IN THE SUPREME COURT OF CALIFORNIA

IN RE GERALD KOWALCZYK, On Habeas Corpus	**Case Number: S277910**

APPLICATION OF CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, PUBLIC DEFENDERS FOR ALAMEDA AND SAN FRANCISCO COUNTIES AND LOS ANGELES COUNTY ALTERNATE PUBLIC DEFENDER TO APPEAR AS *AMICI CURIAE* ON BEHALF OF PETITIONER (CAL. RULES OF COURT, RULE 8.200(c)) AND BRIEF OF *AMICI CURIAE*

In re Kowalczyk (2022) 85 Cal.App.5th 650

First District Court of Appeal Case No. A162891

San Mateo County Superior Court Case No. 21-SF-003700-A

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The California Public Defenders Association, Public Defenders for Alameda and San Francisco Counties and the Los Angeles County Alternate Public Defender apply under California Rules of Court, Rule 8.200, subdivision (c) for permission to appear as *amici curiae* on behalf of petitioner, Gerald Kowalczyk. This application summarizes the nature and history of your *amici* and our interest in the issues presented here and shows that our brief will assist this Court in analyzing and considering the issues presented.

I. Application of California Public Defenders Association to appear as *amicus curiae* on behalf of petitioner.

The California Public Defenders Association (CPDA) is the largest association of criminal defense attorneys, public defenders, and associated professionals in the State of California. With a membership of nearly 4,000 professionals, CPDA is an important voice for the criminal defense bar. The

collective experience of CPDA attorneys in representing indigent criminal defendants at bail hearings in California places CPDA in a unique position to assist the Court in this case. Courts have granted CPDA leave to appear as *amicus curiae* in nearly 50 California cases resulting in published opinions, including *In re Humphrey* (2021) 11 Cal.5th 135. CPDA's Directors and Officers have also participated in statewide work groups regarding California's bail reform efforts. CPDA thus has a significant interest in the present matter.

II. Application of Alameda County Public Defender to appear as *amicus curiae* on behalf of petitioner.

With a population of 1.67 million, Alameda County is the seventh most populous county in the state. The Alameda County Public Defender represents thousands of clients annually and provides representation in more than 90% of the criminal case filings in Alameda County. The vast majority of those cases begin with a bail hearing. Decisions in these bail hearings, even post-*Humphrey*, are far from uniform. As a result, the kind of bail hearing an individual gets depends largely upon the judge they draw. This creates unfair disparities and many clients languish in custody for misdemeanors and other offenses that are outside of article 1, section 12's strict limits on a court's ability to order pretrial detention. As such, the Alameda County Public Defenders and their clients have a strong interest in seeing this Court resolve the issues in this matter.

III. Application of San Francisco Public Defender to appear as *amicus curiae* on behalf of petitioner.

The San Francisco Public Defender is charged with representing thousands of indigent persons charged with crimes annually, many of whom are subject to pretrial custody and apply for release from detention on a daily

basis. This Court's landmark *Humphrey* decision on pretrial detention originated in San Francisco, and the San Francisco Public Defender, in conjunction with Humphrey's appellate counsel at the time, Civil Rights Corp, litigated the case up to this Court. As such, the San Francisco Public Defender has a strong stake and interest in the Court clarifying the constitutional parameters of pretrial detention.

IV. Application of Los Angeles County Alternate Public Defender to appear as *amicus curiae* on behalf of petitioner.

As one of the two public defender offices in Los Angeles County, the Los Angeles County Alternate Public Defender's office represents thousands of indigent clients each year in all types of criminal cases. In 2022, over 100,000 criminal felony and misdemeanor cases were filed in Los Angeles County spread across twelve different judicial districts. When the Los Angeles Public Defender's Office declares that they cannot represent a particular indigent arrestee due to a conflict of interest, that individual is referred to the Alternate Public Defender's office. Each of those arrestees is potentially subject to pretrial detention if they cannot afford to post bail and a court determines that they are not otherwise eligible for release. As such, the Los Angeles County Alternate Public Defender's Office has a strong interest in resolution of this matter.

No party or counsel for a party authored this amicus brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the *amicus curiae*, its members, or its counsel in the pending appeal funded the preparation and submission of the proposed amicus brief. (Cal. Rules of Court, rule 8.520, subd. (f)(4).)

ISSUES PRESENTED

In granting review of the Court of Appeal's decision in *In re Kowalczyk* (2022) 85 Cal.App.5th 650, this Court defined the issues as:

I. Which constitutional provision governs the denial of bail in noncapital cases—article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution—or, in the alternative, can these provisions be reconciled?

II. May a superior court ever set pretrial bail above an arrestee's ability to pay?

Resolution of these issues will impact criminal defendants throughout the state.

SUMMARY OF ARGUMENT

"*We must not penalize the poor for being poor*." (Statement from Former Chief Justice Tani G. Cantil-Sakauye's 2016 State of the Judiciary report highlighting pretrial detention/release as an area of concern for the judicial branch. https://www.courts.ca.gov/34477.htm.) The statement also reflects the premise of this Court's landmark 2021 *Humphrey* decision, holding that setting bail at an amount that a person cannot afford to pay is unconstitutional such that courts must always "consider the individual arrestee's ability to pay" in setting pretrial bail. (*Humphrey*, *supra*, 11 Cal.5th at p.154.)

Yet, there is recent evidence that California courts are not following *Humphrey*'s mandate. A 2022 report by UCLA School of Law Bail Practicum and UC Berkeley Law Policy Advocacy Clinic found that judges across the state often ignore or procedurally misapply the requirements set forth in

Humphrey. The report reviewed California's 58 counties in the 18 months following the *Humphrey* decision, and found no evidence of a decrease in jail population, bail amounts, or average length of pretrial detention in California, and that bail continues to be set at amounts people cannot afford to pay, contravening *Humphrey*. (Alicia Virani, et. al, *COMING UP SHORT: The Unrealized Promise of* In re Humphrey. UCLA School of Law Bail Practicum and UC Berkeley Law Policy Advocacy Clinic. Oct. 2022 ("post-*Humphrey* report"). https://www.law.berkeley.edu/wp-content/uploads/2022/10/Coming-Up-Short-Report-2022-WEB.pdf; David Greenwald, *Judges Uncertain How to Handle New Humphrey Decision, Many Are Simply Treating Cases As No-Bail Cases in Contrast to Explicit Court Ruling*, The Davis Vanguard (May 3, 2021) [examples of Sacramento County Superior Court judges misapplying *Humphrey*]. https://www.davisvanguard.org/2021/05/judges-uncertain-how-to-handle-new-humphrey-decision-many-are-simply-treating-cases-as-no-bail-cases-in-contrast-to-explicit-court-ruling/.)

Anecdotally, there are reports out of Los Angeles County Superior Court that judges routinely ignore the accused's ability to pay and set unaffordable bail. In the Downey and Long Beach branch courts, felony arraignment judges continue to set bail in unaffordable amounts regardless of the nature of the charges, even when defense counsel indicates that their client has no ability to pay that amount of bail. Recently, an arraignment judge in downtown Los Angeles increased bail to an unaffordable amount for an accused charged with retail theft, who appeared in court after having previously bailed out on an affordable bail amount. When defense counsel pointed out that the client could not afford higher bail and that this was a non-violent offense, the court responded "well, it could have become violent."

The accused was remanded into custody because they could not afford to pay the new higher bail. In an attempted murder case in which the accused—the driver of a vehicle from which two gang members shot at another gang member—had no prior criminal history or gang ties, the court set $1 million bail when the accused could afford only $3500, with no discussion of less restrictive alternatives to detention or ability to pay. On a pretrial writ challenging the $1 million bail order, the Court of Appeal ordered the trial court to issue an OSC for a new bail hearing.

Given this alarming post-*Humphrey* landscape, *Kowalczyk* presents grave issues for this Court's review: deprivation of pretrial liberty without due process; equal access to justice; the premise that a defendant's wealth or poverty should not dictate their access to liberty during the pendency of a criminal prosecution. The issues that guided this Court's decision in *Humphrey* underlie basic principles of due process and equal protection under the state and federal constitutions.

As the *Humphrey* Court declared, "[i]t is one thing to decide that a person should be charged with a crime, but quite another to determine, under our constitutional system, that the person merits detention pending trial on that charge." (*In re Humphrey, supra,* 11 Cal.5th at p. 147.) It went on to note that, "[e]ven when charged with a felony, noncapital defendants are eligible for pretrial release — on their own recognizance, on OR supervised release, or by posting money bail. … The disadvantages to remaining incarcerated pending resolution of criminal charges are immense and profound." (*Ibid.*)

Similarly, this Court in *In re White* (2020) 9 Cal.5th 455 cautioned trial judges to be mindful that pretrial detention has a practical impact on even an innocent defendant's decision whether to negotiate a plea, citing research showing that a defendant in custody naturally has a greater incentive to

plead guilty than does a defendant on pretrial release, especially if the time to trial roughly matches the defendant's potential sentence exposure. (*Id.* at 471.)

The Court of Appeal's *Kowalczyk* decision defies the text of the California Constitution and *Humphrey* and places thousands at risk of pretrial detention simply because they are poor. *Kowalczyk* thus creates confusion in the trial courts by expanding exceptions to section 12 and undercutting this Court's *Humphrey* decision. The Court of Appeal claims *Kowalczyk* is rooted in "the constitutionally-based policy purposes of bail." (*In re Kowalczyk, supra*, 85 Cal.App.5th at p. 663.) Yet, this is actually a policy argument that public safety and risk of flight warrant broader detention authority than what is authorized by section 12. The Court of Appeal cannot amend a constitutional provision in this way. Section 12 balances personal liberty against the public welfare and draws a clear line that only the people, through constitutional amendment, may change. To uphold the longstanding limitation on pretrial detention enshrined in section 12 and to safeguard against wrongful deprivations of liberty, this Court should reverse.

Simply put, petitioner Kowalczyk remained in custody because he could not afford bail that was intentionally set above his means; yet, a wealthier person in the same circumstances would have been free pending trial. That is precisely the injustice this Court sought to address in *Humphrey* and that the lower court's opinion here perpetuates.

The prospect that *Kowalczyk* could be used to detain persons charged with misdemeanor and non-violent felony offenses presents a dangerous and unwarranted expansion and abuse of pretrial detention. Section 12 is explicitly limited to felonies and, in its effort to reconcile the two constitutional provisions, *Kowalczyk* suggested that section 28, subdivision

(f)(3) was also a felony provision: "when [Prop 9] mentions the topic of bail, it does so in a manner that is fully consistent with the terms of section 12. For instance, section 28's prefatory declarations include a finding that the rights of crime victims "encompass the expectation" shared by all Californians that, prior to trial, "persons who commit *felonious acts* causing injury to innocent victims will be ... appropriately detained in custody." (*In re Kowalczyk*, *supra*, 85 Cal.App.5th at p. 684-685, emphasis added.)

As discussed below, *Kowalczyk*'s analysis expanding pretrial detention is flawed on numerous grounds, and on a practical level, it is also counter-productive and unnecessary. Precedent and anecdotal accounts, not to mention evidence-based data, show why *Kowalczyk* missed the mark and must be reversed.

MEMORANDUM OF POINTS AND AUTHORIES

I. The *Kowalczyk* decision is flawed and would unjustly expand the circumstances under which courts may impose pretrial detention.

Amici agree with petitioner's legal analysis and will not repeat those arguments here. We provide only a summary of what is wrong with the *Kowalczyk* decision.

A. *Kowalczyk* proceeds on a flawed analysis.

The Court of Appeal reached its opinion by means of a flawed constitutional analysis. The decision is at odds with this Court's opinion in *Humphrey*, the text of section 12, and the history of bail in California and the United States.

First, the decision is incompatible with *Humphrey*'s holding that unaffordable bail is "the functional equivalent of a pretrial detention order," and therefore that "the arrestee's state and federal substantive due process

rights to pretrial liberty" apply to both equally. (*In re Humphrey*, *supra*, 11 Cal.5th at p. 151.)

Second, *Kowalczyk* ignores *Humphrey*'s holding that wealth-based detention offends the state and federal right to equal protection. The Court of Appeal defended its expansion of pretrial detention on the basis that *Humphrey* repeatedly acknowledged that an outright pretrial detention order would not offend due process in those rare instances in which a court concludes, by clear and convincing evidence, that no nonfinancial condition in conjunction with affordable money bail can reasonably protect the state's compelling interests in public safety or arrestee appearance. (*In re Kowalczyk*, *supra*, 85 Cal.App.5th at p. 665 [citation omitted].) But *Humphrey* also held that "[d]etaining an arrestee [by means of unaffordable bail] accords insufficient respect to the arrestee's crucial state and federal equal protection rights against wealth-based detention[.]" (*In re Humphrey*, *supra*, 11 Cal.5th at p. 151.)

Third, ordinary principles of textual interpretation refute *Kowalczyk*'s reading of section 12. The plain meaning of "[a] person shall be released on sufficient sureties, except for: [subdivisions (a) through (c)]," is that release is mandated, and detention prohibited, except in the listed circumstances. In other words, the listed factors must inform a court's calculation of when release is required in all circumstances except those listed in subdivisions (a) through (c). (See *In re York* (1995) 9 Cal.4th 1133, 1139 ["section 12 . . . establishes a person's right to obtain release on bail . . . , identifies certain categories of crime in which such bail is unavailable, . . . [and] sets forth the factors a court shall take into consideration in fixing the amount of the required bail"].) *Kowalczyk*'s tortured reading of this language is not faithful to its plain meaning.

Fourth, *Kowalczyk* is logically incoherent. The Court of Appeal recognized that the circumstances permitting denial of release under section 12, subdivisions (a) through (c) may not be enlarged by implication. (*In re Kowalczyk, supra,* 85 Cal.App.5th at p. 661.) Yet it did just that, holding that courts may impose pretrial detention beyond the circumstances identified in section 12, subdivisions (a) through (c), based only on section 12's requirement that courts consider the purposes of bail in setting amounts. (*Id.* at p. 660.) No analysis of section 12—or section 28, for that matter—justifies expanding the setting unaffordable bail to misdemeanor offenses.

Finally, *Kowalczyk*'s reading of section 12 is contradicted by the history of that section and the constitutional role of bail in both California and the federal system. The history of section 12 reveals that, from the beginning, bail was conceptualized and operated as a mechanism for release, not detention. Thus, since adoption of the State Constitution in 1849, California has enshrined the right to bail as a right to release in all but a limited category of cases. (See *People v. Turner* (1974) 39 Cal.App.3d 682, 684.) The Legislature codified this right in 1872 with the addition of Penal Code section 1271, which established a right to bail for all offenses other than capital offenses. (Pen. Code, § 1271.)

Thus, *Kowalczyk*'s unsound analysis results in a dramatic and unjust expansion in how trial courts may detain defendants pretrial, as argued next.

B. *Kowalczyk* unjustly expands the circumstances in which poor people may be detained.

The Court of Appeal's flawed decision greatly expands the circumstances under which trial courts may detain arrestees. Section 12 establishes "that defendants charged with noncapital offenses are generally entitled to bail" with "exceptions in particular circumstances when a defendant is charged

with at least one felony offense." (*In re White*, *supra*, 9 Cal.5th at p. 462.) *Kowalczyk* obliterates this limitation.

Though the Court of Appeal recognized that section 12 controls the circumstances in which courts may issue detention orders, it held that detention is also permissible "when a person may not be able to post bail as set." (*In re Kowalczyk*, *supra*, 85 Cal.App.5th at p. 660.) *Kowalczyk* ruled that courts may set unaffordable bail whenever "no other conditions of release, including affordable bail, can reasonably protect the state's interests in assuring public and victim safety and the arrestee's appearance in court." (*Id.* at pp. 664-665.) The Court of Appeal decision ignores the plain language of this Court when it held "[t]he common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional." (*Humphrey*, *supra*, 11 Cal.5th at p. 143.) By allowing arrestees to be detained on unaffordable bail amounts, *Kowalczyk* authorizes an end-run around section 12's limitation on pretrial detention.

How significantly this expands the detention authority of trial courts is demonstrated by the facts of *Kowalczyk* itself. The petitioner here was unhoused, had no history of violence, and was arrested on minor charges. Yet the court initially set unaffordable bail to ensure his detention before ultimately ordering detention outright. (*Id.* at p. 651.) *Kowalczyk*'s sweeping ruling allows detention where release would not pose a risk of physical harm to anyone, including in misdemeanor cases. Detention under these circumstances is a far cry from those listed in section 12, and thus, *Kowalczyk* invites a momentous increase in pretrial detention with significant attendant costs. (See *In re Humphrey, supra*, 11 Cal.5th at pp. 147-148 [recognizing effects of detention including prejudice to the arrestee's defense, livelihood, and family life at significant cost to taxpayers].)

Next, your *amici* illustrate why *Kowalczyk* works against the goal that all parties presumably desire: the fair administration of justice and the use of pretrial detention only in the rare instance when no other option will achieve the goals of public safety and an accused's appearance in court.

II. *Kowalczyk* is limited to felony cases.

If left to stand, the Court of Appeal decision would predictably expand pretrial detention beyond the boundaries dictated by section 12 and this Court in *Humphrey* and *White*, thereby effectively eviscerating those precedents.

Two recent examples illustrate this point. Just after the Court of Appeal issued *Kowalczyk*, the San Francisco District Attorney cited the decision to ask for no-bail detention in a felony narcotics sale case, clearly outside section 12's exceptions to pretrial release for cases that involve violence, great bodily injury or death or threats thereof. (*People v. Luis Ramos-Aguilar*, San Francisco Superior Court case 22015943, Notice of Motion and Motion to Detain; Request for Judicial Notice, filed Jan. 3, 2023.) And at least one Los Angeles Superior Court judge, citing *Kowalczyk*, regularly sets bail in misdemeanor cases in amounts the accused cannot afford. In one case, this judge set unaffordable bail in a misdemeanor domestic violence case, where the accused had no prior convictions or failures to appear. The case was ultimately dismissed for a speedy trial violation, after the accused had spent time in custody.

Indeed, it is of great concern that trial courts are using *Kowalczyk* to set unaffordable bail in misdemeanor cases. Persons charged with misdemeanor offenses are presumptively entitled to own recognizance (OR) release and categorically must not be subject to unaffordable bail. (See Pen. Code, § 1270, subd. (a).) To the extent that sections 12 and 28, subdivision (f)(3) permit

detention without bail or on unaffordable bail, they must be limited to felony cases.

A. Persons charged with misdemeanors are statutorily entitled to release on their own recognizance.

An individual charged with only misdemeanor offenses is presumptively entitled to release on his or her own recognizance. Penal Code section 1270, subdivision (a), provides that an arrestee "*shall* be entitled to an own recognizance release unless the court makes a finding on the record[] … that an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required." (Pen. Code, § 1270, subd. (a), emphasis added.) The presumption of OR release in misdemeanor cases is consistent with Penal Code section 853.6, which mandates (with few exceptions) that persons arrested for misdemeanors should be cite-released rather than incarcerated pending their first appearance in court. (Pen. Code, § 853.6, subd. (a)(1).)

B. Courts can no longer set unaffordable bail in misdemeanor cases.

1. The conflict between article I, section 12 and article I, section 28(f)(3) and its impact upon misdemeanor cases.

In 1982, Proposition 4 amended article I, section 12 of the California Constitution to read:

> "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.

Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

A person may be released on his or her own recognizance in the court's discretion." (Cal. Const., art. I, § 12, emphases added.)

The same year, Proposition 8 added section 28, subdivision (e) to the California Constitution:

"A person *may* be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration *the protection of the public,* the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. *Public safety shall be the primary consideration.*

A person may be released on his or her own recognizance in the court's discretion, *subject to the same factors considered in setting bail.* However, no person charged with the commission of any serious felony shall be released on his or her own recognizance. . . ." (Cal. Const., art. I, § 28, subd. (e), emphases added.)

Section 28, subdivision (e) made bail discretionary in all cases, including misdemeanors, and "extended the restrictions it imposed upon bail to OR release." (*In re Kowalczyk*, *supra*, 85 Cal.App.5th at 676, quoting *People v. Standish* (2006) 38 Cal.4th 858, 877-878.)

This turned out to be its downfall. By permitting pretrial detention in *all* cases and making "*[p]ublic safety. . . the primary consideration"* in all bail and OR decisions, section 28, subdivision (e) came into "direct conflict" with Proposition 4. (*People v. Standish, supra,* 38 Cal.4th at p. 877.) Since Proposition 4 garnered more votes, section 28, subdivision (e) never became law. (*Id.* at pp. 877-878.)

The question presented in *Kowalczyk* was whether Proposition 9, the *Marsy's Law Crime Victims Rights Amendment,* could be "reconciled" (*In re Kowalczyk*, *supra*, 85 Cal.App.5th at p. 672) with article I, section 12 so that "both of their bail and OR provisions can be given effect" in petitioner's *felony* identity theft and vandalism case. (*Id.* at p. 676.)

The First District concluded that while Proposition 9's language was almost identical to Proposition 8's, it nevertheless avoided the pitfalls of its predecessor. Justice Fujisaki found that section 28, subdivision (f)(3)'s use of the phrase "[a] person *may* be released on bail by sufficient sureties"—the same phrase that sealed section 28, subdivision (e)'s fate in *Standish*—was really just "a declarative statement of existing law. . . acknowledg[ing] that a person may or may not be released on bail, consistent with the dictates in section 12 that a person is generally entitled to bail release in noncapital cases except under the circumstances articulated in section 12(b) and (c), or. . . when a person may not be able to post bail as set." (*In re Kowalczyk, supra,* 85 Cal.App.5th at pp. 683-684, emphasis in original; compare *People v.*

Standish, supra, 38 Cal.4th at pp. 874, 877 [the phrase "*may* be released on bail" would have "rendered bail discretionary in all cases"].)

Although the court's analysis is hard to swallow, its observation that Proposition 9 applies only to *felonies* is not. As Justice Fujisaki pointed out, the initiative's declaration of purpose "[i]mportantly" contains this caveat:

> "The rights of victims also include broader shared collective rights that are held in common with all of the People of the State of California. . . . These rights encompass the expectation shared with all of the people of California that persons who commit *felonious acts* causing injury to innocent victims will be appropriately and thoroughly investigated, [and] *appropriately detained in custody* ... so that the public safety is protected and encouraged as a goal of highest importance." (*In re Kowalczyk, supra*, 85 Cal.App.5th at p. 677, quoting Cal. Const., art. I, § 28, subd. (a)(4), emphasis added.)[1]

According to *Kowalczyk,* the language in section 28, subdivision (f)(3) no longer conflicts with section 12's command that, except in "narrow circumstances" (*In re Humphrey*, *supra*, 11 Cal.5th at 143), every "person *shall* be released on bail by sufficient sureties" and "[e]xcessive bail may not be required." (Cal. Const., art. I, § 12, subd. (c).)

But if, as the court suggested, section 28, subdivision (f)(3) is limited to felonies, its demand that "[*p*]*ublic safety shall be the primary consideration*

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[1] The ballot arguments in favor of Proposition 9 highlighted the fact that Marsy Nicholas' killer was released on bail and made it clear that Proposition 9 was designed to restore the constitutional balance between crime victims and "RAPISTS, MURDERERS, CHILD MOLESTERS, AND DANGEROUS CRIMINALS." (2008 Voter Information Guide, General Election, pp. 62-63; capitalization in original. See also *Carter v. Com. on Qualifications, etc.* (1939) 14 Cal.2d 179, 185; *White v. Davis* (1975) 13 Cal.3d 757, 775, fn. 11 [the analysis and arguments in the voters' pamphlet is often a useful aid in ascertaining the intention of the framers and the electorate].)

and its requirement that courts "take into consideration. . . the protection of the public" and "the safety of the victim" in determining bail does not apply to misdemeanors. (Cal. Const., art. I, § 28, subd. (f)(3).) Since that phrase does not appear in article I, section 12, the calculus for misdemeanor *bail* must be limited to the ❶ "seriousness of the offense charged," ❷ "previous criminal record of the defendant," and ❸ "probability of his or her appearing at the trial or hearing of the case." (Cal. Const., art. I, § 12, subd. (c).)

2. Penal Code section 1270.

On the day that Proposition 8 passed, Penal Code section 1270 stated that misdemeanants "shall be entitled to an own recognizance release unless the court makes a finding upon the record that an own recognizance release will not reasonably assure the appearance of the defendant as required." (Pen. Code, § 1270, subd. (a); see also Pen. Code, § 853.6 [permitting cite release for most misdemeanors].)

In an apparent effort to harmonize the statute with Proposition 8's bail provision, the Legislature subsequently amended section 1270 to incorporate the "public safety" language contained in article I, section 28, subdivision (e):

> (a). . . A defendant who is in custody and is arraigned on a complaint alleging an offense which is a misdemeanor. . . shall be entitled to an own recognizance release unless the court makes a finding on the record, in accordance with Section 1275,[2] that an own recognizance release will *compromise public*

[2] The "public safety" language from section 28, subdivision (e) was also grafted onto Penal Code section 1275:

> "In setting, reducing, or denying bail, the judge or magistrate shall take into consideration the *protection of the public,* the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or hearing of the case. *The public safety shall be the primary consideration.* . . ." (Pen. Code, § 1275, subd. (a)(1), emphasis added.)

> *safety* or will not reasonably assure the appearance of the defendant as required. *Public safety shall be the primary consideration*. . . . (Pen. Code, § 1270, subd. (a), emphasis added.)

Although the Legislature may not have realized it at the time, it was reprising a provision that never became operative and was in "direct conflict" with article I, section 12. (*People v. Standish, supra,* 38 Cal.4th at p. 877.) For the same reason that section 28, subdivision (e) was nugatory, so was this portion of Penal Code section 1270. And by adding public safety restrictions to section 12's bail and OR provisions and making those restrictions the paramount consideration, the Legislature effectively amended the constitution—something that it cannot do without voter approval. (Cal. Const., art. II, § 10 ["The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval"].) Such an amendment occurs when the Legislature purports to "change an existing initiative statute by *adding* or taking from it some particular provision." (*People v. Cooper* (2002) 27 Cal.4th 38, 44; see also *Assets Reconstruction Corp. v. Munson* (1947) 81 Cal.App.2d 363, 368 [an amendment is "a legislative act designed to change some prior or existing law by adding or taking from it some particular provision"].)

There can be little doubt that the additions to section 1270 satisfy this test. The mandate that courts consider "public safety" obviously "added" an element to article I, section 12's bail calculus, and by making that element the "primary consideration," the Legislature fundamentally "changed" the nature of that calculus. (*People v. Cooper, supra,* 27 Cal.4th at p. 44; *Assets Reconstruction Corp. v. Munson, supra,* 81 Cal.App.2d at p. 368.)

Had someone challenged the amendment, settled rules of statutory construction would have required severing the "public safety" language from the statute. (See *People v. Kelly* (2010) 47 Cal.4th 1008, 1046-1049; *Ayotte v. Planned Parenthood of Northern New England* (2006) 546 U.S. 320, 323, 325, 329 [when language in a statute conflicts with a constitutional provision, it must be redacted or the statute cannot stand]; *In re D.L.* (2023) 93 Cal.App.5th 144 [severing language that conflicted with the Second Amendment from Penal Code section 26150]; *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 147, disapproved on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104 ["Both the United States Supreme Court and the California courts have pointed out on numerous occasions that a court, when faced with an ambiguous statute that raises serious constitutional questions, should endeavor to construe the statute in a manner which avoids any doubt concerning its validity"].)

But if, as *Kowalczyk* suggests, Proposition 9 revived the "public safety" language of section 28, subdivision (e), it did so only as to "*felonious conduct*." (Cal. Const., art. I, § 28, subd. (a)(4).) Accordingly, even if one accepts *Kowalczyk's* dubious analysis, the presumption remains that misdemeanants shall be released on their "own recognizance" (Pen. Code, § 1270, subd. (a)), and in those cases in which misdemeanor *bail* is a necessary condition of release, the calculation is constrained by "the arrestee's ability to pay" (*In re Humphrey*, *supra*, 11 Cal.5th at p. 143) and guided by the considerations set forth in article I, section 12: ❶ the "seriousness of the offense charged," ❷ the "previous criminal record of the defendant," and ❸ the "probability of his or her appearing at the trial or hearing of the case." (Cal. Const., art. I, § 12, subd. (c).)

III. Holding misdemeanants on unaffordable bail is unfair, racially biased and leads to coerced pleas without curtailing recidivism.

For the reasons advanced here, *amici* urge this Court to set a bright-line rule prohibiting the setting of unaffordable bail in misdemeanor cases. Persons booked into custody on largely non-violent misdemeanors offenses are disproportionately Black, suffer from addiction, mental illness and/or chronic homelessness. Many who cannot afford to post bail plead guilty pleas just to get out of jail.

A. Unaffordable bail is too often set on non-violent misdemeanor cases.

Nationwide, misdemeanor cases make up the vast majority—74% to 83%—of court caseloads. (Stevenson, M.T. and Mayson, S.G. "The Scale of Misdemeanor Justice" (2018). Faculty Scholarship at Penn Carey Law, 2391. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3394&context=faculty_scholarship.) The number of misdemeanor cases filed in California superior courts falls within that range. (*2022 Court Statistics Report Statewide Caseload Trends 2011–12 Through 2020–21*. Judicial Council of California at 82 [Criminal Filings, Dispositions, and Caseload Clearance Rate Superior Courts Fiscal Years 2011–12 through 2020–21]. https://www.courts.ca.gov/documents/2022-Court-Statistics-Report.pdf.)

California has some of the highest bail amounts in the country—nearly five times the national average. (Sonya Tafoya, *Pretrial Detention and Jail Capacity in California* (Pub. Pol'y Institute of CA, 2015. https://www.ppic.org/wpcontent/uploads/content/pubs/report/R_715STR.pdf.) Nearly 80% of all Californians arrested cannot afford to post bail. (Human Rights Watch, *"Not in it for Justice" How California's Pretrial Detention and Bail System Unfairly Punishes Poor People* 4 (Apr. 11, 2017). https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-

detention-and-bail-system-unfairly.) And the post-*Humphrey* report issued by UCLA and UC Berkeley found an increase in judges issuing no bail orders, even on misdemeanor cases. (Post-*Humphrey* report, *supra*, at 22.)

As a case in point, a survey conducted by the San Francisco Public Defender found that from October 2022 to October 2023, the San Francisco Superior Court held 119 defendants on unaffordable bail pretrial in 201 misdemeanor cases. Ninety-two (92)—or 45%—of the 201 cases involved non-violent offenses as the primary charge, such as non-domestic violence-related stay away order violations (43), vandalism (28), trespass (9), petty or grand theft (5), commercial burglary (4), simple possession of narcotics (2), and possession of narcotics paraphernalia (3).

B. Black arrestees are disproportionately detained on unaffordable bail.

In the aforementioned survey, Black people charged with misdemeanors in San Francisco were disproportionately subjected to unaffordable bail. Although Blacks comprise less than 6% San Francisco's overall population, 31% of the 119 pretrial arrestees detained on unaffordable bail in misdemeanor cases surveyed were Black. (See also *Do the Math: Money Bail Doesn't Add Up for San Francisco*. The Financial Justice Project and the Office of the Treasurer and Tax Collector of the City and County of San Francisco, at p. 8. (June 2017) ["African American individuals make up 6% of San Francisco's total population, and approximately 38% of individuals paying bail."]. https://sfgov.org/financialjustice/files/2020-04/2017.6.27%20Bail%20Report%20FINAL_2.pdf.)

Research studies have consistently found that Black arrestees receive harsher bail outcomes than those imposed on white arrestees. ("*Give Us Free": Addressing Racial Disparities in Bail Determinations* by Cynthia E.

Jones. NYU J. of Leg. & Pol. 919 - 961 (2013). https://www.nyujlpp.org/wp-content/uploads/2014/01/Jones-Give-Us-Free-16nyujlpp919.pdf.)

Black arrestees are 66% more likely than white arrestees to be jailed pretrial, and twice as likely as similarly-situated white arrestees to receive bail they cannot afford. (Stephen DeMuth, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 Just. Q. 170, 187 (2005); Stephen DeMuth, *Racial and Ethnic Differences in Pretrial Release and Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, 41 Criminology 873, 880-81 (2003) at p. 897.) Black men receive money bail 35% higher on average, $7,000 higher for violent crimes and $13,000 higher for drug crimes. (Jonah B. Gelbach and Shawn D. Bushway. *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model*. (Aug. 20, 2011). https://www.law.upenn.edu/live/files/1142-gelbachbailracialdiscriminationpdf.)

C. Pretrial detention in misdemeanor cases leads to coerced pleas just to get out of jail.

A 2023 study published by the Pretrial Justice Initiative on the state of misdemeanor cases across the country concluded that pretrial detention was among the factors that lead to rushed convictions and limited constitutional protections. (*Unjustified: Reckoning with the racialized legacy of misdemeanors in the United States*. Pretrial Justice Initiative. Local Antiracist Pretrial Justice Series. Fall 2023 ("PJI report"). https://www.pretrial.org/files/resources/misdemeanors9.22final.pdf.) The PJI study found that, if those charged with misdemeanor cases cannot afford bail right away, they must stay in jail hoping they or their families can pull together the necessary funds, or wait in jail until their case is resolved, most often through plea bargain. Pleading guilty becomes a path to freedom, even

though a person may have a factual or legal argument in their favor. (PJI report at p. 6.)

Two cases from the San Mateo County Superior Court (*Kowalczyk*'s court of origin) illustrate this point. In a misdemeanor domestic violence case, the arraignment judge set bail in the unaffordable sum of $15,000, despite defense counsel indicating the accused, with no prior criminal history, could afford no more than $10,000. The court justified setting unaffordable bail on the ground that it did not have enough information on the seriousness of the offense and possible danger to the victim. Yet, just six days later, the defendant was released after pleading guilty to a misdemeanor battery. (*People v. Jon Oxenford*, San Mateo County Superior Court number 22-NM009203-A.)

The same arraignment judge held a man charged with misdemeanor driving on a suspended license on $5,000 bail, knowing that he could not afford to post that amount, and in the face of a pretrial services report that recommended O.R. release. Just one week later, the defendant accepted the prosecution's offer to plead guilty to the charge for one year on informal probation and credit for time served rather than spend another three weeks in custody. (*People v. Arturo Suarez*, San Mateo County Superior Court number 19-SM-014103-A.)

D. Jurisdictions that release people charged with misdemeanors saw a decrease, not an increase, in crime.

Jurisdictions that release people charged with misdemeanors do not experience a corresponding increase in crime. In fact, the available evidence indicates that those jurisdictions saw a decrease in crime and reduced racial disparities in pretrial release rates.

When Harris County, Texas, changed its policy by releasing most people charged with misdemeanors with an unsecured bond amount of $100, the

reforms led to a decline in recidivism, with a 6% reduction in new cases over three years. (Paul Heaton, *The Effects of Misdemeanor Bail Reform* (Quattrone Center, 2022). https://www.law.upenn.edu/institutes/quattronecenter/reports/bailreform/#/.) Furthermore, the rate of pretrial detention decreased from 61% in 2016 to 43% in 2021 and saved the county $3.6 million in jail costs. (Garrett et al., *Monitoring Pretrial Reform in Harris County: Fourth Report of the Court-Appointed Monitor* 38 at p. viii. (2022). https://jad.harriscountytx.gov/Portals/70/documents/ODonnell-Monitor-Fourth-Report-Final.pdf?ver=0KyJYoW_QePq2J2VntQ8fg%3d%3d.) The County also saw an 11% decline in the Black-white gap in pretrial release rates.

In New York State, the Legislature eliminated money bail and pretrial detention in nearly all misdemeanor and nonviolent felony cases in 2019. In the first few months after implementation, there was a 40% decline in pretrial detention across the state. (Michael Rempel & Krystal Rodriguez, *Bail Reform Revisited: The Impact of New York's Amended Bail Law on Pretrial Detention* 12 (Ctr. for Ct. Innovation, 2020). https://www.innovatingjustice.org/sites/default/files/media/document/2020/FactSheet_CCI_Bail_Reform_Revisited_05272020.pdf.)

These examples are not outliers. Research has shown that, as release rates increase, people are less likely to be convicted or get jail sentences, and there is no subsequent correlation to an increase in crime rates. (Evan Mintz, *Cops and Conservatives Backed This Texas Bail Reform. Now Researchers Show It To Be a Success*, Arnold Ventures (Aug. 30, 2022). https://www.arnoldventures.org/stories/cops-and-conservatives-backed-this-texas-bail-reform-now-researchers-show-it-to-be-a-success.) In fact, some

researchers have suggested that such pretrial reforms can cause crime to decrease. (*Id.*) Another study of hundreds of thousands of misdemeanor cases in Harris County, Texas, found that people who are detained pretrial are *more likely* to commit future crime. (Heaton, P., Mayson, S.G. & Stevenson, M. *The Downstream Consequences of Pretrial Detention* (2017). Stan. L. Rev (69). 2017. https://www.law.upenn.edu/live/files/6467-harriscountybailstanford.) Indeed, a study of over 1 million people booked into jail in Kentucky showed that pretrial detention for any length of time is associated with a higher likelihood of re-arrest. (Lowenkamp, C. *The Hidden Costs of Pretrial Detention Revisited* (2022). Core Correctional Solutions. https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf.)

E. Courts' use of successful pretrial release programs protects public safety and reduces recidivism.

Instead of holding persons charged with misdemeanors on unaffordable bail, as the *Kowalczyk* decision would encourage, courts should expand the use of pretrial release programs proven to be successful in many California jurisdictions. According to a report by Californians for Safety and Justice, most California counties now utilize pretrial services to manage its jail population programs. (*Pretrial Progress: A Survey of Pretrial Practices and Services in California*. (CRJ, 2015). https://safeandjust.org/wp-content/uploads/PretrialSurveyBrief_8.26.15v2.pdf.)

From 2019 through 2022, the Judicial Council of California studied the pretrial assessment and release practices of 16 trial courts across the state. The courts tracked more than 422,000 persons from arrest to trial to determine whether they were arrested for new crimes committed while on conditional release from the initial offense, and whether they returned to court as ordered. This pilot program provided an opportunity to test the

process of increased release without monetary bail. The results, showing a decrease in the rates of re-arrest and failures to appear of persons charged with misdemeanor offenses, strongly support the expansion of conditional pretrial release for misdemeanants in California. (*Pretrial Pilot Program: Final Report to the Legislature. Judicial Council of California* (July 2023). https://www.courts.ca.gov/documents/Pretrial-Pilot-Program_Final-Report.pdf.)

A prime example is the Los Angeles County Superior Court's new pre-arraignment release protocols, where persons charged with non-violent, non-serious felonies and misdemeanors are released with non-financial conditions. In the first month of the policy's implementation, only 3% of people released under the new program have been rebooked. (*EARLY DATA REVEALS SIGNIFICANT PUBLIC SAFETY BENEFITS OF NEW LOS ANGELES COUNTY PRE-ARRAIGNMENT RELEASE PROTOCOLS: Preliminary Report on Pre-Arraignment Release Protocols in Los Angeles County Demonstrates Individualized Risk Determinations Protect Public Safety More Effectively Than Money Bail System*. Superior Court of California, County of Los Angeles Media Relations. Oct. 30, 2023. https://www.lacourt.org/newsmedia/uploads/142023103010291423NREARLYDATAREVEALSPUBLICSAFETYBENEFITOFNEWPREARRAIGNMENTRELEASEPROTOCOLS.pdf.)

Other examples of agencies successfully investing in pretrial services can be found in San Francisco County (See San Francisco Pretrial Diversion Project https://sfpretrial.org), Santa Clara County of Pretrial Services https://pretrialservices.sccgov.org/about-us/office-pretrial-services-overview) and New York City Mayor's Office of Pretrial Justice Initiatives https://criminaljustice.cityofnewyork.us/programs/office-of-pretrial-justice-

initiatives/.) These agencies rely on case managers and community-based services to support people in the pretrial phase of their case.

In San Francisco, people provided with "light-touch monitoring" by the non-profit Pretrial Diversion Project had a 94% court appearance rate and a 95% public safety rate. (SF Pretrial Diversion Project, 2019-2020 Fiscal Year Recap. https://sfpretrial.org/wp-content/uploads/2020/10/19-20-Annual-Outcomes-Infographics-Final-3.pdf.) New York City's Supervised Release Program has not shown increased arrests for new crimes of its participants, nor were they significantly more likely to fail to appear in court. (Melanie Skerner et al., *Pursuing Pretrial Justice Through an Alternative to Bail, Findings from an Evaluation of New York City's Supervised Release Program*, (MDRC Ctr. for Crim. Just. Rsch. (2020)). https://www.mdrc.org/publication/pursuing-pretrial-justice-through-alternative-bail.)

CONCLUSION

> *"The misunderstanding of bail as a tool to incarcerate people before trial has left in its wake a simultaneously unsafe, unfair and unjust legacy. No arrested individual who is judicially determined to pose a substantial threat should ever be allowed to buy their unconditional release. Similarly, no arrested person should ever be detained simply because they cannot afford monetary bail…*
>
> *Under state law, bail is a mechanism to bring about conditional release, not to keep a person charged with a crime in custody. Setting monetary bail at such high amounts that it becomes a de facto detention is an abuse of this system."*

(Brett R. Alldredge, J. Richard Couzens and Sherrill A. Ellsworth.[3] "Opinion: As judges, we've made thousands of bail decisions. Here's the truth about detention and public safety." Los Angeles Times. Sept. 2, 2023.)

The *Kowalczyk* court erred in its constitutional analysis. The decision cannot be reconciled with this Court's opinion in *Humphrey*, the text of section 12, and the history of bail in California and the United States. Given the concerns that *Kowalczyk*, if left to stand, will pave the way for courts to set unaffordable bail in misdemeanor cases, *amici* urge this Court to set a bright-line rule prohibiting the setting of unaffordable bail in misdemeanor cases. Persons charged with misdemeanor offenses are presumptively entitled to O.R. release and categorically must not be subject to unaffordable bail. (See Pen. Code, § 1270.) To the extent that sections 12 and 28, subdivision (f)(3) permit detention without bail or on unaffordable bail, they must be limited to felony cases. A contrary construction would further perpetuate racism against Black people and discrimination against the poor that *Humphrey*—and our legal system—was designed to eradicate. For the foregoing reasons, we urge this Court to reverse.

Dated: November 7, 2023 Respectfully submitted,

By: ____/s/_____
Lisa Maguire
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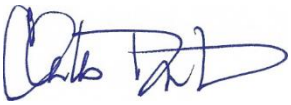
California Public Defenders Association

[3] Brett R. Alldredge is a judge of the Tulare County Superior Court. J. Richard Couzens is a retired judge of the Placer County Superior Court. Sherrill A. Ellsworth is a retired judge of the Riverside County Superior Court.

By: 

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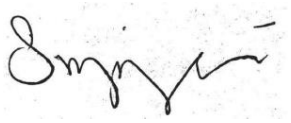
By: 

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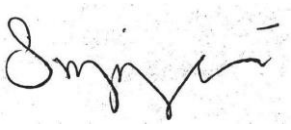
CERTIFICATE OF WORD COUNT

I, Sujung Kim, declare and certify under penalty of perjury that I am an attorney licensed to practice law in the State of California (State Bar Number 176602). I have conducted a word count of this brief using Microsoft's Word computer software. On the basis of the computer-generated word count, I certify that the text of this brief consists of 7,501 words in length, excluding the tables and this certificate. (Cal. Rules of Court, rule 8.520, subd. (c)(1).)

Dated: November 7, 2023

Respectfully submitted,

By: 

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IN THE SUPREME COURT OF CALIFORNIA

IN RE GERALD KOWALCZYK, On Habeas Corpus	**Case Number: S277910**

APPLICATION OF CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, PUBLIC DEFENDERS FOR ALAMEDA AND SAN FRANCISCO COUNTIES AND LOS ANGELES COUNTY ALTERNATE PUBLIC DEFENDER TO APPEAR AS *AMICI CURIAE* ON BEHALF OF PETITIONER (CAL. RULES OF COURT, RULE 8.200(c)) AND BRIEF OF *AMICI CURIAE*

PROOF OF SERVICE

In re Kowalczyk (2022) 85 Cal.App.5th 650

First District Court of Appeal Case No. A162891

San Mateo County Superior Court Case No. 21-SF-003700-A

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I, the undersigned, declare under penalty of perjury that I am over eighteen years of age and not a party to the within action.

My business address is 555 Seventh Street, San Francisco, California 94103.

On November 7, 2023, I e-served the Application of California Public Defenders Association, Public Defenders for Alameda and San Francisco Counties and Los Angeles County Alternate Public Defender to Appear as *Amici Curiae* On Behalf of Petitioner (Cal. Rules of Court, rule 8.200(c)) and Brief of *Amici Curiae* in the matter of *In re Gerald Kowalczyk On Habeas Corpus* (S277910; First District Court of Appeal Case No. A162891 San Mateo County Superior Court Case No. 21-SF-003700-A) on:

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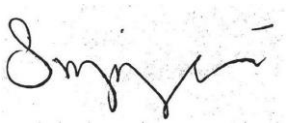
By: 

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Case Name: **KOWALCZYK (GERALD JOHN) ON H.C.**
Case Number: **S277910**
Lower Court Case Number: **A162977**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/7/2023

Date

/s/Sujung Kim

Signature

Kim, Sujung (176602)

Last Name, First Name (PNum)

San Francisco Public Defender

Law Firm