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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S267138

THE PEOPLE,
Plaintiff and Respondent,

v.

MONICA MARIE MARTINEZ,
Defendant and Appellant.

Court of Appeal of California
Sixth District
No. H046164

Superior Court of California
Santa Clara County
No. C1518585
Hon. Socrates Manoukian

ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Defendant and Appellant Monica Marie Martinez in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208.

Dated: October 1, 2021 By: /s/ John Rorabaugh

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Statement of the Facts and Case

On August 25, 2015, defendant Monica Marie Martinez ("also known as Monica Marie Milla" (Opn. 1)), a licensed bail agent, was charged with seven felony counts under Insurance Code section 1814. (CT 1–4, 172.)

The criminal complaint alleged that, 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.)

This complaint was part of 31 similar complaints filed as part of "the largest enforcement action ever." (AOB 55)

Defendant demurred to the complaint, on the basis that that section 2076 violates the United States and California Constitutional, guarantees of due process and free speech. (CT 16–38.). 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).)

The Court of Appeal reversed holding that section 2076 is "facially" invalid under the First Amendment (opn. 32). The opinion found that the restrictions on speech were not "quintessential commercial speech" (opn 21) and questioned but did not decide whether section 2076' restrictions were pure speech, because even under the Commercial free speech standards section 2076 did not survive intermediate scrutiny. The Court of appeal applied the Central Hudson test and found that the People had identified "substantial state interests" but that they "utterly fail to tie section 2076 to the direct and material advancement of those interests" (opn. 31) The court further explained that while section 2076 might indirectly deter illegal solicitations, bail licensees could also use the information criminalized by CCR section 2076 for "facilitating licensees' lawful negotiations or solicitation of bail with permissible persons other than arrestees." (See §§ 2079, 2079.1, 2080.)" (opn. 31–32)

The court applied intermediate scrutiny, and held that "Facial invalidation of the regulation", "requires the reversal of defendant's conviction." (opn 32.) 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 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 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."

Standard of Review

Because CCR section 2076 criminalizes pure speech based upon the content of that speech the burden is on the state to demonstrate the constitutionality of CCR section 2076. When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. E.g., *Greater New Orleans Broad. Assn. v. United States* (1999) 527 U.S. 173, 183. *United States v. Playboy Entm't Grp., Inc.* (2000) 529 U.S. 803, 804 "when the government restricts speech, the government bears the burden of proving the constitutionality of its actions. [citations]. And [when the government seeks to restrict speech based on its contents of the usual presumption of constitutionality afforded congressional enactments is reversed. Content-based regulations are presumptively invalid." *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 382. A statute such as this one, which makes criminal a form of pure speech, must be interpreted

with the commands of the First Amendment clearly in mind." (*Watts v. United States* (1969) 394 U.S. 705, 705, 707.)" *People v. Mirmirani* (1981) 30 Cal.3d 375

In *Bose Corp. v. Consumers Union* (1984) 466 U.S. 485, the Supreme Court explained "that in cases raising First Amendment issues [it has] *repeatedly* held that an appellate court has an obligation to `make an independent examination of the whole record' in order to make sure that `the judgment does not constitute a forbidden intrusion on the field of free expression.'" (*Bose, supra*,466 U.S. at p. 499, italics added, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 284–286.) (Bose, supra, 466 U.S. at p. 514.)

A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself not its application to the particular facts. "To support a determination of facial unconstitutionality, voiding the statute as a whole, …, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.'" (Arcadia Unified School Dist. v. State Dept. of Education (1992) 2 Cal.4th 251, 267 [5 Cal.Rptr.2d 545, 825 P.2d 438], quoting Pacific Legal Foundation v. Brown(1981) 29 Cal.3d 168, 180–181 [172 Cal.Rptr. 487, 624 P.2d 1215].)" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, original italics.) *U.D. Registry v. State of California* (2006) 144 Cal.App.4th 405

Question Presented

1. Did the Court of Appeal correctly declare California Code of Regulations, title 10, section 2076, unconstitutional on its face?

Introduction

CCR 2076 prevents a bail licensee from making an agreement or having an understanding with a wide range of individuals including "any person " to be informed of the present or imminent detention of a person by the State. Neither compensation, any breach of confidentiality nor non-public information, nor any communication between the licensee and its client, the potential indemnitor, are necessary elements of a violation of CCR 2076. Penal Code section 1814 makes a violation of this regulation a felony or misdemeanor commonly designated as a wobbler.

CCR 2076 criminalizes the passing of information from an intermediary to a bail licensee regarding certain public facts, such as the fact of an arrest. Both the bail licensee, and their potential clients, the friends and family of a detained person, have the right to hear about the public facts covered by CCR 2076. The People's opening brief does not even attempt to justify the speech restrictions of 2076 under the strict scrutiny analysis required for the government suppression of pure speech. Even if the court were to find the prohibitions of CCR 2076 to be commercial speech, the People's justifications for CCR section 2076 rely on elements of compensation and confidentiality that are not necessary elements of a violation of CCR 2076. Even if the restrictions of CCR section 2076 are treated as commercial

speech, the Appellate court was correct that the People fail to prove that the governmental interests are substantially advanced by CCR section 2076. In addition, CCR 2076 is not necessary because other statutes regulations and caselaw cover the governmental interests identified by the People.

Summary of Argument

CCR 2076 is invalid because its restrictions on a bail licensee having an arrangement or understanding to receive information about a public fact, the arrest of a person by the State, totally and fatally conflicts with the constitutional protections granted by both the United States and California constitutional free speech provisions. Section 2076 criminalizes the free communication about important public facts, the Government's actions in arresting and detaining persons. Being able to communicate such important public facts is an important public right. Bail licensees are restricted by other statutes and regulations that prevent the payment of compensation for soliciting, and limit the time place manner, and persons that they may conduct bail solicitations. Penal Code 160, CCR sections 2068, 2079, 2079.1, 2080, *People v. Dolezal* (2013) 221 Cal.App.4th 167.

The avoidance financial penalties associated with commercial bail provides an additional incentive for the defendant's family to ensure the appearance of the defendant in court. It is this incentive that provides the historical basis for the secured release of an arrestee. (AOB 20). The bail forfeiture penalties align the interests of the defendant's social circle with the interests of the People in conducting a fair criminal process. The prompt

communication about the fact of an arrest to those who can secure an arrestee's release, is important to all stakeholders in the criminal justice system.

Bail agents have long formed the backbone of California's fugitive recovery system. *Cnty. of Los Angeles v. Am. Contractors Indem. Co.* (2007) 152 Cal.App.4th 661 ["Given the limited resources of law enforcement agencies, it is bail bond companies, as a practical matter, who are most involved in looking for fugitives from justice."] It is the relationship formed by the posting of a bail bond with a monetary penalty that provides the incentive for the defendant's friends and family to cooperate with bail agents in returning fugitives to court. California has long relied upon this alignment of interests to provide the pretrial system for its most difficult cases.

As recently recognized by the New York Supreme Court in *People v. Johnston* (N.Y. City Ct. 2020) 67 Misc. 3d 267 the monetary penalties of bail are often the least restrictive condition that a trial court can impose to release a defendant from custody.

Criminalizing the acquisition of the knowledge of the fact of an arrest, or the contemplation of an imminent arrest, cannot be justified as a restriction on mere commercial speech. The First Amendment restricts the government's power to restrict free expression especially of important "public facts." The arrest and detention by the State of a person is the type of fact that the public and each of the parties listen in CCR section 2076 have a right to hear. Mere economic interest in a public communication does not make such communication commercial speech.

CCR section 2076 is not "quintessential commercial speech" because it does not propose a commercial transaction, but merely

provides "identification of people with imminent bail needs." (dis .4) Therefore the communications prohibited by 2076 are not those of a commercial transaction, but a mere identification of potential clients who are being detained by the State and may wish to be released on bail. The People, and the dissent fail to point to any authority that the identification of potential clients, especially with public information, can be criminalized by the government as a restriction on commercial free speech. Moreover no direct communication between the bail licensee and any potential client is required to violate section 2076, as the crime occurs when and agreement or understanding is made, in order to identify potential clients.

Nor can the penological interests of a jail justify the criminalization of the dissemination of the fact that a person has been detained by the government, to a bail licensee. The People rely on cases restricting convicted felony inmates. Pretrial detainees are not subject to this enhanced power of the State

Criminalizing an understanding or agreement to obtain a "public fact" from an uncompensated intermediary has never been justified under any of the commercial speech, or penological supervision cases relied on by the People.

The People's justifications of prohibiting what they describe as "insider tipping arrangements" are not furthered by the restrictions of CCR 2076, because sections 2076's necessary elements do not include the payment of compensation, or the necessity of the information being secret, confidential, or non-public. There is nothing in the text or justifications provided by the People that would allow the saving of the restrictions of CCR 2076 by restricting the scope of its application.

The People fail to establish any "commercial harms" that are prevented by CCR section 2076. The People cite "unfair competition" between bail licensees, but rely on nonexistent elements such as compensation or "nonpublic" or "insider" information that are simply not present in CCR section 2076. The People fail to justify how a bail licensee's receipt of public information and conducting legal solicitations with this public information is unfair.

Commercial bail provides the most common, and the fastest means of release from the State's custody. *In re Humphrey* (2021) 11 Cal.5th 135, 276 Cal. Rptr. 3d 232, 237. The Government cannot criminalize the communication of such vital public importance to a bail licensee, the class of persons most likely to secure the release of a person from the custody of the state. [The disadvantages to remaining incarcerated pending resolution of criminal charges are immense and profound.] *Id.* at p. 241

Even if there is an advantage to a bail licensee who first discovers that the State has arrested a person, it is not unfair. Bail licensees have the same rights to discuss "public facts" as any other member of the public. Arranging the fastest secured release of arrestees is the job of a bail licensee. In the often used ambulance chasing metaphor the bail licensee is the ambulance. It is the bail licensees duty to find family and or friends to secure the release of the defendant to the custody of the surety. Like a delay in calling an ambulance causes additional harm to the paitent, the delays caused by the criminalization of the communication of the public fact of an arrest delays the release of persons from pretrial detention, therby extending the harms of pretrial detention.

The People have not identified when the arrest of a person by the State is "nonpublic", "insider" or otherwise confidential. Even if there were some period of time that an arrest of a person was somehow confidential, that confidentiality could not exist once the person is booked into custody, because the People have a duty to disclose such booking. The People have failed to explain how a communication by an inmate of the detention of another inmate can ever be "nonpublic" "insider" or confidential.

Even if CCR section 2076 is considered commercial speech, the public nature of the truthful facts communicated are inexorably intertwined with the public purpose of the communication of the fact of an arrest.

The People's attempt to justify criminalizing communications between an arrestee and a co-arrestee intermediary, as a tool of penological supervision is particularly chilling. This justification exposes the many problems that occur by criminalizing the transfer of knowledge of the fact of an arrest to those who could provide security for the arrestee's release. The cases relied upon by the People apply to prisoners who have been convicted, while 2076 applies to pretrial arrestees. The State does not have the same powers to control arrestees that it does to control convicted inmates. The States invocation of its supervisory powers to limit the communication of information about the fact of an arrest has chilling echoes of secret arrests.

Argument

I. Section 2076 is a facially invalid content-based restriction on the free speech rights guaranteed by the United States and California Constitutions.

The Appellant Court correctly found that CCR 2076 is a content-based regulation on its face because "… it targets a bail licensee's arrangement or understanding with another to pass specified information to any bail licensee." (opn 19)

"The First Amendment of the United States Constitution provides in part that "Congress shall make no law . . . abridging the freedom of speech. . . ." (U.S. Const., 1st Amend..) "Although by its terms this provision limits only Congress, the United States Supreme Court has held that the Fourteenth Amendment's due process clause makes the freedom of speech provision operate to limit the authority of state and local governments as well. [Citation.]" (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951 [119 Cal.Rptr.2d 296, 45 P.3d 243] (*Kasky*).) Article 1, section 2, subdivision (a) of the California Constitution states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const. art. I, § 2, subd. (a).) "The state Constitution's free speech provision is `at least as broad' as [citation] and in some ways is broader than [citations] the comparable provision of the federal Constitution's First Amendment." (*Kasky, supra,* 27 Cal.4th at pp. 958–959; see *Gerawan Farming, Inc. v. Lyons*

(2000) 24 Cal.4th 468, 490 [101 Cal.Rptr.2d 470, 12 P.3d 720] (*Gerawan I*).)" Baba v. Board of Supervisors (2004) 124 Cal.App.4th 504, 512–513

II. The Speech Criminalized by Section 2076 Is Pure Speech About Important Public Facts. CCR section 2076 Unconstitutionally Criminalizes Dissemination of Public Information

CCR section 2076 prohibits the communication 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" Factual communications regarding the State's arrest and detention of persons are public information that the State is required to publish.

The California Constitution protects access to public records. "The People have the right of access to information concerning the conduct of the People's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that

interest." Sunshine Amendment, Cal. Const. Art. I, § 3(b) California Public Records Act ("CPRA"), Cal. Gov't. Code §§ 6250 through 6276.48,

A police blotter is a public record as to information that is expressly stated to be subject to disclosure in the statute. Cal. Gov't Code § 6254(f)(1), (2) and (3). Specified facts from investigatory or security records, without disclosure of the records themselves, must be disclosed unless disclosure would endanger the successful completion of an investigation, or related investigation, or endanger a person involved in the investigation. Cal. Gov't Code §§ 6254(f)(1), (f)(2) and (f)(3). For arrests, the agency must disclose such facts as the name, occupation and detailed physical description of every individual arrested by the agency, as well as the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds. Cal. Gov't Code § 6254(f)(1). *Serna v. Superior Court* (1985) 40 Cal.3d 239, 260

Further the Serna Court noted that The Attorney General "expressed his view that local officials may publish in a newspaper the names of persons for whom warrants of arrest have been issued for the purpose of obtaining public assistance in locating them. He reasons that the information that a warrant has been issued is a "public fact." (67 Ops.Cal.Atty.Gen. No. 83–906, Oct. 11, 1984.)" Serna v. Superior Court (1985) 40 Cal.3d 239, 260

"In support of its suggestion that factual information qualifies as protected speech, the high court in Sorrell cited *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532(Rubin), which invalidated a federal regulation banning disclosure of alcohol content on beer labels. (See Sorrell, supra, 564 U.S. at p. ——, 131 S.Ct. at p. 2667.) In Rubin, there was no dispute that the brewing company sought "to disclose only truthful, verifiable, and non-misleading factual information about alcohol content on its beer labels." (*Id.* at pp. 483, 115 S.Ct. 1585.) The high court concluded that the factual information about alcohol content was protected commercial speech and that restrictions on such speech require substantial justification, which the government in that case failed to provide. (*Id.* at pp. 481–486, 115 S.Ct. 1585.)" *Beeman v. Anthem Prescription Mgmt., LLC* (2013) 165 Cal.Rptr.3d 800.

In 1984 the California Attorney General was asked whether law enforcement could distribute the names of those subject to arrest for failure to pay child support. In attorney general opinion number 83–9061984 than Attorney General John van de Kamp relied upon the public nature of "The fact that a person is subject to a warrant of arrest is a public fact..." @p. 9. The public itself has the right to know and who the government has arrested, and where such persons are being detained. The potential for abuse by governmental powers implied by non-public arrests needs no citation, The history of secret detentions or "non-public" arrests (AOB 16, 35, 61) is rife with abuse. California's specifically protects the disclosure of such public facts as newsworthy.

(Coverstone v Davies (19__) 38 Cal.2d 315, 323 Firth v. Associated Press (E.D.S.C.,1959) 176 F.Supp. 671)" *Kapellas v. Kidman* (1969) 1 Cal.3d 20.

In order to justify the speech restrictions imposed by section 2076, the People rely on several inaccurate characterizations of the necessary elements of Section 2076. First the People allege that 2076 prevents "insider tipping arrangements" similar to insider trading [AOB 51]. However, insider tipping theories necessarily relate to the transmission of confidential or non-public information.

In the context of insider trading in the stock market the United States supreme Court explained that the basis for finding liability of the "tipee" is that the receiver of confidential information is 'participating in the insider's breach of his fiduciary duty" *Dirks v. Sec. & Exch. Comm'n* (1983) 463 U.S. 646, fn 20 ["Other authorities likewise have expressed the view that tippee liability exists only where there has been a breach of trust by an insider of which the tippee had knowledge. See, e.g., *Ross v. Licht* (SDNY 1967) 263 F.Supp. 395, 410; A. Jacobs, The Impact of Rule 10b-5, § 167, p. 7–4 (rev. ed. 1980) ("[T]he better view is that a tipper must know or have reason to know the information is nonpublic and was improperly obtained"); Fleischer, Mundheim, Murphy, An Initial Inquiry Into the Responsibility to Disclose Market Information, 121 U. Pa. L. Rev. 798, 818, n. 76 (1973) ("The extension of rule 10b-5 restrictions to tippees of corporate insiders can best be justified on the theory that they are participating in the insider's breach of his fiduciary duty"). Cf. Restatement (Second) of Agency § 312, Comment c (1958) ("A person who, with notice that an agent is thereby

violating his duty to his principal, receives confidential information from the agent, may be [deemed] . . . a constructive trustee").”]

The fallacy of the People’s approach is that there is no period of time identified where an arrest and detention of a person is non-public. The arrest and detention of a person is a public act. There has been no showing in the record below that the information regarding the arrest of the defendant was a non-public event. Indeed, as the People concede California law requires the publication of arrest information and once an inmate is in custody State has a duty to publicly release such information.

The People fail to identify any duty of the intermediary providing information to the bail licensee to keep such information confidential. None of the intermediaries listed in section 2076 have a duty, fiduciary, or otherwise to not speak about the arrest of a person.

Here all of the arrestees released in this case had already been booked at the time of the communication between the intermediary inmate, and the licensee. Since there is nothing in the language of 2076 that requires that any of the information passed between a licensee and an intermediary be non-public, there was no showing in the record that any non-public information was shared between the inmate and the bail licensee.

Similarly, there is no element requiring payment for information about the existence of an arrest contained in 2076. The payment of anything of value for such information is already criminalized by Penal Code section 160. Prohibiting the transfer of knowledge of an arrest from an intermediary within a

detention facility to a licensee without compensation is not necessary, because the State already punishes such compensation without reference to the mere communication between a licensee and an intermediary of a "public fact" that is criminalized by section 2076.

Therefore even if there was an abstract way to consider the prohibitions of section 2076 commercial speech, the subject matter of the communications covered by section 2076 are "public facts" that are inexorably intertwined with fully protected speech about those important "public facts" *Riley v. Nat'l Fed'n of Blind* (1988) 487 U.S. 781, 796.) *Beeman v. Anthem Prescription Mgmt., LLC*, *supra*, 165 Cal.Rptr.3d 800. Since the fact of an arrest is a constitutionally protected public fact, the commissioner does not have authority to criminalize the distribution of this public information to a bail licensee through the intermediaries listed in CCR section 2076.

There is a right to hear the speech criminalized by section 2076

The purpose of restricting the government's power to limit free speech is to foster the free flow of ideas and perspectives necessary for sustaining a civil discourse. Implicit in the right to free speech is the right to hear such speech. It is hard to imagine a fact more necessary of public distribution than the fact of an arrest of a person and their detention by the State. Each of the parties referenced in CCR 2076, as well as the public itself, have a right to know about such arrest and detention

The public

In *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 757,758 the Supreme Court emphasized the right of the public to receive information. California law specifically provides that the public has a right to know that the State has arrested and is detaining a person. A bail licensee is also a member of the public, as are the arrestee, the intermediary, and the loved ones of the defendant. The information covered by CCR section 2076 is explicitly public information and serves important public purposes of notifying the public of the State's use of its criminal power.

In *Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 643 The high court explained that the State cannot use its power to prevent people from learning of their legal rights.[The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights." @ 643"..."But the State is not entitled to prejudge the merits of its citizens' claims by choking off access to information that may be useful to its citizens in deciding whether to press those claims in court.] In *Bates* v. *State Bar of Arizona*, 433 U.S., at 375, n. 31, theZauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, @fn12

The People fail to explain how the State can require the public dissemination of arrest information, and simultaneously criminalize its communication to a bail license. Therefore CCR 2076 is facially invalid because it pure speech regarding

important “public facts” and the People have not even attempted to justify the restriction under the strict scrutiny standard required to restrict free speech.

The defendant

The person with the most acute need to have the public dissemination of the fact of an arrest is the arrestee. Bail licensees are not able to directly or indirectly solicit defendants themselves. Penal Code 160 CCR section 2079.1 Dolezal supra. While advertising and other means of communication are available to arrestees, many such arrestees may not have the language skills or cultural knowledge necessary to navigate the requirements necessary to secure their release. California has numerous immigrant populations that speak a wide variety of languages.

The public dissemination of the fact of such a defendant’s arrest allows commercial bail agents to begin the process to secure a defendants release, by notifying the loved ones of the person‘s detention. There is of course an advantage to a bail licensee being the first to contact such potential clients, but it is a communication that the defendant who is being detained has an a right to be hear in order to minimize the many negative consequences of extended pretrial detention. *In re Humphrey*, *supra*, 11 Cal.5th at p. 241

The potential indemnitor

The primary client of a commercial bail agent is the friend or family member of the defendant that pays the premium and indemnifies the bail agent against loss if the defendant breaches the bail contract by failing to appear in court. When an individual is arrested and detained by the State the friends and family of such arrestee, have a right to know that their loved one has been arrested and is being detained by the State.

CCR 2079.1, and Penal Code 160, both restrict the parties who can be solicited by a bail licensee, based on the relationship of those parties to the arrestee. These categories of people with a social relationship to the arrestee are those who are most likely to be primarily held responsible for the appearance of the defendant in court.

Here the information criminalized by CCR 2076 is the fact of an arrest, and similar detention information. This is exactly the kind of information that a loved one has a right to know so that they may secure an arrestee's release. Criminalizing the transfer of information about the fact of an arrest from an intermediary to a bail licensee necessarily delays the transmission of the information of the arrest to the defendant's loved ones, and necessarily delays the secured release of an arrestee.

The securing of a defendant's release from State custody is a formal relationship with the court. Real consequences to those liable on the bond enhance the Court's confidence that a defendant will appear when lawfully required. Not everybody is qualified or willing to subject themselves to the serious, often financially ruinous, consequences of a bail forfeiture. Before a

commercial bail agent will write a bond they must ensure themselves that the defendant is likely to appear in court when required, and can be returned to court if the defendant fails to appear. Pen. Code, § 1305, § 1305.4. This process of underwriting a commercial bail bond takes time. The sooner that the fact of an arrest is known by potential indemnitors, the faster they can provide the documentation and assurances necessary to secure the arrestee's release. Therefore the indemnitor has a right to hear that their loved one is being detained by the State and to provide the necessary security and assurances to secure their loved one's release.

The bail licensee

A commercial bail licensee is a service provider that competes with other bail licensees to provide security for the release of arrestees from State custody. Much like a newspaper reporter, the first licensee to discover the relevant "public fact" has an advantage. The opinion below recognized that discovering the fact of the arrest allows legitimate solicitation as allowed by law. (opn. 31–32). In fact speed of service is the primary advantage of commercial bail agents. Admitted sureties can post bail security without further justification. Penal code 1276.

As noted by this Court in *In re Humphrey* (2021) 276 Cal.Rptr.3d 232, 237 most of those who post security for their release use a commercial bail agent. The fast performance of bail agents in performing their primary duty of releasing defendants from custody, as quickly as possible, also serves the public's interests. As the decision in Humphries supra also explained

many harms flow from extended pretrial detention. [The disadvantages to remaining incarcerated pending resolution of criminal charges are immense and profound.] *Id.* at p. 241. Such detentions are also at public expense.

Bail agents are compensated to provide the fastest possible secured released from custody. Commercial bail is a 24-hour business, and bail agents routinely give up sleep to make critical decisions on who will be released from custody, at all hours of the day and night. This 24-hour availability is necessary because of the demand of both those in jail and their loved ones, and the public itself, that arrestees be released as quickly and securely as possible.

III. Section 2076 is not a regulation of commercial speech.

The commercial speech doctrine allows the government greater latitude in regulating speech intended for commercial purposes. The United States Supreme Court explained in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York* (1980) 447 U.S. 557, 447 that commercial speech is characterized by its content "Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. [Citation.] In addition, commercial speech, the offspring of economic self-

interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.' [Citation.]" (*Id.* at p. 564, fn. 6, 100 S.Ct. 2343.)

While the definitions are somewhat fluid the basic definition of commercial speech, was described in *People v. Dolezal*, *supra*, 221 Cal.App.4th 167 where the court of appeals upheld prohibitions of bail agents directly soliciting arrestees for bail at a jail facility. The Dolezal court gave the following standard for determining whether the State could restrict commercial speech:

"Speech that proposes a commercial transaction is entitled to the protection of the First Amendment if it concerns a lawful activity and is not misleading. (*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, *supra*, 447 U.S. at pp. 563–564 [65 L.Ed.2d 341, 100 S.Ct. 2343].) Assuming that threshold is met, the government "must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." (*Id.* at p. 564.)

At its core commercial free speech is A communication involving the offer to sell a commercial product or service. "The high court has identified "preventing commercial harms " as "the typical reason why commercial speech can be subject to greater

governmental regulation than noncommercial speech" (*Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, 426), and it has explained that "[t]he interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech even when they are intermingled in the same publications" (*id.* at p. 426, fn. 21). (See also *Rubin v. Coors Brewing Co.*, *supra*, 514 U.S. at p. 496 (conc. opn. of Stevens, J.) [stating that "[t]he evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explains why we tolerate more governmental regulation of this speech than of most other speech"].) *Kasky v. Nike, Inc.*, *supra*, 27 Cal.4th at pp. 955–956.

In *Bolger v. Youngs Drug Prods. Corp.* (1983) 463 U.S. 60, 64–65 the Supreme court established a test to determine if a communication is commercial speech. “Because of the difficulty of drawing clear lines between commercial and non-commercial speech, the Supreme Court in *Bolger* outlined three factors to consider. "Where the facts present a close question, ‘strong support’ that the speech should be characterized as commercial speech is found where [1] the speech is an advertisement, [2] the speech refers to a particular product, and [3] the speaker has an economic motivation." *Hunt v. City of L.A.* (9th Cir. 2011) 638 F.3d 703, 715 (citing *Bolger v. Youngs Drug Prods. Corp.*, *supra*, at pp. 66–67, 103 S.Ct. 2875). These so-called *Bolger* factors are important guideposts, but they are not dispositive. *See id.* at 67 n.14, 103 S.Ct. 2875 ("Nor do we mean to suggest that each of the characteristics present in this case must necessarily be present in

order for speech to be commercial."); *Dex Media West, Inc. v. City of Seattle* (9th Cir. 2012) 696 F.3d 952, 958." *Ariix, LLC v. NutriSearch Corp.* (9th Cir. 2021) 985 F.3d 1107, 1116

The speech criminalized by section 2076 is not an advertisement but is the receipt of information by a bail licensee about potential clients. Therefor the first element of Bolger is not met.

The speech criminalized by section 2076, also does not meet Bolger's second prong because the covered speech is not speech about a product, but merely identifies those in public detention who have an interest in being released from custody.

The third prong of Bolger is also not met. Both the People and the opinion below rely on the economic interests of a bail licensee in obtaining the information of the fact of an arrest to characterize the speech covered by section 2076 as commercial. (opn 21) However the bail licensee is not the speaker of a commercial message, but a listener of an intermediary about a "public fact." Section 2076 "targets a bail licensee's arrangement or understanding with another to pass specified information to any bail licensee. (opn 19) (aob fn 24) [section 2076 "pertains only to bail agents and reaches only information identifying potential clients to the bail licensee"]. Therefor the speaker covered by section 2076, is not the bail licensee soliciting a bail bond, but a member of the public communicating public information about a "public fact."

At a minimum a proposal for a commercial transaction must be involved in the communication. In each of the commercial free-

speech cases relied upon by the People the participants in the speech were a entity seeking to purchase goods or services, and a potential purchaser of such goods or services.

The communication criminalized by CCR 2076 is that between the bail licensee and an intermediary with potential information about the status of an arrestee. This communication between a licensee and an intermediary is not commercial speech. Here section 2076 criminalizes the preparation of a potential commercial message, and the purported crime occurs, necessarily, before any communication to a potential bail client is made.

For instance, in the *Florida Bar v. Went For It, Inc.* (1995) 515 U.S. 618 decision the Florida bar prohibited attorneys from solicitating those involved in accidents for 30 days. This was upheld as a valid restriction on free speech. The equivalent in this case would be criminalizing not the solicitation of the recent accident victims, but the solicitation of a vendor who could compile a list of accident victims to be solicited. The People fail to cite any case where the expansive governmental power to regulate free-speech extended to speech between a licensee and an intermediary to gather information about potential clients. Therefore, the communications criminalized by section 2076, do not involve a commercial transaction, but merely describe potential participants in that market.

Defendants are not protected by restricting information about their custodial status to bail licensee so that they can be released from jail. Potential bail indemnitors, those who care about

arrestees enough to pledge security for their release, are not protected by delays in being informed that their loved one is under arrest.

The People's reference the State's interest in restricting the speech between licensees and intermediaries with knowledge of those arrested as protecting "fair bail industry competition" (AOB 34). It is axiomatic that in a commercial market less competition means higher prices. *Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc.* (2007) 148 Cal.App.4th 1130, 1135–1136. By restricting access of bail licensees to information about those in State custody, section 2076 necessarily reduces the number of bail licensees aware of a defendants arrest, and therefore reduces competition, increases prices, and delays the release of the arrestee. The People cannot justify criminalizing speech in order to increase bail premiums and delay the release of arrestees from custody. It is in the public's interest for arrestees to post the required security and be released as quickly as possible. Restricting information about the fact of an arrest will necessarily result in additional delays in the release of arrestees from custody, causing harm to arestees, thier loved ones, and the public itself.

The speaker and audience covered by section 2076 are not consistent with commercial speech

When examining whether speech is of a commercial nature the California Supreme Court in *Kasky v. Nike, Inc.*, *supra*, 27 Cal.4th 939 explored the relationship between the speaker of commercial speech, and the recipient of that information.

Section 2076 involves communications between four categories of persons, the arrestee, an intermediary, a bail licensee, and a potential client of the bail agency, the indemnitor. 2076 covers communications between the bail licensee and the intermediary, in this case another arrestee. There is no commercial transaction being proposed between the bail licensee and the intermediary. As described by the opinion below the bail agent is seeking information that could be used to conduct a subsequent solicitation of a friend or family member of an arrested person. Other regulations prohibit the bail agent from directly soliciting the arrestee (section 2079.1) or providing anything of value to another to solicit an arrestee while detained. Penal Code section 160.

It is unclear who the People are attempting to protect with this regulation. The only effect of 2076 is to delay the discovery of the arrest of the defendant by those who can secure his or her release. The People have failed to establish any relationship between CCR section 2076 and the prevention of commercial harms. *Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484. [It is the State's interest in protecting consumers from "commercial harms" that provides "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech." *Cincinnati v. Discovery Network, Inc.*, *supra*, 507 U.S. at p. 426. Yet bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms. Instead, such bans often serve only to obscure an "underlying governmental policy" that could be implemented without regulating speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, *supra*, 447 U.S. at 566, n. 9. In

this way, these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy. See *id.* at p. 575 (Blackmun, J., concurring in judgment).

The State cannot keep People in the dark for their own good. As explained in *Beeman v. Anthem Prescription Mgmt., LLC, supra*, 165 Cal.Rptr.3d 800, "The commercial speech doctrine looks skeptically upon the paternalistic "assumption that the public will respond 'irrationally' to the truth." (*Ibid.,*see *Sorrell,* at p. ——, 131 S.Ct. at p. 2670 ["the fear that speech might persuade provides no lawful basis for quieting it"]; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, *supra*, 447 U.S. at p. 562, 100 S.Ct. 2343 ["In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech. '[P]eople will perceive their own best interests if only they are well enough informed, and ... the best means to that end is to open the channels of communication, rather than to close them....' [Citations.]"].) *Beeman v. Anthem Prescription Mgmt., LLC*, *supra*

There are particularly Orwellian overtones of preventing arrestees from talking about the arrest of another arrestee to a bail agent to prevent the bail agent from contacting an indemnitor so that the arrestee's secured release can be arranged. Even if there was some indirect affect on the competitiveness of bail licensees, such competition benefits the public, the arrestee, and the family of the arrestee because the free communication of the "public fact" of an arrest speeds the release of a arrestees on secured release.

Pursuant to CCR section 2076 the speech prohibited by this regulation is not the traditional merchant customer communication. It is the agreement or understanding between an intermediary in possession of specified information such as the fact of an arrest, agreeing to provide such information to the bail licensee. CCR section 2076 "targets a bail licensee's arrangement or understanding with another to pass specified information to any bail licensee." (opn. 19) Therefore unlike any other case where commercial free-speech limitations have been applied, the speaker restricted by 2076 is the intermediary and it is the acceptance of this information by understanding or agreement, that is criminalized. Section 2076 does not cover communications between the licensee, and the consumer of the bail agent's services, the arrestee, and or his friends and family. No communication between the bail licensee and its customers is covered by section 2076.

The agreement of a bail agent to receive information about the fact of an arrest is not a communication that solely involves a commercial transaction. First as explained in in more detail above the arrest and detention of a person is a public fact, and not a product. Criminalizing the agreement or understanding to receive knowledge of the fact of an arrest is very different than limiting speech that merely proposes a commercial transaction. It is one thing to limit a licensee from proposing a commercial transaction it is very different to criminalize the agreement to obtain knowledge that another person may need one's services.

Therefore, CCR section 2076 does not criminalize the commercial speech of a bail licensee, but penalizes the acquisition of "public facts" of arrests in preparation of potentially making commercial speech.

If the government's power to regulate the discussion about the fact of an arrest, to the very professionals who most frequently arrange the release of the defendant from the State's custody, then any professional group that communicates controversial information is at risk. The powers implied by the governments criminalization of the discussions covered in CCR section 2076 are profound. For instance, could the State Bar decide to apply a similar regulation against attorneys to delay the communication of an arrest to incentivize "fair competition" amongst attorneys? (AOB 49). What is the commercial harm caused by bail licensees, or attorneys who obtain "wholesale identification of people with imminent bail needs." People detained by the State have immediate need to provide the court with security that will allow their release. Delaying the communication of those needs to bail licensees causes profound harm *In re Humphrey*, *supra*, 11 Cal.5th 135.

IV. If considered commercial speech the government has not carried its burden to justify the restrictions of section 2076

Section 2076 bans the uncompensated, communication of facts about a public arrest. Even if section 2076 is considered commercial speech the Appellate Court was correct in its holding that that section 2076's prohibitions do not directly advance the identified government interests. Moreover Section 2076 is more

extensive than necessary because other regulations and statutes ban the compensation of solicitors and impose time place and manner restrictions that sufficiently cover the legitimate interests identified by the People.

The State is not required, pursuant to the intermediate level of constitutional scrutiny applied to commercial speech, to demonstrate that its regulations adopt the least restrictive means available to serve its substantial interests. (*Florida Bar v. Went For It, Inc.*, *supra*, 515 U.S. at p. 632.) Instead, the First Amendment requires a "`"fit" between the legislature's ends and the means chosen to accomplish those ends,' [citation] — a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is `in proportion to the interest served,' [citation]; that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." (*Bd. of Trs. of the State Univ. of New York et al. S.V.N.Y. v. Fox et al.* (1989) 492 U.S. 469, 480 [106 L.Ed.2d 388, 109 S.Ct. 3028].)" *People v. Dolezal*, *supra*, 221 Cal.App.4th at p. 173

Section 2076 does not substantially advance governments purported legitimate interests

The People list several governmental interests in their attempt to justify the speech restrictions of CCR 2076, including "promotion of fair competition in the bail industry, to preventing disruption and jail administration, eliminating a source of public corruption and conflict of interest and for the integrity of the

justice system in the eyes of the public." (AOB 52). The People summarize the prohibitions of CCR 2076 as preventing "insider-tips" (AOB 28, 47, 50)

In order to support their arguments, the People mis-characterize the necessary elements of a violation of CCR 2076. The People include both a financial element, and a non-public information element, that are simply not present in 2076.

The government interests identified by the People are not furthered by the speech restrictions of 2076, and other regulations and statutes already prohibit the conduct identified by the People. For instance, Penal Code section 160 prohibits the payment of anything of value to a person in a place of detention for soliciting bail.

Therefore payment is not a necessary element of section 2076, and any such payments are criminalized by other statutes. Therefore, the only effect of CCR 2076 is to criminalize uncompensated agreements to provide information of those in need of bail. This will necessarily increase the time persons are detained by the State, increasing costs to the State and reducing competition among bail licensees, thereby increasing the costs of bail.

The necessary elements of a violation of section 2076 do not require the communication of confidential information

The People also attempt to justify the speech restrictions of 2076 by alleging that the information of the fact of an arrest is "non-public" information. Nothing in 2076 requires the transmission of information between the bail licensee and the

intermediary to be non-public. In fact, the People acknowledge that the State has a duty to publicly disclose the arrest of inmates when booked into jail. (AOB 49)

Here any communication of the presence of an inmate in jail occurred after that inmate has been booked. The non-public communication of the fact of an arrest is not a necessary element of 2076. There is no showing that the conviction below required proof that the inmate information was non-public. As the arrestees disclosed to the defendant were already in the jail they had obviously been booked, and the information regarding the arrestee was already public at the time it was communicated to the defendant.

It is hard to understand what the People mean by "non-public" or "insider information." The People acknowledge that " [j]ust like other members of the public, then, bail bond agents can obtain information about recent arrestee from these publicly available sources." (AOB 49). The arrest of a person by the State is necessarily a public act. The People have not provided any evidence that California is conducting secret arrests or hiding people in secret detention centers. Such "nonpublic" arrests would be in violation of numerous State, Federal, statutory, and constitutional rules and principles. Because the arrest of a person is a public act bail licenses should be free to discuss this "public fact" with any other member of the public, including those intermediaries listed in section 2076. The People have offered no justification to exclude bail licensees from the free flow of communication of public facts held by all members of the public.

The Peoples analogy of section 2076 to insider stock trading and other disclosures of non-public information are inapplicable

to this case, because the communication of the fact of an arrest, particularly after and arrestee has been booked into custody, is not the communication of a non-public fact. section 2076 does not contain a necessary element that the information of the fact of an arrest is non-public, and so the Peoples justifications based on the transmission of a non-public fact are inapplicable.

Section 2076 is overbroad because it is more extensive than necessary to substantially advance the interests identified by the People because other law prohibits the harms identified by the People

Section 2076 is part of a larger regulatory scheme to regulate the bail industry. Section 2076 only criminalizes the communication of a public fact to a bail licensee, and does not even require that the bail licensee actually make any communication with any potential client. Bail licensees are restricted by other statutes and regulations that prevent the payment of compensation for soliciting, and limit the time place manner, and persons that they may conduct bail solicitations, and prohibit the direct solicitation of arrestees. Pen. Code, § 160, CCR sections 2068, 2079, 2079.1, 2080, *People v. Dolezal*, *supra*, 221 Cal.App.4th 167.

In light of this comprehensive regulatory scheme the justifications for any additional restrictions on the public speech covered by section 2076 is weak. The People have failed to prove that section 2076 is necessary to advance the State's substantial interests.

V. Penological interests do not justify Section 2076's restrictions on free speech.

The People rely on *Turner v. Safley* (1987) 482 U.S. 78 to attempt to justify criminalizing the speech covered by section 2076. Turner allowed a prison to restrict communications between convicted felons if those restrictions survived a rational basis test. The People's main reliance is placed on *Thornburgh v. Abbott* (1989) 490 U.S. 401 which allowed a federal prison warden to restrict certain publications from being distributed in the prison "only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." § 540.71(b). *ibid.*

In Turner the court overturned restrictions on the marriage of inmates because the regulation "represents an exaggerated response to such security objectives." *Turner v. Safley*, *supra*, 482 U.S. at pp. 99–100 ["where an individual is incarcerated before trial but has not been convicted of any crime, imposing adverse conditions during his detention as a means of deterring crimes is not permissible. Such exploitation of pretrial detainees is not "appropriate to assure the detainees' presence at trial [or] to maintain the security and order of the detention facility and otherwise manage the detention facility." *Halvorsen v. Baird* (9th Cir. 1998) 146 F.3d 680, 689." *Demery v. Arpaio* (9th Cir. 2004) 378 F.3d 1020

The primary criminal liability imposed by CCR 2076 is on the bail licensee, not the pretrial detainee, much less an imprisoned convicted felon. Further the People's premise that the Insurance commissioner considered the penological interests of jailors when

enacting a regulation of a bail licensees is farfetched not supported by any authority and is not within the scope of the commissioner's duties to regulate insurance.

The State cannot impose the same level of restrictions on pretrial arrestees as convicted inmates. In *Demery v. Arpaio*, *supra*, 378 F.3d 1020 the ninth circuit explained that the Turner standard could not be used to restrict the constitutional rights of pretrial detainees. Section 2076 only applies to the communications of pretrial arrestees and others in a pretrial context. The purpose of bail is to ensure the arrestee's appearance in court when lawfully required to determine guilt. *In re Humphrey*, *supra*, 11 Cal.5th 135.

Therefore the penological interests of the State cannot justify the criminalization of a communication of a public fact to a bail licensee.

Even if a rational basis standard were applied to CCR 2076 it would not survive scrutiny. The dissemination of the fact of or the contemplation of an arrest is purely factual. The People's justifications of financial compensation or transferring "insider tipping" arrangements are not relevant because neither compensation or confidentiality are necessary elements of 2076, and other more specific statutes, regulations and case decisions restrict compensated solicitations. CCR 2079, 2079.1, 2068, Penal Code 160, *People v. Dolezal*, *supra*, 221 Cal.App.4th 167.

The People's invocation of supervisory needs of the jail to justify criminalizing the communication between bail licensees and arrestees about the "public fact" of an arrest would allow a jail facility to prohibit arrestees from discussing even the possibility of a commercial bail release. When the communication

between a licensee and an intermediary regarding the fact of an arrest is criminalized then collateral criminal consequences can easily flow to others involved through conspiracy, accomplice, accessory theories, or any of the broad range of jail disciplinary powers.

For instance, two individuals are arrested. both speak one of the many thousands of languages spoken in California jails but only one speaks English. The only person that the non-English speaker can communicate with may be his co-arrestee. If the English-speaking defendant asks a bail licensee if they could contact the non-English speaker's family to arrange for bail, a crime has occurred. Even if the only direct criminal target of 2076 is the bail licensee, both the intermediary, and the non-English-speaking arrestee have assisted in the commission of a felony. Such communications could be criminally charged as conspiracy to commit a felony see i.e. *Schenck v. United States* (1919) 249 U.S. 47, and could subject arrestees to the panoply of disciplinary actions imposed by the State on those in their custody. The assistance of the commission of a felony could serve as a basis of discipline for the arrestees under the State's expansive rights to control inmates. For example, the English-speaking intermediary arrestee could be subject to solitary confinement for requesting a bail licensee help release his non-English-speaking co-arrestee. If section 2076 is valid the intermediary arestee has participated in a criminal communication.

Similar non-criminal disciplinary and employment consequences can flow to other intermediaries. For instance, a newspaper reporter could be fired for a "criminal" communication with a bail licensee about the public fact of an arrest. A jail

trustee could be fired for providing a public record of an arrest to a bail license, even though the information is already public. A policeman could be disciplined for providing his department's public livestream web address. Such discipline for communicating a "public fact" is extremely chilling and as discussed more fully above, will naturally lead to longer pretrial detention, greater state expense, and higher bail costs.

VI. The prosecution was part of a larger political campaign against bail

The Peoples description of the investigation that led to the filing of charges against the defendant can be characterized in a very different manner than the chosen by the People. Apparently without specific complaint the prosecutor decided to investigate bail agents by having an investigator listen to thousands of hours of phone calls between bail agents and jail inmates. (AOB 55) While the People's description of this investigation alleges that bail agents were found compensating inmates and others, (AOB 55) it is notable that no charges for violating Penal Code 160 or 2079.1 were filed against defendant. Since the solicitation of persons in a jail for compensation is criminalized by Penal Code 160, and direct solicitation of inmates is prohibited by CCR2079, it can be inferred that prosecutors were only able to file charges based on the communication of the fact of an arrest. Apparently any evidence of compensation, or the passing of confidential information, were not sufficient to file a complaint. Instead the People focused on section 2076, a regulation that, to counsel's

knowledge, has never been criminally enforced before. This is certainly the first appellate case that has considered 2076 since it's 1937 enactment.

San Jose county has conducted a well-publicized campaign against bail. The People note some of the extensive anti-bail campaigns that have been conducted often by Santa Clara County @fn 29. In this context a prosecution for the transmission of a public fact appears more of a political then criminal prosecution. Notably absent from the record is any victim. The People allude to a "fair bail system" but the bail system is incentivized by the speed of service because of the immense hardships caused to persons in pretrial detention. *In re Humphrey*, *supra*, 11 Cal.5th at p. 241. The motivation of the department of Insurance and the prosecutor in bringing "the largest enforcement action ever" on such tenuous grounds as section 2076 appear to be an effort to minimize bail releases in favor of government pretrial. This overzealous prosecution is best explained by a political campaign against commercial bail, rather than a valid use of the State's criminal jurisdiction.

Law Office of John Rorabaugh

Respectfully submitted,

Dated: October 1, 2021

By: /s/ John Rorabaugh

Attorney for Defendant and Appellant
Monica Marie Martinez

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(for The People)

Lisa W. Chao
(for The People et al.)

Samuel Thomas Harbourt
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