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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re
KENNETH HUMPHREY
Petitioner,

on habeas corpus.

S247278

Court of Appeal Case No.
A152056 (1st Dist., Div. 2)

San Francisco County
Superior Court Case No.
17007715

SUPREME COURT
FILED

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PROPOSED BRIEF OF AMICUS CURIAE
THE DISTRICT ATTORNEY OF SAN BERNARDINO COUNTY

Upon the Grant of Review of the Decision of the First District Court of Appeal, Division Two, Granting a Petition for Writ of Habeas Corpus.

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re *HUMPHREY*	S247278 A152056 (1st Dist., Div. 2) 17007715 (San Francisco County)

TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The District Attorney of the County of San Bernardino respectfully submits this amicus curiae brief to assist the Court's consideration of this case.

On granting review, the Court posed three questions:

> (1) Did the Court of Appeal err in holding that principles of constitutional due process and equal protection require consideration of a criminal defendant's ability to pay in setting or reviewing the amount of monetary bail?
>
> (2) In setting the amount of monetary bail, may a trial court consider public and victim safety? Must it do so?
>
> (3) Under what circumstances does the California Constitution permit bail to be denied in noncapital cases? Included is the question of what constitutional provision governs the denial of bail in noncapital cases—article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution—or, in the

> alternative, whether these provisions may be reconciled.

The Court added a fourth question on September 12, 2018:

> What effect, if any, does Senate Bill No. 10 (2017-2018 Reg. Sess.) have on the resolution of the issues presented by this case?

The Court of Appeal below erred when it held in *In re Humphrey* (2018) 19 Cal.App.5th 1006 (*Humphrey*) that courts are constitutionally compelled to consider a defendant's financial resources when setting the amount of a defendant's bail;[1] no such constitutional command exists. The amount of bail is constrained by the constitutional limitation that the amount not be "excessive,"[2] which has always been viewed in light of the seriousness of the offense, not a defendant's financial resources.

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[1] The term "bail" has multiple meanings. In a strict sense, it refers to the person (or entity) that must pay the State a sum, should a defendant fail to appear in court. (*People v. Ranger Ins. Co.* (2003) 110 Cal.App.4th 729, 733-734.) In this brief, the term "bail" is used in its more ordinary sense, as the undertaking of bail. (See Pen. Code, § 1269.)

[2] It has been assumed, but never decided, that the Eighth Amendment's bail clause is incorporated against the States. (See *Galen v. County of Los Angeles* (9th Cir., 2007) 477 F.3d 652, 659, citing *Baker v. McCollan* (1979) 443 U.S. 137, 144, fn. 3.) As the California Constitution also prohibits excessive bail, the point is ultimately not dispositive. (Art. I, §§ 12; 28, subd. (f), par. (3).)

When setting the amount of bail, a trial court *must* consider public safety. The federal Constitution permits safety to be considered; the California Constitution requires it.

Although the California Constitution previously created an affirmative right to have bail set in most cases, that right was removed in 2008, and replaced with the common law rule giving judges discretion to deny bail.

Senate Bill No. 10 (2017-2018 Reg. Sess.) does not resolve the issues raised in this case. It will not take effect for over a year and could be amended or revoked in the interim. Even if it were to take effect as written, its viability under the California Constitution is questionable. In large part, the fate of Senate Bill 10 depends on the Court's ruling in this case.

MEMORANDUM

I.

BAIL IS UNQUESTIONABLY CONSTITUTIONAL DUE TO ITS INCLUSION IN THE CONSTITUTION'S TEXT AND ITS LONG COMMON LAW HISTORY

Bail has a long history in the common law tradition and is expressly mentioned in the Eighth Amendment to the federal Constitution, which reads in part "[e]xcessive bail shall not be required." This is the only restriction that the federal Constitution imposes on bail.

A. Bail's Inclusion in the Text of the Constitution Makes It Inherently Constitutional

The Court of Appeal below criticized money bail, arguing that its mechanics do not protect the public.[3] (*Humphrey, supra,* 19 Cal.App.5th at p. 1029.) Whatever validity such critiques may or may not have,[4] they are beside the point—bail is inherently constitutional, due to its inclusion in the constitutional text. (U.S. Const., 8th Amend. ("Eighth Amendment").)

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[3] The Court of Appeal made no mention of Penal Code section 12022.1, which provides for increased penalties for new felonies committed while out on bail or own recognizance release on a felony offense.

[4] The concerns of Alexis de Tocqueville, made in 1835, show that critiques of bail rooted in disparities of wealth are hardly new. (*Humphrey, supra,* 19 Cal.App.5th at p. 1049, fn. 29.) Despite early criticism from such an esteemed source, the Eighth Amendment has remained unchanged.

B. Bail Was Inherited from English Common Law, Which Considered the Circumstances of the Case to Decide Whether Bail Was Excessive

Bail has a long history in this country; it is "basic to our system of law..." (*Schlib v. Kuebel* (1971) 404 U.S. 357, 365.) At the time of the Founding, bail was a well-established feature of English common law. The bail clause in the Eighth Amendment "was lifted with slight changes" from the English Bill of Rights. (*Carlson v. Landon* (1952) 342 U.S. 524, 545.) Like its English predecessor, the Eighth Amendment does not guarantee bail in all cases, but rather prevents it from being excessive in cases where bail is appropriate. (*Id.* at pp. 545-546.) Importantly, "the very language" of the Eighth Amendment does not require that bail be available in all cases. (*Id.* at p. 546.)

English law conceived of bail as a substitute for the custody of a defendant, while recognizing that in some serious cases there could be no sufficient equivalent.[5] (4 Blackstone, Commentaries[6] 294.) Particularly in capital cases, the problem was acute, and no amount of bail could suffice: "For what is there that a man may not be induced to forfeit, to save his own life?" (*Ibid.*) English law similarly recognized that in serious

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5 In medieval England, a prisoner could be released to a surety—a responsible third party who guaranteed the defendant's presence at future proceedings. (*State v. Briggs* (Iowa 2003) 666 N.W.2d 573, 579.) Early on, the surety would suffer the punishment of an absent defendant. (*Ibid.*) The forfeiture of a surety's money or property in lieu of suffering the defendant's sentence developed over time. (*Ibid.*)

6 Citations to William Blackstone's *Commentaries on the Laws of England* use the Oxford University Press edition, 2016.

cases, society's interest in the prosecution of dangerous criminals could not be vindicated by the forfeiture of bail; "...what satisfaction or indemnity is it to the public, to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity?" (*Ibid.*) In cases where bail was appropriate, English Law prohibited excessiveness, which was defined as "a greater amount than the *nature of the case* demands." (*Ibid.*, italics added.)

Blackstone's commentaries were "the preeminent authority on English law for the founding generation..." (*Alden v. Maine* (1999) 527 U.S. 706, 715.) Blackstone's chapter on bail makes no mention of considering a defendant's financial circumstances when setting the amount of bail—only the nature of the case. (4 Blackstone, Commentaries 293-297.) Whether bail was excessive was left to the courts to decide, "considering the circumstances of the case..." (*Id.* at p. 294.)

When the Founders included a prohibition on excessive bail in the Eighth Amendment, the word "excessive" would have been understood in the context of English law; any excessiveness is determined based on the seriousness of the offense and its potential punishment, not the defendant's financial resources. Under the federal Constitution, there is no right to release on bail; rather, if bail be proper in a particular case, the amount may not be excessive. (*Carlson v. Landon, supra,* 342 U.S. 524, 545-546.) The California Constitution, which also uses the word "excessive," incorporates this earlier understanding.

C. The Court of Appeal Failed to Consider Excessiveness—a Specific, Substantive Constitutional Limit on the Amount of Bail

In its opinion, the Court of Appeal expressly did not consider the question of whether Mr. Humphrey's bail was excessive. (*Humphrey, supra,* 19 Cal.App.5th at p. 1015, fn. 2.) In so doing, it ignored a specific, substantive constitutional limit on the amount of bail, found in the Eighth Amendment, and the relevant provisions of the California Constitution. (Art. I, § 12; § 28, subd. (f), par. (3) (hereafter subd. (f)(3)).) The Court of Appeal's approach disregarded one of the basic principles of statutory and constitutional construction: where there are specific and general provisions, the specific governs. (*Miller v. Superior Court* (1999) 21 Cal.4th 883, 895 (*Miller*).) When a specific constitutional provision controls, broader concepts such as due process must yield. (*Ibid.*; see also *Graham v. Connor* (1989) 490 U.S. 386, 394-395 [excessive force claim analyzed under specific Fourth Amendment reasonableness standard, not general substantive due process].)

By ignoring the specific constitutional provisions that limit the amount of bail and focusing instead on constitutional provisions of broad application, the Court of Appeal implicitly allowed those general provisions to supersede a specific one—the prohibition on excessive bail. Similarly, the Court of Appeal failed to accord due weight to the considerations that the California Constitution compels judges to follow when setting bail—considerations that do not include a defendant's ability to pay.

II.

THE CONSTITUTION DOES NOT REQUIRE COURTS TO CONSIDER A DEFENDANT'S FINANCIAL RESOURCES WHEN SETTING THE AMOUNT OF BAIL

The Court of Appeal erred when it held that trial courts must consider a defendant's ability to pay (and/or "nonmonetary alternatives") when setting bail, under the equal protection guarantee of the Fourteenth Amendment to the federal Constitution and its state equivalent, article 1, section 7 of the California Constitution. (*Humphrey, supra,* 19 Cal.App.5th 1006.) Although in some situations, pursuant to statute, a court may consider a defendant's ability to post bond (Pen. Code, § 1270.1), it is not constitutionally compelled to. To the contrary, the state constitutional provisions governing bail neither mention nor approve of any consideration of a defendant's financial resources. Under the principle of *expressio unius est exclusio alterius,* consideration of a defendant's finances may well be prohibited by our state Constitution.

A. A Defendant's Inability to Furnish Bail at the Set Amount Does Not Render the Amount Excessive

The proposition that unaffordable bail is per se excessive was rejected by this Court well over a century ago in a pair of related cases: *Ex parte Duncan* (1879) 53 Cal. 410 (*Duncan I*) and *Ex parte Duncan* (1879) 54 Cal. 75 (*Duncan II*). Although those cases dealt with the bail provision of the prior

constitution (Cal. Const. of 1849, art. I, § 6), it also used the term "excessive."[7]

Mr. Duncan argued that the fact that he could not make bail rendered the amount per se excessive. (*Duncan II,* 54 Cal. at pp. 77-78.) The Court recognized the inherent problem in that argument:

> If the position of the counsel were correct, then the fact that the prisoner had no means of his own, and no friends who were able or willing to become sureties for him, even in the smallest sum, would constitute a case of excessive bail, and would entitle him to go at large upon his own recognizance.

(*Id.* at p. 78.)

In *Duncan II* the Court did not prohibit consideration of a defendant's finances, instead considering it one circumstance among many, while cautioning that ability to pay is "not in itself controlling." (*Duncan II, supra,* 54 Cal. at p. 78.) The Court repeated its observations from a prior case involving the same defendant: that for bail to be unreasonably great, it must be "clearly disproportionate to the offense involved." (*Ibid.*, quoting *Duncan I, supra,* 53 Cal. 410.) For the purposes of setting the amount of bail, it must be assumed that the defendant is guilty of the charged offenses. (*Duncan I,* at p. 411; see also *Ex parte Ryan* (1872) 44 Cal. 555, 558.)

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[7] In its entirety, article I, section 6 of the prior Constitution read: "Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonably detained."

At the time *Duncan II* was decided, the purpose of bail was limited to securing the defendant's attendance in court. (*Duncan II, supra,* 54 Cal. at p. 77.) If a trial court were required to set bail in an amount that the defendant could afford, the amount could be very small, perhaps zero. A defendant with nothing to lose would have little incentive to return to court.

Early on, this Court recognized the importance of public safety when setting bail. After the 1879 Constitution was enacted, the Court decided *In re Williams* (1889) 82 Cal. 183 (*Williams*). Following its prior caselaw, the Court held that bail was too high only if clearly disproportionate to the offense. (*Id.*, citing *Ex parte Ryan, supra,* 44 Cal. 555; *Duncan I, supra,* 53 Cal. 410; *Duncan II, supra,* 54 Cal. 75.) The Court further noted that the amount of bail depended on "the moral turpitude of the crime, the danger resulting to the public from the commission of such offenses, and the punishment imposed or authorized by law therefor." (*Williams*, at p. 184.)

Today, the probability of a defendant attending court is not the only consideration when setting bail, and not even the most important one. Additional factors include: the seriousness of the charges, the prior criminal record of the defendant, and public and victim safety. (Cal. Const., art. I, §§ 12; 28, subd. (f)(3).) Importantly, the California Constitution demands that public and victim safety be a court's primary considerations when considering bail. (Art. I, § 28, subd. (f)(3).)

This shift in priorities magnifies the problem that the Court identified in *Duncan II*—that allowing a defendant's ability to pay control the amount of bail is not consistent with

bail's purposes. A defendant whose bail is set in a negligible amount has little to lose by violating their terms of release. Setting bail based solely or primarily on a defendant's ability to pay does not take public safety into account.

Because the prohibition on excessive bail is a specific constitutional provision—found twice in our state Constitution and once in our national Constitution—it is the only limit on the amount of bail that should be considered. (Cal. Const., art. I, §§ 12, 28; Eighth Amendment.) Otherwise, general constitutional provisions would overrule specific ones, contrary to well-established norms of constitutional and statutory construction. (*Miller, supra*, 21 Cal.4th at p. 895.)

B. The Federal Constitution Does Not Require a Court to Consider a Defendant's Ability to Pay When Setting the Amount of Bail

In *Humphrey*, the Court of Appeal held that California's present system of bail violates the due process and equal protection clauses of the Fourteenth Amendment[8] to the federal Constitution. (*Supra*, 19 Cal.App.5th at pp. 1025-1031.) As noted *ante*, the court did not address whether Mr. Humphrey's bail was excessive under the Eighth Amendment.

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[8] Both the Fifth and Fourteenth Amendments contain due process clauses.

1. A Particular Defendant's Inability to Meet the Set Amount of Bail Does Not Render that Amount Excessive

A set amount of bail "is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement." (*United States v. McConnell* (5th Cir. 1988) 842 F.2d 105, 107.) A defendant's lack of financial resources "does not automatically indicate excessiveness." (*White v. United States* (8th Cir. 1964) 330 F.2d 811, 814.) The purposes of bail go beyond "accommodating the defendant's pocketbook and his desire to be free pending possible conviction." (*Ibid.*) While a defendant's finances may be a factor to consider when setting the appropriate amount of bail, it cannot be a controlling one. (*Simon v. Woodson* (5th Cir. 1972) 454 F.2d 161, 166; see also *Pilkinton v. Circuit Court of Howell County, Mo.* (8th Cir. 1963) 324 F.2d 45, 46.)

In light of the specific rule provided by the Eighth Amendment—the amount of bail may not be excessive—there is no need to apply more general rules to the determination of bail amount. (See *Miller, supra,* 21 Cal.4th at p. 895.)

2. Even if the Equal Protection and Due Process Clauses Are Considered, they Do Not Require a Court to Consider a Defendant's Finances When Setting Bail

Assuming that the due process and equal protection Clauses of the Fourteenth Amendment could overrule or modify the excess bail prohibition of the Eighth Amendment,

they nonetheless would not require trial courts to consider a defendant's finances when setting bail.

The equal protection clause of the Fourteenth Amendment's central purpose is the prevention of racial discrimination by government. (*Washington v. Davis* (1976) 426 U.S. 229, 239.) The guarantee of equal protection has been expanded to ensure that an indigent convict does not face additional imprisonment solely due to their poverty. (*Williams v. Illinois* (1970) 399 U.S. 235; *Tate v. Short* (1971) 401 U.S. 395.) It has been applied to ensure that an indigent defendant has adequate opportunity to present their claims fairly within the adversarial legal system. (*Ross v. Moffitt* (1974) 417 U.S. 600, 612.) But it does not require absolute equality, precisely equal advantages, or equalization of economic conditions. (*Ibid.*)

In *In re York* (1995) 9 Cal.4th 1133, 1152 (*York*), the petitioners argued that they were being denied equal protection because own recognizance (OR) release included conditions of release, such as drug testing or warrantless search terms, while money bail did not. (*Id.* at pp. 1151-1152.)

This Court rejected that argument. Penal Code section 1318, which empowers a trial court to impose reasonable conditions on defendants granted OR release, is facially neutral. (*York, supra,* 9 Cal.4th at p. 1152.) The equal protection clause "guarantees equal laws, not equal results." (*Ibid.*, quoting *Personnel Administrator of Mass., et al. v. Feeney* (1979) 422 U.S. 256, 273.) The Court noted that the equal protection argument could be taken further, but dismissed it:

> Insofar as petitioners' contention rests upon the thesis that the statute creates an impermissible wealth-based classification, because persons who can afford to post the bail set for their offense will not need to seek OR release, petitioners' argument is in essence an argument that the bail process itself is unconstitutionally discriminatory, because that process is based upon a defendant's ability to post bail. We have rejected similar contentions raised in previous cases.

(*York, supra,* 9 Cal.4th at p. 1152.)

Similarly, in *Schilb v. Kuebel* (1971) 404 U.S. 357, 360-361, the High Court examined three ways of obtaining pretrial release in Illinois: OR release, posting the full amount of bail, or depositing 10% of the bail amount with the court. Under the full amount option, the entire amount of bail would be refunded to a defendant who complied with the conditions of release. (*Id.* at pp. 361-362.) Under the 10% option, the court retained 1% of the total bail set (10% of the deposited amount) as bail bond costs. (*Id.* at pp. 360-361.) Mr. Schilb, who posted 10% of the bond amount, argued that it violated equal protection for the court to keep part of it, since a defendant with greater financial resources would have been able to post the full amount of bail without being subject to the fee. (*Id.* at pp. 365-366.) The Supreme Court rejected his argument. The Court acknowledged that any administrative costs would be "substantially the same" whether a 10% bond was posted, or the full amount of bail. (*Id.* at p. 367.) Yet a defendant who posted the full amount of bail encumbered a greater amount of

their property. (*Ibid.*) Similarly, should bail be jumped, the state had greater protection, being able to claim the full amount of bail. (*Ibid.*) Those grounds were sufficiently reasonable to survive an equal protection challenge. (*Id.* at pp. 367-368.) Separately, the Court questioned whether there was truly discrimination based on wealth; a defendant of means could very well decide to post only 10% of the bail amount and invest the other 90% in an interest-bearing account. (*Id.* at pp. 369-370.)

3. *Rational Basis Is the Appropriate Standard of Review*

In *York*, *supra*, 9 Cal.4th at p. 1152, this Court applied rational basis review to a bail-related equal protection claim. The Court was correct to do so.

Equal protection of the laws requires that persons "similarly situated with respect to the legitimate purpose of the law receive like treatment" but does not require absolute equality; differences are permissible as long as they do not "amount to invidious discrimination." (*People v. Romo* (1975) 14 Cal.3d 189, 196.) Importantly, similarly-situated persons are entitled to receive like treatment, not *identical* treatment. (See *People v. Moreno* (2014) 231 Cal.App.4th 934, 943; *In re Jose Z.* (2004) 116 Cal.App.4th 953, 960.)

When considering the proper level of scrutiny to apply, the fact that a defendant's liberty is in play does not require application of strict scrutiny—nearly all facets of criminal law can result in a deprivation of a defendant's liberty; the

application of strict scrutiny to all of them would unduly intrude upon the Legislature's constitutional prerogatives. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 837-838 (*Wilkinson*).)

Most legislation is subject only to the rational basis test; where fundamental rights are impinged, strict judicial scrutiny may apply. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913.) But when legislation merely touches on a fundamental right, strict scrutiny is not necessarily required. (*Id.* at p. 914, citing *Burdick v. Takushi* (1992) 504 U.S. 428, [433-434].) While the right to individual liberty is important and fundamental, it has never been sufficient to extend strict scrutiny to all statutory distinctions that provide for custody, such as the length of a sentence. (*People v. Turnage* (2012) 55 Cal.4th 62, 74, citing *Wilkinson, supra*, 33 Cal.4th at pp. 836, 838, 840.) Further, pretrial detention does not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*United States v. Salerno* (1987) 481 U.S. 739, 750-751, quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105.) To the contrary, pretrial detention is authorized if there is probable cause. (*Gerstein v. Pugh* (1975) 420 U.S. 103, 111.) Conditioning pretrial release on the posting of sufficient bail and denying it outright in the most serious cases has long been the rule.

4. There Is a Rational Basis for California's Bail Laws

In California, there are three types of pretrial detainees: those who may be held without bail, those who are held but may secure release through bail, and those who may be released on OR.

When a defendant is denied the opportunity to post bail altogether (discussed in greater detail, *post*), there is no equal protection violation based on wealth, because neither the rich nor the poor may post bail in any amount at all. Similarly, OR release involves a written promise to appear and no money need be paid; therefore, it also cannot be a wealth-based equal protection violation. Misdemeanor defendants are presumptively eligible for OR release. (Pen. Code, § 1270, subd. (a).) That leaves the question of whether a set amount of bail, which does not account for a defendant's ability to pay, survives rational basis review.

A statutory distinction must be upheld if there is some rational relationship between a disparity of treatment and some legitimate governmental purpose. (*Heller v. Doe* (1993) 509 U.S. 312, 320 (*Heller*).) It must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. (*Ibid.*, quoting *F.C.C. v. Beach Communications* (1993) 508 U.S. 307, 313.) The Legislature need not articulate that rationale. (*Heller*, at p. 320, quoting *Nordlinger v. Hahn* (1992) 505 U.S. 1, 15.)

In the case of California's bail laws, the underlying rationale is contained in two sections of the state Constitution.

The first provides that the amount of bail is to be based on the seriousness of the offense charged, the defendant's prior criminal record, and the probability of appearing at future hearings. (Cal. Const., art. I, § 12.) The second repeats those considerations and adds that public and victim safety must be considered and must be paramount. (Cal. Const., art. I, § 28, subd. (f)(3).) The concerns articulated in both provisions provide a rational basis for California's bail laws.[9]

The more serious the offense, the more serious the possible punishment. Similarly, a defendant with a significant prior criminal record faces greater punishment and less likelihood of leniency, due to recidivist sentencing laws. Logically, the greater the possible punishment a defendant faces, the greater the incentive to flee, rather than face trial and lengthy incarceration. Setting a higher bail amount for defendants facing serious charges, and/or defendants with serious criminal histories therefore makes sense. Because those defendants have a greater incentive to flee, higher bail amounts serve to discourage them from doing so by increasing the financial cost of bail-jumping. Considering the seriousness

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9 Notably, these provisions govern the *amount* of bail to be set. The Court of Appeal below erred when it equated the setting of bail with a finding that Mr. Humphrey was suitable for release. (*Humphrey*, *supra*, 19 Cal.App.5th at p. 1045.) California's bail laws operate on a continuum: the less suitable a defendant is for release, the higher the bail amount, unless the case is in one of the situations where bail is prohibited outright (discussed *post*).

of the offense, the defendant's criminal history, and the likelihood of flight is reasonable.

Along similar but related lines, consideration of public and victim safety are also rational considerations when fixing an amount of bail. First and foremost, certain threats to victims and the public at large are grounds for denying bail altogether. (Cal. Const., art. I, § 12.) Further, a high bail will require a defendant, as well as any family, friends, or other supporters, to put more effort into securing the defendant's release. With more on the line, there is an extra incentive to keep the defendant on the straight and narrow during their pretrial release, and greater social pressure on defendant not to engage in any act that might put their sureties at risk.

The Court of Appeal found the public and victim safety rationale unpersuasive. (*Humphrey, supra,* 19 Cal.App.5th at p. 1029.) The court noted that bail is not forfeited upon the commission of additional crimes, and that a wealthy defendant would be released even if they were dangerous. (*Ibid.*) This assumes that a defendant who commits new crimes while out on bail will continue to make their court appearances. But a defendant who has committed new crimes while out on bail has renewed reason to flee the jurisdiction of the court. Moreover, new felonies committed while on felony bail are punished by a sentencing enhancement. (Pen. Code, § 12022.1.) Considering public and victim safety is rational.

In *Salerno,* the High Court expressly approved of public safety as a consideration in bail decisions. (*Supra,* 481 U.S. 739.) Although that case concerned a no-bail order (*id.* at pp.

743-744), federal bail law permits courts to require monetary bail as a condition of release (18 U.S.C. § 3142(c)(1)(B)(xii)) and even gives the surety the power to arrest the defendant (18 U.S.C. § 3149).

Finally, if the lack of bail forfeiture upon commission of a new crime were truly the problem that the Court of Appeal perceived it to be, the problem lies in the Penal Code, not the California Constitution, which does not limit the grounds upon which bail may be forfeited. Yet if an underinclusive Penal Code is the problem, it does not rise to the level of an equal protection violation. The "widest discretion" is accorded to a legislative determination "to attack some, rather than all, of the manifestations of the evil aimed at." (*McLaughlin v. Florida* (1964) 379 U.S. 184, 191.) "[M]ere underinclusiveness" does not make a statute violative of equal protection, even if the law disadvantages an individual or identifiable members of a group. (*Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 471, fn. 33.)

The considerations that the California Constitution establishes for setting the amount of bail are reasonably related to compelling state interests: ensuring public and victim safety and ensuring that defendants appear for court proceedings. Because California's bail laws have a rational basis, they do not violate the principle of equal protection.

5. *Practical Problems with the* **Humphrey** *Opinion*

In *Humphrey, supra,* 19 Cal.App.5th at p. 1016, the Court of Appeal faulted the trial court for failing to "inquire into

petitioner's financial circumstances and less restrictive alternatives to money bail." It remanded the case for a new bail hearing, where the trial court was to consider Mr. Humphrey's "financial resources and other relevant circumstances, as well as alternatives to money bail." (*Id.* at p. 1048.)

The Court of Appeal's rule fails to recognize the incredible complexity of determining just what a defendant's financial circumstances actually are. Must a defendant bring in bank statements and pay stubs? Tax returns? Home and vehicle valuations? Should the credit limit on a defendant's credit card be considered? What about the financial resources of a spouse, parents, or other friends and family? It has long been the practice for a defendant's relations to arrange for bail, often using their own resources. Is a college student with wealthy parents but no income of their own really in the same position as an unemployed person with no such connections? Should the college student's bail depend on whether or not their parents are willing to post a higher bail? And why should the parents agree to do so, if their refusal produces the same result—pretrial release—but at lower cost?

In short, it will not be easy for a busy trial court to figure out what a defendant's true financial circumstances actually are. Trial courts need a clear rule. The *Humphrey* decision provided little guidance, in that regard.[10]

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10 *Humphrey* implicitly recognized the potential magnitude of the task when it observed that "Judges may, in the end, be compelled to reduce the services courts provide..." (*Humphrey, supra,* 19 Cal.App.5th at p. 1049.)

C. The State Constitution Does Not Provide Greater or Different Protection than the Equal Protection Clause of the Federal Constitution

Article I, section 24 of the California Constitution guarantees criminal defendants equal protection and due process of law. However, it also provides that those guarantees are to be construed by the courts "in a manner consistent with the Constitution of the United States." (*Ibid.*) It expressly prohibits giving criminal defendants (and minors in juvenile proceedings) greater rights than those granted by the federal Constitution. (*Ibid.*)

D. The State Constitution Implicitly Limits Consideration of a Defendant's Ability to Pay When Setting the Amount of Bail

Neither of the bail-governing provisions of the California Constitution directs the courts to consider a defendant's ability to pay when setting the amount of bail. (Art. I, §§ 12, 28, subd. (f)(3).)

Under the principle of *expressio unius est exclusio alterius*, the expression of one thing in a statute ordinarily implies the exclusion of others. (*In re J.W.* (2002) 29 Cal.4th 200, 209.) It is not applied if it would contradict discernable, contrary legislative intent, or result in absurdity. (*Id.* at pp. 209-210.) The *expressio unius* inference properly arises only when there is reason to believe that an omission is intentional, such as when a statute or constitutional provision contains a specific list or facially comprehensive treatment. (*Lopez v. Sony*

Electronics, Inc. (2018) 5 Cal.5th 627, 636, citing *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 514.)

Here, the two relevant constitutional provisions provide both a list and facially comprehensive treatment. Article I, section 28, subdivision (f)(3) provides a list of things to be considered:

> [T]he protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

This list mostly overlaps with the one found in Article I, section 12; they are identical, word-for-word, except for the victim and public safety language excerpted above. Both provisions use mandatory language: "shall."

Because the two constitutional provisions provide a list and facially comprehensive treatment, they implicitly exclude other considerations. A defendant's wealth or lack thereof may only be considered to the degree it informs one of the five criteria mandated by the California Constitution.

III.

TRIAL COURTS MUST CONSIDER PUBLIC SAFETY WHEN SETTING THE AMOUNT OF BAIL

Article I, section 28, subdivision (f)(3) of the California Constitution mandates that trial courts take public and victim safety into account when setting the amount of bail, and further requires that they be the primary considerations. This

constitutional command has been incorporated into Penal Code section 1275, subdivision (a)(1).

A. Public Safety Has Been a Proper Consideration Since the Electorate So Directed in 1982

In the June 1982 primary election, two Propositions, 4 and 8, amended the constitutional provisions governing bail. At the time, Proposition 4 received the larger share of votes, and thus took precedence over any conflicting provisions in proposition 8. (Cal. Const., art. XVIII, § 4; *York, supra,* 9 Cal.4th at p. 1140, fn. 4; *People v. Standish* (2006) 38 Cal.4th 858, 874-875 (*Standish*).) However, the proponents of Proposition 4 "made it clear they intended that public safety should be a consideration in bail decisions." (*Standish,* at p. 875.) Moreover, Proposition 4 brought public safety into play by amending article I, section 12 of the California Constitution and directing courts to consider the seriousness of the offense charged and defendant's prior criminal record—both relevant to public safety. In 1994, the people passed Proposition 189, which explicitly added felony sexual assault offenses to the violent offenses for which bail could be denied.

B. The Enactment of Marsy's Law in 2008 Cemented Public and Victim Safety Considerations into the State Constitution

In the general election in November of 2008, the electorate passed Proposition 9, the Victims' Bill of Rights Act of 2008: Marsy's Law. Proposition 9 made changes to article I,

section 28 of the state Constitution, including the "Public Safety Bail" section (renumbered as subdivision (f)(3)). Specifically, Proposition 9 added the safety of the victim as a consideration when setting, reducing, or denying bail. It also established a victim's right to have their safety and the safety of their family "considered in fixing the amount of bail and release conditions for the defendant." (Cal. Const., art. I, § 28, subd. (b)(3).)

Mr. Humphrey argues that when the electorate passed Proposition 9, the people did not understand that the portions of that amendment related to bail were amending a defunct section of the State Constitution. (Respondent's Brief on the Merits, pp. 31-36.) But the electorate is presumed to be aware of existing law, and to have voted intelligently upon a constitutional amendment. (*People v. Valencia* (2017) 3 Cal.5th 347, 369.) Moreover, by voting to expand the language of the public safety bail provision by adding victim safety (Cal. Const., art. I, § 28, subd. (f)(3)), the electorate clearly intended that provision to be governing law. (Ballot Pamp., Gen. Elec. (Nov. 4, 2008) text of Prop. 9, p. 130.) Similarly, the electorate removed the provision which barred OR release for defendants charged with serious felonies. (*Ibid.*) Proposition 9 did not treat article I, section 28, subdivision (f)(3) as defunct. If the voters were amending an inoperative provision, the act of amendment showed their intent to revive it.

IV.

BAIL MUST BE DENIED IN THREE SITUATIONS ESTABLISHED BY THE CALIFORNIA CONSTITUTION, AND MAY BE DENIED IN ALL OTHERS

A. Most of the Conflicting Provisions in the California Constitution May Be Reconciled

Article I, section 12 of the state Constitution gives criminal defendants a right to bail in most cases. The mandatory nature of bail is shown by language that a defendant "*shall* be released on bail by sufficient sureties" (*id.*, italics added), followed by a number of exceptions. Conversely, article I, section 28, subdivision (f)(3) provides that a person "*may* be released on bail by sufficient sureties" (italics added), indicating that release on bail is within the court's discretion.

As discussed *ante*, the public safety bail provision was reenacted by Proposition 9 in 2008 (Gen. Elec.) Unlike Proposition 8 (Primary Elec. (June 8, 1982)), nothing in Proposition 9 suggested an intent to repeal article I, section 12 of the state Constitution.

As a general matter of constitutional construction, repeals by implication are disfavored. (*Sevier v. Riley* (1926) 198 Cal. 170, 176; see also *Lopez v. Sony Electronics, supra,* 5 Cal.5th 627, 637 (*Lopez*).) But when the later provision is "manifestly inconsistent and in conflict with the earlier provision" repeal by implication must occur. (*Sevier v. Riley,* at p. 176.) However, the inconsistent provisions should be

harmonized, if possible. (*Lopez,* at pp. 637-638.) Even when there is implied repeal, its scope may be limited. (*Id.* at p. 638.)

The two constitutional provisions at issue can be harmonized in most respects.

The consideration of pubic and victim safety (Cal. Const., art. I, § 28, subd. (f)(3)) simply adds to the existing list of considerations in article I, section 12, and in no way conflicts with them, particularly in light of Proposition 4's intent to consider public safety. (*Standish, supra,* 38 Cal.4th at p. 875.)

Similarly, both state Constitution sections recognize that a trial court has discretion to grant OR release; article I, section 28, subdivision (f)(3) adds that discretion is "subject to the same factors considered in setting bail." That addition does not conflict with article I, section 12. As noted *ante,* Proposition 9 removed language that had prohibited OR release to defendants charged with serious felonies. (Ballot Pamp., Gen. Elec. (Nov. 4, 2008) text of Prop. 9, p. 130.) By keeping the language about considering bail factors when deciding whether to grant OR release, the electorate intended to enact that provision. Because it supplements existing language, it can be easily harmonized.

B. There Is No Longer a Right to Be Released on Bail; Discretion Has Been Returned to the Courts

What is less simple is the discretionary versus directory distinction in the two constitutional provisions. Article I, section 12 states that a person "shall" be released on sufficient bail unless one of three disqualifying findings are made by the

court. (See also Pen. Code, § 1271 [pretrial bail a matter of right, except in capital cases].) The original purpose of this bail provision was to abrogate the common law rule that bail was a matter of judicial discretion, replacing it with an absolute right to bail in most cases. (*In re Law* (1973) 10 Cal.3d 21, 25 [discussing predecessor provision].) Conversely, article I, section 28, subdivision (f)(3) states that a person "may" be released on sufficient bail, unless one disqualifying finding is made by the court. The purpose of using the word "may" in the original, ineffective enactment in 1982 was to restore the courts' discretion whether to grant bail. (Ballot Pamp., Primary Elec. (June 8, 1982) analysis of Prop. 8, p. 54.)

Eligibility for pretrial release on bail is either mandatory, and thus a matter of right for the defendant, or it is discretionary, within the power of the trial court to grant or withhold; it cannot be both. Because Proposition 9 was enacted in the general election of 2008, it supersedes earlier, conflicting provisions. "May" is the current state of the law, under the California Constitution.

Nevertheless, the text of Penal Code section 1271 still grants bail eligibility as a matter of right in non-capital cases. If it is within the Legislature's power to regulate judicial discretion in that way, then bail eligibility remains a matter of right, despite the changes made by Proposition 9 in 2008. Conversely, if Penal Code section 1271 violates separation of powers, then it does not revive a right to bail, and the grant, setting, or denial of bail is within a court's discretion, except in the situations where the California Constitution prohibits it.

There does not appear to be any California case law on this question, and federal authorities are split.

For example, in *United States v. Gardner* (N.D. Cal. 2007) 523 F.Supp.2d 1025, the district court considered whether the electronic monitoring conditions of the Adam Walsh Act,[11] which were being applied to a defendant out on bail, violated the separation-of-powers doctrine. The court recounted impermissible legislative encroachments on federal judicial power: a legislature may not prescribe a rule of decision without amending applicable law; it cannot transfer review of judicial decisions to the Executive Branch; and it may not interfere with the power of the judiciary to decide cases by commanding that federal judgments be reopened. (*Id.* at p. 1035.) The court then concluded that because bail is an ancillary proceeding, separate from the adjudication on the merits, a final judgment was not being reopened. (*Ibid.*) The court further found that because Congress had amended the applicable law, it did not improperly interfere with the exercise of judicial power. (*Ibid.*) Finally, the court observed that although the Judicial Branch is the primary enforcer of the constitutional protection against excessive bail, Congress has been substantially involved in legislating bail since 1789. (*Id.* at pp. 1035-1036.) Under the Eighth Amendment, Congress

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[11] 18 U.S.C. § 3142(c)(1)(B) lists fourteen conditions that a court may impose on pretrial detainees who are released on OR or an unsecured appearance bond. The Adam Walsh Act makes six conditions mandatory if the defendant is charged with certain offenses involving a minor victim.

may define the classes of cases in which bail is allowed. (*Id.* at p. 1036, citing *Salerno, supra,* 481 U.S. at p. 754.)

Conversely, in *United States v. Crowell* (W.D.N.Y. Dec. 7, 2006, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F)) 2006 WL 3541736, *3 (*Crowell*), the district court held that the pretrial release provisions of the Adam Walsh Act violated the Fifth Amendment, the Eighth Amendment, and the separation-of-powers doctrine. The court opined that the setting of bail was "the quintessential exercise of judicial power." (*Id.* at p. *11, citing *Stack v. Boyle* (1951) 342 U.S. 1, 4-5.) The district court concluded that the Adam Walsh Act's amendments encroached on an exclusive judicial function, and thus violated separation of powers. (*Crowell,* at p. *11.)

In California the separation-of-powers problem is more complex, because the powers of both the Legislative and Judicial Branches face greater constraint by the state Constitution. Because Penal Code section 1271's grant of a right to bail conflicts with the discretion explicitly granted to the courts by article I, section 28, subdivision (f)(3) of the California Constitution, it is unconstitutional, because it would deny the courts the exercise of the discretion that the Constitution vests in them.

C. The California Constitution Limits the Availability of Bail in Certain Cases

Both bail provisions of the California Constitution contemplate a denial of bail when a defendant is charged with a capital crime "when the facts are evident or the presumption

great." (Art. I, §§ 12, 28, subd. (f)(3).) The degree of evidence required has been defined as less than would justify a jury verdict, and sufficient if the evidence "points to him and induces the belief that he may have committed the offense charged." (*In re Page* (1927) 82 Cal.App. 576, 578.)

Additionally, article I, section 12 adds two further classes of cases where bail is prohibited, again, where the facts are evident or the presumption great. First, felony offenses involving acts of violence against another, including felony sexual assault, if the court finds by clear and convincing evidence that there is a substantial likelihood that defendant's release would result in great bodily harm to others. (Cal. Const., art. I, § 12.) Second, felony offenses where the court finds by clear and convincing evidence that the defendant has threatened another with great bodily harm and there is a substantial likelihood that the defendant would carry out that threat if released. (*Ibid.*)

In these three scenarios,[12] a court has no discretion to grant bail—release must be denied. In all other cases, whether to deny a defendant bail is within the discretion of the trial court. The use of the word "may" in article I, section 28, subdivision (f)(3) of the state Constitution has returned that discretion to the courts. That discretion is guided by the

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[12] Because Proposition 9 (Gen. Elec. (Nov. 4, 2008)) did not repeal article I, section 12 of the California Constitution, the two additional no-bail scenarios included in that section survive, as they do not conflict with the language or intent of Proposition 9.

purposes of bail, as laid out by the people of this state: protection of the public, victim safety, seriousness of the offenses charged, the defendant's previous criminal record, and the probability of the defendant appearing at future court hearings. (Cal. Const., art. I, § 28, subd. (f)(3).)

V.

SENATE BILL 10 IS INCONSISTENT WITH THE CALIFORNIA CONSTITUTION

On August 28, 2018, the Governor approved Senate Bill 10 (2017-2018 Reg. Sess.) (Senate Bill 10), which makes far-reaching changes to California's bail laws.[13] Those changes, however, no matter how well-intentioned, must be consistent with the constitutional provisions governing bail. Regrettably, Senate Bill 10 diverges in several respects.

At the outset, it should be noted that both governing constitutional provisions permit release on bail "by sufficient sureties." (Cal. Const., art. I, §§ 12, 28, subd. (f)(3).) Section 12 further describes "fixing the *amount* of bail" (italics added) which strongly implies the availability of money bail, due to the use of the word "amount." Similarly, there would be no need to

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[13] It appears that the Initiative Coordinator at the Attorney General's Office received a proposed statewide referendum (Cal. Const., art. II, § 9) on Senate Bill 10 on August 29, 2018 (number 18-0009). It is impossible to predict whether the referendum will obtain the needed signatures for placement on the ballot, and if so, the outcome of that election. Nonetheless, the possibility exists that Senate Bill 10 will never take effect. Senate Bill 10 does not render this case moot.

consider "setting" or "reducing" bail, as contemplated by section 28, if bail is not an amount of money that can be set or reduced.

Thus, it is questionable whether the Legislature has the power to eliminate a money bail system. Unlike the federal Constitution, which prohibits excessive bail (Eighth Amendment), California's Constitution goes much further, establishing the method by which a court sets the amount of bail. Even if the grant of bail is within the court's discretion, rather than a matter of right for the defendant, as argued *ante*, defendants still have a right to have the court exercise that discretion.

A. Any Risk Assessment Tool Must Comply with the California Constitution

Section 4 of Senate Bill 10 creates a "Pretrial Assessment Services" program within the courts which is charged with assessing a defendant's "risk"—the likelihood that a defendant will fail to appear in court or will commit a new crime if released. (Pen. Code, § 1320.7, subds. (g), (h), added by Stats. 2018, ch. 244, § 4.) Risk is characterized as "high," "medium," or "low," based off of a numerical value derived by using a "validated risk assessment tool." (*Id.*, subds. (f), (i), (k).)

If the risk score produced by a risk assessment tool is to be relied upon by the courts when making bail decisions, that tool must be compliant with the mandates of the California Constitution, which establishes the considerations that courts must take into account when making bail decisions: public

safety, victim safety, seriousness of the offenses charged, the defendant's previous criminal history, and the probability of defendant making future court appearances. (Cal. Const., art. I, § 28, subd. (f), par. (3).) Any assessment tool that does not include these five considerations cannot be relied upon by the courts.

For example, the "Public Safety Assessment" produced by the Laura and John Arnold Foundation[14] uses nine risk factors to produce a risk score: defendant's age at current arrest, whether the current offense is violent, whether there was a pending charge at the time of the offense, prior misdemeanor convictions, prior felony convictions, prior violent convictions, prior failure to appear in the past two years, prior failure to appear more than two years prior, and prior sentence of incarceration. While most of these factors are certainly relevant to the court's consideration of whether to grant a defendant pretrial release, they do not directly address victim safety—one of the paramount considerations for the court, under article I, section 28, subdivision (f)(3) of the California Constitution. Mathematical in nature, it makes no provision for case-specific facts that could show whether defendant is a potential threat to victims or witnesses in the case.

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[14] The four-page document may be found at <https://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf> (accessed Oct. 3, 2018). On page 4 it cautions that it is not intended to replace judicial discretion.

Yet Senate Bill 10 requires Pretrial Assessment Services to release defendants that it deems "low risk" after such an assessment, and further entrusts that entity with ordering the release or detention of defendants deemed "medium risk," with release or detention to be based on standards laid out in a local court rule. (Pen. Code, § 1320.10, subds. (b), (c), added by Stats. 2018, ch. 244, § 4.) While certain defendants are excluded from such consideration (*id.*, subd. (e)), those exclusions cannot substitute for a judge's considered discretion in every circumstance. For example, Pretrial Assessment Services shall not release a defendant "who has intimidated, dissuaded, or threatened retaliation against a witness or victim of the current crime." (*Id.*, subd. (e)(10).) While this sensible provision will suffice in many situations, in some it will not. If, for example, a defendant has intimidated witnesses in other cases, that should be taken into consideration when assessing the danger to victims and witnesses in the current case. Yet subdivision (e)(10) only considers such actions if they were against victims and witnesses in the current case. Moreover, there are degrees of intimidation, which a judge should be able to take into account: a defendant who acted on threats against a past victim or witness should be considered a much higher risk than one who made a nasty telephone call. Those judgments are properly left to the discretion of judges, who can apply their experience and common sense to the facts of a particular case; such judgment simply cannot be replicated by mathematical formulae.

B. Senate Bill 10 Unconstitutionally Intrudes Upon the Discretion Vested in Judicial Officers

California, like the United States, has three branches of government—legislative, executive, and judicial—and those who exercise one power may not exercise another, unless permitted by the state Constitution. (Cal. Const., art. III, § 3.) This separation of powers protects a branch's core constitutional functions from being usurped by another branch. (*People v. Bunn* (2002) 27 Cal.4th 1, 16.) While one branch may still regulate or oversee another, the level of such regulation must remain reasonable, and may not defeat or materially impair the other branch's core functions. (*Ibid.*)

The initial decision to detain a suspect lies with the Executive Branch, when a law enforcement officer arrests the suspect and takes them into custody. (*Gerstein v. Pugh, supra*, 420 U.S. 103, 113-114.) Thereafter however, a neutral magistrate—from the Judicial Branch—must authorize further confinement. (*Id.* at pp. 114.)

As discussed *ante*, Senate Bill 10 creates a Pretrial Assessment Services entity within the courts. (Pen. Code, § 1320.7, subd. (g), added by Stats. 2018, ch. 244, § 4.) Were this entity solely advisory in nature, there would be no constitutional issue. Yet Pretrial Assessment Services is granted *independent authority* to order the release and detention of those defendants it deems "medium risk" and is required to release those it deems "low risk." (Pen. Code, § 1320.10, subds. (b), (c), added by Stats. 2018, ch. 244, § 4.) Notably, those decisions are made "without review by the

court." (*Ibid.*) Senate Bill 10 explicitly *excludes* judicial officers from exercising their constitutionally-granted discretion in some cases.

When discretion is judicial in nature, it must be exercised by a judge, not a clerk. (See *Lynch v. Bencini* (1941) 17 Cal.2d 521, 530; *Liberty Loan Corp. of North Park v. Petersen* (1972) 24 Cal.App.3d 915, 919; *In re Marriage of Barnes* (1978) 83 Cal.App.3d 143, 152.) A court's clerks may only perform ministerial functions, not discretionary ones. (See *Page v. Superior Court* (1888) 76 Cal. 372; 2 Witkin, Cal. Procedure (5th Ed. 2008) Ministerial Functions, § 361.)

Even though the use of a risk assessment tool could be characterized as ministerial in nature, given that it consists of collecting data and assigning numerical scores, the end result is a pretrial release decision. That decision is a matter of judicial discretion, under the dictates of the state Constitution. It may not be reduced to ministerial number-crunching.

Just as the Legislature cannot remove a trial court's inherent discretion in the area of bail, it cannot transfer it to a ministerial officer, even if that officer is within the judicial branch. Any recommendation by Pretrial Assessment Services can be advisory in nature only; a ministerial entity may not exercise judicial power.

C. The Court's Resolution the Question of Whether Bail Is a Defendant's Right or Is in the Court's Discretion Affects Senate Bill 10's Constitutional Analysis

As argued *ante*, the passage of Proposition 9 in the 2008 general election eliminated bail as a matter of right and reinstated the common law rule of judicial discretion in bail decisions. However, should the Court find to the contrary, Senate Bill 10's provisions would be called into question. Article 1, section 12 of the California Constitution is unequivocal that there is a right to bail except in three cases. It further provides that the "amount" of bail is to be fixed, clearly indicating a financial component. If those provisions retain their vitality despite the passage of Proposition 9, then in most cases there is a right to have an amount of bail set. A defendant could receive an adverse, "high risk" designation from Pretrial Assessment Services, could come before a judge whose experience and judgment indicate that the defendant is not a good candidate for pretrial release, and yet that defendant would still be entitled to release on non-excessive monetary bail. If the right to monetary bail embodied by article I, section 12 of the state Constitution still exists, then Senate Bill 10 cannot eliminate it; writing monetary bail out of the Penal Code would not eliminate it from the California Constitution.

CONCLUSION

The Court of Appeal erred when it decided *Humphrey, supra,* 19 Cal.App.5th 1006. The amount of bail set must not be excessive, relative to the seriousness of the offense; that determination does not take a defendant's finances into account. Nothing in the federal or state Constitution requires otherwise.

The California Constitution requires that courts consider and place paramount importance on public and victim safety when setting the amount of bail. While the Court of Appeal was skeptical of public safety's import in bail decisions, the constitutional command is unmistakable. These provisions are rational, and do not violate equal protection. In *Salerno, supra,* 481 U.S. 739, the United States Supreme Court recognized that public safety is a valid concern when setting bail. The state Constitution requires that bail be denied in certain very serious cases and gives courts the discretion to deny bail in the remaining ones.

Senate Bill 10's sweeping changes to bail are on uncertain footing, due to the extensive bail provisions in the state Constitution. Senate Bill 10's fate rests, in part, on this Court's resolution of the conflicts between those provisions, in particular the use of "shall" and "may."

If there is still an affirmative, constitutional right to monetary bail, then such a right cannot be eliminated by Senate Bill 10; the Legislature may not take away rights that the California Constitution grants.

Conversely, if the right to bail has been replaced with judicial discretion to grant or deny bail in most cases, then Senate Bill 10 must be construed in a way that does not unconstitutionally interfere with that discretion by transferring it to ministerial officers.

Done this 5th day of October, 2018, at San Bernardino, California.

Respectfully submitted,

MICHAEL A. RAMOS,
District Attorney,

/s/
BRENT J. SCHULTZE,
Deputy District Attorney,
Appellate Services Unit.

CERTIFICATE OF COMPLIANCE

I certify that the attached **PROPOSED BRIEF OF AMICUS CURIAE** uses a 13-point Bookman Old Style typeface and contains **9,343** words.

Done this 5th day of October, 2018, at San Bernardino, California.

Respectfully submitted,

MICHAEL A. RAMOS,
District Attorney,

/s/
BRENT J. SCHULTZE,
Deputy District Attorney,
Appellate Services Unit.

SAN BERNARDINO COUNTY
OFFICE OF THE DISTRICT ATTORNEY
PROOF OF SERVICE BY UNITED STATES MAIL

STATE OF CALIFORNIA	} ss.	*In re HUMPHREY* S247278
COUNTY OF SAN BERNARDINO		

Brent J. Schultze says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; that my business address is 303 W. Third Street, Fifth Floor, San Bernardino, CA, 92415-0511.

That I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

That on October 5, 2018, I served the within:

PROPOSED BRIEF OF AMICUS CURIAE

on interested parties by depositing a copy thereof, enclosed in a sealed envelope for collection and mailing on that date following ordinary business practice at 777 E. Rialto Avenue, San Bernardino, CA, 92415, addressed as follows:

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San Francisco, CA, 94102

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I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino, California, on October 5, 2018.

/s/
Brent J. Schultze