CASE NO. S272632
IN THE SUPREME COURT OF CALIFORNIA

In Re JOHN HARRIS, JR.,
on Habeas Corpus.

BRIEF OF AMICI CURIAE CIVIL RIGHTS CORPS, THE ACLU OF NORTHERN CALIFORNIA, THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AND VENTURA COUNTY PUBLIC DEFENDER CLAUDIA Y. BAUTISTA IN SUPPORT OF PETITIONER

Court of Appeal Case No. A162891 (First Appellate District)
Superior Court Case No. 21-NF-002568A (County of San Mateo),
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ISSUE PRESENTED

What evidence may a trial court consider at a bail hearing when evaluating whether—for purposes of article I, section 12 of the California Constitution—"the facts are evident or the presumption great" with respect to a qualifying charged offense, and whether there is a "substantial likelihood" the person's release would result in great bodily harm to others?

INTERESTS OF AMICI CURIAE

Civil Rights Corps ("CRC") is a non-profit organization dedicated to challenging systemic injustice in the United States' legal system. CRC works with individuals accused and convicted of crimes, their families and communities, people currently or formerly incarcerated, activists, organizers, and government officials to create a legal system that promotes equality and freedom.

CRC has developed unique and unparalleled expertise on the bail system in the United States. It has spent years studying the history of the bail system in American courts and modern practices regarding bail. It has also worked with state supreme courts, attorneys general, local judges, state and local legislators, prosecutors, pretrial-services agencies, and public defenders to design and implement effective and fair bail practices. In addition, CRC has been instrumental in litigating constitutional issues relating to bail systems across the country. That includes California, where CRC has litigated numerous cases, including *In re Humphrey*, 11 Cal.5th

135, 156 (2021). CRC works to ensure that individuals are not detained pretrial simply because they are poor or otherwise detained in violation of their constitutional rights.

The ACLU of Northern California ("ACLU NorCal") is an affiliate of the national ACLU, a nationwide nonprofit, nonpartisan organization with approximately two million members dedicated to preserving and protecting the principles of liberty and equality embodied in the state and federal Constitutions and related statutes. ACLU NorCal has over 100,000 total members. As a legal organization and on behalf of its members, ACLU NorCal has an abiding interest and expertise in freedom from unnecessary confinement, the presumption of innocence, criminal due process, and the right to bail in particular.

In the bail context, ACLU NorCal has appeared as amicus to uphold the rights enshrined in Article I, section 12 of the California Constitution, including *In re Humphrey*, 19 Cal. App. 5th 1006 (2018). ACLU NorCal has also been active in shaping legislation on bail at the state level. More generally, ACLU NorCal frequently litigates matters of State and Federal due process in the courts of California in an effort to ensure robust protection of the fundamental liberty interest in freedom from confinement.

The California Public Defenders Association ("CPDA") is the largest association of criminal defense attorneys and public defenders in the State of California. CPDA's members represent the vast majority of

individuals charged with serious criminal offenses in California's courts. And for the past half century, CPDA has been a leader in continuing legal education and is one of only two organizations deemed by the Legislature to be an "automatically" approved MCLE provider. In light of this collective experience, CPDA is in a unique position to offer a practitioner's perspective of the issue presented in this case.

California courts have granted CPDA leave to appear as amicus curiae in nearly 80 cases, *see, e.g.*, *In re Humphrey*, 11 Cal.5th 135 (2021). CPDA has likewise filed amicus briefs with the United States Supreme Court on several occasions. *See, e.g.*, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007).

The Ventura County Public Defender's office is established pursuant to Government Code sections 27700-27712 to provide quality legal representation to indigent persons in the courts of Ventura County. The Public Defender is well-versed on all issues relating to California's criminal justice system and often files amicus briefs with California courts on issues of statewide and national significance.

Claudia Y. Bautista is the Public Defender of Ventura County. Each year, the Public Defender provides a defense in some 16,000 new misdemeanor cases and over 3,500 new felonies. The Public Defender has been permitted to appear as amicus in this Court since 1969. *See, e.g.*, *Humphrey*, 11 Cal.5th 135. In 2005, the Court allowed the Public Defender

to present oral argument as an amicus in *People v. Salazar*, 35 Cal.4th 1031 (2005).

INTRODUCTION

Freedom from forced bodily restraint by the government is "a fundamental interest second only to life itself in terms of constitutional importance." *Van Atta v. Scott*, 27 Cal.3d 424, 435 (1980). While deprivation of physical liberty is common once a person has been convicted of a crime, the U.S. Supreme Court has explained that because "[i]n our society liberty is the norm, … detention prior to trial … is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). The federal constitutional standard for pretrial detention is accordingly high, requiring—as this Court held last year—"an individualized determination that … detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests." *Humphrey*, 11 Cal.5th at 156.

California law, meanwhile, has long been more protective of the fundamental right to pretrial liberty than federal law, dating back to the state's first constitution, in 1849. The state constitution today continues to protect that right, prohibiting pretrial detention in article 1, section 12—the provision at issue in this case—absent specific findings that the narrow circumstances in which such detention is permitted are present.

California's longstanding commitment to pretrial liberty is all the more important now, as overwhelming research has established the catastrophic long-term effects of pretrial detention, including separation from children, elderly parents, and other dependents; loss of jobs and housing; exposure to infectious disease and violence (including sexual assault); inadequate medical care; interrupted mental health treatment; and increased recidivism—thereby reducing overall public safety.

The high standards for pretrial detention under federal and state law mean little, however, if all that is needed to jail presumptively innocent individuals—for weeks, months, and often even years—is hearsay, a prosecutor's proffer, and/or unproven criminal charges. Amici therefore urge the Court to provide evidentiary protections at pretrial-detention hearings that are maximally protective of individual liberty. But even if the Court declines to apply the full strictures of the Evidence Code, or declines to determine their applicability on the limited facts of this case, it should make clear that the protections required in this context by the state and federal constitutions exceed the process afforded in this case.

More specifically, the Court should hold as a matter of constitutional law that, at a minimum, a trial court may not (1) assume guilt, i.e., assume the truth of criminal charges when making decisions about pretrial detention, or (2) rely on inadmissible hearsay to establish a fact that is material to a detention determination and that the defendant disputes,

absent good cause. The Court should further hold that, even in the presence of good cause to permit hearsay, a trial court may not (3) rely on hearsay *alone* when imposing pretrial detention.

Each of these rules reflects both common sense and a wide judicial consensus in other jurisdictions. The rules are also consistent with the approach California courts have taken to the use of hearsay in parole- and probation-revocation hearings (where the liberty interest is weaker than with bail, due to the conviction). Amici's proposed hearsay rules are also straightforward to administer and provide ample room for the parties to make stipulations to streamline proceedings or to protect the government's important interests.

In urging these rules—which are compelled by the constitutional gravity of confining a human being in a jail cell for long periods prior to conviction—amici recognize the changes they will require for courts in which pretrial-detention hearings have lacked the rigor required not only by our state and federal constitutions, but also by our society's commitments to pretrial liberty and the presumption of innocence. But as the U.S. Supreme Court has repeatedly observed (including in the context of unconstitutional detention), the fact that a "holding may place a further burden on States in administering criminal justice" does not justify declining to enforce constitutional rights. *Williams v. Illinois*, 399 U.S. 235, 245 (1970). "[C]onstitutional imperatives," the Court has rightly

explained, "must have priority over the comfortable convenience of the status quo," including where (as here) the status quo involves "old infirmities which apathy or absence of challenge has permitted to stand." *Id.* And requiring courts to be more attentive to the constitutionally required evidence-based alternatives to pretrial detention that can ensure safe release of most charged individuals will only increase the strength and integrity of California's pretrial system.[1]

SUMMARY OF ARGUMENT

I. Pretrial detention (or the imposition of conditions or release) based on a presumption of guilt greatly undermines the bedrock presumption of innocence, and it vitiates the burdens on the government set forth in both article I, section 12 of the California Constitution and this Court's precedent, including *Humphrey*. However, a single line of dicta in *Humphrey* appears to require that result, stating that courts in setting bail "must assume the truth of the criminal charges." 11 Cal.5th at 153. That statement—made without the benefit of any briefing or argument on the issue—is contrary to the dictates of the California and U.S. Constitutions, and it is already causing (and will continue to cause) both confusion among

[1] The same due process principles that govern pretrial detention also require stringent protections before any significant pretrial deprivation of liberty and bodily autonomy such as electronic monitoring, forced medical treatment, or the forfeiture of protections against warrantless search and seizure. Because this case concerns only pretrial detention, the Court need not decide the contours of those protections here.

lower courts on how to reconcile a presumption of guilt with *Humphrey*'s core holding, as well as improper curtailment of fundamental rights. It is also anomalous; amici are not aware of any other decision instructing trial courts to assume guilt in making determinations about pretrial detention or release. This Court should repudiate *Humphrey*'s dictum and hold that trial courts may not assume the truth of criminal charges when making the factual findings required for pretrial detention.[2]

II. The U.S. and California Constitutions preclude reliance on inadmissible hearsay, over a defendant's objection, to establish a fact that is material to detention if that fact is disputed by the defendant by means of a not-guilty plea, proffer, or otherwise. As a matter of procedural due process, inadmissible hearsay is too unreliable in those circumstances to adequately guard against the risk of an erroneous deprivation of the fundamentally important interest in pretrial liberty, an interest that far outweighs the burdens on the government of adducing evidence other than inadmissible hearsay. Inadmissible hearsay is also too unreliable to constitute "evident" facts, to give rise to a "great" presumption, or to

[2] This issue is encompassed within the one on which this Court directed briefing and argument. The granted issue is what evidence a court may rely on at a bail hearing. Trial courts routinely rely on the charge or charges that a defendant faces—and a key part of the question of what evidence may be considered is whether that evidence may or must be presumed true. *See, e.g.*, *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008) (treating a presumption bearing on pretrial detention as "evidentiary," "to be weighed along with other evidence").

establish "clear and convincing" evidence, as the state and federal constitutions require to justify pretrial detention. This Court should therefore hold that the government may not, over the defendant's objection, rely on inadmissible hearsay to establish a disputed fact material to a pretrial-detention decision.

This rule will protect defendants' fundamental rights in those circumstances where adversarial testing is most necessary, while preventing pretrial-detention hearings from becoming unduly burdensome. To further ensure its workability, the rule should be subject to additional limits developed in case law regarding revocation of post-conviction supervision, namely that courts can tolerate certain reliable forms of hearsay that would be inadmissible at trial, and may dispense with live testimony upon a demonstration of good cause.[3]

Finally, for essentially the same reasons, this Court should hold that (as courts have recognized in a variety of contexts) hearsay is insufficiently reliable to provide the *exclusive* basis for any order of pretrial detention.[4]

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[3] This brief will use the term "inadmissible hearsay" to refer to hearsay that is inadmissible under the relaxed rules of evidence that apply at supervision-revocation proceedings and that are proposed here.

[4] The term "hearsay" can have two meanings in the context of this case. It could include any "proffer"—i.e., an attorney's description of what they assert the evidence would show. Or it could refer more narrowly to evidence that is hearsay in nature, whether put on at an evidentiary hearing or described by an attorney. Amici use the second definition in this brief so as to distinguish "hearsay" from "proffers," with the latter sometimes describing non-hearsay evidence and constituting merely an offer of proof

ARGUMENT

I. COURTS MAY NOT PRESUME PEOPLE GUILTY OF UNPROVEN CHARGES WHEN MAKING PRETRIAL-DETENTION DETERMINATIONS

The presumption of innocence is a "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship*, 397 U.S. 358, 363 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Together with the heightened burden of proof in criminal proceedings, the presumption protects an individual's fundamental right not to "'lose his liberty unless the Government has borne the burden of … convincing the factfinder of his guilt.'" *Id.* at 363-364 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). And pretrial release is a vital manifestation of the presumption of innocence. As the U.S. Supreme Court has stated, "[u]nless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951). Pretrial detention based on a presumption of guilt, i.e., an assumption that "evidence" in the form of unproven criminal charges is true, would turn the presumption of innocence on its head.

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as to what the non-hearsay evidence would show. For purposes of this brief, such "proffers" are not themselves "hearsay." Rather, the use of such proffers is an alternative to holding an evidentiary hearing.

Amici urge the Court to impose similar constraints on the use of proffers as on hearsay, save for a distinction elaborated below. *See infra* footnote 12.

That, however, is what dictum in *Humphrey* seems to endorse. There, this Court stated that "[a]long with th[e] primary considerations of victim and public safety, the [trial] court must assume the truth of the criminal charges." 11 Cal.5th at 153. As elaborated in the balance of this section, that statement was not necessary to resolve any issue before the Court in *Humphrey*, is contrary to state and federal constitutional law, and will, if uncorrected, cause considerable confusion among lower courts attempting to apply the bail-determination framework that constitutes *Humphrey*'s core holding. This Court should now squarely hold that courts may not, in making determinations about pretrial release and detention, presume guilt, i.e., presume the truth of unadjudicated criminal charges.

A. *Humphrey*'s dictum about presuming guilt in making decisions about pretrial release was made without the benefit of briefing or argument. Whether a court, in considering conditions of pretrial release, must presume the truth of criminal charges was not one of the issues on which the Court explicitly directed briefing and argument when it granted review in the case. *See In re Humphrey (Kenneth) on Habeas Corpus*, 233 Cal. Rptr.3d 129 (Cal. 2018). Accordingly, none of the parties—including the original petitioner (the San Francisco District Attorney) and the California Attorney General (who was substituted as petitioner after briefing concluded)—addressed that issue in briefing or at oral argument.

Nor was *Humphrey*'s statement about presuming the truth of criminal charges necessary to the Court's resolution of the issues that were before it, including whether pretrial release may be conditioned on a person's ability to afford money bail and whether pretrial detention in the interest of public safety must be based on "clear and convincing evidence that no condition short of detention could" protect the safety of the community. *Humphrey*, 11 Cal.5th at 143. Indeed, *Humphrey* expressly declined to define the contours of exactly what evidence may or must be considered and what procedures may or must be used at bail hearings, leaving those questions "to future cases." *Id.* at 156. Here, the question of what evidence a trial court may consider at a bail hearing is squarely presented. This Court should clarify that a court may not presume criminal charges true when deciding whether, and under what conditions, a person should be released pretrial.

B.1. Rejection of *Humphrey*'s dictum is warranted because neither the California nor the U.S. Constitution permits courts to presume the truth of criminal charges when making bail determinations. The California Constitution bars pretrial detention unless "the facts [of the offense] are evident or the presumption great," Cal. Const., art. I, § 12, language this Court has construed to mean "enough evidence of reasonable, credible, and solid value to sustain a guilty verdict," *In re White*, 9 Cal.5th 455, 463 (2020). Detention for non-capital offenses, such as in this case, requires

more still; the government must also produce "clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others." Cal. Const., art. I, § 12(b). And the prerequisites for detention in cases involving threats are similarly stringent. *Id.* § 12(c). Presuming the truth of criminal charges—the filing of which requires no more than probable cause—is flatly inconsistent with these standards. As the Pennsylvania Supreme Court recently explained in reaching the same conclusion regarding its similarly worded constitutional bail provision, "the evidentiary threshold for denying bail [must] be greater than that needed to arrest or indict the accused in the first place. Otherwise, the right-to-bail clause need only have provided that '[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses' [or felony offenses involving acts of violence on another person] full stop." *Commonwealth v. Talley*, 265 A.3d 485, 515 (Pa. 2021) (quoting Pa. Const. art. I, § 14). That's because "an interpretation of the phrase 'proof is evident, or presumption great' as equivalent to the standard required for those pre-detention determinations would render it both duplicative and superfluous." *Id.* at 515-516.[5]

[5] *See also Williams v. Virgin Islands*, 53 V.I. 514, 532 (2010) (noting, in a case involving the same standard, that "Detective Matthews's testimony at the pre-trial detention hearing added little, if anything, to the statements offered in Detective Matthews's affidavit to establish probable cause for an arrest warrant and to support the Information. To hold … that Detective Matthews's repetition of the hearsay statements in his probable cause affidavit met the clear and convincing standard … would … permit

The state and federal constitutions' due process guarantees likewise preclude presuming the truth of criminal charges in making bail determinations. As the Supreme Court has explained, "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). And as the Ninth Circuit has elaborated, the fact that "an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody." *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006). Pretrial detention therefore requires more than simply proof of the existence of criminal charges.

Humphrey cited *Salerno* in support of a presumption of guilt, *see* 11 Cal.5th at 153, but *Salerno*, in upholding the constitutionality of the Bail Reform Act, explained that "probable cause to believe that the charged crime has been committed by the arrestee" was "not enough" to justify detention under the statute, 481 U.S. at 750. Rather, "the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.* It is under those "narrow circumstances," the Court stated, that "society's interest in crime prevention" is sufficient to outweigh

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the People to detain a defendant without bail upon the showing of mere probable cause that the defendant committed" an offense qualifying for pretrial detention).

the arrestee's interest in pretrial liberty. *Id.* Indeed, the Bail Reform Act that *Salerno* upheld requires judges to analyze "the weight of the evidence against the person" rather than assuming the truth of the charges. 18 U.S.C. § 3142(g)(2); *see also United States v. Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985) ("[T]he statute neither requires nor permits a pretrial determination that the person is guilty."). Permitting detention based upon a presumption that criminal charges are true vitiates the protections *Salerno* held critical to ensuring due process and amounts in essence to detention based upon the mere existence of criminal charges.

Moreover, presuming guilt would violate this Court's core due process holding in *Humphrey*: in view of the "state and federal constitutional constraints," 11 Cal.5th at 151, the permissibility of pretrial detention "depends on the insufficiency of less restrictive conditions to vindicate compelling government interests." *Id.* at 143. Since untested criminal charges may overstate the degree of the defendant's danger or flight risk, simply presuming the truth of those charges will in many instances lead to improper detention. In other words, if a trial court simply assumes that the defendant committed a particular act or series of acts that are themselves the basis for the finding of dangerousness or flight risk, it may well be imposing detention not actually necessary "to vindicate compelling government interests," as required under *Humphrey*'s substantive due process analysis. *Id.*

The procedural protections that *Humphrey* mandated in connection with pretrial-detention decisions are likewise contravened by a presumption of guilt. *Humphrey* mandates "individualized determination[s]," 11 Cal.5th at 156; *accord Salerno*, 481 U.S. at 755; *Stack v. Boyle*, 342 U.S. 1, 5 (1951)—determinations as to which the government bears the burden of proof by clear and convincing evidence, 11 Cal.5th at 156. To the extent a court justifies pretrial detention with an assumption of guilt, it excuses the government from proving the alleged acts that bear on the detention determination, thereby violating these procedural due process requirements.[6]

2. The authority *Humphrey* cited for the proposition that criminal charges must be presumed true in bail hearings cannot support such a rule. *Humphrey* relied on the Court's 142-year-old per curiam decision in *Ex parte Duncan*, 53 Cal. 410 (1879), and a century-old court of appeal decision, *Ex parte Ruef*, 7 Cal. App. 750 (1908). *See* 11 Cal.5th at 153. *Duncan*, in turn, cited a single-justice decision, *Ex parte Ryan*, 44 Cal. 558 (1872), which cited no authority for its assertion that "the presumption of guilt arises against the prisoner upon the finding of an

[6] In view of these requirements, courts have invalidated mandatory-detention statutes that direct detention for specified categories of defendants, often relying on the offense charged. *See, e.g.*, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc); *State v. Wein*, 417 P.3d 787, 797 (Ariz. 2018); *Simpson v. Miller*, 387 P.3d 1270 (Ariz. 2017). The presumption of guilt *Humphrey* mandated shares the same essential constitutional defect as these statutes.

indictment against him." *Id.* at 558. Before *Humphrey*, moreover, this Court had cited *Duncan* only once in the last 131 years, in *In re York*, 9 Cal.4th 1133, 1148 (1995)—a case that considered not what evidence could support pretrial detention (or presuming the truth of criminal charges), but only whether release on one's own recognizance could be subject to certain conditions, *id.* at 1137. Given all this, *Duncan* and *Ryan* are not a sound basis to adopt a presumption of guilt. *Humphrey*, moreover, went beyond even what *Duncan* and *Ryan* stated. Each stated that a presumption of guilt arises only "'upon … indictment.'" *Duncan*, 53 Cal. at 411 (quoting *Ryan*, 44 Cal. at 558). *Humphrey* did not include that limitation.[7]

As *York* noted, *see* 9 Cal.4th at 1148, *Bell v. Wolfish* stated that the "presumption of innocence … has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun," 441 U.S. at 533. To amici's knowledge, however, no other case

[7] To the extent that *Humphrey* was citing *Duncan* for the proposition that courts should presume guilt to help determine a defendant's threat to public safety, that is all the more reason to reject the dictum. When *Duncan* was decided (and for a century thereafter), courts in California were prohibited from setting or denying bail in non-capital cases to protect public safety. As the court of appeal explained in *In re White*, 21 Cal. App. 5th 18 (2018), "[h]istorically, with the exception of capital cases, bail was available to a defendant without regard to his threat to public safety. The former provisions of the California Constitution prohibited applying a public safety exception to the general right to reasonable bail." *Id.* at 27. That is why this Court stated in *In re Underwood*, 9 Cal.3d 345 (1973), that "[b]ail is not a means for … protecting the public safety," *id.* at 348. *Duncan* (and *Ryan*) thus provide no support for presuming guilt in assessing whether public safety requires pretrial detention, or any particular conditions of release.

(state or federal) has read *Bell* to mean that a court considering pretrial detention "must assume the truth of the criminal charges," *Humphrey*, 11 Cal.5th at 153. And for good reason. *Bell* did not address what is required to justify pretrial detention, only what conditions of confinement are permissible for those for whom pretrial detention has already been deemed necessary. *See* 411 U.S. at 523-525. Far from suggesting that arrestees must be presumed guilty for purposes of determining the necessity of pretrial detention, *Bell* held only that the presumption of innocence is not "the source" of any "right to be free from [certain] conditions" attendant to a properly imposed confinement. *Id.* at 532. Moreover, to say (as *Bell* did) that the presumption of *innocence* does not apply "to a determination of the rights of a pretrial detainee during confinement," 441 U.S. at 533, is very different than saying (as *Humphrey* did) that a court considering conditions of pretrial release must presume *guilt*. *Bell*'s statement is consistent with a court not making any presumption when considering conditions of pretrial release, but instead basing its decision on the evidence actually adduced.

C. Lower courts already treat *Humphrey*'s dictum as authoritative, reducing the government's burdens at bail hearings. In this case, for example, the court of appeal ruled there was clear and convincing evidence that Mr. Harris's release would risk great bodily harm to others because Mr. Harris was charged with "'serious' and 'violent' felonies … and the [superior] court was required to assume the truth of these charges."

In re Harris, 71 Cal. App. 5th 1085, 1102 (2021) (citing *Humphrey*, 11 Cal.5th at 153).

Unless corrected, courts will undoubtedly continue to read *Humphrey* to require treating the charges as true when determining whether the criteria for pretrial detention are met. That presumption will generate confusion because it is hard to reconcile with this Court's instruction that trial courts must evaluate the strength of the government's evidence. *See In re White,* 9 Cal.5th at 463-469 (affirming finding of dangerousness because it "did not rest 'merely on the fact of arrest for a particular crime,' but on an 'individualized determination' that White's release threatened others with a substantial likelihood of great bodily harm"). And as noted, it is contrary to *Humphrey*'s own holding that the government must establish on an individualized basis that pretrial release presents an intolerable risk that alternative conditions of release cannot sufficiently mitigate. 11 Cal.5th at 153.

The dictum also raises numerous practical problems that risk enormous confusion. For example, should courts only presume the elements of the charges? Or should they also presume the truth of the initial police report or witness statements? Or the prosecutor's proffer of the facts underlying the charges? Or every single fact alleged by any witness? These and other questions make clear that a far better rule would be, as is common practice in federal courts and in the courts of other states,

to require the prosecution to support contested material factual assertions with reliable evidence. *Humphrey* did not provide answers to any of these questions.

For all these reasons, this Court should reject its dictum in *Humphrey* and hold that courts may *not* presume the truth of the charges against a defendant when determining whether the government has met its burden to warrant pretrial detention.

II. THE U.S. AND CALIFORNIA CONSTITUTIONS PRECLUDE PRETRIAL DETENTION BASED ON INADMISSIBLE HEARSAY WHEN THE DEFENDANT OBJECTS AND THERE IS A DISPUTE AS TO A MATERIAL FACT

The court of appeal held here that a trial court may rely on inadmissible hearsay as a basis to deprive a presumptively innocent person of one of the most fundamental of all interests: physical liberty. That holding is incorrect. Inadmissible hearsay is too unreliable to support a deprivation of pretrial liberty, and thus cannot be the basis for such a deprivation if a defendant objects to that evidence. Amici recognize that bail hearings must happen quickly, and when prosecutors and defendants consent to the introduction of hearsay or proceeding by proffer, or if no factual dispute is implicated, nothing in the U.S. or California Constitution is violated. But when the defendant does object, both due process and article I, section 12 require the government to establish a disputed material fact through an evidentiary hearing rather than by proffer. Moreover, at the evidentiary hearing, the defendant must be able to cross-examine adverse

witnesses, absent good cause to deny that opportunity. (As elaborated below, however, even in the presence of good cause, pretrial detention cannot be based *exclusively* on hearsay.) This rule mirrors the approach of several jurisdictions where evidentiary hearings on pretrial detention are common, as well as California's own approach to vindicating the due process rights of convicted supervisees facing revocation. And it avoids the anomalous situation in which pretrial detention is the only instance of long-term physical confinement permitted in California without evidentiary protections at least as strong as those identified here.

A. Absent Good Cause, Due Process Requires An Opportunity For Cross-Examination When The Government Seeks To Rely On Inadmissible Hearsay To Establish A Fact Material To A Deprivation Of Pretrial Liberty

A pretrial deprivation of physical liberty is constitutionally permissible only when imposed "in a fair manner." *Salerno*, 481 U.S. at 746. Under the familiar test adopted by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), claims of inadequate procedural due process are resolved under federal law by examining: (1) the "private interest" (here, in pretrial liberty); (2) the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

requirement would entail," *id.* at 335. This Court has interpreted California's Constitution to require more, reasoning that the federal approach "undervalues the important due process interest in recognizing the dignity and worth of the individual by treating him as an equal, fully participating and responsible member of society." *People v. Ramirez*, 25 Cal.3d 260, 267 (1979). Procedural due process claims under the California Constitution thus also involve a fourth factor: "the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official." *Id.* at 269.

Applying these factors makes clear that it is impermissible, absent good cause to rely on inadmissible hearsay to establish a material fact in dispute to support detention over the defendant's objection.

1. The Individual Interest Here—Freedom From Being Jailed Before Any Determination of Guilt—Is Extraordinarily High

As the U.S. Supreme Court has explained, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). And as this Court has held, personal liberty is "a fundamental interest second only to life itself in terms of constitutional importance." *Van Atta*, 27 Cal.3d at 435; *accord People v. Olivas*, 17 Cal.3d 236, 249 (1976); *Salerno*, 481 U.S. at 750 (describing "the individual's … interest in liberty" as

"fundamental"). That interest is not diminished after criminal charges are filed; "[t]he accused retains a fundamental constitutional right to liberty" prior to a determination of guilt. *Humphrey*, 11 Cal.5th at 150. As a result, detention prior to trial is, as noted, the "carefully limited exception." *Salerno*, 481 U.S. at 755.

The importance of the individual interest in pretrial liberty is magnified by the often-extended duration of pretrial detention and the tremendous harms such detention inflicts. When researchers investigated pretrial detention across the state in 2021, more than 1,300 individuals then in custody had been jailed pretrial for longer than three years. Robert Lewis, *Waiting for Justice*, Cal Matters (March 31, 2021), https://calmatters.org/justice/2021/03/waiting-for-justice (all web pages cited in this brief visited July 28, 2022). A quarter of these had endured more than five years of pretrial custody. *Id.* In just 32 of California's 58 counties, where data was available, about 5,800 individuals then in custody had been in jail pretrial for more than a year. *Id.* The mine-run case can involve substantial periods of confinement, too: in Los Angeles County, the median felony pretrial detainee from 2018 through 2020 was incarcerated for 62 days, and 25% of felony detainees were detained for more than 150 days. County of Los Angeles, Chief Executive Office, *Report on Data Collection to Support Pretrial Reform in Los Angeles County (Item No. 3, Agenda of August 4, 2020)* at 19 (Oct. 26, 2021), tinyurl.com/mrxah6a7.

As this Court emphasized in *Humphrey*, the harms stemming from any pretrial incarceration can be "immense and profound." 11 Cal.5th at 147. They include not just impairment of the defendant's ability to "prepar[e] a defense," but also the "heighten[ed] risk of losing a job, a home, or custody of a child," and correlation with a "higher likelihood of reoffending, beginning anew a vicious cycle." *Id.*; *see also Van Atta*, 27 Cal.3d at 436 (pretrial detention "curtail[s]" a detainees ability to prepare a defense by "impair[ing]" communications with counsel and "hinder[ing] the detainee's ability to gather evidence and interview witnesses"). Numerous other courts agree. *See, e.g.*, *Brangan v. Commonwealth*, 80 N.E.3d 949, 966 n.23 (Mass. 2017); *Curry v. Yachera*, 835 F.3d 373, 376 (3d Cir. 2016); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (en banc). Put simply, "[a]ny amount of actual jail time" imposes "exceptionally severe consequences for the incarcerated individual." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1907 (2018).

Voluminous social-science research amply supports these judicial conclusions. For example, according to one study of several hundred thousand Texas cases, an arrestee "detained for even a few days may lose her job, housing, or custody of her children." Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 713 (2017); *see also* Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344, 1354-1356 (2014). And the U.S.

Justice Department's Bureau of Justice Statistics has explained that those in jail suffer every major type of chronic condition and infectious disease at higher rates than others. Maruschak, Laura M., et al., *Medical Problems of State and Federal Prisoners and Jail Inmates* at 2-4, Bureau of Justice Statistics, U.S. Department of Justice (revised Oct. 4, 2016), https://bjs.ojp.gov/content/pub/pdf/mpsfpji1112.pdf. After they are freed, moreover, those who have been imprisoned earn less on average than their counterparts—a 40% decrease in earnings, one study found. *See Collateral Costs: Incarceration's Effect on Economic Mobility* 11, The Pew Charitable Trusts (2010), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf. Finally, because of all these dire consequences, pretrial detainees are more likely to plead guilty—regardless of whether they are guilty—in order to gain speedy release. *See ODonnell v. Harris County*, 251 F.Supp.3d 1052, 1105-1107, 1157-1158 (S.D. Tex. 2017) (citing relevant studies), *aff'd in relevant part*, 892 F.3d 147 (5th Cir. 2018) (op. on reh'g). Pleading guilty, of course, itself brings enormously deleterious consequences.

In short, individuals' extremely "strong interest in liberty" prior to a determination of guilt, *Salerno*, 481 U.S. at 750, cannot be overstated. The first *Mathews* factor thus strongly supports robust procedures to prevent erroneous infringements of that interest.

2. The Risk Of Erroneous Deprivation Without The Additional Procedural Protection Sought Is Significant Given The Inherent Unreliability Of Hearsay

The second *Mathews* factor likewise weighs in favor of barring reliance (where objected to) on hearsay to establish a disputed fact that is material to a detention decision, absent good cause. Such reliance creates a significant risk of erroneous deprivations of pretrial liberty. As this Court noted in *In re Cindy L.*, 17 Cal.4th 15 (1997), the "general rule that hearsay evidence is inadmissible because it is inherently unreliable is of venerable common law pedigree," *id.* at 27 (citing *Englebretson v. Industrial Accident Commission*, 170 Cal. 793, 798 (1915)). That rule is grounded in the widely understood reality that "repetition of conversations, no matter how good the intentions of the narrator may be, is subject to twists of wishful thinking, of interpretation or substitution of words or differences in phraseology[]—in short, the conveyance of a completely erroneous version of what the actual conversation was." *United States v. Fisher*, 618 F.Supp. 536, 538 (E.D. Pa. 1985). When a fact established through hearsay is immaterial, undisputed, or the defendant does not object, the risk of any erroneous deprivation is reduced. But when hearsay is relied upon to establish a material fact, particularly one that the defendant disputes, the risk of an erroneous deprivation caused by hearsay's inherent unreliability is too great.

The additional procedural protection at issue here—requiring live testimony subject to cross-examination—would substantially mitigate this risk. Courts have repeatedly described cross-examination as "'the greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore, Evidence § 1367, at p.29 (3d ed. 1940))); *accord, e.g.*, *People v. Reynolds*, 152 Cal. App. 3d 42, 46 (1984). It serves to "test the credibility, knowledge and recollection of the witness" and to "elicit additional evidence." *People v. Zambrano*, 124 Cal. App. 4th 228, 240 (2004). Mistakes of memory can be identified, and undisclosed information teased out. Moreover, the proposed additional procedure would be required only where the risk of erroneous deprivation of people's freedom is highest—i.e., where (1) the defendant objects to reliance on hearsay and (2) there is dispute as to a material fact, established either through a not-guilty plea as to facts underlying criminal charges or through a proffer by the defense outlining the dispute. This will greatly reduce the risk of presumptively innocent individuals being deprived of their fundamental interest in physical liberty, in many cases for months or years, and exposed to the significant harms that pretrial detention inflicts.

3. The Benefit Of The Additional Procedural Protection Far Outweighs Any Burden On The Government

The third *Mathews* factor—the government's interests—does not remotely outweigh the first two, and thus does not tip the balance against requiring the procedural protection sought here.

The government unquestionably has legitimate interests in promoting public and victim safety and reasonably ensuring the arrestee's appearance at trial. But it has no valid interest in pretrial detention of anyone who poses neither a flight risk nor a safety threat. The government's interest in pretrial detention extends "only to those prisoners who, in fact, pose[] a flight risk" or risk to public safety. *Talley*, 265 A.3d at 514. Indeed, the government has an interest in *not* erroneously detaining those who need not be detained. As this Court stated in *Humphrey*, "[j]ust six California counties (Alameda, Fresno, Orange, Sacramento, San Bernardino, and San Francisco) … spent $37.5 million over a two-year period jailing people who were never charged or who had charges dropped or dismissed." 11 Cal. 5th at 147-148. Such unnecessary pretrial detention is all that the ban on inadmissible hearsay sought here would avoid.

Moreover, any incremental burden on the government from the rule amici urge would be limited, because that rule would require the proposed additional procedure only in the "exception[al]" cases where the government seeks pretrial detention, *Humphrey*, 11 Cal.5th at 155, and only in the event of both a disputed material fact and objection by the defendant to the reliance on hearsay. Any burden on the government could be lessened still further through permitting inherently reliable "documentary" hearsay, such as lab reports, as California courts do in post-conviction revocation hearings. *See People v. Johnson*, 121 Cal. App. 4th 1409, 1413

(2004). Pennsylvania's Supreme Court has struck a similar balance as to the use of hearsay at pretrial-detention hearings, requiring "admissible evidence in order to establish the material factual claims implicated by the principal asserted ground for the bail denial" while permitting "hearsay to present scientific, technical, or forensic information, to introduce laboratory reports, or to corroborate competent witness testimony." *Talley*, 265 A.3d at 524 n.35.

The government also has an interest in protecting witnesses from particular hardship associated with live testimony. That interest can be accommodated by permitting the government to rely on hearsay testimony when a court finds individualized good cause to do so, such as a demonstrated risk of harm to the declarant, witness unavailability, or excessive difficulty or expense. The same exception already exists for post-conviction revocation hearings, in which defendants otherwise maintain the right to confront and cross-examine witnesses. *See People v. Winson*, 29 Cal.3d 711, 718-719 (1981). The burdens of the procedure sought here are thus minimal, particularly when weighed against the individual's fundamental interest in pretrial liberty, the high risk of erroneous deprivations of that liberty with inadmissible hearsay, and the

substantial mitigation of that risk provided by requiring live testimony subject to cross-examination.[8]

4. California's Emphasis On Individual Dignitary Interests Reinforces The Need For Additional Procedural Protections

While federal due process alone mandates the proposed procedural protections, that mandate is bolstered by California's additional state constitutional guarantees. In finding the three *Mathews* factors insufficient, this Court has emphasized the importance of the due process interest in recognizing an individual's "dignity and worth." *Ramirez*, 25 Cal.3d at 267; *accord In re Vicks*, 56 Cal.4th 274, 310 (2013). "Dignity and worth" are necessarily intertwined with liberty prior to a determination of guilt; individuals jailed before trial "suffer[] the stigma of a 'loss of good name,'" and have the "fact of [their] arrest" "broadcast[]" to the community as a result of their "removal from … home, job and community." *Van Atta*, 27 Cal.3d at 440 (citation omitted). As a result, California's added emphasis on the dignity and worth necessarily requires greater weight be accorded to the interest in pretrial liberty. The conclusion that due process under California law requires the procedural protection sought here is thus even stronger than the conclusion that federal due process does so.

[8] If a court finds good cause to dispense with live testimony, it should allow a defendant to test the government's hearsay in other ways, such as through written discovery for a witness who lives too far to travel—save where good cause likewise excuses such measures.

This Court's decision in *People v. Otto*, 26 Cal.4th 200 (2001), supports that conclusion. Although the Attorney General suggests (Br. 36) that *Otto* held that "reliance on hearsay evidence does not impair an individual's dignitary interest," that is incorrect. In *Otto*, when the defendant "pled no contest to the prior crimes, … he stated the factual basis for his plea was contained in the police reports." 26 Cal.4th at 211. Thus, this Court stated, "Otto's plea admitted the truth of the victims' statements." *Id.* In other words, *Otto* held that reliance on hearsay there did not offend the dignity protected by due process because the hearsay allegations were formally admitted and undisputed. That of course is not the case here.

5. Revocation And Civil Commitment Proceedings Illustrate The Necessity And Workability Of Additional Procedural Protections

Under the court of appeal's decision, pretrial-detention hearings in California are a stark anomaly, the only pre-conviction proceedings in the state where hearsay suffices to confine a person for months or even years. Indeed, some post-conviction proceedings in California provide even *greater* procedural protections than bail hearings would under the court of appeal's ruling. Probation and parole revocation hearings, for example, bar reliance on testimonial hearsay unless the court finds good cause for overriding the defendant's due process right to confrontation. *See Winson*, 29 Cal.3d at 718-719. Federal courts have likewise held that due process

precludes reliance on hearsay at revocation hearings subject to a balancing test that weighs "the releasee's interest in [their] … right to confrontation against the Government's good cause for denying it." *United States v. Comito*, 177 F.3d 1166, 1170 (9th Cir. 1999); *accord, e.g.*, *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

The court of appeal's decision also means that bail hearings involve fewer procedural protections than civil-commitment hearings, even though both involve determinations regarding the danger an individual poses to others as well as "the decision whether to restrict a person's liberty." *In re White*, 9 Cal.5th at 466. For example, individuals allegedly unable to manage their own affairs are given trials governed by the rules of evidence prior to an order establishing a conservatorship. Cal. Welfare & Institutions Code § 5350. Parolees committed to psychiatric hospitals as a condition of supervision are also afforded trials with the rules of evidence that determine such commitment. Cal. Penal Code §§ 2962, 2966. And under the Sexually Violent Predator Act, which authorizes civil commitment *after felony sentences*, individuals are not only given full-blown trials on the issue of confinement, Cal. Welfare & Institutions Code § 6603, but also have a due process right of confrontation, *In re Parker*, 60 Cal. App. 4th 1453, 1470 (1998), and enjoy the protections of the rules of

evidence at the probable cause hearing. *Walker v. Superior Court*, 12 Cal.5th 177, 191 (2021).

The Attorney General points (Br. 31) to two other analogies: sentencing hearings and probable-cause determinations. Neither supports his position. As to sentencing, it is firmly established that convicted defendants have a diminished liberty interest. *See, e.g.*, *McMillan v. Pennsylvania*, 477 U.S. 79, 84 (1986) (describing a defendant's post-conviction liberty interest as "substantially diminished"). Moreover, courts have emphasized that they must not restrict what information to consider at sentencing because the inquiry in that context—worthiness of punishment—is uniquely open-ended. *See Williams v. New York*, 337 U.S. 241, 251 (1949), *cited in People v. Arbuckle*, 22 Cal.3d 749, 754 (1978). Meanwhile, the post-arrest probable-cause determinations required under *Gerstein v. Pugh*, 420 U.S. 103 (1975) (cited at AG Br. 31) "perform entirely different functions" than bail hearings; they are "intended to be only a preliminary screening device and [thus] require only a minimal showing by the state." *Massey v. Mullen*, 366 A.2d 1144, 1148 (R.I. 1976). And probable-cause determinations are required by the Fourth Amendment, not due process. In short, this preliminary screening mechanism does not set the due process standard for detention hearings, and there is nothing

"anomalous" (AG Br. 28) about requiring greater protections before an order imposing pretrial incarceration.[9]

The Attorney General's unsuccessful attempts to analogize pretrial detention to sentencing and probable cause determinations are telling: There is no other phase of the criminal process—nor any civil proceeding—in which an unconvicted person stands unprotected from informal proffers and untested hearsay serving as the bases for a court order confining them to a jail cell, potentially for years.

* * *

The forgoing application of the relevant due-process factors leads to the conclusion that many courts have reached: "[F]undamental due process requires that no adjudication be based solely on hearsay evidence," at least where the defendant objects and where there is no good cause to dispense with live testimony and confrontation. *Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d 172, 174 (Pa. 1990); *see also Commonwealth v. McClelland*, 233 A.3d 717, 736 (Pa. 2020) (reaffirming *Verbonitz* and holding that government may not rely on hearsay alone at preliminary hearing); *United States v. Martir*, 782 F.2d 1141, 1147 (2d Cir. 1986) (uncorroborated hearsay insufficient to support detention when

[9] In contrast to the informal probable-determinations that the Supreme Court held constitutionally required under the Fourth Amendment in *Gerstein*, the preliminary hearings required by statute in California feature rules of evidence *more* rigorous than those proposed here for pretrial detention hearings, as discussed below. *See infra* p.46.

"challenge[d]" by the defendant). Rather, balancing "the competing demands of speed and of reliability" in bail determinations requires "selectively insisting upon the production of the underlying evidence or evidentiary sources where their accuracy is in question." *United States v. Acevedo Ramos*, 755 F.2d 203, 207 (1st Cir. 1985) (Breyer, J.); *accord United States v. LaFontaine*, 210 F.3d 125, 131 (2d Cir. 2000). Specifically, when a defendant "challenge[s]"—whether by not-guilty plea, proffer, or otherwise—"the reliability or the correctness of the government's proffer" on a material fact, the defendant must, absent good cause, be permitted to cross-examine the government's witnesses. *United States v. Cabrera-Ortigoza*, 196 F.R.D. 571, 575 (S.D. Cal. 2000); *accord United States v. Sanchez*, 457 F.Supp.2d 90, 92-93 (D. Mass. 2006) (cross-examination should be permitted where defense counsel provides "some reason to question the reliability of hearsay evidence proffered by the Government").

B. Article One, Section Twelve Of The California Constitution Likewise Precludes Reliance, Over A Defendant's Objection, On Inadmissible Hearsay To Establish A Disputed Fact Material To A Determination Regarding Pretrial Liberty

An independent constitutional basis to preclude the use of inadmissible hearsay, over a defendant's objection, to establish a disputed fact material to a pretrial-detention determination is article 1, section 12 of the California Constitution. That provision permits pretrial detention only

when the "facts are evident or the presumption great" that the arrestee committed a qualifying offense and, for non-capital offenses, there is "clear and convincing evidence [of] a substantial likelihood the person's release would result in great bodily harm to others." Both of these are demanding standards. The first requires a court to "assess[] whether the record, viewed in the light most favorable to the prosecution, contains enough evidence of reasonable, credible, and solid value to sustain a guilty verdict on one or more of the qualifying crimes." *White*, 9 Cal.5th at 463. Clear and convincing evidence, in turn, "requires a finding of high probability." *Conservatorship of O.B.*, 9 Cal.5th 989, 998 (2020). The party bearing this burden must therefore "convince the jury or judge … that it is *highly probable* that the facts which he asserts are true. He must do more than show that the facts are probably true." *Id.* at 998-999 (quoting Bennett et al., Comment, *Evidence: Clear and Convincing Proof*: Appellate Review, 32 Cal. L. Rev. 74, 75 (1944)). The evidence, in other words, must be "reasonable, credible, and of solid value." *Id.* at 1001.

Reliance on inadmissible hearsay violates these standards. Because inadmissible hearsay is "inherently unreliable," *Cindy L.*, 17 Cal.4th at 27, other courts have held that pretrial detention may not be based on such

hearsay when challenged by the defendant, recognizing constitutional limits similar to those described here.[10]

For example, in *Commonwealth v. Talley*, the Pennsylvania Supreme Court construed its similarly worded constitutional bail provision to preclude pretrial detention based solely on "the Commonwealth's untested characterization of the evidence purportedly in its possession." 265 A.3d at 528-529. The court reasoned that the "proof is evident or the presumption great" standard "requires both a qualitative and quantitative assessment of the evidence adduced at the bail hearing." *Id.* at 522. And because a court cannot weigh the quality or test the credibility of hearsay, it "cannot rely upon … untested assertions alone." *Id.* at 524.

Talley also held, as noted, that "admissible evidence in order to establish the material factual claims implicated by the principal asserted ground for the bail denial" is required to justify pretrial detention, while permitting "hearsay to present scientific, technical, or forensic information, to introduce laboratory reports, or to corroborate competent witness testimony." 265 A.3d at 524 n.35. In other words, "the bulk of the Commonwealth's proof must consist of admissible evidence." *Id.*

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[10] The Attorney General cites (Br. 22) *In re Nordin*, 143 Cal. App. 3d 538 (1983), to imply that the clear and convincing *standard* has nothing to do with what *mode* of proof is permissible, because *Nordin* applied that standard without deciding what modes are appropriate. But *Nordin* explained that it would not address the issue, or other procedural issues, because they were not raised by the parties. *Id.* at 544 n.4. That is not true here.

The New Jersey Supreme Court reached a similar result in *State v. Pinkston*, 187 A.3d 113 (N.J. 2018). Construing what constitutes clear and convincing evidence in the context of a bail hearing, *Pinkston* emphasized that weighing the evidence relevant to a determination regarding pretrial release necessarily requires "qualitative judgments" regarding the strength and credibility of the evidence. *Id.* at 121. Specifically, the court held that a defendant must be allowed to cross-examine an adverse witness when the defendants "proffer[s] how the witness's testimony would tend to undermine the State's evidence in support of detention in a material way," in other words, when the proffer "tend[s] to negate the propriety of detention." *Id.* at 121-122.

However, the due-process balancing discussed above, combined with the fact that the burden to justify detention rests on the government as to unadjudicated allegations of criminal conduct, means that defendants should not be required to proffer specific evidence tending to undermine the government's hearsay before their right to cross-examination is vindicated. Given the ongoing dispute between the individual who has pleaded not guilty and the state, inadmissible hearsay is simply too unreliable to "satisfy the clear and convincing standard" even without such a proffer. As one court put it recently, "[a] court, left with only a government's proffer, has almost no mechanism to evaluate the reliability

of the uncharged conduct provided by the government." *United States v. Russell*, 2021 WL 5447037, at *5 (N.D. Ill. Nov. 22, 2021).[11]

C. Even When Good Cause Excuses Live Testimony, Courts May Not Rely Exclusively On Hearsay To Make A Factual Finding Supporting Pretrial Detention

Even when the government is permitted to introduce hearsay at a bail hearing, article I, section 12 of the California Constitution prohibits a court from making any factual finding in support of pretrial detention if inadmissible hearsay is the *sole* evidence supporting that finding. So does due process. This conclusion follows not only from the cases cited above (deeming hearsay generally insufficient to meet the standards required to justify pretrial detention), but also from extensive case law barring *exclusive* reliance on hearsay where a weighty interest such as pretrial liberty is at stake.

For example, when interpreting the Colorado Constitution's materially identical right-to-bail provision, the Colorado Supreme Court concluded, as to a contested factual finding underlying pretrial detention: "There must be competent, direct evidence to support the denial [of bail]. The hearsay evidence may be admitted in corroboration. We are moved to so hold because … a defendant has a constitutional right to bail in this state.

[11] Because due process likewise requires "clear and convincing evidence" of flight risk or dangerousness that cannot be adequately mitigated without detention, *see Humphrey*, 11 Cal.5th at 153, the foregoing argument applies under the due process standard as well.

A variance of that right should not be made lightly." *Gadney v. District Court*, 535 P.2d 190, 192 (Colo. 1975). Similarly, the Supreme Court of the Virgin Islands concluded that, to satisfy the clear and convincing standard necessary to order pretrial detention, defendants must be permitted to cross-examine the adverse witnesses on which the prosecution *exclusively* relies whenever "their accuracy is in question." *Williams v. Virgin Islands*, 53 V.I. 514, 532 (2010). Numerous other courts have agreed. *See, e.g.*, *United States v. Hazzard*, 598 F.Supp. 1442, 1453 (N.D. Ill. 1984); *Fisher*, 618 F.Supp. at 537-538 (the "obvious" tendencies for "distortion and imprecision" inherent in hearsay "falls far short of the clear and convincing standard"); *Azadi v. Spears,* 826 So.2d 1020, 1020 (Fla. Dist. Ct. App. 2001) (holding that pretrial-detention orders are statutorily prohibited from being based exclusively upon hearsay).

Courts, including in California, have reached similar results in non-criminal contexts where hearsay evidence is admissible. "As this court has long recognized, '[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence.'" *In re Lucero L.*, 22 Cal.4th 1227, 1244 (2000) (alteration in original) (quoting *Walker v. City of San Gabriel*, 20 Cal.2d 879, 881 (1942)) (other quotation marks omitted). In preliminary-injunction proceedings, for example, the rules of evidence do not apply but courts have recognized that because of hearsay's "limited probative value," it *alone* cannot meet the "clear and convincing" standard and ought instead

be considered only "for corroboratory purposes." *Motorola, Inc. v. Abeckaser*, 2009 WL 1362833, at *3 n.3 (E.D.N.Y. May 14, 2009); *accord Florida Atlantic University Board of Trustees v. Parsont*, 465 F.Supp.3d 1279, 1287 n.2 (S.D. Fla. 2020).

Similarly, in child-dependency hearings, courts by necessity admit "out of court statements by alleged victims of child sexual abuse," but only where the child is "available for cross examination" or there is other evidence that "corroborates the statement made by the child." *Cindy L.*, 17 Cal.4th at 18, 29. Those limits are necessary under due process, this Court held, to "safeguard the reliability of [the] hearsay statements." *Id.* at 28. The due-process balancing analysis above, as to the general use of inadmissible hearsay to justify pretrial detention, further supports a bar on exclusive reliance on hearsay: When inadmissible hearsay alone is offered to justify pretrial detention, the risk of an erroneous deprivation of liberty is at its highest.

The Court should therefore interpret article I, section 12 to provide that "in determining whether a clear and convincing showing has been made," courts must "require that the hearsay evidence [be] buttressed by otherwise admissible evidence to meet the clear and convincing standard," *Lynch v. United States*, 557 A.2d 580, 582 n.6 (D.C. 1989) (analyzing

pretrial detention), and should hold due process to likewise bar *exclusive* reliance on hearsay.[12]

D. The Court Of Appeal's And Attorney General's Counterarguments Are Unavailing

In holding that inadmissible hearsay alone can support a deprivation of physical liberty over the defendant's objection, the court of appeal stated that federal courts unequivocally "recognize that proceeding by proffer does not violate due process." *Harris*, 71 Cal. App. 5th at 1097. That is incorrect. As shown above, federal courts widely recognize the due-process limits on hearsay in pretrial-detention hearings, holding that a defendant must be allowed to cross-examine the government's underlying witnesses when the defendant "challenge[s] the reliability or the correctness of the government's proffer." *Cabrera-Ortigoza*, 196 F.R.D. at 575; *accord, e.g.*, *LaFontaine*, 210 F.3d at 131; *Martir*, 782 F.2d at 1147; *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986); *United States v.*

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[12] The analysis in the foregoing sections as to the propriety of hearsay applies just as surely to the use of proffers in place of evidentiary hearings. For the same reasons, the Court should hold proffers insufficiently reliable to establish a disputed fact material to justifying pretrial detention, and should bar pretrial detention based on proffer when the defense objects under these circumstances.

The difference recognized in the case law, however, is the absence of a good-cause exception as to proffers. Even supervisees facing post-conviction revocation are entitled, as a matter of due process, to an evidentiary hearing to adjudicated disputed facts (one at which hearsay is permitted upon a showing of good cause). *See Morrissey v. Brewer*, 408 U.S. 471, 488 (1972) (holding that a parole revocation hearing "must lead to a final evaluation of any contested relevant facts").

Bibbs, 488 F.Supp.2d 925, 926 (N.D. Cal. 2007); *Sanchez*, 457 F.Supp.2d at 92-93; *United States v. Hammond*, 44 F.Supp.2d 743, 746 (D. Md. 1999).

The cases the court of appeal cited to support its characterization of federal law are not to the contrary. Indeed, two of those cases confirm that defendants have a "conditional right to call adverse witnesses" when the reliability of the government's hearsay evidence is in doubt. *United States v. Gaviria*, 828 F.2d 667, 670 (11th Cir. 1987); *accord Acevedo-Ramos*, 755 F.2d at 207 (judges should "selectively insist[] upon the production of the underlying evidence or evidentiary sources where their accuracy is in question"). And likewise, in a third case the court cited, the trial court required live testimony because the defendant "asserted that certain proffered information was incorrect," and the government subsequently withdrew its proffer. *United States v. Cardenas*, 784 F.2d 937, 938 (9th Cir. 1986) (per curiam). As for *United States v. Delker*, 757 F.2d 1390 (3d Cir. 1985), the court there expressly left the question open, declining to decide "whether a defendant may have a right to confront non-appearing government witnesses when the defendant can make a specific proffer to the court of how the witness' testimony will negate the government's contention," *id.* at 1398 n.4. Finally, in *United States v. Smith*, 79 F.3d 1208 (D.C. Cir. 1996) (per curiam), the D.C. Circuit—in affirming the trial court's reliance on hearsay (an unsurprising result given that the defendant's own testimony and prior convictions tended to corroborate the

government's hearsay)—cited cases recognizing that cross-examination must be permitted where the accuracy or reliability of the hearsay is in question, *see id.* at 1210-1211 (citing *Martir*, among others).

Similarly, the practical concerns raised by the Attorney General are unavailing. In particular, the Attorney General protests (Br. 23) that neither prosecutors nor defendants can be expected to marshal live witnesses by the time of a defendant's *arraignment*. That is irrelevant, for two reasons.

First, the good-cause exception proposed here—which, under the case law cited above, includes considerations of factors such as witness unavailability—already accommodates such practical concerns. The government is always free, including at arraignment, to argue that good cause excuses live testimony in a particular case. Moreover, pretrial-detention hearings often occur post-arraignment pursuant to Penal Code sections 985, 1270.2, 1277, and 1289. For example, Mr. Harris's pretrial-release motion was filed and heard weeks after his arrest, *see* Pet. Ex. F, as was the section 1270.2 motion in *Humphrey*. *In re Humphrey*, 19 Cal. App. 5th at 1018. The timeframes for these post-arraignment hearings are more than adequate to incorporate live testimony: Detained defendants are entitled to bail review hearings within five days of the original bail order under section 1270.2, and to preliminary hearings—after which bail may be set under Penal Code § 1277—within ten court days from arraignment or plea under Penal Code section 859b. *Cf.* 18 U.S.C. § 3142(f)(2) (requiring

the detention hearing to be held at the initial appearance, and only permitting a prosecutor to move for a continuance limited to three court days, absent good cause for longer delay). In these and other post-arraignment hearings on detention or release, prosecutors will have additional time to marshal witnesses.

Second, the concern that a defendant may not be able to present live witness testimony is no reason to lower the bar for what *the State* must present to justify pretrial detention. Due process protects the *defendant* from the erroneous deprivation of pretrial liberty. And the California Constitution places the burden of justifying pretrial detention on the government. *See, e.g.*, *Van Atta*, 27 Cal.3d at 439-442. There is no basis for a rule demanding that the defendant produce live testimony in order to preserve his or her pretrial liberty.[13]

Next, the Attorney General suggests (Br. 23) that live testimony cannot be required because crime victims might in some cases be unable to appear. But that is no reason to limit a defendant's rights in all cases. Rather, the competing needs of defendants and crime victims can, as noted,

[13] To be sure, a court could, in its discretion, choose not to credit a defendant's proffer if the government raised a well-founded doubt; the court could then invite the defendant to provide witness testimony or other admissible evidence regarding a significant disputed fact. Absent such evidence, the court would be free to give the defendant's proffer the weight due it under the circumstances. But there is no reason, certainly no constitutional imperative, to require defendants to always produce admissible evidence in support of a disputed fact.

be addressed by allowing courts to excuse the government from producing crime victims (or other witnesses) for cross-examination on a showing of good cause, as is the standard practice at revocation hearings. *See supra* pp.28-30.

The Attorney General also asserts (Br. 28) that it would be "anomalous" for "stricter" evidentiary standards to govern pretrial-detention hearings than preliminary hearings, since the former often occur before the latter. But, all told, the constitutional rule amici propose is *less* strict than the rules of evidence governing preliminary hearings. As Mr. Harris notes (Reply Br. 6), all rules of evidence apply to such hearings except that hearsay from qualified law enforcement officers is allowed. *See* Evid. Code §§ 300, 1200; Penal Code § 872(b); *Menifee v. Superior Court of Santa Clara County*, 57 Cal. App. 5th 343, 357-358, 364-365 (2020), *as modified* (Nov. 17, 2020). In contrast, the rule proposed here admits of several reasonable limitations—for good cause, documentary hearsay, and circumstances in which a defendant does not object or there is no factual dispute.[14]

[14] If anything, it is anomalous for preliminary hearings to proceed under stricter rules of evidence than pretrial-detention hearings, in light of the constitutional gravity of pretrial liberty and the requirement of clear and convincing evidence rather than mere probable cause. But the legislature is free to prescribe more protective rules for preliminary hearings than constitutionally required. That does not, however, mean that preliminary hearings render anomalous the rule proposed here.

Finally, there is no support for the Attorney General's speculation (Br. 24 n.3) that requiring live testimony will cause undue delay. Live testimony at bail hearings is already common. *See, e.g.*, *State v. Mascareno-Haidle*, __ P.3d __, 2022 WL 2351632, at *3 (N.M. June 30 2022); *Simpson v. Owens*, 85 P.3d 478, 482 n.3 (Ariz. Ct. App. 2004); *United States v. Ferranti*, 66 F.3d 540, 542 (2d Cir. 1995); *Accetturo*, 783 F.2d at 384. Yet the Attorney General cites no evidence of resulting delays. In any event, the Attorney General's evident view that one of the most fundamental of all rights—freedom from incarceration—can be sacrificed on the altar of government convenience and expediency is disturbing indeed, and should be soundly rejected.

CONCLUSION

The Court should reverse the court of appeal's decision and hold that a court, in making a determination about whether to release a defendant pretrial, may not presume guilt, i.e., presume the truth of any unproven criminal charges against the defendant, or (absent good cause) rely on hearsay regarding a disputed fact over the defendant's objection.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

According to the word-count function of the computer program used to prepare it, the foregoing brief contains 11,211 words, excluding the portions exempted by California Rule of Court 8.520(c)(3).

/s/ Salil Dudani

STATE OF CALIFORNIA
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