No. S267138

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

MONICA MARIE MARTINEZ ,
Defendant and Appellant.

Sixth Appellate District, Case No. H046164
Santa Clara County Superior Court, Case No. C1518585
The Honorable Socrates Manoukian, Judge

OPENING BRIEF ON THE MERITS

ROB BONTA (SBN 202668)
Attorney General of California
MICHAEL J. MONGAN (SBN 250374)
Solicitor General
LANCE E. WINTERS (SBN 162357)
Chief Assistant Attorney General
JANILL L. RICHARDS (SBN 173817)
Principal Deputy Solicitor General
JEFFREY M. LAURENCE (SBN 183595)
Senior Assistant Attorney General
*SAMUEL T. HARBOURT (SBN 313719)
Deputy Solicitor General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3919
Samuel.Harbourt@doj.ca.gov
Attorneys for Plaintiff and Respondent

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ISSUE PRESENTED

A longstanding regulation promulgated by the California Department of Insurance provides:

> No bail licensee shall, for any purpose, directly or indirectly, enter into an arrangement of any kind or have any understanding with a law enforcement officer, newspaper employee, messenger service or any of its employees, a trusty in a jail, any other person incarcerated in a jail, or with any other persons, to inform or notify any licensee (except in direct answer to a question relating to the public records concerning a specific person named by the licensees in the request for information), directly or indirectly, of:
>
> (a) The existence of a criminal complaint;
> (b) The fact of an arrest; or
> (c) The fact that an arrest of any person is impending or contemplated.
> (d) Any information pertaining to the matters set forth in (a) to (c) hereof or the persons involved therein.

(Cal. Code Regs., tit. 10, § 2076.)

On March 17, 2021, this Court granted review on its own motion, directing that the "issue to be briefed and argued is limited to the following: Did the Court of Appeal correctly declare California Code of Regulations, title 10, section 2076, unconstitutional on its face?"[1]

[1] Unless otherwise noted, all further citations to regulations are to title 10 of the California Code of Regulations.

INTRODUCTION

For nearly 80 years, California has comprehensively regulated the bail bond industry. Regulations promulgated by the Department of Insurance foster transparency and fair dealing, barring practices that breed corruption and give unscrupulous bail businesses unfair advantages over their competitors to the detriment of incarcerated arrestees and their families. One longstanding regulation—on the books since 1941—prohibits licensed bail agents from entering into arrangements with jail inmates, police officers, and jail officials, among others, to provide insider information about new arrestees booked into jail.

The regulation—section 2076—forces bail businesses to compete with one another based on price and quality of services, rather than market-circumventing tactics that rely on insiders to provide tips about potential new customers. Without such regulation, jail officials, inmates, and other insiders could sell nonpublic information about new arrests and bookings to the highest bidder. And with that inside information, a bail agent could immediately reach out to solicit the new arrestee's business before any competitors have an opportunity to do so. Insider-tipping arrangements thus hinder fair competition in the bail bond industry and, in certain circumstances—particularly those involving arrangements with jail inmates or officials—interfere with the operations of, and have a corrupting influence on, public institutions.

In the early 20th century, such corrupt and anticompetitive practices flourished in the industry. The Nation's first

commercial bail bond business, for example, locked up a monopoly in San Francisco by paying off legions of insiders, including law enforcement officers, to alert it as soon as a new person was arrested and booked into jail. And the firm's monopoly profits fueled rampant criminality and bribery that eventually sparked a crisis in public trust of local government and the criminal justice system. The Insurance Commissioner responded by promulgating a comprehensive set of industry regulations, including the predecessor to section 2076.

In the decision below, the Court of Appeal held section 2076 invalid under the First Amendment—not only as applied to defendant, but in all applications, requiring "[f]acial invalidation." (Opinion 32.) The court's decision was grounded in its skepticism that the regulation "advances the state's substantial interests." (Opn. 30-31.)

That was error. The only portion of the regulation at issue in this case is its prohibition of bail bond agents' insider-tipping arrangements with "person[s] incarcerated in a jail." (§ 2076.) In considering that application of the regulation, the Court should focus on the legitimate *penological* interests that section 2076 reasonably furthers. While section 2076's principal overarching purpose is to guard against unfair and corrupt practices in the bail bond industry, state regulators could have also rationally determined that the regulation helps to promote sound, secure jail management. That is sufficient to satisfy the form of rational basis review that governs the constitutionality of restrictions on communications with jail inmates. And no other applications of

section 2076 are properly presented. Absent special considerations not relevant here, courts do not entertain challenges to hypothetical applications of a statute or regulation.

Even if the Court were inclined to apply heighted constitutional scrutiny to section 2076's bar on insider-tipping arrangements with jail inmates—or to examine additional applications of the regulation not at issue in this case—there would be no basis to invalidate the regulation. As demonstrated by the historical record, recent investigation and enforcement efforts, and simple common sense, section 2076 advances important government interests in all or substantially all applications—and is certainly not invalid in so many applications as to render it facially invalid. Beyond its direct promotion of fair competition in the bail industry, the regulation prevents disruption of jail administration, eliminates sources of public corruption and conflicts of interest, and helps to preserve the integrity of the criminal justice system in the eyes of the public.

The Court should reverse the Court of Appeal's facial invalidation of section 2076, restoring to full operation a regulation that has well served important government interests for nearly eight decades.

LEGAL BACKGROUND

The Bail Bond Regulatory Act of 1937 and its 1941-issued implementing regulations were designed to regulate and reform an early 20th century bail bond industry rife with corruption and anticompetitive practices. Those regulations, including section 2076, remain on the books in substantially similar form today.[2]

A. Corruption and unfair competition in California's early commercial bail industry

An "arrestee's release pending trial is often conditioned on whether the arrestee can make bail." (*In re Humphrey* (2021) 11 Cal.5th 135, 142.) "To do so, an arrestee posts security—in the form of cash, property, or (more often) a commercial bail bond"—which may be "forfeited if the arrestee later fails to appear in court." (*Ibid.*) Commercial bail bond agents profit on such bonds by, among other things, charging defendants a fee called a bail premium (today, "typically 10 percent of the value of the bond").

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[2] While there appear to be few legislative history materials from enactment of the 1937 legislation, newspaper articles and other historical materials from the period "may be considered in ascertaining . . . legislative intent" and in assessing the constitutionality of the statute and its implementing regulations. (*Carmack v. Reynolds* (2017) 2 Cal.5th 844, 850, internal quotation marks omitted; see, e.g., *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 483-487 [reviewing newspaper articles revealing impetus for enactment of California's Assault Weapons Control Act after the superior court sustained a demurrer to a complaint challenging the statute's constitutionality]; see generally *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 775, fn. 5 [discussing background materials that "appellate courts routinely consider" when "interpreting, explaining and forming the law"].)

(Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice (Oct. 2017) p. 30 <https://www.courts. ca.gov/documents/PDRReport-20171023.pdf> [as of June 29, 2021].)[3]

Though the concept of bail has centuries-old roots (see, e.g., 4 Blackstone's Commentaries 293-297), the rise of the for-profit bail bond industry is a relatively recent development. Before the late 1800s, a family member or a friend would typically act as a surety, "provid[ing] a pledge guaranteeing an accused would appear in court." (Baughman, The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System (2018) p. 164.) The surety would then get his bail money "back from the court when the accused appeared for his court date." (*Id.* at pp. 164-165.) "Only when America expanded and there was an absence of extended family and friends did the accused have difficulty finding people to put up bail money." (*Id.* at p. 165.) Recognizing a profit-making opportunity, certain businessmen in the late-19th century began to ask: "Why not charge a fee for the[] service" of "putting up bail money"? (Bauer, *Inside the Wild,*

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[3] Historically, the term "bail" has referred to the "temporary release of a person awaiting trial for a crime." (Baughman, The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System (2018) p. 1.) Today, it is more commonly used to refer specifically to "the money or security a person accused of a crime is required to provide to the court in order to be released from custody." (Pretrial Detention Reform: Recommendations to the Chief Justice, *supra*, p. 9.) This brief generally uses that modern understanding of the term.

Shadowy, and Highly Lucrative Bail Industry (May-June 2014) Mother Jones.)[4]

In particular, two San Francisco brothers established what is widely considered the first for-profit bail bond business in the United States. (See Baughman, *supra*, p. 165.) McDonough Brothers Bail Bond Brokers was initially "founded as a saloon," blocks away from the city's Hall of Justice. (*The Old Lady Moves On* (Aug. 18, 1941) Time, at p. 67.)[5] It "became a popular watering spot for the city's legal professionals." (Barnes, *"Fountainhead of Corruption": Peter P. McDonough, Boss of San Francisco's Underworld* (1979) 58 Cal. History 142, 145.)[6] The owner's two sons, Peter and Thomas McDonough, began lending money to help the saloon's attorney clientele bail their clients out of jail. (*Ibid.*) When the brothers "learned that the lawyers were charging their clients for these bonds, they began charging too." (*The Old Lady Moves On*, *supra*, p. 67.) Eventually, they "ripped out the bar, dealt solely in bail bonds," and "became . . . millionaire[s]." (*Ibid.*)

McDonough Brothers soon "monopolized the bail bond business in San Francisco." (Barnes, *supra*, p. 145.) "[A] remarkable network of informants . . . provided [the firm] with

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[4] Available at <https://www.motherjones.com/politics/2014/06/bail-bond-prison-industry/> (as of June 29, 2021).

[5] Available at <http://content.time.com/time/subscriber/article/0,33009,802159,00.html> (as of June 29, 2021).

[6] Available at <https://www.jstor.org/stable/25157907> (as of June 29, 2021).

information about the needs of prospective clients." (*Id.* at p. 146.) "Policemen of all ranks," for example, "could be seen visiting the McDonough office every day." (*Ibid.*) "Booking sergeants reportedly provided daily lists of who had been arrested, the charges, and the bail set." (*Ibid.*) It was "even discovered at one point that a system of wirelesses connected the city prison, outlying jails, and the McDonough office." (*Ibid.*) With these advance inside tips about recent arrests, McDonough Brothers could move more quickly than any would-be competitors to solicit a new arrestee's business (see *ibid.*) and start making arrangements to "return[] the McDonough client to freedom" (*ibid.*). A "call to McDonough Brothers" became "obligatory for anyone accused of criminal activity in San Francisco." (*Ibid.*)

The success of the McDonoughs' operation also "brought [the firm] into contact with people engaged in every branch of underworld activity." (Barnes, *supra*, p. 146.) "Gradually, McDonough Brothers became an agency which could provide [criminals] protection *from* arrest as well as protection *after* arrest." (*Ibid.*, italics added.) Drawing on its vast network of connections, for example, McDonough Brothers began bribing police officers to provide tips about raids on illegal prostitution and gambling businesses—information the firm then conveyed, for a fee, to those businesses so that they could prepare for the raid. (See, e.g., *Records Show Bail Monopoly McDonough Aim*, S.F. Examiner (May 25, 1937) p. 6.) McDonough Brothers also used its enormous wealth to expand into, and effectively take control of, the city's vice trades—investments the firm protected

by paying off public officials to "turn[] a blind eye." (DiEdoardo, Lanza's Mob: The Mafia and San Francisco (2016) p. 40; see also *id.* at pp. 38-39; Barnes, *supra*, pp. 147-149.) By the Prohibition Era, McDonough Brothers' "control over San Francisco vice—and through it, the police and the mayor and the board of supervisors"—was virtually unchallenged. (DiEdoardo, *supra*, p. 38.) "Tammany never ran New York City as completely as the McDonoughs ran the right to break the law in San Francisco." (Barnes, *supra*, p. 147, internal quotation marks omitted.)

In 1937, an investigation into citywide corruption concluded in a widely publicized report—called the "Atherton Report," after the lead investigator, Edwin Atherton—that McDonough Brothers operated as a "fountainhead of corruption, willing to interest itself in almost any matter designed to defeat or circumvent the law." (*Report to the 1937 Grand Jury on Graft in San Francisco*, reprinted in S.F. Chronicle (Mar. 17, 1937) p. F2, col. 3 (Atherton Report).)[7] Not content with "develop[ing] a virtual 'corner' on the bail bonds business" by "'freez[ing] out'

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[7] For additional background on the investigation and report, see, e.g., *San Francisco Graft Inquiry Ensnares District Attorney*, L.A. Times (Mar. 27, 1937) p. 1; *Accused Assail Atherton: Report Called All Lies*, S.F. Chronicle (Mar. 17, 1937) p. 1; *Prober Unmasks: Edwin N. Atherton Is Man Investigating Police*, S.F. Examiner (Feb. 8, 1936) p. 4; *Police Graft Will Be Sifted Thoroughly*, S.F. Chronicle (Sept. 24, 1935) p. 28. The Atherton report is also available online at <https://archive.org/details/AthertonReportText.> (as of June 29, 2021). To access the online version of the report, make sure to include the period (".") at the end of the hyperlink, following "/AthertonReportText."

what little competition [was] left" (Atherton Report, *supra*, p. F2, col. 4), McDonough Brothers also took pains to ensure that "[n]o one [could] conduct a prostitution or gambling enterprise in San Francisco without" the firm's approval (*id.* at p. F2, col. 3). And the firm significantly contributed to the $1 million or more in bribes and kickbacks annually collected by police officers across the city. (See *id.* at pp. F2, col. 3-5, F4, col. 1, F6, col. 6.) "[S]hock[ing] [to] people who were individually facing economic oblivion" in the midst of the Great Depression (Barnes, *supra*, p. 152), the Atherton report prompted "public outrage" and calls for reform—including passage of legislation regulating the bail bond industry. (*Ibid.*; see, e.g., *Bail Bond Regulation Demanded*, S.F. Chronicle (July 1, 1937) p. 5.)

B. The Bail Bond Regulatory Act of 1937 and its implementing regulations

One "concrete result[]" of the 1937 report was enactment of the Bail Bond Regulatory Act. (*The Old Lady Moves On*, *supra*, p. 68.)[8] The act took "direct aim" at the anticompetitive and

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[8] The Legislature originally enacted two statutes regulating the bail industry—one addressing bail agents who secure an arrestee's release with cash or property (Stats. 1937, ch. 653, pp. 1797-1800), and another regulating agents who secure release using surety bonds, the most common commercial bail service today (Stats. 1937, ch. 654, pp. 1800-1804; see Pretrial Detention Reform: Recommendations to the Chief Justice, *supra*, pp. 29-31, 108; *Governor Gets Bill to Curb Bail Brokers*, S.F. Examiner (May 26, 1937) p. 8). In 1939, the Legislature merged the two acts. (See Stats. 1939, ch. 361, § 28, p. 1700.) Because the differences between the two original acts are immaterial here, the People refer to a single "act" for simplicity. (Cf. Dept. of

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corrupt practices that the report had disclosed, as well as McDonough-like practices among certain Southern California bail businesses.[9] Specifically, the act imposed licensing requirements on the bail bond industry for the first time, giving the Insurance Commissioner broad authority to deny a license to, or revoke a license from, anyone deemed not "fit or proper" to work in the industry. (Ins. Code, § 1806.) It also authorized the Commissioner to promulgate rules necessary "for the administration and enforcement" of the act (*id.*, § 1812), and made the "violation of any . . . provision of [the act], or of any rule of the commissioner made pursuant thereto" subject to criminal prosecution (*id.*, § 1814). The "purpose [of the act]," as explained by the Insurance Commissioner's Office at the time, "is to provide the highest possible class of agents and solicitors in the bail bond

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Insurance, *Bail Bonds* <http://www.insurance.ca.gov/01-consumers/170-bail-bonds/> [as of June 29, 2021] [discussing enactment of the "Bail Bond Regulatory Act in 1937"].)

[9] *Bills to End McDonough's Rule Signed*, S.F. Examiner (July 3, 1937) p. 1; see also *ibid.* (noting that "sponsors of the bill asserted" that the legislation "is calculated to put Pete McDonough out of the bail bond business"); *Bail Broker Control Bill in Assembly*, Oakland Tribune (Mar. 30, 1937) p. 5 (reporting that the bill's principal author told a committee that, "in some instances brought to his attention," "policemen had notified bondsmen of arrests," giving them an opportunity to "visit prisoners" in jail and solicit business before their competitors learned of the arrests); *Bail Brokers Are Rapped As Bill Wins Okeh*, Sacramento Bee (Mar. 30, 1937) p. 13 (similar).

business." (*Anti Bail Bond Proposal*, S.F. Examiner (Apr. 5, 1937) p. 2.)

In the first few years of the act's operation, the Insurance Commissioner's Office held a series of licensing hearings, providing it with insight into anticompetitive and corrupt practices then-prevalent across the State's bail bond industry. The Commissioner, for example, conducted a "sweeping investigation" of over 120 bail bond agents in Southern California. (*Bail Bondsmen Facing Inquiry*, L.A. Times (June 25, 1941) p. 3.) "[I]nvestigators found," among other things, that information about arrestees in need of bail "leaked from members of the Police Department." (*Ibid.*) As a result, "the same clique of bondsmen" was able to get the lion's share of the business and charge "exorbitant bond fees" to arrestees who thought they had no other option. (*Ibid.*; see also *Bail Bondsmen Activities Probed*, San Pedro News-Pilot (June 24, 1941) p. 2 [similar].) The Commissioner also considered Peter McDonough's application to continue in the bail business. After hearing evidence echoing and expanding on the 1937 Atherton Report's findings, the Commissioner denied his application—and then denied it a second and third time when McDonough repeatedly reapplied. (See *McDonough v. Goodcell* (1939) 13 Cal.2d 741, 753 [upholding one of the denials].)[10]

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[10] See also *State Again Denies McDonough License; Reputation Blasted*, S.F. Examiner (May 8, 1941) pp. 1-2; Barnes, *supra*, p. 152.

In December 1941, based on the experience of investigating and uncovering "'pretty rotten practices'" across the industry (*Bail Bondsmen Activities Probed*, *supra*, p. 2), the Insurance Commissioner issued a set of 48 regulations to "eradicate[]" any "form of racket . . . from the bail bond business in [the] State" (MacDonald, *48 Stringent Rules Set Up By Caminetti*, S.F. Chronicle (Dec. 8, 1941) p. 21). Those regulations, which remain on the books in substantially similar form today (§ 2064 et seq.), barred bail licensees from, among other things: permitting unlicensed persons (such as jail inmates, police officers, and jail officials) to solicit or negotiate on behalf of a bail bond business (§ 2068); soliciting bail in jails and courthouses (§ 2074); and charging any rates or fees different from those disclosed in filed rate schedules (§§ 2081-2082, 2094 et seq; see also Dept. of Insurance, Ruling No. 21 (Dec. 1, 1941) ¶¶ 19, 27, 35-36 [included as an attachment to this brief, see *post*, pp. 66-75].)

That 1941-issued body of rules also included the regulation at issue here, section 2076. (See Ruling No. 21, *supra*, ¶ 37.) In its present form, largely unchanged from its original version, section 2076 provides that "[n]o bail licensee shall . . . enter into an arrangement of any kind or have any understanding with a law enforcement officer, newspaper employee, messenger service or any of its employees, a trusty in a jail, any other person incarcerated in a jail, or with any other persons, to inform or notify any licensee" of, among other things, "[t]he fact of an arrest." The rule prohibits one of the principal anticompetitive practices revealed by the Atherton Report and the Insurance

Commissioner's post-1937 investigations: arrangements between bail bond businesses and various types of insiders to provide advance tips about new arrestees in need of bail services. As explained above, McDonough Brothers and other bail bond businesses relied on such insider tips to gain an edge on competitors and exploit new clients by charging exorbitant fees.

While section 2076 bars bail licensees from obtaining arrest-related information through insider-tipping arrangements, it does not prevent licensees from learning about recent arrests through lawful, publicly available channels. To the contrary, it expressly provides that licensees may make "public records" requests for arrest information concerning "a specific person named by the licensee[]." And the California Public Records Act requires "state and local law enforcement agencies" to publicly disclose information about recent arrests, including the "full name and occupation of every individual arrested by the agency" and "the time and date of arrest." (Gov. Code, § 6254, subd. (f)(1); see *County of Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 588, 595.) Consistent with that mandate, many law enforcement agencies across the State affirmatively release data about recent arrests and jail bookings on their websites—often with updates every 24 hours.[11] Local news outlets often publicly report daily arrest-related information as well.[12]

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[11] See, e.g., Santa Clara Police Dept., *Arrest Log* <https://www.santaclaraca.gov/our-city/departments-g-z/police-department/crime/arrest-log> (as of June 29, 2021); El Dorado County District Attorney's Off., *Arrest Log* <https://www.eldora

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Today, section 2076 works in conjunction with an additional rule—section 2079.1—regulating solicitation of bail bond services. While a "bail agent may . . . solicit the arrestee's attorney [or] family members" and "may also advertise his or her services in every form of media," no agent may directly solicit an arrestee in person, over the phone, or through any other means. (*People v. Dolezal* (2013) 221 Cal.App.4th 167, 173; see § 2079.1.) As the Department of Insurance has explained, being "in a jail environment" can be highly "confus[ing]," "stress[ful]," and even "embarrass[ing]" for an arrestee. (*Dolezal*, *supra*, 221 Cal.App.4th at pp. 171-172 [quoting "a senior investigator with the Department of Insurance"].) The purpose of the "ban on direct solicitation," then, is to "protect[] arrestees from 'undue influence,'" as well "harassment, intimidation [and] overreaching" by bail licensees. (*Id.* at pp. 172, 174.) It also contributes to the State's overall goals of maintaining an "orderly" and "even playing field for all [bail] licensees in the state" (*id.* at p. 171) and

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doda.com/investigations/arrest_log/> (as of June 29, 2021); Fresno County Sheriff's Off., *Jail Bookings for Last 72 Hours* <https://publicinfo.fresnosheriff.org/inmateinfocenter/blotter> (as of June 29, 2021); Solano County Sheriff-Coroner, *Jail Booking Logs* <https://www.solanocounty.com/depts/sheriff/pubinfo/jail_booking_logs.asp> (as of June 29, 2021).

[12] See, e.g., Sacramento Bee, *Sacramento County Arrest Logs* <https://www.sacbee.com/news/local/crime/article2763931.html> (as of June 29, 2021); Local Crime News <https://www.localcrimenews.com/> (as of June 29, 2021).

ensuring that licensees "operate in a fair, honest and professional manner" (*id.* at p. 174).

STATEMENT OF THE CASE

On August 25, 2015, defendant Monica Marie Martinez ("also known as Monica Marie Milla" (Opn. 1)), a licensed bail agent employed by a San Jose bail firm, was charged with seven felony counts under Insurance Code section 1814. (CT 1-4, 172.) As discussed *ante*, page 25, section 1814 makes it a crime to violate any regulation promulgated by the Insurance Commissioner pursuant to the Bail Bond Regulatory Act. According to the criminal complaint, defendant violated section 2076 by entering into arrangements with "person[s] incarcerated in jail" "to inform and notify defendant . . . of the fact of an arrest." (CT 2-4.)

Defendant demurred to the complaint, maintaining that section 2076 violates separation of powers requirements of the California Constitution, as well as the state and federal guarantees of due process and free speech. (CT 16-38.) Specifically, defendant argued that the regulation is impermissibly vague under the due process clause (CT 26-30); not sufficiently "tailored and limited to achieve a substantial state interest," as required under intermediate First Amendment scrutiny (CT 32; see CT 26-34); and "overbroad" on the ground that the regulation's scope is "sweeping" (CT 26, 33; see CT 26-30,

33).[13] At the hearing on the demurrer, counsel for defendant declined to "get into . . . any depth at all" about the free speech-related arguments, characterizing them as "more minor" "in comparison to the separation of powers argument and the vagueness argument." (Augmented RT 19-20.) Following the hearing, the superior court overruled the demurrer. (CT 52; 1 RT 3-4.)

The parties then reached a plea bargain, under which the defendant pleaded no contest to one of the seven counts in exchange for dismissal of the remaining counts. (CT 148-156.) Pursuant to the plea agreement, the court suspended imposition of sentence and placed defendant on probation for three years, with four months to be served in county jail and with a promise that the court would reduce the offense to a misdemeanor under Penal Code section 17 after defendant successfully completed one year of probation. (CT 148-156, 178; 2 RT 303-307; 3 RT 605-608.) It also granted a certificate of probable cause pursuant to Penal Code section 1237.5, allowing defendant to appeal the court's demurrer ruling despite entering a plea. (CT 193; 2 RT 305; see Cal. Rules of Court, rule 8.304(b).)

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[13] Because the California Constitution's free speech guarantee is generally consistent with its federal counterpart (see, e.g., *Keenan v. Superior Court* (2002) 27 Cal.4th 413, 436), and because defendant has not raised any separate arguments under the state provision, this brief refers for simplicity to the "First Amendment" to describe both federal and state free speech rights.

The Court of Appeal reversed. It agreed with the superior court's rejection of defendant's vagueness challenge (see opn. 8-13) but held that section 2076 is "facially" invalid under the First Amendment (opn. 32).[14] Applying "the intermediate level of review [for] commercial speech" (opn. 32), the court determined that section 2076 fails to "*directly and materially* advance[] the state's substantial interests (opn. 30-31). The court focused on the State's interest in preventing "unlawful, predatory solicitation of arrestees" (opn. 29), concluding that section 2076's insider-tipping ban "might," at most, "indirectly deter" such solicitation (opn. 32). The court did not consider whether the regulation advances other important state interests. (See opn. 28-32.) Nor did the court find it "[]necessary to resolve defendant's First Amendment overbreadth claim." (Opn. 32.) "Facial invalidation of the regulation" under intermediate scrutiny, the court held, "requires the reversal of defendant's conviction." (*Ibid.*)

Justice Grover dissented. In her view, the majority failed to consider the State's "substantial interest" in "prevent[ing] unfair competition among licensed bail agents." (Dis. opn. 4.) Section 2076 directly serves that interest, the dissent explained, by "restricting bail licensees' access to . . . insider information" that "facilitate[s] wholesale identification of people with imminent bail needs." (*Ibid.*) Justice Grover would have accepted the People's

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[14] Defendant did not pursue her separation of powers challenge on appeal. (Opn. 2.)

argument that, "by 'preventing bail agents from obtaining arrest information from third parties inside the criminal justice system,'" the regulation "'prevents bond agents who have these insider arrangements from gaining an unfair competitive advantage over licensees who are not engaged in this type of practice.'" (Dis. opn. 3-4.)

The dissent also stressed that section 2076 imposes, at most, a modest "restriction on constitutionally protected speech." (Dis. opn. 5.) It "pertains only to bail agents and reaches only information identifying potential clients to the bail licensee." (Dis. opn. 2.) The regulation does not prohibit bail agents from requesting information "regarding persons already known to and identified by a bail agent." (Dis. opn. 4.) Nor does it otherwise "restrain a bail agent's lawful communications with an arrestee, incarcerated or otherwise." (Dis. opn. 5.) For these reasons, Justice Grover would have "also reach[ed] and reject[ed] defendant's overbreadth challenge." (*Ibid.*)

The People and the Department of Insurance filed a joint request with this Court seeking depublication of the Court of Appeal's decision. Shortly thereafter, the Court denied that request but granted plenary review of the case on its own motion. It directed the parties to address whether the Court of Appeal correctly declared section 2076 "unconstitutional on its face."

SUMMARY OF ARGUMENT

The Court of Appeal erred by facially invaliding section 2076. Only one application of the regulation is implicated in this case: its prohibition of insider-tipping arrangements between bail bond

licensees and "person[s] incarcerated in a jail." That particular prohibition is the only portion of the regulation charged by the People's criminal complaint against defendant. And it easily satisfies the relevant standard of constitutional scrutiny—the rational basis standard governing First Amendment challenges to restrictions on communications with incarcerated persons.

Under that standard, courts examine whether a regulator could rationally conclude that the restriction furthers legitimate penological interests. While section 2076 was principally designed to address unfair, corrupt practices in the bail bond industry, a rational regulator could also conclude that its bar on insider-tipping arrangements with jail inmates contributes to sound, secure jail administration. It does so by, among other things, barring inmates from personally profiting through relationships with commercial bail agents, eliminating any profit- or loyalty-motivated temptation for inmates to pressure recent arrestees to retain a certain bail bond firm, and helping to prevent the emergence of rivalries—and even violence—between inmates working for competing bail bond firms.

Even if intermediate constitutional scrutiny applied, however, section 2076's prohibition of insider-tipping arrangements with "person[s] incarcerated in a jail" would satisfy it. Beyond serving legitimate penological ends, that prohibition directly advances the government's substantial interest in promoting fair bail industry competition. And its modest burden on First Amendment-protected rights goes no further than necessary in light of those interests. As the dissenting justice

explained below, section 2076 does not entirely bar bail bond licensees from obtaining information about recent arrests. Licensees may, for example, field inquiries from concerned family members or friends interested in retaining the licensee on behalf of an arrested individual; they may file public records requests for arrest-related information; and they may turn to publicly available sources—such as news outlets or local law enforcement websites—to learn when new arrestees are booked into jail. The one thing licensees may not do under section 2076 is enter into an arrangement or understanding with an insider—such as a jail inmate—to obtain nonpublic tips about new arrestees in an effort to gain an edge on the competition.

The Court of Appeal did not limit its analysis to section 2076's prohibition on arrangements with "person[s] incarcerated in jail." It instead evaluated the constitutionality of the regulation in its entirety and struck it down in all applications. That was error. It is well-established that courts are to limit their analysis to applications of a statute or regulation presented in the case at hand. And while First Amendment overbreadth doctrine provides a limited exception to that rule—allowing challengers, in some circumstances, to seek facial invalidation of a provision on the ground that it may hypothetically be applied unconstitutionally in a substantial number of other cases not before the court—the Court of Appeal did not purport to rely on overbreadth doctrine here. To the contrary, it expressly avoided reaching defendant's overbreadth challenge.

In any event, defendant's overbreadth challenge fails. Overbreadth doctrine is inapplicable in cases, like this one, involving commercial speech. And even if the doctrine applied, defendant could not satisfy its demanding standard for facial invalidation. Far from posing constitutional problems in a substantial number of cases, section 2076 advances compelling government interests in all or substantially all of its applications. For nearly 80 years, the regulation has helped the State deter and punish the kind of corrupt, anticompetitive bail bond industry practices that flourished at the beginning of the 20th century. And it remains a relevant, vital component of the State's regime for regulating the industry today.

The Court should reverse the Court of Appeal's facial invalidation of section 2076.

ARGUMENT

The People do not contest, for purposes of this case, that section 2076 implicates the First Amendment-protected rights of commercial bail agents.[15] Any modest burden on those rights, however, is plainly justified. As applied here, section 2076 validly prohibits licensed bail bond agents from forming insider-

[15] As a general matter, the First Amendment protects the right to speak, as well as the right to listen—that is, to obtain information from another. (See generally *Kleindienst v. Mandel* (1972) 408 U.S. 753, 762-765; cf. *Sorrell v. IMS Health Inc.* (2011) 564 U.S. 552, 567-569.) Here, defendant asserts a First Amendment right to obtain arrest-related information from jail inmates through section 2076-prohibited insider-tipping arrangements.

tipping arrangements with jail inmates. And while no other applications are properly presented, section 2076 is valid in all or substantially all applications—and certainly not unconstitutional in so many applications as to justify facial invalidation.

I. SECTION 2076 COMPORTS WITH THE FIRST AMENDMENT AS APPLIED TO INSIDER-TIPPING ARRANGEMENTS WITH JAIL INMATES

The People's criminal complaint alleges, and defendant pleaded no contest to, a violation of one specific portion of section 2076: its prohibition of arrangements with "person[s] incarcerated in a jail" to "inform or notify" a bail bond licensee when new arrestees are booked into jail. (CT 2-4, 148-156.) In this case, then, any request for "as-applied" relief should focus on the constitutionality of that portion of the regulation alone. Under the rational basis standard for reviewing the validity of restrictions on communications with jail and prison inmates—or, indeed, under heightened, intermediate scrutiny—any such as-applied challenge fails.[16]

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[16] The People use "as-applied" to mean a constitutional challenge to the specific portion of section 2076 charged in the criminal complaint: the prohibition of insider-tipping arrangements with "person[s] incarcerated in a jail." This Court has not adopted a specific "label" for such challenges, which have "characteristics of both" as-applied and facial challenges. (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 768, internal quotation marks omitted.) Like classic as-applied challenges, such challenges do not "seek to strike [a statute or regulation] in all its applications." (*Ibid.*) Like facial challenges, this type of challenge alleges constitutional defects in "the text of [a] measure itself, not its application to the particular circumstances of an

(continued…)

A. As applied here, section 2076 satisfies the rational basis standard governing constitutional challenges in the jail and prison context

1. Restrictions on communications with incarcerated persons are constitutionally valid so long as they rationally relate to legitimate penological interests

The First Amendment allows the government to restrict communications between jail inmates and noninmates so long as such restrictions "rationally relate[]" to "legitimate penological interests." (*Thornburgh v. Abbott* (1989) 490 U.S. 401, 413, 414, internal quotation marks omitted.) Under this standard—often called the "*Turner* standard" (see generally *Turner v. Safley* (1987) 482 U.S. 78)—the government "need not make . . . a showing" that its restriction "in fact advances [the State's] legitimate interests." (*Thompson v. Dept. of Corrections* (2001) 25 Cal.4th 117, 133, internal quotation marks omitted.) It is enough that the State's "judgment was 'rational'"—that is, that the State "might reasonably have thought that the policy would advance" legitimate penological interests. (*Ibid.*, italics omitted.)

The *Turner* standard applies here. While many cases applying the standard involve *prisons*, it also governs where, as here, a law or policy regulates conduct involving *jail* inmates.

(…continued)

individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) Such challenges could thus be considered partial facial challenges, or class or category-based as-applied challenges.

(See, e.g., *Florence v. Bd. of Chosen Freeholders of County of Burlington* (2012) 566 U.S. 318, 330; *Bell v. Wolfish* (1979) 441 U.S. 520, 546; *County of Nevada v. Superior Court* (2015) 236 Cal.App.4th 1001, 1009, and fn. 2.) The *Turner* standard also applies whether the challenger is herself an inmate or instead, as here, a noninmate who seeks to correspond or otherwise interact with an inmate. In *Thornburgh*, *supra*, 490 U.S. at p. 411, fn. 9, for example, the high court addressed a First Amendment challenge by "nonprisoner[]" publishers to restrictions barring inmates from receiving certain publications while incarcerated. The Court applied *Turner*, explaining that it would be improper "to focus . . . on the identity of the individuals whose rights allegedly have been infringed" because restrictions on inmate communications often "affect[] rights of prisoners *and* outsiders." (*Ibid.*, original italics.)

It also makes no difference for purposes of applying *Turner* that section 2076 was promulgated by the Department of Insurance pursuant to the Bail Bond Regulatory Act, and does not focus exclusively on jails or prisons. While many decisions applying *Turner* involve regulations devised by jail or prison administrators to address specific penological concerns (see, e.g., *In re Jenkins* (2010) 50 Cal.4th 1167, 1176), the same standard governs where, as here, a general law or policy adopted by another lawmaking body is *applied* in the jail or prison context. For example, in *Massachusetts Prisoners Association Political Action Committee v. Acting Governor* (2002) 435 Mass. 811, 813, the high court of Massachusetts addressed a prisoner's First

Amendment challenge to a statute forbidding political fundraising in all public buildings. The prisoner challenged application of the statute to political fundraising by incarcerated inmates in state correctional facilities. (*Id.* at p. 816.) In rejecting the challenge, the court applied the "deferential standard of review for constitutional challenges to prison regulations and policies" (*id.* at p. 820), concluding that the statute's application was valid because it was "rationally related" to legitimate penological interests (*id.* at p. 821).[17]

In applying the *Turner* standard, courts generally consider four closely related questions: First, "is there a 'valid, rational connection'" between the regulation and "the legitimate governmental interest put forward to justify it"? (*Beard v. Banks* (2006) 548 U.S. 521, 529 (plurality opn).) Second, "are there 'alternative means'" of expression that "remain open" to inmates? (*Ibid.*) Third, "what 'impact' will 'accommodation of the asserted constitutional right . . . have on guards and other inmates'"? (*Ibid.*) And, fourth, are "'ready alternatives' for furthering the governmental interest available"? (*Ibid.*; see also *Thornburgh*, *supra*, 490 U.S. at pp. 414-418.) The "second, third, and fourth factors," however, may "add little, one way or another, to the first

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[17] See also *Waterman v. Farmer* (3d Cir. 1999) 183 F.3d 208, 212 (applying *Turner* standard to statute adopted by State's legislature, rather than a regulation adopted by prison or jail administrators); *Amatel v. Reno* (D.C. Cir. 1998) 156 F.3d 192, 196, 202 (same for federal statute); *Matthews v. Morales* (5th Cir. 1994) 23 F.3d 118, 119 (state statute); *Craft v. Ahuja* (9th Cir. 2012) 475 Fed. Appx. 649, 650 (same).

factor's basic logical rationale." (*Banks*, *supra*, 548 U.S. at p. 532 (plurality opn.); see *id.* at pp. 541-542 (opn. of Thomas, J., conc. in the judgment) [similar].) The ultimate question is whether the regulation in question bears a "*reasonable* relation" to legitimate penological interests. (*Id.* at p. 533 (plurality opn.).)

2. By barring insider-tipping arrangements with jail inmates, section 2076 rationally furthers legitimate penological interests

As applied here, section 2076 satisfies the *Turner* standard. While section 2076 was principally designed to address corruption and unfair competition in the bail bond industry (see *ante*, pp. 27-28), California regulators "might reasonably have thought" (*Thompson*, *supra*, 25 Cal.4th at p. 133, italics omitted) that the regulation's prohibition of insider-tipping arrangements with jail inmates would also promote sound, secure jail administration. A regulator could rationally conclude, for example, that such insider arrangements are harmful because they generally involve the payment of money or something else of value to the inmate.[18] This kind of dealmaking allows an inmate to effectively turn his or her incarceration into a profit-making enterprise, threatening to erode the deterrent and retributive

[18] Documented examples include deposits by a bail bond licensee into an inmate's commissary account and gift packages sent to inmates. (See, e.g., Lewis, *Inside Santa Clara Jails, Predatory Bail Schemes Flourished for Years,* KQED (Apr. 10, 2017) <https://www.kqed.org/news/11393155/inside-santa-clara-jails-predatory-bail-schemes-flourished-for-years> [as of June 29, 2021].)

value of incarceration. Indeed, many jails and prisons across the country appear to have made this very judgment, barring profit-making arrangements between inmates and outsiders. (See generally *French v. Butterworth* (1st Cir. 1980) 614 F.2d 23, 24 ["a prisoner has no recognized right to conduct a business while incarcerated"]; cf. *Johnson v. Avery* (1969) 393 U.S. 483, 490 [noting that the government may validly bar "jailhouse lawyers" from accepting payment or other "consideration" for their services].)[19]

Reasonable regulators could also rationally conclude that for-profit arrangements between inmates and bail bond licensees compromise other important penological objectives. Such arrangements could diminish an inmate's incentive to participate in a detention facility's work programs by offering the inmate alternative sources of income. They may also lead to inmate rivalries—and even violence. For example, a recent Santa Clara County investigation revealed that inmates working for one bail bond firm would take steps to retaliate against inmates working

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[19] See, e.g., Cal. Code Regs. tit. 15, § 3024, subd. (a) ("Inmates shall not engage actively in a business or profession except as authorized by the institution head or as provided in Section 3104. For the purpose of this section, a business is defined as any revenue generating or profit making activity."); Merced County Sheriff's Off., Corrections Bureau, Policy and Procedure Manual § 4.02 p. 2 <https://www.co.merced.ca.us/DocumentCenter/View/22912/ Corrections-Policy-October-30-2019> (as of June 29, 2021); Plumas County Sheriff's Off., Corrections Div., Policy and Procedure Manual § 5.02 p. 2 <https://plumascounty.us/DocumentCenter/ View/25146/Jail-Policy-for-website> (as of June 29, 2021).

for competitors—including by taking measures "to get the [competitor] inmate 'rolled out' (kicked out of the dorm)" so that he would no longer be in a position to learn about new arrestees booked into the jail. (Lewis, *Inside Santa Clara Jails, Predatory Bail Schemes Flourished for Years*, KQED (Apr. 10, 2017) internal quotation marks omitted.)[20] An investigation in New Jersey uncovered similar practices—in particular, that "gangs . . . [were] being recruited for the purpose of bail referral." (State of N.J., Com. of Investigation, Inside Out: Questionable and Abusive Practices in New Jersey's Bail-Bond Industry (2014) pp. 12-13, internal quotation marks omitted.)[21] "As you can imagine," the report explained, "if one gang gets involved, and another comes in to compete, a gang war could ensue causing harm in the community." (*Id.* at p. 13, internal quotation marks omitted; see also Defendant's Court of Appeal OBM (Dec. 17, 2019) p. 29 [acknowledging that section 2076 "could be an effort to prevent some kind of cottage industry dealing with bail within the jail which could lead to conflict and ultimately violence"].)

Relatedly, an influx of money from bail bond agents into a jail might empower one group or gang within the facility at the expense of others. With profits from an insider-tipping scheme, inmates could afford to buy favors from other inmates and

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[20] Available at <https://www.kqed.org/news/11393155/inside-santa-clara-jails-predatory-bail-schemes-flourished-for-years> (as of June 29, 2021).

[21] Available at <https://www.nj.gov/sci/pdf/BailReportSmall.pdf> (as of June 29, 2021).

otherwise wield influence and gain allegiances. In particular, where one inmate or a specific group of inmates control connections to, and the flow of proceeds from, a certain bail bond business, those inmates may be able to demand favors from other inmates who want to be cut in on the insider-tipping scheme. Given this power and profitmaking potential, inmates would have a significant incentive to protect their turf—potentially even through violence—to prevent rivals from taking over an insider-tipping scheme.

Nonmonetary forms of payment to inmates may also threaten significant harms. In the Santa Clara investigation mentioned above, investigators discovered that one way bail bond agents would compensate inmates was by setting up "three-way calls"—calls in which the inmate first calls the agent, who then forwards the call to someone else. (*Inside Santa Clara Jails, Predatory Bail Schemes Flourished for Years*, *supra*.) Such calls not only allow inmates to avoid the charges levied by many jails on outgoing phone calls; they also provide a means for inmates to circumvent a facility's restrictions on outgoing calls and "hid[e] the ultimate targets of their calls." (*Ibid.*) Inmates may thus "use the free calls to intimidate witnesses," "run other criminal activities from behind bars," or contact a "domestic violence victim" in violation of a restraining order—all without leaving records for jail and law enforcement authorities to monitor and investigate. (*Ibid.*, internal quotation marks omitted.)

Inmates recruited to tip-off bail agents may also develop loyalties to their bail-licensee patrons—and then act on those

loyalties by taking more active efforts to steer business toward a particular bail bond firm. Such insider bail solicitation, commonly called "bail capping," is one of the most coercive practices known in the bail industry today. (See generally *Inside Santa Clara Jails, Predatory Bail Schemes Flourished for Years*, *supra*.) One recent investigation revealed, for example, that, "[f]or years," inmates had been "drum[ming] up business in the county's jails," creating a "predatory environment" in which "[f]irst-time inmates are especially vulnerable, because often they're afraid and have little information." (*Ibid.*; see also *post*, pp. 55-56, and fn. 28-30; cf. *Dolezal*, 221 Cal.App.4th at pp. 175-176.) By eliminating a source of profit-motivated loyalty owed by inmates to particular bail bond businesses, section 2076 rationally furthers the State's objective of eliminating any temptation or incentive for inmates to engage in this coercive form of solicitation.

Finally, the second, third, and fourth *Turner* factors discussed above (*ante*, pp. 40-41), likewise support the validity of section 2076's application here. Section 2076 provides both inmates and bail agents with ample "alternative means" of expression. (*Banks*, *supra*, 548 U.S. at p. 532 (plurality opn).) As the Court of Appeal recognized, the regulation merely "prevent[s] a bail licensee from" obtaining arrest-related information through one specific means: "*entering* an arrangement or understanding . . . to have such information channeled to [a] licensee" by a jail inmate or other insider. (Opn. 22.) And the regulation "reaches only information identifying potential clients

to the bail licensee." (Dis. opn. 2.) It does not prohibit bail agents from requesting information "regarding persons already known to and identified by a bail agent." (Dis. opn. 4.) Nor does it otherwise "restrain a bail agent's lawful communications with an arrestee, incarcerated or otherwise." (Dis. opn. 5.) Indeed, under section 2076, jail inmates remain free to engage in a "broad range" of expression on virtually any subject, with bail bond agents, fellow inmates, and others. (*Thornburgh*, *supra*, 490 U.S. at p. 418.)[22]

As to the third and fourth factors, they "add little" to the rational grounds for the regulation discussed above: The "resulting 'impact' would be negative" if inmates were allowed to form insider-tipping arrangements with bail bond agents because such arrangements threaten to compromise legitimate penological interests. (*Banks*, *supra*, 548 U.S. at p. 532 (plurality opn.); *Thornburgh*, *supra*, 490 U.S. at p. 418 [similar]; *Thompson*,

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[22] While the application of section 2076 "turn[s], to some extent, on [the] content" of what an inmate conveys to a bail bond agent pursuant to a prohibited arrangement or understanding (*Thornburgh*, *supra*, 490 U.S. at p. 415), that does not render the regulation suspect or invalid under the *Turner* standard (see *id.* at pp. 415-416). Content-based restrictions are permissible in the jail or prison context when, as in this case, they rationally further legitimate penological interests and are "unrelated to the suppression of expression." (*Id.* at p. 415, internal quotation marks omitted.) Like the content-based restriction upheld in *Thornburgh*, section 2076 in no way "invite[s]" jail officials and employees "to apply their own personal prejudices and opinions as standards for . . . censorship" of inmate expression. (*Id.* at p. 416, fn. 14, internal quotation marks omitted.)

supra, 25 Cal.4th at p. 133 [similar].) And there is no "alternative method of accommodating" a bail agent's desire to rely on inmates for insider tips without inviting the myriad harms discussed above. (*Banks*, *supra*, 548 U.S. at p. 532 (plurality opn.), internal quotation marks omitted.) Section 2076 thus bears the requisite "rational connection" to legitimate penological interests. (*Id.* at p. 529, internal quotation marks omitted.) The Court should uphold its application in this case.

B. Even if intermediate scrutiny applied, section 2076's application here would satisfy that standard

The Court of Appeal held that the People failed to show that the regulation "*directly and materially* advances the state's substantial interests" (opn. 30-31) as required under intermediate, "heightened," constitutional scrutiny (opn. 24). As discussed, the appropriate standard of scrutiny is instead the rational basis standard that governs constitutional challenges to jail and prison regulations. (*Ante*, pp. 38-41.) But even if intermediate scrutiny applied, the regulation's application to insider-tipping arrangements with "person[s] incarcerated in a jail" would satisfy that standard.[23]

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[23] In the analysis that follows, the People address intermediate scrutiny as applied to the specific portion of section 2076 alleged in this case. Because other portions of the regulation—such as its prohibition of insider-tipping arrangements with "law enforcement officer[s]"—advance the same or similar government interests, the analysis that follows would also adequately justify those portions of the regulation, were they at issue here. (See also *post*, pp. 60-62.)

1. Section 2076 directly advances substantial interests in promoting fair competition in the bail bond industry

Where the government restricts commercial expression, intermediate scrutiny requires the State to demonstrate that "the asserted governmental interest is substantial," as opposed to merely "rational" or "reasonable"; that the "regulation directly advances the governmental interest asserted"; and that "it is not more extensive than is necessary to serve that interest." (*Central Hudson Gas & Electric Corp. v. Pub. Service Com. of N.Y.* (1980) 447 U.S. 557, 566; see also *Delano Farms Co. v. Cal. Table Grape Com.* (2018) 4 Cal.5th 1204, 1229, fn. 13.)[24]

The Court of Appeal expressed no doubt about the State's ability to satisfy the first and third *Central Hudson* criteria, and for good reason: The government has powerful, "substantial" interests in promoting, not only the important penological objectives discussed above (*ante*, pp. 41-47), but also fair competition in the bail bond industry (see dis. opn. 4). And section 2076's prohibition of insider arrangements with jail inmates is no more "extensive than necessary" for serving those

[24] The Court of Appeal briefly questioned whether section 2076 "regulates commercial speech." (Opn. 21; see opn. 21-24.) It does. Like the provision that this Court treated as a commercial speech regulation in *Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329, 352, section 2076 "operates in a commercial setting," "relate[s] to the economic interests" of those who work in that setting, and is "linked" to a broader commercial regulatory regime. (See dis. opn. 2 [section 2076 "pertains only to bail agents and reaches only information identifying potential clients to the bail licensee"].)

interests. Section 2076 merely "prevent[s] a bail licensee from entering an arrangement or understanding . . . to have such information channeled to [a] licensee" by an inmate or other insider. (Opn. 22, italics omitted.) It does not block a licensed bail agent from learning about recent arrests through other sources. To the contrary, the regulation expressly recognizes that bail licensees may obtain such information from "public records." (§ 2076.) Many California law enforcement agencies and media outlets maintain publicly accessible websites that report the names of any individuals arrested within the previous 24 hours. (*Ante*, p. 28, and fns. 11-12; see Gov. Code, § 6254, subd. (f)(1).) Just like other members of the public, then, bail bond agents can obtain information about recent arrestees from these publicly available sources.

The Court of Appeal focused on *Central Hudson*'s second prong, concluding that section 2076 fails to "'directly advance[] . . . governmental interest[s].'" (Opn. 16, quoting *Central Hudson*, *supra*, 447 U.S. at p. 566.) As explained above, however, the regulation addresses the State's need for sound, secure jail administration. (*Ante*, pp. 41-47.) That analysis suffices to show that the regulation "directly advances" important government interests for purposes of satisfying intermediate scrutiny.

More fundamentally, as Justice Grover explained in dissent, section 2076 directly advances the State's substantial interest in promoting "fair competition" in the bail bond industry. (Dis. opn. 3-4.) It does so by barring insider arrangements "which facilitate the wholesale identification of people with imminent bail needs."

(Dis. opn. 4.) Under the regulation, bail bond agents must learn of bail needs from publicly available arrest reports—or instead from prospective customers themselves, or their attorneys or family members, when they reach out to engage a particular bail business—rather than from jail inmates or other insiders.

In that way, section 2076 levels the playing field among bail bond licensees, requiring them to seek new business through legitimate forms of competition, such as price, scope, and quality of services, rather than through insider channels.[25] Offering such legitimate benefits and services would be unnecessary—or at least offer a diminished competitive advantage—if a bail bond licensee could simply rely on insider tips about new arrestees. While state regulations block bail bond agents from soliciting such arrestees directly (see *ante*, p. 29; §§ 2079, 2079.1), they

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[25] Bail bond businesses can legitimately attract customers by, among other things, providing discounts and "'offer[ing] payment plans [that] make bail affordable.'" (Lord, *The Dog-Eat-Dog Bail Industry*, Criminal Law and Policy (Apr. 19, 2016) <https://crimlawandpolicy.wordpress.com/2016/04/19/the-dog-eat-dog-bail-industry/#more-593> [as of June 29, 2021] [report based on numerous interviews with bail agents in Santa Clara County].) They can also compete by offering various support services—for instance, by helping to enroll clients in "certain rehab services upon their release from jail" (*ibid.*), acting as an attentive "sounding board" for clients and their families during a vulnerable, difficult time (Page, *Desperation and Service in the Bail Industry* (2017) 16 Contexts 30, 34 <https://tinyurl.com/jd4de5np> [as of June 29, 2021]), and by helping clients and their family members "understand and navigate" what can be "opaque, confusing legal processes" (*id.* at p. 33).

"may still solicit the arrestee's attorney [or] family members" (*Dolezal*, *supra*, 221 Cal.App.4th at p. 173). And there is a significant "first mover" advantage in the bail industry that would allow bail bond agents to exploit insider knowledge of an arrestee's need for bail before it becomes publicly or generally available: Because arrestees' family members are often highly distressed and desperate for assistance (see Page, *supra*, pp. 30-37; Gonzalez, Note, *Consumer Protection for Criminal Defendants* (2018) 106 Cal. L.Rev. 1379, 1420), they are liable to engage any business that reaches out to them directly.[26]

Section 2076 thus operates in much the same way as other commonplace forms of regulation restricting the ability of individuals and businesses to profit "through special, privileged access" to information, rather than "effort, ingenuity, [and] risk-taking." (Kim, *Insider Trading as Private Corruption* (2014) 61 UCLA L.Rev. 928, 966.) State and federal insider-trading restrictions, for example, prohibit investors from relying on insider tips about corporate earnings and policies, rather than putting in the work of researching and analyzing market conditions, company performance metrics, and the like. (See, e.g., *United States v. O'Hagan* (1997) 521 U.S. 642, 658-659; *Friese v. Superior Court* (2005) 134 Cal.App.4th 693, 703.) And public-

[26] See, e.g., Page, *supra*, pp. 30-31; cf. Page, Piehowski, & Soss, *A Debt of Care* (2019) 5 Russell Sage Found. J. of the Social Sciences 150, 157 <https://www.rsfjournal.org/content/rsfjss/5/1/150.full.pdf> (as of June 29, 2021) ("close relations of the accused may feel tremendous pressure to co-sign a bail").

sector procurement regulations forbid firms bidding for government contracts from relying on insider tips to gain advantages over competitors. (See, e.g., 48 C.F.R. § 9.505(b).) These regulations reflect the commonsense judgment that it is a form of "cheating" to rely on insider information to gain a competitive advantage over others. (Kim, *supra*, p. 967.)

Indeed, such cheating is especially concerning in the bail bond context. Bail bond agents are "an integral part of the criminal justice system." (*Dolezal*, *supra*, 221 Cal.App.4th at p. 174.) The State thus has a profound "interest in regulating their work to make sure that they operate in a fair, honest and professional manner" and avoid tarnishing the credibility of the criminal justice system in the eyes of the public. (*Ibid.*)[27] Because section 2076 directly advances that important government interest, its application here satisfies intermediate scrutiny.

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[27] See also *McDonough*, *supra*, 13 Cal.2d at p. 746 ("it must . . . be said without hesitation" that "abuses have arisen or may arise" in the bail bond industry which "make it necessary or desirable that there be some public supervision of that business"); *Bail: An Ancient Practice Reexamined* (1961) 70 Yale L.J. 966, 972; cf. Beeley, The Bail System in Chicago (1927) p. 42 (describing the "demoralizing effect of the professional bondsman upon the administration of criminal justice").

2. The Insurance Commissioner promulgated section 2076 in response to corrupt, unfair industry practices that continue to arise today

In holding that section 2076 fails to satisfy intermediate scrutiny, the Court of Appeal reasoned that no "empirical data, history, or evidence . . . establish the efficacy of the regulation." (Opn. 30-31, fn. 14.) No such showing is required. If the government had to furnish a "surfeit of background information" or "empirical data" to justify the validity of a regulation (*Fla. Bar v. Went For It, Inc.* (1995) 515 U.S. 618, 628), it would be exceptionally difficult for the State to defend the constitutionality of any new or innovative regulation, as empirical proof of efficacy is generally lacking when a regulation is first promulgated. And even long after promulgation, it can be challenging to produce evidence proving efficacy with any scientific degree of certainty. (Cf. *Williams-Yulee v. Fla. Bar* (2015) 575 U.S. 433, 444 ["dispel[ling] the notion that strict scrutiny is 'strict in theory, but fatal in fact'"].)

The U.S. Supreme Court has accordingly recognized that, "even . . . in a case applying strict scrutiny," the government may "justify restrictions based solely on . . . 'simple common sense.'" (*Fla. Bar*, *supra*, 515 U.S. at p. 628, quoting *Burson v. Freeman* (1992) 504 U.S. 191, 211.) And as explained above, the justifications for section 2076 are a matter of simple common sense: The "regulation prohibits arrangements which facilitate the wholesale identification of people with imminent bail needs"; "[b]y restricting bail licensees' access to that insider information,

the regulation directly prevents unfair competition among licensed bail agents." (Dis. opn. 4; see also *ante*, pp. 41-47 [discussing how the regulation also serves important interests in sound, secure jail administration].)

In any event, there is no shortage of historical evidence demonstrating that insider-tipping arrangements in the bail bond industry yield significant harms. Prior to promulgation of section 2076 and other state regulations of the industry, corrupt and anticompetitive practices flourished. In early 20th century San Francisco, for example, McDonough Brothers "monopolized the bail bond business" in the city through reliance on the very practice that section 2076 now forbids. (Barnes, *supra*, p. 145; see also *ante*, pp. 20-24) Many Southern California bail bond agents engaged in similar practices. (*Ante*, pp. 25-26, and fn. 9.) The Insurance Commissioner's investigation of these practices provided the impetus for promulgation of comprehensive bail bond industry regulations, including section 2076. (*Ante*, pp. 26-28.) Thus, far from a regulatory reaction to hypothetical, unproven concerns, section 2076 was devised in direct response to demonstrated, real-world harms.

Since that time, the regulation has directly contributed—and continues to contribute—to the State's efforts to police and punish unfair industry practices. In *Nardoni v. McConnell* (1957) 48 Cal.2d 500, 504, for example, this Court upheld the revocation of several bail bond agents' licenses based on evidence that they had entered into an "'arrangement' or conspiracy" with an insider (there, a "certain police officer") to provide insider tips about new

arrestees that the agents would then use "in contacting relatives of the arrestees and arranging for the prisoners' release on bail." More recently, section 2076 played an important role in the "largest enforcement action ever" of state bail bond industry regulations.[28] In 2015, after obtaining and "combing through thousands of recorded phone calls" between bail agents and inmates at Santa Clara jail facilities, investigators discovered "widespread" evidence that numerous bail licensees were violating a host of state regulations. (*Inside Santa Clara Jails, Predatory Bail Schemes Flourished for Years, supra.*) Approximately "100,000 digital [call] recordings, and 50 witness and bail agent interviews" revealed, among other things, "schemes by bail agents to scoop business away from competitors by rewarding jail inmates . . . [for] providing information about newly booked individuals in the jails." (Dept. of Insurance, Recommendations for California's Bail System (Feb. 2018) p. 6.)[29] The "Santa Clara District Attorney's office and the Santa Clara

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[28] Dept. of Insurance, Release, *South Bay Bail Agents Targeted in Law Enforcement Sweep* (Sept. 9, 2015) <http://www.insurance.ca.gov/0400-news/0100-press-releases/archives/release083-15.cfm> (as of June 29, 2021).

[29] Available at <https://www.insurance.ca.gov/01-consumers/170-bail-bonds/upload/CDI-Bail-Report-Final-2-8-18-2.pdf> (as of June 29, 2021); see also CT 55 [listing cases brought as a result of this investigation]; County of Santa Clara, Bail and Release Work Group, Final Consensus Report on Optimal Pretrial Justice (2016) pp. 41-42 <https://countyexec.sccgov.org/sites/g/files/exjcpb621/files/final-consensus-report-on-optimal-pretrial-justice.pdf> (as of June 29, 2021).

Sherriff's office have since reported that due to this enforcement action, illegal activity in Santa Clara jails has significantly diminished." (Dept. of Insurance, Recommendations for California's Bail System, *supra*, p. 6.) Similar abuses have been reported in other parts of California, as well as in other States.[30] And as the Court of Appeal noted below, monopoly conditions can still arise in some of the State's bail markets, where, for example, "one bail company has written nearly every bond at a jail." (Opn. 29, citing Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1694 (2003-2004 Reg. Sess.).)[31]

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[30] See, e.g., Serna, *Former LAPD Jailer Accused of Taking Bribes from Bail Bond Company Owners*, L.A. Times (May 6, 2016) <https://www.latimes.com/local/lanow/la-me-ln-former-lapd-jailer-accused-taking-bribes-20160506-story.html> (as of June 29, 2021); County of San Bernardino, Grand Jury Final Report, Bail Solicitation of Inmates at County Detention Facilities (2012-2013) pp. 73-75 <https://wp.sbcounty.gov/grandjury/wp-content/uploads/sites/15/2017/10/Grand_Jury_Final_Report_002.pdf> (as of June 29, 2021); State of N.J., Com. of Investigation, Inside Out: Questionable and Abusive Practices in New Jersey's Bail-Bond Industry, *supra*, p. 13; Coolican, *Minn. Commerce Department Seeks to Clean Up Bail Bond Industry With New Settlement*, Minn. Star Tribune (Jan. 13, 2016) <https://www.star tribune.com/commerce-dept-seeks-to-clean-up-bail-bond-industry-with-new-settlement/365223301/> (as of June 29, 2021).

[31] See also Pretrial Detention Reform: Recommendations to the Chief Justice, *supra*, p. 42 (discussing the "number and seriousness of bail complaints" received by the Department of Insurance in recent years).

Section 2076 thus continues to have an essential role to play, prohibiting bail bond licensees from leveraging insider connections for a competitive edge. There is no constitutional infirmity in application of the regulation here.

II. THE COURT OF APPEAL ERRED BY ADDRESSING APPLICATIONS OF SECTION 2076 NOT PRESENTED IN THIS CASE

The Court of Appeal did not limit the scope of its analysis to section 2076's prohibition of insider-tipping arrangements with "person[s] incarcerated in a jail." It instead held that the regulation is "facially" unconstitutional, requiring "invalidation" of the regulation in all applications. (Opn. 32.) That was error. The court disregarded the well-established rule that constitutional challenges should be limited to a statute or regulation's application in the case at hand; courts are not to address the constitutionality of a provision's "potential application to other, differently situated individuals" not before the court. (*People v. Buza* (2018) 4 Cal.5th 658, 675.) As the U.S. Supreme Court has explained, "[a]lthough passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular." (*Sabri v. United States* (2004) 541 U.S. 600, 608-609; see generally *Yazoo & M.V.R. Co. v. Jackson Vinegar Co.* (1912) 226 U.S. 217, 220.)

This Court has consistently adhered to that rule in numerous constitutional contexts. In *Buza*, for example, the Court refused to consider a Fourth Amendment challenge to a DNA collection law on the grounds that it was invalid as applied

to those arrested for committing offenses that are not "particularly serious or violent." (4 Cal.5th at p. 675.) The challenger in that case, the Court emphasized, was arrested for an offense "classified as a 'serious felony' under California law." (*Ibid.*) Similarly, in *Today's Fresh Start, Inc. v. L.A. County Office of Education* (2013) 57 Cal.4th 197, 205, 218-219, the Court entertained a due process challenge to a statute addressing revocation of charter school licenses. While the same provision governed revocations by both "county offices of education" and "local school district[s]," the Court limited its analysis to the former because that was the only type of revocation at issue. (*Id.* at p. 219, fn. 10; see also, e.g., *Mathews v. Becerra* (2019) 8 Cal.5th 756, 768 ["declin[ing] to address" a privacy-rights challenge "as applied" to circumstances "not allege[d]" in the case].)

To be sure, First Amendment overbreadth doctrine provides a "limited exception[]" to the ordinary rule barring consideration of circumstances not before the court. (*Buza*, *supra*, 4 Cal.5th at p. 675.) It allows litigants to challenge a statute on its face, "not because their own rights of free expression are violated, but because the very existence of an overbroad statute may cause others not before the court to refrain from constitutionally protected expression." (*In re M.S.* (1995) 10 Cal.4th 698, 709; see Isserles, *Overcoming Overbreadth: Facial Challenges & the Valid Rule Requirement* (1998) 48 Am. U. L.Rev. 359, 365-371, 382-385.) In *United States v. Stevens* (2010) 559 U.S. 460, 464, for example, the high court facially invalidated a statute criminalizing the

dissemination of "depictions of animal cruelty"—not because the Court had any doubt about the constitutionality of criminalizing the defendant's distribution of dogfighting videos, but because the provision was drafted too broadly, criminalizing many forms of legitimate, constitutionally protected expression disseminated by other individuals not before the Court (such as "hunting magazines and videos"). (*Id*. at p. 482.)

Here, however, the Court of Appeal did not apply overbreadth doctrine. It expressly found it "unnecessary to resolve defendant's First Amendment overbreadth claim." (Opn. 32.) And that claim would fail in any event. Facial invalidation on overbreadth grounds is "strong medicine" (*People v. Toledo* (2001) 26 Cal.4th 221, 234); it "is not casually employed" (*L.A. Police Dept. v. United Reporting Publishing Corp.* (1999) 528 U.S. 32, 39). In particular, overbreadth doctrine is inapplicable in commercial speech cases because commercial expression is "more hardy, less likely to be 'chilled,' and not in need of surrogate litigators." (*Bd. of Trustees of State Univ. of N.Y. v. Fox* (1989) 492 U.S. 469, 481; see *Leoni v. State Bar* (1985) 39 Cal.3d 609, 622, fn. 11; *Goldin v. Pub. Utilities Com.* (1979) 23 Cal.3d 638, 660, and fn. 9.) Because this is a commercial speech case (*ante*, p. 48, fn. 24), defendant may not seek facial invalidation on overbreadth grounds.

An additional limitation on overbreadth doctrine, relevant here, is that a challenger may argue only that the particular portion of a statute or regulation applied in his or her case is overbroad. In *Colten v. Kentucky* (1972) 407 U.S. 104, 108, 111,

fn. 3, for example, the Court entertained an overbreadth challenge to one portion of Kentucky's disorderly conduct statute—the portion prohibiting failure "to comply with a lawful order of the police." But it refused to consider an overbreadth challenge to other portions of the provision prohibiting different types of disorderly conduct not alleged in the case—"such as those that prohibit the making of an 'unreasonable noise' and the use of 'abusive or obscene language.'" (*Id.* at p. 111, fn. 3.) Thus, even if overbreadth doctrine applied in commercial speech cases, defendant could at most challenge the portion of section 2076 alleged by the criminal complaint in this case: the regulation's prohibition of insider-tipping arrangements with "person[s] incarcerated in a jail." (See also *ante*, pp. 37-38, fn. 16.)

In any event, the overbreadth standard is demanding, requiring a challenger to show that, "measured in relation to a statute's constitutionally permissible sweep, the overbreadth of a statute is not only real, but substantial as well." (*Toledo*, *supra*, 26 Cal.4th at p. 234, internal quotation marks and alterations omitted.) Defendant cannot satisfy that exacting standard. Section 2076 "directly advances [substantial] governmental interests" in all or substantially all of its applications. (*Central Hudson*, *supra*, 447 U.S. at p. 566.) It is certainly not invalid in so many applications as to render it facially unconstitutional on overbreadth grounds.

First and foremost, section 2076 promotes fair competition in the bail bond industry—not just as applied to insider-tipping arrangements with incarcerated persons, as alleged by the

criminal complaint in this case, but also as applied to the other types of insider arrangements barred by the regulation. Section 2076, for example, prohibits insider arrangements with "law enforcement officer[s]," such as jail officials and police officers. Like jail inmates, these public officials are often in a position to find out when new arrestees are booked into jail. (See, e.g., *Nardoni*, *supra*, 48 Cal.2d at p. 504.) By sharing that information with a bail bond licensee, the insider gives the licensee the same kind of unfair advantage he or she can obtain through similar arrangements with jail inmates.[32]

Section 2076 also advances other important government interests. Among other things, it addresses the problem of public corruption and helps to eliminate sources of conflicts of interest. By prohibiting bail bond agents from paying off "law enforcement officer[s]" for insider information, the regulation directly proscribes a species of bribery: the exchange of a "quid" in the form of compensation, favors, or other things of value from a bail bond agent, for a "quo" in the form of valuable, insider

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[32] The same competitive harm may also flow from insider arrangements with "newspaper employee[s]," employees of a "messenger service," or "any other persons" in a position to possess inside information about new arrestees in need of bail services. (§ 2076.) Historically, for example, law enforcement agencies have reported information about recently conducted arrests to newspapers and other media outlets. (See *County of Los Angeles*, *supra*, 18 Cal.App.4th at pp. 598-599.) With advance, nonpublic information about recent arrests, employees at such outlets would be in a position to unfairly tip-off bail bond agents about potential new customers.

information to which the agent's competitors lack access.[33] The government, of course, has a profound interest in outlawing and punishing public corruption, which risks "erod[ing] to a disastrous extent" the public's "confidence" in government. (*U.S. Civil Service Com. v. Nat. Assn. of Letter Carriers, AFL-CIO* (1973) 413 U.S. 548, 565.) Indeed, it is "essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice." (*People v. Rhodes* (1974) 12 Cal.3d 180, 185.) And by prohibiting corrupt arrangements between bail bond agents and law enforcement officials, section 2076 operates directly to ensure that such officials are not biased in favor of a particular bail firm—a conflict of interest that may, consciously or unconsciously, lead an official to recommend or refer an arrestee to that firm out of loyalty or financial benefit, rather than merit.[34]

Defendant argued below that section 2076 is overbroad because it reaches "a substantial amount of speech" that is "not intended to be suppressed." (Defendant's Court of Appeal OBM (Dec. 17, 2019) p. 26.) She asserted, in particular, that the

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[33] Cf. Gov. Code, § 1098 (making it a crime for a "public officer" to "disclose[] for pecuniary gain, to any other person, confidential information acquired by him or her in the course of his or her official duties").

[34] See generally Fair Political Practices Com., *Recognizing Conflicts of Interest* (Aug. 2015) pp. 1-10, 12-13 <https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Conflicts%20of%20Interest/Conflicts-Guide-August-2015-Jan-2016-Edits.pdf> (as of June 30, 2021).

regulation "prohibits licensees from asking anyone about anything relating to criminal complaints, arrests, or 'any information pertaining' to them"—even if the licensee asks "out of simple curiosity." (*Ibid.*; see also CT 33 [similar].) As the Court of Appeal explained in rejecting defendant's vagueness-related arguments, however, defendant "misreads section 2076." (Opn. 22.) "The section is aimed at preventing a bail licensee from entering an arrangement or understanding with another to have [arrest-related] information channeled to [the] licensee." (*Ibid.*, italics omitted.) "Contrary to defendant's assertion," section 2076 does not "prohibit bail licensees from merely asking 'about newsworthy arrests or complaints out of simple curiosity.'" (*Ibid.*) It instead prohibits licensees from obtaining arrest-related information through one specific means: an insider "arrangement or understanding" that "facilitate[s] the wholesale identification of people with imminent bail needs." (Dis. opn. 4.) That modest restriction on First Amendment-protected activity goes no further than necessary to "prevent[] unfair competition among licensed bail agents." (*Ibid.*; see *ante*, pp. 45-46, 48-49; cf. *People v. Harrison* (2013) 57 Cal.4th 1211, 1228 ["a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question"].)[35]

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[35] Defendant also argued below that section 2076 is overbroad because the "regulation forbids the entry into an arrangement or understanding 'for any purpose.'" (Court of Appeal RBM (July 8, 2020) p. 9.) But as the dissent explained, "the phrase 'for any purpose' . . . prevent[s] a bail licensee from circumventing the regulation by assigning an ostensibly neutral

(continued…)

Section 2076 is accordingly not overbroad or otherwise invalid. It has served important government interests for decades and continues to play an important role in the State's regulation of the bail bond industry.

(…continued)

purpose to a prohibited arrangement or understanding." (Dis. opn. 2.) In other words, the phrase makes clear that the government need not prove that a bail bond agent acted with any particular "purpose" in violating section 2076.

CONCLUSION

The Court should reverse the Court of Appeal's judgment invalidating section 2076 on its face and restore to full operation this important, longstanding component of the State's regime for regulating the bail bond industry.

Respectfully submitted,

ROB BONTA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
LANCE E. WINTERS
Chief Assistant Attorney General
JANILL L. RICHARDS
Principal Deputy Solicitor General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
SAMUEL T. HARBOURT
Deputy Solicitor General

Attorneys for Plaintiff and Respondent

July 1, 2021

ATTACHMENT

Pursuant to California Rules of Court, rule 8.520(h), the People provide an attachment of Dept. of Insurance, Ruling No. 21 (Dec. 1, 1941). (See *ante*, p. 27.) It is a "citable" material that may not be "readily accessible" to the Court or defendant. (California Rules of Court, rule 8.520(h).) It does not exceed a "total of 10 pages." (*Ibid.*)

A. CAMINETTI, JR.
INSURANCE COMMISSIONER

Culbert L. Olson
Governor

EUGENE P. FAY
CHIEF ASSISTANT INSURANCE COMMISSIONER

STATE OF CALIFORNIA

Office of the

Insurance Commissioner

417 MONTGOMERY STREET
SAN FRANCISCO

December 30, 1941

(Incorporated in Rules filed March 13, 1942)

Honorable Paul Peek
Secretary of State
State Capitol
Sacramento, California

Dear Paul:

Pursuant to Chapter 628 of the Statutes of 1941 (Pol. C. 721), we are enclosing herewith for filing by you, three original copies of Ruling No. 21 issued by this Department December 1, 1941, and in effect December 10, 1941.

We should appreciate being furnished with evidence that this filing has been made with you in compliance with law, and are enclosing a duplicate copy of this letter should you wish to endorse the fact of filing upon it and return it to us.

With best wishes for the New Year, I am

Sincerely yours,

A. CAMINETTI, JR.
Insurance Commissioner

By
Sidney L. Weinstock
Deputy

SLWef
Encl.

STATE OF CALIFORNIA

DEPARTMENT OF INSURANCE

RULING NO. 21

RULES AND REGULATIONS
GOVERNING BAIL BOND TRANSACTIONS

Pursuant to Section 1812 of the Insurance Code of the State of California, the following rules and regulations are hereby promulgated to govern all persons licensed to solicit, negotiate, execute, or deliver bail bonds.

License Regulations

1. No bail agent or permittee shall permit any person in his employ to execute or deliver a bail bond.

2. No bail agent, bail permittee or bail solicitor shall pay or allow directly or indirectly any commission or other valuable consideration on a bail bond to other than a licensed bail agent, bail permittee, or bail solicitor.

3. No bail solicitor shall conduct a separate bail enterprise in his own name or under a fictitious name or style.

4. No bail agent, bail permittee, or bail solicitor shall be directly or indirectly connected with the administration of justice, a court of law, or any public or private law enforcing agency.

5. No bail agent, bail permittee, or bail solicitor shall be so licensed unless he shall have resided in the State of California for not less than one year and in the county of his residence for not less than 90 days next preceding the date of his application. This provision shall not apply to renewal of existing licenses or removal from one county to another during a period of license.

6. Every bail agent, bail permittee, and bail solicitor shall possess an identification card in a form approved by the Department of Insurance of the State of California, having thereon his own photograph of reasonable likeness, his thumbprints, his description and his signature. Identification cards shall not be transferable.

7. No bail licensee shall permit any person to use his identification card for any purpose directly or indirectly relating to a transaction of bail.

8. Whenever a bail agent, bail permittee or bail solicitor shall solicit or negotiate bail said licensee shall upon request display the identification card to the person solicited or with whom negotiations are conducted.

9. No license bond of a bail agent or bail solicitor required by Section 1802(b), or 1803 of the Insurance Code of the State of California shall have as admitted surety insurer thereon the same insurer for whom said licensee is agent or is the employee of such agent.

10. Every bail licensee shall report in writing any change made in his business address or his residence address to the Department of Insurance within five (5) days after the making of such change.

11. Every licensed bail agent or bail permittee shall file with the Department of Insurance, in writing, a statement of the maximum rate of premium to be charged by such licensee for various classes of bail bond. Any alteration or change in the basis of rate shall be filed with the Department of Insurance at least five (5) days prior to the effective date thereof. Rates so filed with the Department of Insurance shall, in the discretion of the Commissioner, become public records.

12. No person shall at one time be licensed as a bail solicitor on behalf of more than one employer.

13. No person shall at one time be licensed as a bail permittee and at the same time be licensed as a bail solicitor.

14. No person shall at one time be licensed as a bail agent and at the same time be licensed as a bail solicitor.

15. No bail solicitor shall directly or indirectly represent that he is or has the authority or powers of a bail agent or permittee.

16. No bail agent shall directly or indirectly represent that he is or has the authority or powers of a bail permittee.

17. No bail permittee shall directly or indirectly represent that he is or has the authority or powers of a bail agent.

18. No bail agent, bail permittee, or bail solicitor shall in any transaction of bail directly or indirectly misrepresent that he is or that he has the authority or powers of a surety insurer.

Conduct of Bail Licensees

19. No bail agent or bail permittee shall directly or indirectly permit any person on his behalf to solicit or negotiate in respect to execution or delivery of a bail bond or to execute or deliver a bail bond unless such person be licensed as provided in Article I, Chapter 7, Part 2, Division 1 of the Insurance Code of the State of California. The fact that services are rendered gratuitously or otherwise shall not affect the application of this rule.

20. A bail agent or bail permittee may do business under not more than one fictitious name or style provided:

(a) That such fictitious name or style has been previously approved in writing by the Department of Insurance.

(b) That such fictitious name or style has been previously recorded with the County Clerk of the county in which the business is located.

(c) That such fictitious name or style does not tend to indicate or represent that the licensee is a bonding company or an insurer.

(d) That such fictitious name or style shall not conflict with the name or style used by any other bail licensee or by an admitted insurer transacting surety insurance in the State of California.

21. Where two or more bail licensees wish to jointly use the same fictitious name or style they shall first file with the Department of Insurance in writing a statement of partnership or association setting forth the following:

(a) The name of the partnership

(b) The character of the business

(c) The location of the principal place of business

(d) The name and place of residence of each member of the partnership.

22. Every bail agent or bail permittee, and every partnership or association consisting of bail agents or bail permittees, doing business under a fictitious name or style as approved in Rules Two and Three hereof shall inform the Department of Insurance in writing whenever there shall be a change in any condition set forth in Rule Two or Rule Three hereof. Such notice shall be made within five days after the making of any such change.

23. No bail agent, bail permittee, or bail solicitor shall in any manner directly or indirectly suggest to any person the name of, or recommend, any attorney or attorneys at law. Nothing contained in this rule shall prevent a bail licensee from following any procedure prescribed by the local Bar Association or the State Bar of California.

24. No bail agent, bail permittee, or bail solicitor shall prepare or make a petition for a writ of habeas corpus for, or on behalf of, an arrestee or in any manner directly or indirectly assist in the preparation of a petition for, or otherwise aid in the securing of a writ of habeas corpus. Nothing contained in this rule shall prevent the posting of bail in connection with a writ of habeas corpus when done by a licensed agent or licensed permittee.

25. No bail agent, bail permittee, or bail solicitor shall solicit or negotiate for a bail bond except with:

(a) The arrestee.

(b) His attorney at law.

(c) An adult member of the arrestee's family at the arrestee's residence address.

(d) Such other person as the arrestee shall specifically authorize and designate in writing.

26. No bail agent, bail permittee, or bail solicitor shall solicit at the residence address of an arrestee between the hours of 12 o'clock midnight and 7 o'clock A.M., unless directly and specifically authorized to do so by the arrestee or his attorney at law.

27. No licensed bail agent, bail permittee, or bail solicitor shall solicit any other person for a bail bond, in state prisons, county jails, city jails, city prisons, or other places of detention of persons, police courts, justice's courts, municipal courts, superior courts, or in any other public institution.

28. Every bail agent, bail permittee, or bail solicitor shall fully comply with the letter and the spirit of any regulation or ordinance issued by a proper public authority, governing the conduct of persons in or about state prisons, county jails, city jails, city prisons, or other places of detention of persons, police courts, justice's courts, municipal courts, superior courts,

or in any public institution or in any public place or upon any public street or highway.

29. No bail agent, or bail solicitor shall require as a condition to the execution or delivery of a bail bond the waiver by a depositor of collateral of any right or rights said depositor might have or thereafter acquire in connection therewith as against the licensee's principal.

30. Every bail agent, bail permittee or bail solicitor shall report in writing to the Department of Insurance within ten days after the service of process, the filing of any suit or action of law against said bail agent, bail permittee, or bail solicitor, together with a statement of whether or not the action, directly or indirectly, relates to or arises out of a transaction of bail.

31. No bail agent or bail permittee shall have in his employ at any time a person who is not of good business reputation and good general reputation.

32. Every bail agent or bail permittee shall file with the Department of Insurance in writing a complete list of all persons in his employ setting forth briefly the duties of each, and the basis of compensation of each.

33. Every bail agent or bail permittee shall within five days after the hiring of each employee or within five days after the termination of employment of any employee notify the Department of Insurance of the name and residence address of each such person employed or terminated. Each termination notice shall contain a full statement of the reasons for the termination of the employment.

34. No bail licensee shall directly or indirectly send or cause to be sent or transmitted to himself or to any other person a fictitious communication authorizing said licensee or any person on his behalf to solicit or negotiate bail. No such fictitious communication shall at any time or in any manner be used directly or indirectly as an aid in securing information concerning a person confined in a jail or prison, or for the purpose of visiting an arrestee in a prison, jail, or place of detention, or otherwise.

35. No bail agent, bail permittee, or bail solicitor shall in any bail transaction charge to or collect from any person a sum of money, directly or indirectly, for any purpose, in addition to the premium on a bail bond except a charge for guard or other services when actually required and rendered. No service or guard fee shall be charged for any part or the whole of the first twelve hours after release of an arrestee.

36. Every bail agent, bail permittee, or bail solicitor shall file with the Department of Insurance in writing a schedule of the basis of all fees for guard or other services to be rendered in connection with transactions of bail. Any alteration or change in the basis of charge shall be filed with the Department of Insurance at least five days prior to the effective date thereof. Rates so filed with the Department of Insurance shall, in the discretion of the Commissioner, become public records.

37. No bail agent, bail permittee, or bail solicitor shall for any purpose, directly or indirectly, enter into an arrangement of any kind with a law enforcement officer, newspaper employee, messenger service or any of its employees, a trusty in a jail, any other person incarcerated in a jail, or with any other persons to inform or notify any licensee directly or indirectly of the fact of an arrest, or the arrest of any person, his name or address, his personal or legal representative, his friend or relative, or any other information relating thereto.

38. No bail agent, bail permittee, or bail solicitor shall enter into any agreement or arrangement with any person, firm, corporation, or association, which has for its purpose the guaranteeing or assuring said person, firm, corporation, or association, in advance of commission of any offense set forth as crimes against public decency and good morals in Part 2, Title 9, Chapters VIII, IX, and X of the Penal Code that bail will be furnished to such person, firm, corporation or association, or any of its employees, agents, or vendees when and if such person, firm, corporation, association or its employee, agent, or vendee is arrested.

39. No bail agent, bail permittee or bail solicitor shall disclose or reveal any information coming into his possession or to his knowledge concerning a pending arrest or the detention of a person by a law enforcing agency.

40. Every bail agent, bail permittee, and bail solicitor shall, at the time of obtaining an application for a bail bond, deliver to the applicant, or person arranging bail, a written statement signed by the licensee which shall set forth as separate items the following:

(a) The amount charged as premium for the bail bond.

(b) The amount charged for guard services, rendered or to be rendered, if any, and the period covered by such charge.

(c) The amount charged for any special services rendered or to be rendered, if any, and a statement of the nature thereof.

(d) The total of all amounts so charged.

(e) The amount of all money received on account and a statement of the balance remaining unpaid, if any.

41. Every licensed bail agent and bail permittee is responsible for violations of the provisions of the Insurance Code, and of these rules, committed by his employees and permitted by him.

Records

42. All forms and documents used in connection with a transaction of bail, shall have been approved in writing by the Department of Insurance of the State of California.

43. Every bail agent and bail permittee shall deliver, or cause to be delivered, to each and every defendant for whom release on bail has been secured, or to his representative, a true copy of the bail bond, or in lieu thereof a certificate of bail on a form approved by the Department of Insurance at the time of the execution thereof.

44. Every bail bond issued by a surety insurer or an agent thereof, shall comply with the provisions of Section 381 of the Insurance Code of the State of California and particularly such bail bond shall show the charge made as premium therefor.

45. Every bail bond issued by a bail permittee shall be numbered consecutively and shall set forth a statement of the premium charged therefor.

46. No bail bond shall be issued except upon a full and complete written application therefor.

47. Every application for a bail bond shall be signed by the licensee accepting same and shall have endorsed thereon or attached thereto a statement, in a form approved by the Department of Insurance, setting forth full information as to the source from which notice or knowledge leading to the solicitation or negotiation of bail was received. Full information shall include:

(a) Full name of the person supplying the information.

(b) The address of such person.

(c) Connection or relation of such person to the arrestee.

(d) Where the application is received direct from the arrestee a statement of the manner in which the arrestee communicated with the bondsman.

(e) Where the arrestee is one who has been previously bailed, a statement of the date, the charge, the bond number covering the previous arrest.

(f) The date and the time at which the application or information leading to the application was received.

48. Every bail agent and bail permittee shall keep complete records of all business done under authority of his license, or under the authority of the license of any bail solicitor appointed under authority of his license. These records shall be open to inspection or examination by the Commissioner at all times, at the principal place of business of the licensee as designated in his license. Complete record of all business shall include the following:

(a) Name and address of the arrestee.

(b) Date of the arrest.

(c) Date of the application for bail.

(d) Date of the execution of the bail.

(e) The penal sum of bail.

(f) If surety bail, the name of the insurer.

(g) The bond number.

(h) Amount of premium charged therefor.

(i) Amount of guard fees charged in connection therewith.

(j) Amount of special service fees charged in connection therewith.

(k) The date of each and every collection of premium or guard fee or service charge fees.

(l) A true copy of each receipt for money, or other consideration received, as provided in Rule 40 hereof.

(m) The full name and address of each and every person directly or indirectly paying, promising to pay, or guaranteeing the payment of, the whole or any part of the premium, guard fees, or service charges made in connection with a bail bond.

(n) The name of any bail agent, bail permittee, or bail solicitor from whom the business is accepted or to whom commissions are promised or paid in connection therewith.

(o) The amount of commission promised or paid.

(p) Name of any unlicensed person who received or was promised any portion of the premium, guard fee, or service charges, or commissions or is compensated in any manner directly or indirectly because of this transaction of bail.

(q) Where a writ bond is issued the name of the attorney appearing thereon.

(r) If any valuable consideration other than money is received directly or indirectly as premium, guard fee or service charge or as any part thereof, a full statement of such consideration and the circumstances attendant thereto.

The foregoing rules and regulations are effective December 10, 1941.

A. Caminetti Jr.

A. CAMINETTI, JR.
Insurance Commissioner

Dated December 1, 1941

Insurance Commissioner
Rules & Regs, 3/13/42-5/10/46

CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13-point Century Schoolbook font and contains 12,114 words.

ROB BONTA
Attorney General of California

/s/ Samuel Harbourt

SAMUEL T. HARBOURT
Deputy Solicitor General
Attorneys for Plaintiff and Respondent

July 1, 2021

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. MARTINEZ**
Case Number: **S267138**
Lower Court Case Number: **H046164**

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7/1/2021
Date

/s/Samuel Harbourt

Signature

Harbourt, Samuel (313719)

Last Name, First Name (PNum)

California Department of Justice

Law Firm