-Serve | 11/8/2023 3:25:42 PM |

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|---|---|---|---|
| Salil Dudani<br>Federal Defenders of San Diego | salil.dudani@gmail.com | e-Serve | 11/8/2023 3:25:42 PM |
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| Office Office Of The Attorney General<br>Court Added | sfagdocketing@doj.ca.gov | e-Serve | 11/8/2023 3:25:42 PM |
| Kassandra Dibble<br>ACLU of Northern California | kdibble@aclunc.org | e-Serve | 11/8/2023 3:25:42 PM |
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| Emi Young<br>ACLU Foundation of Northern California<br>311238 | eyoung@aclunc.org | e-Serve | 11/8/2023 3:25:42 PM |
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| Rose Mishaan<br>Law Offices of Marsanne Weese<br>267565 | rose.mishaan@gmail.com | e-Serve | 11/8/2023 3:25:42 PM |
| Stephen Wagstaffe<br>Office of the District Attorney | sgiridharadas@smcgov.org | e-Serve | 11/8/2023 3:25:42 PM |
| Marsanne Weese<br>Law Offices of Marsanne Weese<br>232167 | marsanne@marsannelaw.com | e-Serve | 11/8/2023 3:25:42 PM |
| Kelly Woodruff<br>COMPLEX APPELLATE LITIGATION GROUP LLP<br>160235 | kelly.woodruff@calg.com | e-Serve | 11/8/2023 3:25:42 PM |
| Jerome Ferrer<br>Arnold & Porter Kaye Scholer | jerome.ferrer@arnoldporter.com | e-Serve | 11/8/2023 3:25:42 PM |
| Carmen Lo | carmen.lo@arnoldporter.com | e-Serve | 11/8/2023 3:25:42 PM |
| Jocelyn Porter | jocelyn.porter@arnoldporter.com | e-Serve | 11/8/2023 3:25:42 PM |
| Mike Gentine | mike.gentine@arnoldporter.com | e-Serve | 11/8/2023 3:25:42 PM |

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11/8/2023

Date

/s/Jerome Ferrer

Signature

Ferrer, Jerome (Other)

Last Name, First Name (PNum)

Arnold & Porter Kaye Scholer

Law Firm