No. S277910

In the Supreme Court of the State of California

IN RE GERALD JOHN KOWALCZYK,

Petitioner,

ON HABEAS CORPUS.

First Appellate District, Division Three, Case No. A162977
San Mateo County Superior Court, Case No. 21-SF-003700-A
The Honorable Susan Greenberg, Judge
The Honorable Elizabeth K. Lee, Judge
The Honorable Jeffrey R. Finigan, Judge

APPLICATION FOR LEAVE TO FILE BRIEF AND AMICUS CURIAE BRIEF SAN FRANCISCO DISTRICT ATTORNEY BROOKE JENKINS IN SUPPORT OF NEITHER PARTY

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons to list in this Certificate under California Rules of Court, rule 8.208.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF NEITHER PARTY

Brooke Jenkins, the District Attorney of the City and County of San Francisco (Amicus), respectfully requests permission to file the attached brief in support of neither party under California Rules of Court, rule 8.520(f).

Amicus is the District Attorney of the City and County of San Francisco, a county home to approximately 815,000 Californians and responsible for generating over $250 billion in gross domestic product—more than a quarter of the Bay Area's total economic output in 2022. As Northern California's financial and cultural center, the City and County of San Francisco has long been at the forefront of innovation and social change, foremost within the criminal justice system.

After taking office, Amicus directed the San Francisco District Attorney's Office to maintain a policy "not to seek cash bail in criminal cases, except in those exceptional circumstances where the law provides a court no other choice to protect victim or public safety or ensure a defendant's appearance in court" in recognition that the systematic use of cash bail, consistent with this Court recent rulings, may impinge on a criminal defendant's constitutional rights and not adequately protect victim and public safety. (*REVISED Pre-Trial Release and Detention Policy* (Jan. 18, 2023) San Francisco District Attorney's Office, at p. 2 <https://sfdistrictattorney.org/wp-content/uploads/2023/01/Revised-PreTrial-Release-and-Detention-Policy-rev-01.18.23.pdf> [as of Nov. 8, 2023].)

Accordingly, Amicus conducts an individualized approach to assess whether a defendant can be released on their own recognizance with nonfinancial conditions—such as electronic monitoring, outpatient treatment, protective orders, or stay-away orders—and if those conditions will adequately protect victim and public safety while the case proceeds through the criminal justice system.

Before the Court of Appeal's decision here, Amicus asked the trial court to deny bail for defendants in certain cases where detention is necessary to protect victim and public safety or to ensure the defendant's reappearance and where clear and convincing evidence shows that *no* less restrictive condition of release can protect the People's compelling interests. Following the Court of Appeal's decision here, Amicus must now request unaffordable bail in cases that do not fall within the scope of article I, section 12 of the California Constitution, but are still cases where the defendant's release would pose an unreasonable danger to victim and public safety—an illogical workaround. That is, a trial court, after considering a defendant's ability to pay, would impose an order of money bail *above* that defendant's ability to pay to secure victim and public safety for felonious offenses that Petitioner would deem "nonserious, nonviolent, or victimless." (Reply Br. at p. 17.) Rather, pretrial detention (by denying bail) is the honest, legal, and constitutional order.

Amicus's insight on this issue is not just limited to its implementation in the trial court. At the outset of *In re Humphrey* (2021) 11 Cal.5th 135, Amicus was designated as the Real Party in Interest and submitted all briefing on the merits and a consolidated answer to multiple amicus briefs submitted in that matter. While the Court did not ultimately address the issue of which constitutional provision governs bail, Amicus now offers this brief to assist the Court that supports neither Party in *toto* but provides another perspective about the interplay of two fully effective

provisions of the California Constitution. Amicus also strives to fulfill a pragmatic need of local trial courts for guidance and workable rules, applying the favored construction to harmonize and reconcile the two conflicting constitutional provisions, remaining faithful to the voters' intent to protect both victim and public safety, and limiting pretrial detention to certain cases.

The undersigned authored the brief and no person or entity other than Amicus, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of the brief.

Dated: November 8, 2023

Respectfully submitted,

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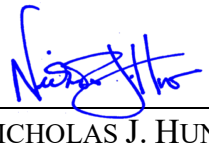

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ISSUES PRESENTED

This Court specified two issues for review:

(1) Which 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, can these provisions be reconciled?

(2) May a superior court ever set pretrial bail above an arrestee's ability to pay?

INTERESTS OF AMICUS CURIAE

Like the San Mateo County District Attorney, who is capably representing the interests of the People of the State of California in this proceeding as the Real Party in Interest, Amicus must evaluate dozens of arrests every day, and Amicus must determine which cases warrant prosecution. For cases in which it is appropriate to bring formal criminal charges, Amicus's consideration must go one step further. Amicus—as the City and County of San Francisco's public prosecutor—must determine whether the accused can, or should, be safely released back into the community while pending trial, or whether pretrial detention must be sought at the accused's arraignment to appropriately protect victim and public safety. As one of California's few district attorneys to maintain a policy of *not* seeking money bail as a matter of course, Amicus has undertaken a significant review of the use of money bail in California and the constitutional limitations placed on pretrial detention. It is that review that directly informs Amicus's present submission to this Court.

Amicus's perspective and conclusions on the legal and practical considerations raised by the interpretation of which provision of California's Constitution governs the use of bail and pretrial detention are similar in some regards to the Real Party in Interest's representatives here

but differ in others. Amicus expects that this separate submission will assist the Court in considering this exceptionally important issue and to recognize that voters allowed trial courts to consider denying bail where necessary to protect victim and public safety.

ARGUMENT

This Court's decision in *In re Humphrey*[1] was clear: the use of bail may frustrate a criminal defendant's fundamental right to pretrial liberty if a trial court does not consider the defendant's ability to post such security. In the years following *In re Humphrey*, some California prosecutors, like Amicus, began to move away from seeking cash bail, instead opting to use nonmonetary conditions of release to protect victim and public safety while simultaneously ensuring the reappearance of defendants in criminal proceedings. But some criminal defendants pose too great of a risk to victim and public safety to be released into the community during the pendency of criminal proceedings. Or some defendants flagrantly ignore the integrity of the judicial system. Either scenario demands that district attorneys ask a trial court to order the defendant to remain in custody during the pendency of criminal proceedings. Thus, to order a defendant detained before trial, a court must find by clear and convincing evidence that no condition short of detention could suffice and then must ensure the detention otherwise complies with statutory and constitutional requirements. To harmonize the two sections of the California Constitution governing bail—article I, sections 12 and 28, subdivision (f)(3)[2]—and in accordance with this Court's

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[1] *In re Humphrey* (2021) 11 Cal.5th 135.

[2] Unless otherwise noted, references to section 12 or §12 refer to article I, section 12, subdivision (b) and references to section 28, subdivision (f)(3) or section 28 refer to article I, section 28, subdivision

past jurisprudence, a trial court may deny bail to a defendant *regardless of whether the offense is enumerated in section 12* where clear and convincing evidence shows that no less restrictive condition of release can reasonably protect victim and public safety or ensure a defendant's future reappearance in court.[3]

Amicus is the District Attorney of the City and County San Francisco and serves as the City and County's public prosecutor; Amicus has a constitutional duty to see that state law is uniformly and justly enforced within the county. (Cal. Const., art. XI, § 1, subd. (b); Gov. Code, § 26500.) To guarantee that every criminal defendant is afforded equal justice under law in San Francisco, Amicus maintains a policy of using nonmonetary conditions to ensure victim and public safety when considering what pretrial release conditions, if any, are appropriate for each criminal prosecution undertaken within the jurisdiction.

This Court should recognize that the voters—through Proposition 9—intended to provide trial courts with the ability to deny bail, should pretrial detention be necessary, regardless of the underlying criminal offense charged. After harmonizing sections 12 and 28, subdivision (f)(3), and reading the constitutional provisions in conjunction with all other existing authorities, this Court should provide clear guidance to trial courts to deny

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(f)(3) of the California Constitution. 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, Mr. Gerald Kowalczyk. ABM refers to the Answering Brief on the Merits filed by Real Party in Interest in this Court, the People of the State of California.

[3] Though Real Party in Interest's solution of an implied repeal of section 12 and the Court of Appeal's authorization to set unaffordable bail have the same pragmatic result, the jurisprudence of harmonization is the better, and more transparent legal avenue. (ABM at pp. 23-34.)

bail where sufficient evidence supports a hypothetical verdict of guilt and the People have presented clear and convincing evidence that detention is necessary to advance a compelling interest of the People—namely, protecting victim and public safety or ensuring the defendant's reappearance in court—*and* that no less restrictive conditions can reasonably protect these compelling interests. (*In re Humphrey* (2021) 11 Cal.5th 135, 151-156; *In re White* (2020) 9 Cal.5th 455, 463, 470-471.)

I. Pretrial Release Is Governed Under Two Operative Provisions of the California Constitution that Permit Pretrial Detention by Denying Bail.

The California Constitution contains two provisions which govern pretrial release: article I, sections 12 and 28, subdivision (f)(3). (Cal. Const., art. I, §§ 12, 28, subd. (f)(3).) Section 12 allows for pretrial detention for a limited set of felony prosecutions involving violence, sexual assault, or threats. But section 28, subdivision (f)(3), amended after section 12, explicitly allows a court to deny bail after considering victim and public safety, the seriousness of the charged offense, the defendant's prior criminal record, and the likelihood that the defendant will appear in court as ordered. Our Constitution demands that victim and public safety remain at the forefront of all pretrial release decisions.

In relevant part, section 28 provides that "[a] person *may* be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great." (Cal. Const., art. I, § 28, subd. (f)(3), italics added.) Section 28 further states that bail may be denied for additional, specific reasons: "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." (Cal. Const., art. I, § 28, subd. (f)(3), italics added; see also Pen. Code, § 1275.) A court may deny bail once the court has considered the enumerated factors in subdivision (f)(3) of section 28 and has found that no less restrictive nonmonetary condition, or any combination of conditions, would be sufficient to protect victim and public safety or to ensure a defendant's appearance in court. (Cal. Const., art. I, § 28, subd. (f)(3); see also *In re Harris* (2021) 71 Cal.App.5th 1085, 1105-1106, review granted Mar. 9, 2022, S272632 [*Humphrey* analysis of less restrictive alternatives applies to detentions under section 12]; Cal. Rules of Court, rule 8.1115(e)(3).)

Petitioner argues that section 12 sets forth the exclusive grounds for pretrial detention. (Cal. Const., art. I, § 12 ["A person shall be released on bail by sufficient sureties" with three noted exceptions]; *In re Law* (1973) 10 Cal.3d 21, 25 [addressing prior constitutional right to bail]; *People v. Turner* (1974) 39 Cal.App.3d 682, 684 [right to bail was included in "California Constitution as adopted in 1849"]; see generally OBM at pp. 26-35.) Petitioner asserts that a criminal defendant has an "'absolute' right to pretrial release outside the listed exceptions of section 12[.]" (OBM at p. 26.) And Real Party in Interest argues section 28 applies in full force after Proposition 9 without need for significant harmonization. (ABM at pp. 23-34.) But a scrupulous review of harmonization law allows conciliation that honors both sections, preserving pretrial detention where victim and public safety is endangered (section 28) while ensuring this is limited by applying the standards set forth in *In re Humphrey* and *In re White*[4] to any pretrial detention (sections 12 and 28). And it would avoid the ungainly and disingenuous work-around the court below would have the trial courts

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[4] *In re White* (2020) 9 Cal.5th 455.

engage in by setting unaffordable bail.

In *In re Humphrey* (2021) 11 Cal.5th 135, this Court posed a similar question about the governing constitutional provisions, but because that case did not involve an order denying bail (rather, an order setting money bail), the Court left that question unanswered. (*In re Humphrey*, *supra*, 11 Cal.5th at p. 155, fn. 7, citing *In re White, supra,* 9 Cal.5th at pp. 470-471.)

But then, as it is now, the answer remains the same: pretrial release is governed under two operative provisions of the California Constitution that allow trial courts to deny bail, regardless of the offense charged, so long as the requisite findings are made. A brief history of the interplay between sections 12 and 28 of the Constitution and other legislative amendments shows the intent of the electorate to provide courts with the additional authority to deny bail where necessary to protect victim and public safety, or to ensure a defendant's appearance in court.

In 1982, voters were presented with two competing provisions about detention and bail, namely Proposition 4, which addressed section 12, and Proposition 8, which addressed section 28. Section 12 initially provided that all persons shall be released on bail, except for capital crimes when the facts are evident and the presumption great. (*People v. Standish* (2006) 38 Cal.4th 858, 874, 892.) Proposition 4 sought to "broaden the circumstances under which the courts may deny bail[]" to include: (1) felony offenses involving acts of violence where the proof of guilt is evident and presumption great and clear and convincing evidence shows that there is a substantial likelihood release would result in great bodily harm to another;[5] or (2) felony offenses where the proof of guilt is evident and presumption

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[5] In 1994, this provision was later amended to include felony sexual assault offenses.

great and clear and convincing evidence shows the accused threatened another with great bodily injury and that there is a substantial likelihood the accused would carry out the threat if released. (See Ballot Pamp., Primary Elec., (June 8, 1982) analysis of Prop. 4 by legislative analyst, p. 16.)

Proposition 8, alternatively, sought to amend the Constitution "to give courts discretion in deciding whether to grant bail" by stating that "[a] person *may* be released on bail[.]" (Ballot Pamp., Primary Elec., (June 8, 1982) analysis of Prop. 8 by legislative analyst, p. 54.) The proposed amendment also required a court "[i]n setting, reducing or *denying* bail" to consider not only the factors listed in Proposition 4 (seriousness of the offense, previous record, likelihood of appearance), but also established the protection of public safety as a court's primary consideration. (*Ibid*., italics added.) With two competing constitutional provisions enacted in the same election, this Court held that the bail provisions of section 12, enacted through Proposition 4, preempted those of section 28, enacted through Proposition 8, because Proposition 4 received more votes. (*Standish*, *supra*, 38 Cal.4th at pp. 876-878; *In re York* (1995) 9 Cal.4th 1133, 1140, fn. 4.)

In 2008, the voters again amended section 28, but this time through Proposition 9. To "preserve and protect a victim's rights to justice and due process," Proposition 9 amended section 28 to state that victims shall be entitled "[t]o have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant." (Ballot Pamp., Gen. Elec. (Nov. 4, 2008) text of Prop. 9, p. 129 (2008 Ballot Pamp.) <https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2288&context=ca_ballot_props> [as of Nov. 8, 2023].) The amendment further added "the safety of the victim" as an additional, primary consideration in "setting, reducing or denying bail[.]" (2008 Ballot

Pamp., text of Prop. 9, p. 130.)

A. The intent of the voters must govern the interpretation of section 28, subdivision (f)(3), which is broader than section 12.

Essential to properly interpreting and applying section 28, subdivision (f)(3) is to, in the first instance, understand the intent behind section 28, subdivision (f)(3). Where, as here, "a constitutional provision [was] enacted by the voters, their intent governs." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) Indeed, the "primary purpose" of a court reviewing a constitutional amendment passed by ballot initiative "is to ascertain and effectuate the intent of the voters who passed the ballot initiative." (*People v. Calhoun* (2019) 38 Cal.App.5th 275, 297, citing *People v. Briceno* (2004) 34 Cal.4th 451, 459.) To determine the intent of the voters, this Court must first look to the text of the words themselves. (*Delaney*, *supra*, 50 Cal.3d at p. 798.) "'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters).'" (*Ibid*., quoting *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) "This fundamental principle of statutory construction applies with equal force to constitutional amendments adopted by the initiative process." (*People v. Castro* (1985) 38 Cal.3d 301, 328-329.)

The plain meaning of the text can only be disregarded "if the text contains a clear drafting error or if the consequences would be unreasonable or absurd." (*People v. Valencia* (2017) 3 Cal.5th 347, 391 (dis. opn. of Liu, J.), citing *People v. Broussard* (1993) 5 Cal.4th 1067, 1071; *People v. Skinner* (1985) 39 Cal.3d 765, 775; accord, *Valencia*, *supra*, 3 Cal.5th at p. 410-411 (dis. opn. of Cuéllar, J.), citing *Skinner*, *supra*, 39 Cal.3d at pp. 775-779 [drafting error reflects that word was erroneously used and

absurdity doctrine must be invoked sparingly] and *Gorham Co., Inc. v. First Financial Ins. Co.* (2006) 139 Cal.App.4th 1532, 1544.)

But when a court seeks to interpret a voter initiative, it must liberally construe the initiative's terms through a deferential lens. As a result, courts jealously guard this precious right and liberally construe the terms of an initiative, "resolving reasonable doubts in favor of the people's exercise of their reserved power." (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 262.) This is because California's initiative and referendum procedures are "one of the most precious rights of our democratic process[,]" and are drafted under the powers reserved by the electorate. (*Ibid*., internal quotations omitted.) "If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." (*Ibid*.)

Adherence to the well-established principles of interpretation which dictate that courts must first review the text of the provision, give significance to every word, phrase, and sentence, and give those words their ordinary meaning in the context of the provision as a whole show that section 28, subdivision (f)(3) provided trial courts with the ability to deny bail to defendants outside the enumerated situations in section 12. (See, e.g., *People v. Gonzalez* (2018) 6 Cal.5th 44, 49-50; *Valencia, supra,* 3 Cal.5th at p. 357; *Cal. Redevelopment Assn v. Matosantos* (2011) 53 Cal.4th 231, 265; *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571; *In re Kowalczyk* (2022) 85 Cal.App.5th 667, 686.) Under such review, the first sentence—noting the trial court's discretion in determining whether a defendant may be released on bail—cannot merely be a declarative sentence of existing law, as the court below ruled. (See, *infra*, II.B.; *In re Kowalczyk, supra,* 85 Cal.App.5th at p. 686.) Rather, section 28, subdivision (f)(3)'s first sentence is a command to courts that, in all cases, bail may be denied, and must be denied in capital crimes where the facts are evident or the presumption great.

After section 28, subdivision (f)(3)'s first sentence (which was seized upon by the court below), the words "denying bail" appearing in the provision's third sentence could not more clearly refer to pretrial detention. (Merriam-Webster's Collegiate Dict. (11th ed. 2014) p. 334, col. 1 (Merriam-Webster) [deny; denied; denying: to refuse to grant], p. 92 col. 2 [bail: "the temporary release of a prisoner in exchange for security given for the due appearance of the prisoner"]; see also Webster's Concise Dict. (Internat. Encyclopedic ed. 2002) p. 53, col. 2 (Webster's Concise) [bail: "Money or security given to a court to secure the release of an arrested person on the proviso that the person will be present later to stand trial."].) Thus, the plain language of section 28, subdivision (f)(3) authorizes courts to refuse to release defendants from custody on bail when necessary to protect victim and public safety. (Cal. Const., art. I, § 28, subd. (f)(3).) While these safety risks are to be the court's primary considerations, section 28, subdivision (f)(3) also permits courts to deny bail based on a defendant's prior criminal record and flight risk. Therefore, section 28, subdivision (f)(3) authorizes courts to deny bail and preventatively detain a defendant before trial in noncapital cases.

Moreover, there are no drafting errors here, and neither party has alleged as much. Nor does denying bail when necessary to protect victim and public safety or to ensure a defendant's appearance lead to absurd results. Therefore, the plain language of section 28, subdivision (f)(3) cannot be disregarded. Because Petitioner ignores the plain language, Petitioner unnecessarily and unreasonably restricts section 28, subdivision (f)(3)'s application to only serve as a mere guide for a trial court in evaluating pretrial detention under section 12. But that construction would render the sentence containing the phrase "denying bail" superfluous, which would directly contravene this Court's long-established practice of giving meaning to every word in an initiative. (*Tuolumne Jobs & Small*

Business Alliance v. Superior Court (2014) 59 Cal.4th 1029, 1038.) And if Petitioner were correct that section 28, subdivision (f)(3) is limited to the release of a defendant and any conditions placed on that release, section 28, subdivision (f)(3) would have contained limiting language, but it does not.

But if this Court determines that the plain language of section 28, subdivision (f)(3) is ambiguous in any respect, the ballot pamphlet also reflected the intent of voters to give courts discretion to deny bail. (*Matosantos*, *supra*, 53 Cal.4th at p. 265 [if text is ambiguous, courts look to extrinsic aids to determine voters' intent]; *Pearson*, *supra*, 48 Cal.4th at p. 271 [ballot summaries as an extrinsic aid]; *People v. Floyd* (2003) 31 Cal.4th 179, 187 [ballot pamphlet arguments as same].) Proposition 9, named after a young woman, Marsy Nicholas, who was murdered by her former boyfriend, noted that the family was shocked to see the defendant after his arrest, later "learning that he had been *released on bail* without any notice to Marsy's family and *without any opportunity for her family to state their opposition to his release*." (Prop. 9 Ballot Pamp., *supra*, text of Prop. 9, § 2, p. 129, italics added.) To avoid any similar scenarios in the future, the amendment authorized courts to deny bail based on safety considerations along with requiring notification to the victim or their family.

Proposition 9 sought to implement those rights, including public safety bail and detention, that had not been enforced under 1982's Proposition 8:

> [T]he 'broad reform' of the criminal justice system intended to grant these basic rights mandated in the Victims' Bill of Rights initiative measure passed by the electorate as Proposition 8 in 1982 had not occurred as envisioned by the people. Victims of crime continue to be denied rights to justice and due process.

(Prop. 9 Ballot Pamp., *supra*, text of Prop. 9, § 2, p. 128.) As the *Standish*

Court held, section 28 was preempted by section 12 following the 1982 election. (*Standish*, *supra*, 38 Cal.4th at pp. 876-878.) Thus, the timing of Proposition 9's enactment—two years after the Supreme Court's decision in *Standish*—shows an intent by voters to re-enact the bail and detention provisions of Proposition 8 that were held inoperative by this Court. Thus, the overall intent behind Proposition 9 was to give courts the means to detain persons who pose an unmanageable safety risk to both the victim and the public. With the intent of the voters established, this Court must interpret section 28, subdivision (f)(3) in a manner that is faithful to their intent, which includes pretrial detention in a set of cases much greater than the limited serious felonies in section 12.

B. The constitutional provisions governing bail can be harmonized by recognizing that section 28 expanded a trial court's ability to set, reduce, or deny bail in qualifying cases.

Petitioner's "harmonization" would in effect nullify section 28—but that is not harmonization. Instead, it favors section 12 over section 28 without the full, fair consideration of section 28's validity. The court below sincerely tried to harmonize both provisions, but it did not fully credit section 28, subdivision (f)(3)'s reach, consistent the electorate's intent as it should have. When properly harmonized, there is no need to set unaffordable bail; fair harmonization of the sections warrants the denial of bail following the rubric outlined in *In re Humphrey* and *In re White*. And as this Court implied with its citations to both sections in *In re Humphrey*, neither section negates the other; rather, both must be read in light of the other. (*In re Humphrey*, *supra*, 11 Cal.5th at pp. 150, 152.)

Although the court below correctly recognized that section 28, subdivision (f)(3) is "fully operative," it erred in harmonizing section 28,

subdivision (f)(3) with section 12. (*In re Kowalczyk*, *supra,* 85 Cal.App.5th at pp. 680, 682-688.) In summarizing its conclusion, the court below read "the first sentence of section 28(f)(3) as a declarative statement recognizing that bail may or may not be denied under existing law." (*Id.* at p. 686.) The court continued that "[u]nder this construction, section 12's general right to bail remains intact, while full effect is accorded to section 28(f)(3)'s mandate that rights of crime victims be respected in bail and [own recognizance] release determinations." (*Ibid*.) But such an interpretation is directly at odds with canons of construction used to interpret enacted initiatives. Such interpretation—one that veers from the voters' intent and renders language superfluous—should not be allowed by this Court.

Here, this Court may resolve the perceived tension between "shall," as used within section 12, and "may," used within section 28, subdivision (f)(3), while also giving full effect to both provisions. Petitioner asserts that "shall" must be read to be a mandatory obligation—in Petitioner's own words, if a defendant is not charged with an enumerated offense in section 12, then the defendant "may not be detained before trial and *must* be released on their own recognizance or on conditions that are reasonably necessary to assure public safety and the person's future appearance in court." (OBM at p. 35, italics added; see OBM at pp. 33-35.) "The word 'shall,' however, depending on the context in which it is used, is not necessarily mandatory." (*Matosantos*, *supra*, 53 Cal.4th at p. 257, citing *People v. Lara* (2010) 48 Cal.4th 216, 227.)

In the context of section 12, the use of the word "shall" does not necessarily mean "mandatory." (Compare, Pen. Code, § 1271 [for noncapital offenses, a defendant "*may* be admitted to bail before conviction, as a matter of right."] (italics added); Cal. Const., art. I, § 12 [a defendant "*may* be released" on own recognizance] (italics added).) Before the 1982 amendment, section 12 provided an *absolute* right to release on

bail for noncapital cases (*In re Law* (1973) 10 Cal.3d 21, 25), giving no discretion to the court. The 1982 amendment, however, provided "public safety limitations" on the general right to bail in noncapital cases. (*Standish*, *supra*, 38 Cal.4th at pp. 892-893 (conc. & dis. opn. of Chin, J.).) In this context, the word "shall" is not mandatory because the right to release on bail is now limited by the exceptions that follow. That is, the right to release on bail in section 12 is now limited by public safety exceptions, which corresponds with the victim and public safety exception to release on bail in section 28, subdivision (f)(3).

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

Until the Court of Appeal's decision here, no decision reconciled the 2008 revisions to section 28, subdivision (f)(3) with the provisions of section 12. (See *In re Humphrey*, *supra*, 11 Cal.5th at p. 155, fn. 7; see also *In re Kowalczyk* (2023) 305 Cal.Rptr.3d 440, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456; Cal. Rules of Court, rule 8.1115(e)(3).) In this absence, an obligation is placed "on courts 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.) In that vein, this Court has "emphasized the importance of harmonizing potentially inconsistent statutes." (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955.) Here, this Court's "primary task[,]" is to "ascertain the intent of the electorate" in enacting Proposition 9 and "effectuate that intent." (*Arias v. Superior Court* (2009) 46 Cal.4th 969,

978-979.)

Based on the amended text and ballot pamphlet supporting Proposition 9's amendments to section 28, the voters intended to provide trial courts with the authority to deny bail when necessary to protect victim and public safety or to ensure a defendant's appearance in court. (See Prop. 9 Ballot Pamp., *supra*, official title and summary, p. 58 [referencing consideration of victim safety regarding bail], analysis of Prop. 9 by legislative analyst, p. 59 [same]; argument in favor of Prop. 9, p. 62 [same], text of Prop. 9, § 4.1, pp. 129-130.) By requiring a trial court to place victim and public safety at the forefront when determining whether to deny bail, the plain language of section 28 authorizes courts to exercise their discretion and deny bail when necessary to protect such interests. The removal of the mandatory language that prohibited courts from releasing persons charged with a serious felony on their own recognizance further showed an intent to vest discretion with the courts. (Prop. 9 Ballot Pamp., *supra*, p. 130.) But in permitting the court's discretion, the voters left a clear guide for the courts: victim and public safety are to be the primary considerations in deciding whether to deny bail.

II. Petitioner's Interpretation Would Produce Absurd Results by Allowing Criminal Defendants to Commit Felonies While Released on Their Own Recognizance with Impunity.

Petitioner's efforts to harmonize sections 12 and 28 lead to absurd results and should be rejected. "It is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage." (*Tuolumne Jobs & Small Business Alliance*, *supra*, 59 Cal.4th at p. 1038.) Similarly, a court must interpret an ambiguous phrase that *avoids* absurd results. (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105.) Applying the

standard Petitioner encourages this Court to adopt (OBM at pp. 34-35) to San Francisco's ongoing efforts to stop fentanyl trafficking highlights the absurd result that such an interpretation would produce. It also highlights how such an interpretation is at direct odds with the intent of voters that victim and public safety be at the forefront of any pretrial release decision. San Francisco, like cities across California, is plagued with the illicit trafficking and sale of fentanyl, a "disaster in plain sight[,]" that has caused thousands of overdose deaths since January 2020. (Thadani, *A disaster in plain sight* (Feb. 2, 2022) San Francisco Chronicle <https://www.sfchronicle.com/projects/2022/sf-fentanyl-opioid-epidemic/> [as of Nov. 8, 2023].) The Court of Appeal noted that in recent years "blatant and open-air drug sales have been increasingly common in the Tenderloin, with drug dealing occurring all day and night[.]" (*People v. Padilla-Martel* (2022) 78 Cal.App.5th 139, 149, quotations omitted.) The sales of narcotics takes place near children and residents and guests in San Francisco are required to move to the other side of the street to avoid drug dealers. (*Ibid*.) With open drug usage "common on public streets," users often leave behind "crack pipes and dirty syringes, as well as human waste[.]" (*Ibid*.)

As was reported in February 2022, since 2019 officers from the San Francisco Police Department "have arrested more than 1,000 alleged dealers. Many are repeat offenders, caught within just the same few square blocks. One person was arrested nine times." (Thadani, *A disaster in plain sight* (Feb. 2, 2022) San Francisco Chronicle <https://www.sfchronicle.com/projects/2022/sf-fentanyl-opioid-epidemic/> [as of Nov. 8, 2023].) Under Petitioner's proposed standard (OBM at pp. 34-35), no criminal defendant charged with possession of fentanyl for sales purposes or the sale of fentanyl (see Health & Saf. Code, §§ 11351, 11352) can ever be held in custody without bail while pending trial. This includes

criminal defendants arrested with kilogram-amounts of a narcotic that requires only two milligrams to cause a fatal overdose. (*Department of Justice/Drug Enforcement Administration Drug Fact Sheet: Fentanyl* (April 2020) United States Drug Enforcement Administration <https://www.dea.gov/sites/default/files/2020-06/Fentanyl-2020_0.pdf> [as of Nov. 8, 2023].) Petitioner's interpretation would also prohibit the detention of fentanyl dealers who, while released on their own recognizance, continue to pedal deadly fentanyl within the City and County of San Francisco, in defiance of stay-away orders and while incurring additional prosecutions against them. To Petitioner, these are "nonviolent, nonserious, or victimless" crimes that can never fall under the ambit of pretrial detention under the Constitution, regardless of how many times the person is arrested for the same conduct. (Reply Br. at p. 17.) That simply is not—and cannot be—the case.

Proposition 9 expressed explicit dissatisfaction that 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." (Prop. 9 Ballot Pamp., *supra*, text of Prop. 9, § 2, p. 128.) Proposition 9 similarly added a statement to our Constitution that the "collective right[]," of both victims of crime 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." (Prop. 9 Ballot Pamp., *supra*, text of Prop. 9, § 2 at p. 129; Cal. Const. art. I, § 28, subd. (a)(4).) With those express declarations enshrined in our Constitution by voters, treating Proposition 9's bail provisions as simply restating existing law would be inconsistent with this Court's "primary purpose" in interpreting section 28, subdivision (f)(3). (*Calhoun*, *supra*, 38 Cal.App.5th at p. 297.) The passage of

Proposition 9 shows the voters' intent to allow a trial court to detain individuals outside the scope of section 12. And the best way for this Court to honor that intent—and all applicable constitutional requirements as they are understood today—is to give effect to section 28, subdivision (f)(3) as it was presented to the voters, subject to principles of equal protection and due process. Accordingly, Amicus encourages this Court to hold that, after individualized consideration, orders for denying bail may issue only upon a showing by clear and convincing evidence that detention is necessary to advance a compelling interest of the People—the protection of victim and public safety or to ensure the defendant's reappearance in court—*and* that no less restrictive alternative conditions of pretrial release can reasonably protect these compelling interests.

As shown with illicit fentanyl trafficking in San Francisco—and in situations involving domestic violence, child neglect, and prohibited felons in possession of firearms as Real Party in Interest has identified—Petitioner's proposed interpretation of the dueling constitutional provisions would all but ignore and disregard the voters' intent. And it would produce absurd results. (ABM at pp. 32-33.) For a violation of Health and Safety Code section 11351, the People would never be able to ask a court to deny bail for a criminal defendant arrested with kilograms of a synthetic opioid that only takes milligram amounts to cause a fatal overdose. (*Facts about Fentanyl*, United States Drug Enforcement Administration <https://www.dea.gov/resources/facts-about-fentanyl> [as of Nov. 8, 2023].) A court could never consider the victims of illicit narcotics trafficking, i.e., those struggling to overcome their battle with addiction, being subjected to constant temptation. Or neighborhood residents that are subjected to ongoing criminal activity at all hours, day and night. Rather, the court would be forced to release the defendant—who may have multiple active prosecutions for narcotics sales activity and may have violated stay

away orders or other terms of release—because a violation of Health and Safety Code section 11351 is not a section 12 qualifying offense. As examined, *supra*, the electorate's intent in enacting Proposition 9 does not support such a result. Rather, the electorate's intent supports an interpretation that section 28, subdivision (f)(3) was to facilitate an additional category for such situations. [6]

III. In the Alternative, If This Court Follows the Court of Appeal's Harmonization, Trial Courts Must Be Afforded the Ability to Set Bail Above an Arrestee's Ability to Pay to Protect Victim and Public Safety.

Although this Court should adopt the interpretation that is loyal to the terms of both sections 12 and 28, another way to harmonize the two provisions is to allow a court to set unaffordable bail under section 28 for those cases that fall outside section 12's exceptions—contrary to Petitioner's position that trial courts must always set *affordable* bail. Even if this Court agrees with the harmonization approach of the court below, this Court should similarly recognize that a court may set an amount of bail

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[6] Alternatively, as Real Party in Interest has aptly argued, if sections 12 and 28 cannot be reconciled or harmonized, the presumption against implied repeal is overcome and section 28, as the later enacted statute, prevails. (*State Dept. of Public Health, supra,* 60 Cal.4th at p. 960 ["'If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones [citation].'"]; *Briggs v. Brown* (2017) 3 Cal.5th 808, 840 ["Although there is a presumption against repeals by implication, '[w]hen a later statute enacted by initiative is inconsistent and cannot operate concurrently with an earlier statute enacted by the Legislature, the later statute prevails'"]; see generally *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1038-1039 [same rules of construction apply to constitutional amendments].)

above a defendant's ability to pay where the protection of victim and public safety demand such. As Real Party in Interest notes, Propositions 4, 8, and 9 all imagine higher bail for serious offenders. (ABM at p. 35.) And as shown, some defendants that pose danger to victim and public safety do not fall under the ambit of pretrial detention under section 12. Accordingly, as the court below ruled, trial courts must be allowed to set unaffordable bail to fulfill section 28, subdivision (f)(3)'s command of keeping victim and public safety at the forefront of any bail or release decision.

Splitting from the Second Appellate District's approach in *In re Brown* (2022) 76 Cal.App.5th 296,[7] the court below held that under *In re Humphrey*, "[i]f, in balancing the liberty interest of an accused with the state's compelling interests, an outright pretrial detention order would be appropriate, then a fortiori a bail order in an amount higher than a defendant can afford would also be appropriate." (*In re Kowalczyk*, *supra*, 85 Cal.App.5th at p. 690.) The court below buttressed this conclusion by noting "*Humphrey* repeatedly acknowledged that an outright pretrial detention order would not offend the [D]ue [P]rocess [C]lause in those rare instances in which a court concludes, by clear and convincing evidence, that no nonfinancial condition in conjunction with affordable money bail can reasonably protect the state's compelling interests in public safety or arrestee appearance." (*In re Kowalczyk*, *supra*, 85 Cal.App.5th at p. 690, citing *In re Humphrey*, *supra*, 11 Cal.5th at pp. 143, 154, 156.) Amicus agrees with Real Party in Interest's arguments that constitutional protections are not offended by the setting of unaffordable bail because the

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[7] The Second District, in *In re Brown*, ruled that a detention order should issue rather than setting bail in an unaffordable amount because unaffordable bail is at odds with *In re Humphrey*. (*In re Brown* (2022) 76 Cal.App.5th 296, 306.)

In re Humphrey framework "ensures a detainee's equal protection and due process rights are protected." (ABM at p. 57; see also ABM at pp. 59-64.)

But while setting unaffordable bail passes constitutional muster, setting unaffordable bail does not protect victim and public safety in the same manner as the denial of bail. Indeed, victim and public safety—the paramount considerations in any possible pretrial release calculation—would only be endangered if this Court were to agree with the court below that an unaffordable bail order may issue when "no nonfinancial condition in conjunction with affordable money bail can reasonably protect the state's compelling interests in public safety or arrestee appearance." (*In re Kowalczyk*, *supra*, 85 Cal.App.5th at p. 690, citing *In re Humphrey*, *supra*, 11 Cal.5th at pp. 143, 154, 156.)

Practically implemented, only the trial court may determine what is "unaffordable" to each defendant and that calculation cannot reasonably be informed by the People because the People have no ability to obtain such information. Even once an "unaffordable" amount of bail is set based on the defendant's *individual* ability to pay, nothing prevents a third-party from posting bail on the defendant's behalf—a third-party who may have different and significantly more financial resources than the defendant. (See generally Pen. Code, § 1269, et. seq.) And once such security is posted, the defendant would be released back into the community—which is what is supposed to be prevented in certain cases where victim and public safety so demand. Moreover, if such a defendant's "unaffordable" security is posted by a third-party on the defendant's behalf, the possibility of forfeiture of that security cannot be credibly argued to be a sufficient protection of victim and public safety. A defendant's only incentive, then, is to appear because a defendant forfeits bail only if the defendant fails to appear. (Pen. Code, §§ 1269, 1305; cf. Pen. Code, § 12022.1 [sentence enhancement for committing an additional felonious offense while released

from custody on a felony charge].) Bail is *not* forfeited if the defendant reoffends while released from custody. (Pen. Code, §§ 1269, 1305.) As applied to the case of a third-party who posts "unaffordable" bail on behalf of an indigent defendant accused of pedaling fentanyl in San Francisco, nothing prevents that defendant from returning to pedaling fentanyl. Because such a defendant would be free to continue to gravely endanger victim and public safety in doing so only underscores how the court below erred—and how Petitioner repeats that erroneous conclusion now—in determining that the denial of bail be limited to only the enumerated offenses in section 12. Nullifying section 28 is not harmonization. Instead, this Court should give the full, fair consideration of section 28's validity and embrace the intent of the voters through the passage of Proposition 9 and recognize that section 28, subdivision (f)(3) vested trial courts with the ability to deny bail to any defendant where the People's compelling interests so demand.

CONCLUSION

For the foregoing reasons, Amicus requests that this Court give full effect to both sections 12 and 28 of article I of the Constitution and acknowledge that both provisions govern the denial of bail. By properly harmonizing the two sections, and giving full effect to the intent of the electorate through Proposition 9, this Court should rule that trial courts can deny bail where sufficient evidence supports a hypothetical verdict of guilt and the People have presented clear and convincing evidence that detention is necessary to advance a compelling interest of the People—namely, protecting victim and public safety or ensuring the defendant's reappearance in court—*and* that no less restrictive conditions can reasonably protect these compelling interests.

Dated: November 8, 2023

Respectfully submitted,

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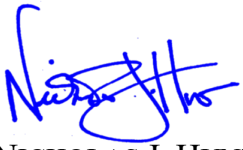

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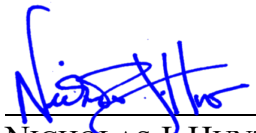
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

[Rule of Court 8.208]

Amicus certifies through its attorney of record that it does not know of any person or entity that has a financial or other interest in the outcome of the proceeding that Amicus reasonably believes that the justices should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 8, 2023, at San Francisco, California.



NICHOLAS J. HUNT
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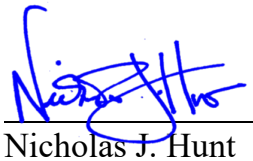
CERTIFICATE OF COMPLIANCE

I, Nicholas J. Hunt, declare under penalty of perjury:

Under California Rules of Court, rules 8.360(b)(1), I hereby certify that the attached **AMICUS CURIAE BRIEF OF SAN FRANCISCO DISTRICT ATTORNEY BROOKE JENKINS** uses 13-point Times New Roman font and contains 6,838 words, inclusive of footnotes, but excluding tables, covers, exhibits, and declaration of service. I have relied on the word count feature and other features of Microsoft Word, the computer program used to author this brief, for this certification.

Executed under penalty of perjury this eighth day of November, 2023, at San Francisco, California.



Nicholas J. Hunt

DECLARATION OF SERVICE

I, Nicholas J. Hunt, state:

That I am a citizen of the United States, over eighteen years of age, an employee of the City and County of San Francisco, and not a party to the within action; that my business address is 350 Rhode Island Street, North Building, Suite 400, San Francisco, California 94103. I am familiar with the business practice at the San Francisco District Attorney's Office (SFDA) for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the SFDA is deposited in the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic system or FileAndServeXpress electronic filing systems. Participants who are registered with either TrueFiling or FileAndServeXpress will be served electronically. Participants who are not registered with either TrueFiling or FileAndServeXpress will receive hard copies through the mail via the United States Postal Service.

That on November 8, 2023, electronically served the attached **Application For Leave to File Brief and Amicus Curiae Brief of San Francisco District Attorney Brooke Jenkins in Support of Neither Party** by transmitting a true copy through this Court's TrueFiling or FileAndServeXpress system. Because one or more of the participants have not registered with the Court's system or are unable to receive electronic correspondence, on November 8, 2023, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the SFDA at 350 Rhode Island Street, North Building, Suite 400, San Francisco, California 94103, addressed as follows:

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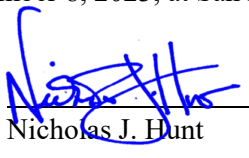
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 8, 2023, at San Francisco, California.



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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **KOWALCZYK (GERALD JOHN) ON H.C.**
Case Number: **S277910**
Lower Court Case Number: **A162977**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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11/8/2023
Date

/s/Nicholas Hunt
Signature

Hunt, Nicholas (333308)
Last Name, First Name (PNum)

San Francisco District Attorney's Office

Law Firm