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In the Supreme Court of the State of California

IN RE JOHN HARRIS, JR.,
ON HABEAS CORPUS.

First Appellate District, Case No. A162891
San Mateo County Superior Court, Case No. 21NF002568A
The Honorable Amarra A. Lee, Judge

ANSWER TO AMICUS CURIAE BRIEF

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Respondent respectfully submits this answer to the amicus brief that was filed by amici curiae Civil Rights Corps, ACLU of Northern California, California Public Defenders Association, and the Ventura County Public Defender.

INTRODUCTION AND SUMMARY OF ARGUMENT

The superior court ordered petitioner John Harris detained based on its finding that there was adequate evidence of his responsibility for charges of attempted murder and aggravated mayhem and its finding of clear and convincing evidence of his dangerousness to others. Harris challenges the superior court's reliance at the detention hearing on proffers from the district attorney about information obtained in the investigation. Harris argues that, under California's statutes and the state and federal constitutions, decisions on whether to detain a defendant pending trial are subject to the exact same evidentiary rules as an eventual trial on guilt. (OBM 20-22; RBM 5-7.)

The People have offered a more moderate view, rooted in precedent. Detention decisions are preliminary decisions. (ABM 8.) They come early in a criminal case and are subject to revision should more information become available. (*Ibid.*) In that context, practical realities make it implausible that the prosecution, defense, or court could proceed under the same evidentiary restrictions that apply to final determinations of guilt. (ABM 9, 23-24.) Neither Article I, section 12, of the California Constitution nor the Evidence Code prohibit the government from establishing a need for detention by the use of proffer, or alternatively by documentary evidence or non-firsthand

testimony, when the court finds the proffer or evidence to be reliable. (ABM 21-28.)

The operative limitation comes from the requirements of due process. A detention hearing predicated on proffer or hearsay evidence requires the judge to closely consider a submission's credibility and reliability. (ABM 31-33.) Where the judge finds the prosecution's submission insufficiently reliable—either because of the submission's own terms, or based on the defense's proffers, evidence, or argument—detention must be denied or the prosecution required to submit additional information in a different form. (ABM 31-32.) In other words, due process principles require procedures designed to assure reliability, while still allowing the flexibility appropriate to pretrial detention hearings. Proper vigilance by superior courts in evaluating each case—together with other safeguards, such as defendants' right to be represented by counsel, their right to submit their own information by proffer or otherwise, their right to have a preliminary hearing, and their ability to reopen the question of detention if new information becomes available—will protect defendants' interests in an accurate and fair determination. (ABM 33-35.) Due process does not require more, and certainly does not mandate rigid prohibitions on proffers or hearsay. (ABM 28-37.)

The Amicus brief to which we now respond proposes a novel and unsupported third approach. Amici portray their proposal as applying to a single category of information, for which they use the term hearsay. But Amici in fact propose two quite different

regimes: one for proffers by an attorney in lieu of documentary or testimonial evidence, the other for hearsay entered into evidence by documentary or testimonial means. (Compare Amicus Br. 9, fn. 4, with *id.* p. 42, fn. 12.) With respect to the first, Amici propose that courts essentially may never rely on the prosecuting attorney's proffer of information. (Amicus Br. 42, fn. 12.) Amici portray their prohibition as less absolute by stating that it would apply only when a defendant has placed a fact at issue. But Amici would deem facts placed at issue if the defendant has merely stated an objection or even pleaded not guilty—circumstances that encompass virtually every case. (Amicus Br. 27.)

Case law provides no support for Amici's proposal. As the U.S. Supreme Court and other courts have long understood, governmental proffers can play a constitutionally permissible role in detention decisions—so long as trial courts conduct a careful and considered review to ensure that the circumstances render the proffer a reliable basis for decision. (See *post* pp. 14-23.)

With respect to hearsay, Amici propose a more complex set of rules. Amici assert that due process generally prohibits the use of hearsay. They would recognize possible exceptions for specific kinds of scientific or technical information, or if the judge finds "good cause" to permit the hearsay. (Amicus Br. 21-34.) But in every case, and without regard to findings of good cause, Amici would require that hearsay could only be used to corroborate other nonhearsay evidence. (Amicus Br. 39.) Here, too, Amici propose rules that are not required by the federal or

state constitutions. Supreme Court and lower-court decisions regarding pretrial detention recognize that hearsay may serve as a proper basis for decisions that cause pretrial detention. (See *post* pp. 24-38; ABM 21-37.) So does the state Constitution's provision on hearsay at preliminary hearings. The safeguard against incorrect or unfair decisions lies not in complex, rigid, and one-sided rules such as those Amici propose, but in the superior court's careful attention to ensuring that decisions are made based on a reliable foundation.

Finally, separate from their arguments about the information the prosecution may offer, Amici take issue with a sentence in *In re Humphrey* (2021) 11 Cal.5th 135 about "assum[ing] the truth of the criminal charges." (*Id.* at p. 153.) Amici argue that when a court is determining whether detention is needed, the mere fact that charges have been filed should not give rise to a presumption that the charges are "tru[e]." (Amicus Br. 10-20.) Amici are correct that California law authorizes no presumption to lessen or shift the prosecution's burden to establish the prerequisites for detention. (See *post* pp. 41-44.) To the extent that the sentence from *Humphrey* could mislead lower courts into misunderstanding that principle, this Court's clarification could be valuable. However, such a clarification should not obscure an important distinction. A court should not assume the truth of the charges for purposes of determining whether the prosecution has adequately established the defendant's responsibility for a qualifying crime or the defendant's dangerousness; but neither the parties nor the

superior court may treat the detention hearing as a proceeding in which to challenge the validity of the criminal case for purposes beyond detention.

ARGUMENT

I. AMICI'S NO-PROFFER RULE IS INCORRECT

Amici's proposed rule with respect to governmental proffers is virtually absolute: Amici would prohibit proffers from being considered in any way if the defendant either objects to the proffer or has in some way placed the underlying facts at issue. (Amicus Br. 8, 27, 42, fn. 12.) These two purported limitations on Amici's no-proffer rule would effectively impose no limit at all: according to Amici, objecting defendants would not have to propose any reason for doubting the proffer's correctness, and the facts would be placed in contention whenever the defendant has pleaded not guilty. (Amicus Br. 27, 35.) As a result, Amici's rule would, as a practical matter, bar proffers in virtually every case where a constitutional right against pretrial detention could be at issue. (See Pen. Code, § 859a, subd. (a) [felony defendants asked to plead guilty or not at first appearance]; Cal. Rules of Court, rule 4.100(2); *Ex parte Voll* (1871) 41 Cal. 29, 32 [state constitution's right to bail contemplates only "cases in which the prisoner as yet [has] stood upon his plea of not guilty"].) Moreover, it would apply only to one side—defendants would be free to proffer their own information in support of release, but the prosecution could not respond by proffer or use proffers in its own affirmative case. (Amicus Br. 45; see *post* pp. 39-40.) Neither precedent nor reason supports such an approach.

A. *Salerno* supports judges' ability to rely on appropriate proffers

As Amici recognize, *United States v. Salerno* (1987) 481 U.S. 739, is the pivotal decision on due process requirements for pretrial detention. (See Amicus Br. 4, 14-16, 21-23, 25, citing *Salerno*.) Amici portray *Salerno* as implicitly supporting the "robust procedures" they advocate. (Amicus Br. 25.) In fact, *Salerno* confirms the constitutionality of reliable prosecutorial proffers as a basis for pretrial detention.

The defendants in *Salerno* were charged with racketeering, conspiracy to commit murder, and other crimes. (*Salerno*, *supra*, 481 U.S. at p. 743.) The district court ordered them detained without bail under the federal Bail Reform Act because "the Government had established by clear and convincing evidence that no condition or combination of conditions of release would ensure the safety of the community or any person." (*Id.* at pp. 743-744.) The Second Circuit held the detention unconstitutional. (See *id.* at p. 744.) But the Supreme Court reversed, concluding that the defendants' due process challenge to the detentions failed. (*Id.* at pp. 746-752.)

Although *Salerno* addressed a substantive due process claim, its reasons for rejecting that claim included the adequacy of the "procedures" that the federal act established to "further the accuracy" of the district court's determination of future dangerousness. (*Salerno*, *supra*, 481 U.S. at p. 751; see *id.* at pp. 751-752 [discussing defendants' procedural rights].) Those procedures included a chance for the defendant to "cross-examine witnesses *who appear at the hearing*." (*Id.* at p. 751, italics

added.) But the act did not require the government to submit its evidence by means of such witnesses. (See *post* pp. 16-17.) Instead, as the statute permitted, the government made its case for detention in *Salerno* through "a detailed proffer of evidence." (*Salerno*, *supra*, 481 U.S. at p. 743; see *post* pp. 16-17.) The government proffered information on what witnesses would say if they did testify.[1]

The Supreme Court concluded that those procedures were "designed to further the accuracy of" the court's determination of future dangerousness to a degree sufficient to enable the law's constitutional application. (*Salerno*, *supra*, 481 U.S. at p. 751; *id.* at p. 752 [holding that the federal procedure had "extensive safeguards suffic[ient] to repel a facial challenge"].) That holding—made notwithstanding the defendants' objections and not-guilty pleas—all but forecloses Amici's contention that proffers are always prohibited by due process.[2]

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[1] The high Court's statement that the government "offered the testimony of two of its trial witnesses" (481 U.S. at p. 743) referred not to actual testimony but to a proffer of "the anticipated testimony of two of the Government's trial witnesses" (*United States v. Salerno* (2d Cir. 1986) 794 F.2d 64, 66; see *United States v. Salerno* (S.D.N.Y. 1986) 631 F.Supp. 1364, 1367-1368 [summarizing government's proffer as to those witnesses]). Indeed, *all* of the government's evidence at the detention hearing came by proffer. (See *United States v. Salerno, supra*, 631 F.Supp. at p. 1366.)

[2] The high Court's conclusion did not depend on any lack of a not-guilty plea. (See *Salerno*, *supra*, 481 U.S. at p. 743 [detention motion was at defendants' arraignment]; Fed. Rules Crim. Proc., rule 10(a)(3), 18 U.S.C. [arraignment includes

(continued…)

B. Judges must assess a proffer's reliability when deciding whether to permit it and what weight it deserves

In *Salerno*, the Court had no need to identify the circumstances that might make a particular proffer improper, nor to define the precise contours of appropriate proffers. A large body of other precedents, however, addresses those issues. Those decisions—including many that Amici misinterpret—reject Amici's argument that defendants may foreclose a court's reliance on governmental proffers simply by raising a general objection or pleading not guilty. Instead, a court must decide whether to rely on a governmental proffer based on careful consideration of the proffer's reliability in the circumstances.

1. Federal courts rely on appropriate proffers at detention hearings

As in *Salerno* itself, governmental proffers are a commonplace feature of detention hearings under the federal Bail Reform Act. (See *United States v. Martir* (2d Cir. 1986) 782 F.2d 1141, 1145 [noting that the use of governmental proffers was intended by Congress, which modeled its nationwide statute after an existing, proffer-permitting statute that Congress had previously passed for the District of Columbia].) Every federal circuit to have considered the issue has rejected the argument

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defendant's plea].) Nor did it depend on lack of an objection. (See *Salerno*, *supra*, 631 F.Supp. at pp. 1372-1373 [defense requested, and was denied, opportunity to cross-examine the witnesses whose expected testimony was proffered by the government].)

that due process forbids the use of proffers in that context. (ABM 23-24.) Those decisions make clear that something more than a general objection to the proffer, and more than a mere plea of not guilty, is required before due process demands that the proffer be rejected. (See, e.g., *United States v. Smith* (D.C. Cir. 1996) 79 F.3d 1208, 1210 (per curiam), citing *United States v. Accetturo* (3d Cir. 1986) 783 F.2d 382, 388-389; *United States v. Winsor* (9th Cir. 1986) 785 F.2d 755, 756-757; *United States v. Delker* (3d Cir. 1985) 757 F.2d 1390, 1397-1398.)

These due process rulings reflect practical need. As then-Judge Breyer explained for the First Circuit, bail hearings "necessarily" are "informal affairs" because of "the need for speed." (*United States v. Acevedo-Ramos* (1st Cir. 1985) 755 F.2d 203, 206.) "[M]agistrates and judges traditionally have been permitted to base their decisions, both as to release conditions and as to possible detention, on hearsay evidence, such as *statements from the prosecution or the defendants about what they can prove and how*." (*Ibid.*, italics added; see *ibid.* ["Often the opposing parties simply describe to the judicial officer the nature of their evidence; they do not actually produce it."].) "This authority rests primarily on the need to make the bail decisions quickly, at a time when neither party may have fully marshalled all the evidence in its favor." (*Ibid.*)

Federal courts have been clear, however, that accepting the government's use of proffers automatically would be no more appropriate than forbidding them automatically. Rather, in

deciding whether to accept a proffer and what weight to grant it, judges properly consider a variety of factors, including:

- The proffer's specificity and detail. (Compare *Martir*, *supra*, 782 F.2d at p. 1147 [criticizing proffer that "simply stated in the most general and conclusory terms what it hoped to prove"], with *ibid.* [contrasting cases with more detailed proffers].)
- The extent to which the proffer is supported by photographs, videos, documents, or testimony. (See, e.g., *ibid.* [noting cases in which prosecutors offered "independent evidence, such as tapes, documents, or photographs, of the crimes charged"]; *United States v. LaFontaine* (2d Cir. 2000) 210 F.3d 125, 131 [discussing proffer "corroborated by extrinsic evidence such as [a recording]"].)
- Whether the proffer attributes its information to particular witnesses with firsthand knowledge. (Cf. *Martir*, *supra*, 782 F.2d at p. 1147 [discussing cases where government supplied "testimony or an affidavit to describe or summarize, albeit in hearsay form, in even moderate detail, the forthcoming trial testimony of its witnesses"].)
- Whether the government has withheld from the court more precise evidence that it could easily have submitted, such as transcripts, recordings, or photographs that the proffer describes. (See, e.g., *United States v. Fisher* (E.D.Pa. 1985) 618 F.Supp. 536, 538 [denying detention where government summarized contents of tapes without providing transcripts or recordings to the court].)

- Whether the defense has, by proffer or otherwise, provided a specific basis for doubting the proffer's reliability and considering live testimony to be needed for an accurate decision. (See *United States v. Winsor*, *supra*, 785 F.2d at p. 757; *United States v. Edwards* (D.C. 1981) 430 A.2d 1321, 1338.)

2. The federal decisions cited by Amici do not support their position

Amici portray certain federal decisions as forbidding proffers or deeming them inherently untrustworthy. (Amicus Br. 42.) In fact those cases stand for something quite different. For example, Amici state that *United States v. Cabrera-Ortigoza* (S.D.Cal. 2000) 196 F.R.D. 571, 575 held "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.'" (Amicus Br. 42.) Actually, *Cabrera-Ortigoza* held that a defendant's right to cross-examine the witness behind a proffer required the defense to first make a proffer "that the government's proffered information is incorrect." (*Cabrera-Ortigoza*, *supra*, 196 F.R.D. at p. 574.) Moreover, *Cabrera-Ortigoza* specifies, that "requirement of a counter proffer contemplates *an offer or a tender of what other witnesses would say 'in reasonable detail,'* [citation]," going "beyond a blanket 'denial' or 'objection' by the defense of the government's proffer." (*Id.* at pp. 574-575, italics added.)

Similarly, the Second Circuit, in *United States v. LaFontaine*, rejected a defendant's argument that it was improper for the government to rely on a proffer about what a trial witness would

say. (*LaFontaine*, *supra*, 210 F.3d at p. 131.) The same court, in *United States v. Martir*, chastised the overly "general and conclusory terms" of the governmental proffer, but made clear that a more specific proffer, especially with corroboration and the attribution of statements to specific witnesses, would be permissible. (*Martir*, *supra*, 782 F.2d at p. 1147.) The court in *United States v. Bibbs* (N.D.Cal. 2007) 488 F.Supp.2d 925 similarly rejected "defendant's argument that the due process clause requires me to allow defendant to subpoena the Government's witnesses for cross-examination," in a case where defense counsel "generally denied defendant's guilt but proffered little in the way of specific, material factual disputes." (*Id.* at p. 926.)

In *United States v. Sanchez* (D.Mass. 2006) 457 F.Supp.2d 90, where the defense sought to compel the appearance and cross-examination of a police officer at a detention hearing, the court ruled that the officer did not need to testify because the defense had not "give[n] the Court some basis for believing that the witness would produce testimony favorable to her client or that there is some reason to question the reliability of hearsay evidence proffered by the Government." (*Id.* at p. 93.) And as Amici's own descriptions make clear, most of Amici's other citations are to cases that similarly support a "'conditional right'" to require testimony from witnesses underlying the government proffer where the "reliability" or "'accuracy'" of the proffered information is "in doubt." (Amicus Br. 43, discussing *United States v. Gaviria* (11th Cir. 1987) 828 F.2d 667, and *Acevedo-*

Ramos, *supra*, 755 F.2d at p. 207.) These decisions support respondent's proposed rule—not Amici's.

Two of Amici's federal cases did reject the prosecution's use of a proffer. But those decisions rested not on any theory that due process *forbids* reliance on a proffer when the defendant challenges it, but rather on the judge's "discretion" to reject proffers where the circumstances make a particular proffer unreliable. (*United States v. Hammond* (D.Md. 1999) 44 F.Supp.2d 743, 746 [rejecting proffer where the proffer's basis was too weak]; *United States v. Russell* (N.D.Ill.) 2021 WL 5447037, at *6.) Those cases illustrate how superior courts could reject unreliable proffers. They do not support a ban on reliable proffers.[3]

3. The out-of-state decisions relied on by Amici are similarly unsupportive

Amici's decisions from other states likewise do not show that California should effectively bar proffers based merely on the defendant's objection or not-guilty plea. Amici discuss the New Jersey Supreme Court's decision in *State v. Pinkston* (2018) 233

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[3] A final decision cited by Amici has unclear relevance to proffers, but in any event does not support Amici's rule. That decision, *United States v. Accetturo* (3d Cir. 1986) 783 F.2d 382, concerned hearsay testimony, rather than a proffer. (*Id.* at p. 384.) The Third Circuit upheld the trial judge's decision not to require the appearance and cross-examination of the witness whose statements the testifying FBI agent recounted, because the defense had provided "no reason to believe [the witness] would give evidence favorable to appellants or would retract information harmful to them." (*Id.* at p. 388.)

N.J. 495. (Amicus Br. 38.) New Jersey law authorizes pretrial detention if the State establishes the appropriate factors "by clear and convincing evidence" (*Pinkston*, *supra*, 233 N.J. at p. 510), and allows the prosecution to "proceed by proffer to satisfy its burden of proof" (*id.* at p. 504). *Pinkston* considered the extent to which, when the prosecution makes such a proffer, the defense has a corresponding right to compel the testimony of the witnesses on whose statements the proffer is based. After considering decisions from other jurisdictions (*id.* at pp. 505-507), the New Jersey Supreme Court arrived at a conclusion quite different from Amici's. The court held that, in order to require the testimony of witnesses behind the government's proffer, the defense must make its own proffer of "how the witness's testimony would tend to undermine the State's evidence in support of detention in a material way." (*Id.* at p. 510.) Witness testimony would be required only if that defense proffer tended to "negate the propriety of detention" by "reveal[ing] a good-faith basis to believe that the witness will testify favorably to the accused on an issue that is both relevant and material to the decision whether to detain the defendant." (*Ibid.*)

The one decision cited by Amici (Amicus Br. 37) that provides some support for their position is *Commonwealth v. Talley* (Pa. 2021) 265 A.3d 485, 524. In *Talley*, the Pennsylvania Supreme Court construed its state constitution as not allowing detention to rest on "untested assertions alone." (*Ibid.*; see also *id.* at pp. 528-529 ["in relying upon the Commonwealth's untested characterization of the evidence purportedly in its possession,

and its unsupported assertion that electronic monitoring was unavailable, the trial court committed an error of law"], fn. omitted.) But the evidentiary requirements identified in *Talley* were based solely on Pennsylvania law, not federal due process. (*Id*. at p. 528 ["That said, it has been more than half-a-century since we held unequivocally in *Alberti* that bail could not be denied without an evidentiary hearing."]; see also *Com. ex rel. Alberti v. Boyle* (1963) 412 Pa. 398, 400-401 [construing state constitution as requiring evidentiary hearing and holding that evidence from coroner's inquest was insufficient].)[4] Whatever the requirements of Pennsylvania law, California law imposes no similar requirement.

C. Judicial scrutiny of proffers adequately protects defendants' rights without a blanket prohibition

The lack of an outright ban on considering proffers in detention hearings does not mean that judges should accept proffers uncritically. The constitutional use of proffers depends, like much else in criminal law, on careful evaluation and consideration by the superior court in light of the circumstances of the particular case. In this case, for example, the court evaluated the prosecution's proffer and found it sufficient. If, however, the court had concerns, questions, or doubts, it could

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[4] Although *Talley* held as a matter of state law that an evidentiary hearing with witnesses was required, it also observed, "If the full complement of due process constraints attendant to a criminal trial applied at a bail hearing, it would seem that bail never could be denied." (*Talley*, *supra*, 265 A.3d at p. 520.)

have required the prosecution to produce available DNA reports, transcriptions or recordings of witness interviews, or investigative reports instead of the prosecution's summaries. And if the superior court had doubts beyond that, it could have determined which witnesses it needed to hear from in person. But to require something beyond the proffer for each part of the prosecution's request for detention in every case—regardless of whether there is a specific reason—would not comport with how the U.S. Supreme Court views the procedural requirements for detention before trial. (See *ante* pp. 14-15 [discussing *Salerno*]; *post* pp. 25-28 [discussing *Gerstein v. Pugh*].) And it is not needed to protect defendants' rights.

II. AMICI'S PROPOSED HEARSAY RESTRICTIONS ARE INCORRECT

Amici reject Harris's argument that evidence at a detention hearing should be strictly limited to what would be admissible at trial. In place of that flawed argument, however, Amici offer another that is also flawed. They propose a complex, confusing, and overly restrictive test for determining when hearsay is admissible and when courts must limit their reliance on it or require corroboration. Amici's test is without support in federal or state precedent, and this Court should reject it.

A. The federal and state constitutions do not require Amici's proposed hearsay rules

As our answer brief explained, hearsay (like proffers) is properly subject to the control of the superior court, which should examine hearsay testimony or documents at a detention hearing to determine whether they are reliable enough on their own or

require something more such as additional corroboration or firsthand testimony. (ABM 31-32 & fn. 5.) Amici, in contrast, would generally forbid the use of inadmissible hearsay "to establish a disputed fact material to a determination regarding pretrial liberty." (Amicus Br. 35.) They hint that an exception might be appropriate to permit the use of "inherently reliable 'documentary' hearsay such as lab reports." (Amicus Br. 28). They propose more generally that hearsay could be admissible on a showing of "good cause." (Amicus Br. 9, 21, 29.) But even where they would allow hearsay under those exceptions, Amici would have this Court "prohibit[] a court from making any factual finding in support of pretrial detention if [the] inadmissible hearsay is the *sole* evidence supporting that finding." (Amicus Br. 39.) Amici's complex rules are not required by the federal or California constitutions.

1. The federal constitution authorizes reliance on hearsay for detention

The leading decision on federal constitutional requirements for detention-producing determinations based on hearsay is *Gerstein v. Pugh* (1975) 420 U.S. 103. In *Gerstein*, two Florida men had been arrested. (*Id.* at p. 105.) One was ordered detained until trial; the other was in custody because he was unable to meet the bail set by the court. (*Ibid.*) Florida law provided no right to a judicial determination of probable cause. (*Id.* at p. 106.) The men maintained that their custody was illegal, and sued in federal court on behalf of the "class of persons detained without a judicial probable cause determination." (*Id.* at p. 110, fn. 11; see also *id.* at p. 107 [noting that two other

criminal defendants who were "also in custody" intervened as additional plaintiffs].)

The Supreme Court concluded that, for anything exceeding "a brief period of detention to take the [] steps incident to arrest," a defendant was entitled to a "judicial determination," given the "consequences of prolonged detention." (*Gerstein*, *supra*, 420 U.S. at p. 114; see *ibid.* ["Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."]; see also *ibid.* [noting as well the possibility of release under "burdensome" conditions].)

The Court concluded, however, that the judicial determination to which the defendant was entitled did not require "confrontation, cross-examination, and compulsory process for witnesses." (*Gerstein*, *supra*, 420 U.S. at pp. 119-120.) Although "confrontation and cross-examination" might "enhance the reliability" of the judicial determination "in some cases" (*id.* at pp. 121-122), the court viewed that benefit as outweighed by the likely costs such as exacerbation of "pretrial delay" (*id.* at p. 122, fn. 23). (See *id.* at p. 123 [recognizing "the desirability of flexibility and experimentation by the States"].) *Gerstein* held that hearsay provided a sufficient basis for the judicial determination that caused the defendants' "detention pending trial." (*Id.* at pp. 120, 125, fn. 27; *Whitman v. Super. Ct.* (1991) 54 Cal.3d 1063, 1078-1079 [discussing the "hearing held to justify continued *detention* of the accused" under *Gerstein*].)

Amici distinguish *Gerstein* as involving only the requirements of "the Fourth Amendment, not due process."

(Amicus Br. 33.) But *Gerstein* made clear that in setting the requirements for the Fourth Amendment probable cause determination the Court was also answering whether due process required more. (Compare *Gerstein, supra*, 420 U.S. at p. 125, fn. 27 [opinion for the Court, refusing to follow concurrence's suggestion to leave unanswered the "determination of the procedural safeguards that are required"], with *id.* at p. 127 (conc. opn. of Stewart, J.) ["I cannot join the Court's effort to foreclose any claim that the traditional requirements of constitutional due process are applicable in the context of pretrial detention"].)

Nor is there reason to believe that the requirements of state due process exceed those of federal due process. (See generally ABM 29, 36-37.) The state due process inquiry does go beyond the three-factor federal test by recognizing 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 government official." (ABM 29, quoting *Today's Fresh Start, Inc. v. Los Angeles County Off. of Educ.* (2013) 57 Cal.4th 197, 213; Amicus Br. 30.) But that factor is not at issue here. Amici's restrictions on hearsay would not affect defendants' ability to present *their* side—they would only restrict presentation of *the government's* side.

A more relevant distinction might be found in the different standards of proof for each determination. The determination that served as a prerequisite for "prolonged detention" in *Gerstein* required a showing of probable cause. (*Gerstein*, *supra*, 420 U.S. at p. 114.) In contrast, detentions under Article I, section 12(b) of

the California Constitution require that proof of the crime be "evident or the presumption great," and require "clear and convincing evidence" of danger. (See *post* pp. 42-44.)[5] But to the extent that difference justifies requiring greater procedural protections in California for a detention without bail than *Gerstein* demanded for a detention-producing probable cause finding, it still would not mean that hearsay must be prohibited or governed by Amici's complex rules. Defendants in California detention hearings benefit from other protections that were absent in *Gerstein*—such as adversary proceedings, representation by counsel, and the ability to present or proffer defense evidence. (See ABM 33-34; see also *post* pp. 40-41 [noting additional safeguard provided by preliminary hearing].) Those protections ensure that the defense can identify for the judicial officer those cases in which firsthand testimony would indeed be required for an accurate decision—making Amici's broader rules unnecessary.

2. The California Constitution does not mandate Amici's proposed limitations on hearsay

With respect to state constitutional requirements, the most pertinent comparison is to the procedures that California voters have enacted, and this Court upheld, for preliminary hearings.

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[5] See *Gerstein*, *supra*, 420 U.S. at p. 121 [reasoning that probable cause determinations usually do not require credibility determinations or the resolution of conflicting evidence].

The voters enacted Article I, section 30, of the California Constitution in 1990 as part of their approval of Proposition 115. (See *Whitman*, *supra*, 54 Cal.3d at pp. 1067, 1070.) It provides that: "'In order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the people through the initiative process.'" (*Id.* at p. 1070.) Proposition 115 also enacted a statutory change under which the judicial determination at a defendant's preliminary hearing "'may be based in whole or in part upon the sworn testimony of a law enforcement officer or honorably retired law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted.'" (*Ibid.*, quoting Pen. Code, § 872, subd. (b).)

Proposition 115 "allow[s] a qualified law enforcement officer to relate single-level hearsay . . . , if the officer had sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to provide meaningful assistance to the magistrate in assessing the *reliability* of the statement." (*People v. Miranda* (2000) 23 Cal.4th 340, 348.) This Court has held that such testimony at a preliminary hearing does not violate due process. (*Id.* at p. 351.) In other words, California's Constitution, via the provisions of Article I, section 30, allows the introduction of hearsay at preliminary hearings in order to protect victims and witnesses, and the Due Process Clause in Article I, section 7, imposes no bar to that procedure.

Given that, Amici's contention that the same constitution requires those victims and witnesses to testify at detention

hearings is exceedingly implausible. (Amicus Br. 35-39.) Detention hearings under section 12 are reserved for the most dangerous defendants: those accused of capital crimes, felony crimes of violence or sexual assault, and those who are alleged to have made explicit threats. A victim of such a crime is precisely the type of person whom the voters wanted to protect in enacting Proposition 115's provisions allowing officer hearsay in lieu of victim testimony. (See Proposition 115, § 1(c) [stating that a goal of the Proposition was to "create a system . . . in which crime victims and witnesses are treated with care and respect"].) It would make little sense to require at detention hearings the victim testimony that this Court held could be replaced with hearsay at the preliminary hearings that effectively caused detention for many defendants.

B. Amici's contrary arguments are unpersuasive

Amici's attempts to support their proposed rules are unpersuasive.

1. Amici's reliance on procedures required by other statutes, or for final determinations, is unavailing

Amici compare pretrial detention decisions to other contexts in which hearsay is prohibited or restricted. (See Amicus Br. 31-32.) But many of Amici's comparisons are to hearings where hearsay is prohibited on statutory, rather than constitutional grounds. For instance, although *Walker v. Superior Court* (2021) 12 Cal.5th 177 applied the Evidence Code's restrictions on hearsay to proceedings under the Sexually Violent Predator Act (SVPA), it did so only as a matter of statutory interpretation of

the SVPA. *Walker* "decline[d] to reach" any due process questions. (*Walker*, *supra*, 12 Cal.5th at p. 209, fn. 5.) The Legislature could have chosen to enact, for section 12 hearings, hearsay restrictions such as those under various statutes Amici cite. (See Amicus Br. 32 [discussing Welf. & Inst. Code, § 5350, and Pen. Code, §§ 2962, 2966].) Instead, the Legislature did the opposite, instructing in Penal Code section 1319, subdivision (b)(3), that the superior court "shall consider," among other things, "any . . . information presented by the prosecuting attorney." (See ABM 27.) And in Penal Code section 1204.5, the Legislature specifically exempted proceedings "in any application for an order fixing or changing bail" from the provision that generally prohibits judges in criminal cases from "read[ing] or consider[ing]" any "written report of any law enforcement officer or witness to any offense" or "any affidavit or representation of any kind, verbal or written." (Pen. Code, § 1204.5, subd. (a); see *O'Neal v. Super. Ct.* (1986) 185 Cal.App.3d 1086, 1095-1096.) This Court should not lightly override the Legislature's determination that strict rules against hearsay would not fit the needs of this context.

Other decisions cited by Amici do not in fact restrict hearsay in the way Amici propose. Amici cite *In re Lucero L.* (2000) 22 Cal.4th 1227, 1244, which addressed a particular type of hearsay in a juvenile dependency hearing. (Amicus Br. 40.)[6] The lead

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[6] The *Lucero L.* opinion is in fact a plurality opinion, with the concurring opinions agreeing in large part, but offering slightly different takes on the nature of the hearsay admissible at (continued…)

opinion in that case held that hearsay *could* on its own meet the burden of substantial evidence: "[W]e conclude that . . . the out-of-court statements of a child who is subject to a jurisdictional hearing and who is disqualified as a witness because of the lack of capacity to distinguish between truth and falsehood at the time of testifying may not be relied on exclusively *unless the court finds that 'the time, content and circumstances of the statement provide sufficient indicia of reliability*.'" (*Lucero L.*, 22 Cal.4th at pp. 1247-1248, italics added, quoting *In re Cindy L.* (1997) 17 Cal.4th 15, 29.) As *Lucero L.* illustrates, the true safeguard against unreliable hearsay lies not in excluding hearsay altogether, or in requiring corroboration in every case, but rather in the superior court's careful parsing of each statement's content and circumstances to determine its reliability. If a superior court orders detention, it must "set forth the reasons for its decision on the record," (*Humphrey*, *supra*, 11 Cal.5th at p. 155), with "'sufficient specificity to permit meaningful review'" (*In re Pipinos* (1982) 33 Cal.3d 189, 197 [addressing bail pending appeal]). If the record reveals that the superior court either failed to apply the correct standard or abused its discretion, then

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(…continued)

a dependency hearing. (Compare *In re Lucero L.*, *supra*, 22 Cal.4th at p. 1244 (plur. opn. of Mosk, J.) with *id.* at pp. 1250-1252 (conc. opn. of Kennard, J.) and *id.* at pp. 1252-1255 (conc. opn. of Chin, J.).)

the appellate court's habeas corpus power provides a further safeguard.[7]

Other of Amici's comparisons concern trials or proceedings that go to a *final* resolution of liability. For instance, the necessity of cross-examination for final revocations of parole or probation says little about whether the same requirement should be imposed for the detention decision here. (See Amicus Br. 31-32.) An adjudication of final liability bears little relationship to the kind of immediate and preliminary decision that a pretrial detention determination represents.[8]

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[7] Amici also cite two district court decisions as establishing that, in preliminary-injunction proceedings, "courts have recognized that because of hearsay's 'limited probative value,' it *alone* cannot meet the 'clear and convincing' standard and ought instead to be considered only 'for corroboratory purposes.'" (Amicus Br. 40-41.) In fact, *Motorola, Inc. v. Abeckaser* (E.D.N.Y.) 2009 WL 1362833 was decided entirely on the basis of hearsay evidence, namely affidavits rather than in-person testimony. (*Id.* at *3.) The court explained that the recounting of other people's statements in one affidavit was of "limited probative value," and used the statements only as corroboration for other affidavits. (*Id.* at *3, fn. 3.) But it never stated that such statements "c[ould] not" (Amicus Br. 40) have met the clear and convincing standard by themselves if the corroboration were missing. Nor did *Florida Atlantic University Bd. Of Trustees v. Parson* (S.D.Fla. 2020) 465 F.Supp.3d 1279 state that hearsay could be used only for corroboration. The court in that case did not rely on live testimony and use hearsay for corroboration; instead, it found hearsay worthy of reliance because the hearsay was corroborated by live testimony. (*Id.* at p. 1287, fn. 2.)

[8] Amici argue that *People v. Otto* (2001) 26 Cal.4th 200 would not have allowed the admission of hearsay victim statements from police reports in an SVPA proceeding if the

(continued…)

Amici's best example of a nonfinal proceeding that imposes good-cause limitations on hearsay as a constitutional matter appears to be in the context of the preliminary hearing required for parole and probation revocation. (See Amicus Br. 31-32, citing *Morrissey v. Brewer* (1972) 408 U.S. 471 [parole], and *Gagnon v. Scarpelli* (1973) 411 U.S. 778 [probation].) Those decisions prescribed various procedures, including first-person testimony, for preliminary decisions to proceed toward revocation. (*See Morrissey*, *supra*, 408 U.S. at pp. 487 [in preliminary parole revocation hearing, "[o]n request of the parolee, [the] person who has given adverse information on which parole revocation is to be based is to be made available for questioning in [the parolee's] presence," except where "an informant would be subjected to risk of harm if his identity were disclosed"]; *Gagnon*, *supra*, 411 U.S. at p. 782 [extending *Morrissey* requirements to probation revocations].)

But that requirement does not translate to the pretrial detention context for two reasons. First, the Supreme Court's ruling as to preliminary revocation hearings was based on a consideration that has no parallel in the pretrial detention context. (See *United States v. Edwards* (D.C. 1981) 430 A.2d

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(…continued)

defendant had not already admitted that information by pleading no contest to the prior crimes based on the factual basis in the police reports. (Amicus Br. 31.) It is not at all clear that *Otto* would have prohibited the hearsay absent that fact. But even if it were, it would not advance Amici's point: *Otto* concerned a *final* commitment under the SVPA. (26 Cal.4th at p. 204.)

1321, 1335-1337.) A preliminary revocation hearing "serves the purpose of gathering and preserving live testimony" that may otherwise be unavailable to the parolee at the final revocation hearing. (*Gerstein*, *supra*, 420 U.S. at p. 121, fn. 22, discussing *Morrissey*, *supra*, 408 U.S. at p. 485; *In re Walters* (1975) 15 Cal.3d 738, 753, fn. 9 [similar]; see *United States v. Delker* (3d Cir. 1985) 757 F.2d 1390, 1397 [explaining how *Morrissey*'s reasoning does not fit the pretrial detention context].) A pretrial detention hearing serves no such purpose. (Cf. *United States v. Smith* (D.C. Cir. 1996) 79 F.3d 1208, 1210 (per curiam) [pretrial detention hearing is not "a discovery device for the defense"].)

Second, in a parolee's or probationer's preliminary revocation hearing the insistence on first-person testimony makes up for a lack of other procedural protections. Most notably, preliminary decisions in the revocation context do not require a judge or a "'neutral and detached'" decisionmaker; the decision may be made by any "parole officer other than the one who has made the report of parole violations or has recommended revocation." (*Morrissey*, *supra*, 408 U.S. at pp. 486; see *Gagnon, supra*, 411 U.S. at p. 782 [applying *Morrissey* to probationers' hearings].) Nor must preliminary revocation decisions be subject to appeal, or to reopening when further evidence arises.[9] Pretrial detention decisions, in contrast, are not made simply by another

[9] Indeed, when *Morrissey* formulated its rules for preliminary revocation proceedings, it was not even clear that parolees would have a right to counsel. (*Morrissey*, *supra*, 408 U.S. at p. 489.)

prosecutor in the district attorney's office. Instead, they are made by a neutral judicial officer. Moreover, orders of detention are subject to prompt habeas review, and detention can be reconsidered in the superior court if new information arises. (See also *post* p. 40 [noting that, in addition to the detention hearing, detainees also have a right to a preliminary hearing with live testimony].) The additional rights that criminal defendants have make the ability to cross-examine each declarant in the detention hearing less necessary.

In any event, the rule that *Morrissey* established is significantly less hostile to hearsay evidence than what Amici propose here. Even as to *final* revocation proceedings, *Morrissey*'s requirements were "flexible." (*Morrissey*, *supra*, 408 U.S. at p. 489.) They were not intended to "prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence." (*Gagnon*, *supra*, 411 U.S. at p. 782, fn. 5 [discussing *Morrissey*].) And neither *Morrissey* nor *Gagnon* adopted anything resembling Amici's proposal that such "substitutes for live testimony" (*ibid.*) could not be an exclusive basis of decision.

2. Amici's out-of-state authorities do not support their proposed rule

Amici portray their rule as one that has received wide acceptance in the detention context. (Amicus Br. 34-35.) But the decisions they cite do not support that view. For instance, Amici depict their rule against exclusive reliance on hearsay as supported by *Williams v. Virgin Islands* (2010) 53 V.I. 514. (Amicus Br. 40.) In *Williams*, the prosecution relied on "multiple

layers of hearsay" without presenting "any of the underlying investigatory records or reports." (*Williams*, *supra*, at pp. 528-529.) The court held that the prosecution had not met the clear and convincing standard under Virgin Islands law. But *Williams* rejected Amici's rigid rule: The court stated that "we are unwilling at this time to hold" that the clear and convincing standard for pretrial detention "can never be met by exclusively hearsay evidence." (*Id.* at p. 528.)

United States v. Hazzard (N.D.Ill. 1984) 598 F.Supp. 1442, similarly did not reach the conclusion that Amici attribute to it. (Amicus Br. 40.) *Hazzard* held that the use of hearsay in a detention hearing "is not so fundamentally unfair as to rise to the magnitude of a constitutional violation." (*Id.* at p. 1453.) *Hazard* entertained the possibility that "[i]t may well be that hearsay alone will rarely, if ever, satisfy the clear and convincing standard." (*Ibid.*) But it did not adopt that view. (*Ibid.*) The Florida intermediate appellate decision in *Azadi v. Spears* (Fla.Dist.Ct.App. 2001) 826 So.2d 1020, in turn, rejected the exclusive use of hearsay because a Florida rule of criminal procedure explicitly provided that "'[a] final order of pretrial detention shall not be based exclusively on hearsay evidence.'" (*Id.* at p. 1020, quoting Fla. Rules Crim. Proc., rule 3.132.) California has no similar rule or statute, making *Azadi* entirely uninstructive. Although Amici portray the Second Circuit as precluding "uncorroborated hearsay" whenever the defendant "'challenge[s]'" it (Amicus Br. 34-35), the decision that they cite, *United States v. Martir*, like Second Circuit precedent as a whole,

supports the use of proffers and hearsay unless there is a specific reason for doubt. (See *ante* p. 18 [discussing *Martir* and *LaFontaine*].) And *Lynch v. United States* (D.C. 1989) 557 A.2d 580 does not say courts "must 'require'" corroboration for hearsay in all cases. (Amicus Br. 41.) Instead, *Lynch* states that courts "*may*" require corroboration, and expresses confidence that courts will do so "in *appropriate* cases." (*Lynch*, *supra*, at p. 582, fn. 6, italics added.)

Finally, Amici's restrictive views on hearsay are not supported by *Gladney v. Dist. Ct.* (Colo. 1975) 535 P.2d 190. (See Amicus Br. 40.) *Gladney* did hold (albeit with little discussion) that "[d]enial of bail may not be predicated upon hearsay alone." (*Id*. at p. 192.) But it also allowed hearsay to be "admitted in corroboration" *without restriction*. (*Ibid*; see also *ibid.* ["We rule that in bail hearings, hearsay evidence is admissible."].) Amici's proposal to not only limit hearsay to corroborative uses but also restrict its admissibility even for such use goes far beyond *Gladney* or any other case they cite.

C. Amici's test is complex, unadministrable, and one-sided

Amici's rule would prohibit superior courts from "making any factual finding in support of pretrial detention if inadmissible hearsay is the sole evidence supporting that finding." (Amicus Br. 39, italics omitted.) But Amici do not specify what their rule means. Would it be satisfied whenever *any* nonhearsay evidence—such as a single excited utterance, or an officer's testimony about the victim's visible injuries—supported the ultimate findings required for detention under

section 12? Or would Amici require nonhearsay evidence as to every factual conclusion along the way—such as that the injuries were due to an attack (rather than self-inflicted)? And if the latter, how much nonhearsay corroboration as to each point would be required—could an observer's nonhearsay testimony about the victim's injuries suffice to allow reliance on her hearsay statements about how it occurred? Such a morass of formalistic inquiries is not suited for a context where initial decisions must be speedy but where information may be later supplemented and decisions (if necessary) revisited.

Nor is it as clear as Amici suggest that their tests for hearsay and proffers could be applied one-sidedly against the government without also affecting defendants' capabilities at the hearing. (Amicus Br. 45 & fn. 13.) Amici claim that due process protects only "the *defendant*." (Amicus Br. 45.) But the California Constitution also recognizes that "the people of the State of California have the right to due process of law" in a criminal case. (Cal. Const., art. I, § 29.) That does not require "'exact equivalen[ce]'" between the procedures benefitting defendants and those benefitting the People. (*People v. Ault* (2004) 33 Cal.4th 1250, 1269.) But Amici's argument is that defendants need the ability to insist on firsthand testimony and cross-examination to prevent unreliable decisions. (Amicus Br. 26, 38-41.) If accepted, that reasoning could imply a similar entitlement for the People when faced with defense submissions

as well.[10] In truth, all parties' interest in an accurate proceeding would be better protected by focusing on the fundamental reliability of each statement, rather than on the distraction of Amici's formalistic rules.

D. Amici's formalistic restrictions are unnecessary

Amici portray their rules as designed to prevent defendants from being detained for long periods on the basis of untested allegations. It is indeed fundamental that defendants should not be detained without a fair opportunity to contest the reason for detention. Other procedural protections—established by the Legislature and long judicial precedent—can satisfy these concerns without the adoption of Amici's novel rules.

Defendants have a right to a preliminary hearing within a statutorily set period. (See Pen. Code, § 859b [setting forth applicable time limits].) At the preliminary hearing the government presents evidence through the testimony of a law enforcement officer who was involved in the investigation. (See *Whitman*, *supra*, 54 Cal.3d at pp. 1070-1075.) As this Court has stated, that witness's knowledge of any hearsay the witness conveys must be sufficient to allow "meaningful[] cross-examin[ation]" (*id.* at p. 1074), and to "meaningfully assist the

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[10] Cf. *Kling v. Super. Ct.* (2010) 50 Cal.4th 1068, 1079, as modified (Nov. 17, 2010), and holding modified by *Facebook v. Superior Court* (2020) 10 Cal.5th 329 [in considering defense's request for ex parte subpoena, trial court must "balance the People's right to due process and a meaningful opportunity to effectively challenge" the defense request against the defendant's constitutional rights and privilege].

magistrate in assessing the reliability of the statement" (*id.* at p. 1075).

Defendants may also renew requests for release in light of new factual developments. (Cf. *Moore v. Super. Ct.* (2010) 50 Cal.4th 802, 825 [opportunities to reevaluate commitment determination "mitigate the effects of any 'error' in the commitment proceeding" attributable to the challenged procedure].) If discrepancies emerge between the facts relied on by the magistrate in denying pretrial release and the evidence disclosed at the preliminary hearing, or if additional facts come to light with subsequent discovery or investigation, the accused may challenge detention again—at which point the court will be required to take any new showing into account and determine if continuing detention is justified or if alternative conditions could meet the State's interests. (See Pen. Code, § 1289 ["[a]fter a defendant has been admitted to bail," a court may, "upon good cause shown, either increase or reduce the amount of bail"].)

These well-established features of California criminal cases provide sufficient procedural safeguards to ensure the reliability of pretrial detention determinations. There is no need for Amici's novel, complex, and distracting rules.

III. THE FACT THAT A PERSON HAS BEEN CHARGED WITH AN OFFENSE CARRIES NO EVIDENTIARY WEIGHT IN DETERMINING WHETHER THE PERSON CAN BE SAFELY RELEASED

Amici also take issue with a sentence from this Court's recent opinion in *Humphrey*. In the challenged passage, this Court explained:

> The voters amended the Constitution to grant the people of this state the right to have the safety of the victim and the victim's family considered in the bail determination process. [Citation.] To that end, they added "the safety of the victim" to the list of factors that a court shall consider in "setting, reducing or denying bail" ensuring that it, along with public safety, will be "the primary considerations" in those determinations. (Cal. Const., art. I, § 28, subd. (f)(3); see Pen. Code, § 1275, subd. (a)(1).) *Along with those primary considerations of victim and public safety, the court must assume the truth of the criminal charges.* (See *Ex parte Duncan* (1879) 53 Cal. 410, 411; *Ex parte Ruef* (1908) 7 Cal.App. 750, 752, 96 P. 24.)

(*In re Humphrey* (2020) 11 Cal.5th 135, 152-153, italics added.)

Amici contend that the mere fact of a charge should not give rise to any presumption that the person in fact committed the charged crime for purposes of the detention decision. (Amicus Br. 10-20.) We agree. This Court's statement about assuming the truth of a charge has relevance to certain aspects of how a detention hearing should proceed, but not to whether there is a basis to detain a defendant on grounds of dangerousness. To avoid confusion, a clarification by this Court would be appropriate.

A. The filing of charges does not give rise to an evidentiary presumption supporting detention

Article I, section 12 of the California Constitution provides in relevant part:

> A person shall be released on bail by sufficient sureties, except for:
>
> (a) Capital crimes when the facts are evident or the presumption great;

> (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or
>
> (c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

The text thus establishes two kinds of conditions that may need to be demonstrated for bail to be denied—a qualifying offense requirement and proof of sufficient dangerousness. To satisfy the first—a qualifying offense under subdivisions (a), (b), or (c)—the prosecution must show that "the facts are evident or the presumption great." That standard requires evidence that would be "sufficient to sustain a hypothetical verdict of guilt on appeal." (*In re White* (2020) 9 Cal.5th 455, 463.) The fact that a person has been charged with the crime cannot help to make the prosecution's case as to this condition. (See CALCRIM Nos. 103, 220 ["The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true."].)

To satisfy the second kind of condition—the dangerousness requirement for noncapital felonies under section 12, subdivisions (b) and (c)—the prosecution must show the requisite dangerousness by clear and convincing evidence. For violent felonies and sexual assault felonies, under subdivision (b), the court must "find[] based upon clear and convincing evidence that

there is a substantial likelihood the person's release would result in great bodily harm to others." For other felonies, under subdivision (c), the court must "find[] based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released." In determining whether these thresholds are met, the nature of the crime may be relevant, but only if the particular defendant in fact committed the crime—a question which the court must evaluate without relying on the mere fact that he has been charged, as explained above. This case provides an opportunity to clarify that point, so that *Humphrey* is not read as somehow lowering the People's burden of proof.

B. Detention hearings are not a proper forum to challenge the propriety of the prosecution or the interest in ensuring the defendant's availability for trial

If the Court does clarify its prior statement in *Humphrey*, however, it should ensure that the clarification does not raise confusion about the extent to which defendants can challenge the underlying prosecution as part of a detention hearing.

First, a detention hearing is not a vehicle for challenging the validity of filed charges. California law provides other ways for a defendant to halt a prosecution. (See, e.g., Pen. Code, § 859b [preliminary hearing]; *id.* § 991 [motion to dismiss a misdemeanor]; *id.* § 995 [motion to set aside indictment or information]; *id.* § 1538.5 [suppression motion].) But the need for detention must be evaluated in terms of the charges as they exist; it does not encompass arguments about what should happen in

later motions to dismiss. Second, the governmental interest in ensuring that a defendant does not abscond or violate court orders pending a trial is independent of whether that trial results in conviction or acquittal. Arguments against detention cannot be based on the proposition that the government will not suffer if the defendant does not answer the charges.

Indeed, those appear to be the ways in which *Ex parte Duncan* (1879) 53 Cal. 410—the decision *Humphrey* cited—applied the assumption that *Humphrey* later referenced. Duncan, who was in jail because he could not meet his bail amount, challenged the amount as unconstitutionally excessive. (*Duncan*, *supra*, 53 Cal. at p. 411.) In determining whether the bail amount was "disproportionate to the offense charged" (*id.* at p. 412), this Court stated, "we must assume . . . that the petitioner is guilty of the . . . felonies of which he is indicted" (*id.* at p. 411, italics omitted). And the governmental purpose against which the bail was to be measured was (as this Court soon described it in another opinion regarding the same prosecution) "to secure the personal appearance of the accused to answer the charge against him." (*Ex parte Duncan* (1879) 54 Cal. 75, 77 (*Duncan II*).) That is why, even after Duncan's first two trials resulted in hung juries rather than convictions, this Court approved the same bail. (*Id.* at pp. 76-78.)

This Court's assumption of Duncan's "guilt" is best understood as reflecting that the possibility of acquittal was irrelevant to the bail setting that caused his detention, and that the bail proceeding was not a forum to challenge the validity of

the continuing criminal proceeding.[11] To the extent *Humphrey* might lead courts to assume that the assumption goes beyond that, this Court should eliminate that misconception.

CONCLUSION

This Court should affirm the judgment of the Court of Appeal.

Respectfully submitted,

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September 21, 2022

[11] The other decision *Humphrey* cited, *Ex parte Ruef* (1908) 7 Cal.App. 750, likewise considered only whether a given amount of bail was excessive as a means to "secur[e] the attendance of the defendant upon court" and "his rendering himself in execution of any judgment that may be pronounced against him." (*Id.* at p. 752.)

CERTIFICATE OF COMPLIANCE

I certify that the attached Answer to Amicus Curiae Brief uses a 13 point Century Schoolbook font and contains 9,501 words.

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September 21, 2022

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **In re Harris**
No.: **S272632**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On September 21, 2022, I electronically served the attached ANSWER TO AMICUS CURIAE BRIEF by transmitting a true copy via this Court's TrueFiling system.

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 21, 2022, at Sacramento, California.

A. Cerussi	*/s/ A. Cerussi*
Declarant for eFiling	Signature

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 21, 2022, at San Diego, California.

Tina Houston	
Declarant for U.S. Mail	Signature

Supreme Court of California
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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

Case Name: **HARRIS (JOHN) ON H.C.**
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9/21/2022

Date

/s/Ann Cerussi

Signature

Klein, Joshua (226480)

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California Dept of Justice, Office of the Attorney General

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