No. S277910

In The

Supreme Court of the State of California

In re GERALD KOWALCZYK,

Petitioner,

On Habeas Corpus

On Writ of Habeas to the
California Court of Appeal, First District,
Case No. A162977
San Mateo County Superior Court,
Case No. 21-SF-003700-A
The Honorable Susan Greenberg, Judge

PROPOSED AMICUS CURIAE BRIEF OF CALIFORNIA DISTRICT ATTONREYS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTRODUCTION

In *In re Humphrey* (2021) 11 Cal.5th 135, 143 (*Humphrey*), the Court held that it was unconstitutional to hold a defendant in pretrial custody "solely" because the defendant cannot afford bail.

The Court of Appeal's decision in *In re Kowalczyk* (2022) 85 Cal.App.5th 667 (*Kowalczyk*) explores the circumstances when unaffordable bail is appropriate, namely because a particular defendant is inappropriate for release. If *Kowalczyk's* common-sense approach is abandoned, absurd results will follow, to the detriment of public safety and society more broadly.

SUMMARY OF THE ARGUMENT

What is the superior court to do when a Defendant is charged with an offense that must have bail set, the Defendant cannot afford any amount of bail, and every indication is that upon release the Defendant will continue to commit crimes and will not follow the court's orders?

That dilemma faced the judge in *Kowalcyzk*. Article 1, section 12 of the California Constitution ("section 12") says

bail must be set in such a case. Yet *Humphrey,* when read broadly, says the bail amount must be affordable. The court is given the Hobson's choice of either denying bail entirely, in contravention of section 12, or setting it at a low amount that guarantees that a Defendant who should be detained will instead be released.

If *Humphrey* is interpreted to stand for the proposition that a bail amount must always be affordable, no matter what, then it ensures that for some Defendants, that amount will be zero or a functional equivalent. Knowing that a court cannot hold them, such Defendants will be free to do as they please. So long as they commit no crimes eligible for no-bail detention under section 12, they will be guaranteed release—regardless of how many court orders they violate or other crimes they commit.

Such a reading of *Humphrey* makes the criminal justice system the proverbial revolving door and undermines the entire voter-approved purposes of the body of laws governing pretrial detention and bail in this state, namely public safety and ensuring that Defendants appear in court.

Sections 12 and 28 of article 1 of the California Constitution can be reconciled. While §12 does create a right to bail in all noncapital and nonviolent offenses, as well as some violent ones, the intent of the voters in enacting Article I, § 28, subdivision (f)(3) ("§ 28"), was to supplement the § 12 analysis, return discretion to the superior court, and place the focus squarely on public safety and the rights of the victims. As the Court of Appeal recognized, § 28, subdivision (f)(3) provides the superior court with a framework to determine if, and at what amount, bail should be set while always maintaining an eye toward public and victim safety.

When the two provisions are reconciled, the superior court must first determine whether a defendant has the right to bail under section 12—in other words, is the Defendant charged with a crime falling into the exceptions to the general rule of bail? If the defendant is not charged with any crime falling under the section 12 exceptions, the court then must consider the factors under section 28, subdivision (f)(3). In doing so, the trial court should consider the financial resources of the Defendant to pay a

bail amount, and any non-financial conditions of release which will reasonably ensure the protection of the public and the defendant's return to court.

If, after considering all of the factors, the court concludes that there are no non-financial conditions that will ensure public safety or the orderly administration of the justice system, the court can set bail at an amount that the Defendant cannot afford. To the extent that *Humphrey* can be read for the proposition that money bail can *never* be set at an unaffordable amount, an exception must be made that allows the trial court to set unaffordable bail in situations where the court finds the Defendant is unsuitable for release (for example, due to a pattern of criminality or failures to appear) and that the purposes of the state's bail laws will be thwarted by setting bail in an affordable amount.

To the extent that § 12 and §28 cannot be harmonized, the later provision granting the court discretion to "set, reduce, or deny bail" should be controlling.

A superior court may set bail at an amount above which an arrestee can afford, and *Humphrey* did not change

this. By its own terms, the *Humphrey* opinion allowed for the setting of unaffordable bail, explaining that "if a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, *that no nonfinancial condition of release can reasonably protect those interests*." (*Humphrey*, *supra*, 11 Cal.5th at p. 154, italics added.) Implicit in this holding is the possibility that a financial condition *will* assure the public's safety, the victim's safety, or the defendant's appearance in court.

Further, in *Humphrey*, this Court stated, "[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 (emphasis added).) A court, applying the balancing test demanded by § 28, subdivision (f)(3), would not be holding a defendant solely based upon his ability to pay; rather, a court, considering all relevant factors, is making a determination as to level the safety of the community, and the efficiency of the justice system is put at risk by the defendant's release and what amount of

money bail is sufficient to account for the risks.

Thus, if a judge does decide to set bail higher than a defendant's ability to pay, detention, while awaiting trial, is not *solely* predicated upon his ability to pay. A judge who exercises his sound discretion, after weighing the relevant factors, in setting to bail, has properly performed the judicial function served the interests of both the defendant's rights and the rights of the victims and the community – even where bail is set higher than the defendant's ability to pay.

STATEMENT OF THE CASE

A. Statement of Facts/Procedural History

Petitioner was charged with three felony counts of identity theft pursuant to Penal Code section 530.5, subdivision (a); one misdemeanor count of petty theft of lost property pursuant to Penal Code section 485; and one misdemeanor count of theft of identifying information pursuant to Penal Code section 530.5, subdivision (c)(1). (*Kowlaczyk at 672.*)

Petitioner was arraigned and granted bail in the

amount of $75,000. (*Ibid.*) Petitioner filed a motion seeking to be released upon his own recognizance (*Id.*) The People opposed the motion arguing the petitioner committed crimes while on probation and that no less restrictive means would protect the public and citing to Petitioner's extensive criminal history. (*Id* at 672-673.*)* The court denied the motion noting the Defendant's RAP sheet was over 100 pages long and consisted of sixty-four (64) criminal convictions including, at least three, out of state convictions and criminal convictions in five different counties of California. (*Id* at 673.) The court noted Petitioner failed to comply with supervised release conditions within the last five years and received the worst possible score on the court's "VPRAI" (Virginia Pre-trial Risk Assessment Instrument) tool. (*Ibid.*)

The petitioner, by motion, again, twice, sought to be released upon his own recognizance. In two separate hearings with separate judges, both courts denied his motions. (*Id* at 673-674.)

After the four attempts by Petitioner to be released on his own recognizance, Petitioner filed a petition for *writ of*

habeas corpus in the Court of Appeal for the First District. (*Id* at 674.) While awaiting his petition, Petitioner entered into a plea agreement for a single misdemeanor count of theft of identifying information under Penal Code section 530.5, subdivision (c)(1). On March 11, 2022, the Court of Appeal dismissed the *habeus* petition on the grounds it was moot.(Order Dismissing Pet. (March 11, 2022) *In re Kowalczyk*, A162977.)

Petitioner sought review by this Court following the denial of the Court Appeal to hear the petition. (Petition for Review.) On June 22, 2022, this Court granted the petition for review and ordered the Court of Appeal to address the first issue presented, "1. Which constitutional provisions govern the denial of bail in noncapital cases – Article I, section 12, subdivision (b) and (c), or Article I, section 28, subdivision (f)(3), of the California Constitution – or, in the alternative, can these provisions be reconciled?" The Court of Appeal answered the question by holding, Article I, section 12, subdivision (b) and (c), and Article I, section 28, subdivision (f)(3), are reconcilable and as such, "section 12 does not prohibit courts from fixing bail at an amount a

defendant cannot likely meet." (Id at 691-92.) Petitioner filed a petition for rehearing in the Court of Appeal on December 6, 2022; the court denied the petition. Petitioner then sought review from this Court on December 30, 2022. On March 15, 2023, this Court granted that petition.

ARGUMENT

I.

ARTICLE 1 §12 AND ARTICLE 1 §28 ARE RECONCILABLE AND TO THE EXTENT THEY ARE NOT §28 IS CONTROLLING.

A. The Conflicting Provisions in the California Constitution Can be Reconciled.

Article I, § 12 of the State Constitution gives criminal defendants a right to bail in most cases. (*In re White* (2020) 9 Cal.5th 455, 462.) The mandatory nature of bail is shown by language that a defendant "*shall* be released on bail by sufficient sureties" (*Id.*, italics added), followed by three exceptions. Conversely, article I, section 28, subdivision (f)(3) provides that a person "*may* be released on bail by sufficient sureties" (italics added), indicating that release on bail is within the court's discretion. The question posed by this Court is whether the mandatory language of §12 conflicts with the permissive "may" found in the later enacted §28(f)(3) to such an extent that the former provisions right to bail has been impliedly repealed.

1. Generally, Repeals by Implication are Disfavored

As a general matter of constitutional construction, repeals by implication are disfavored. (*Sevier v. Riley* (1926) 198 Cal. 170, 176; see also *Lopez v. Sony Electronic*s, *supra*, 5 Cal.5th 627, 637 (*Lopez*).) But when the later provision is "manifestly inconsistent and in conflict with the earlier provision" repeal by implication must occur. (*Sevier v. Riley*, at p. 176.) However, the inconsistent provisions should be harmonized, if possible. (*Lopez*, at pp. 637-638.) Even when there is implied repeal, its scope may be limited. (*Id.* at p. 638.)

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

2. The Two Constitutional Provisions at Issue Can be Harmonized.

The consideration of public and victim safety (Cal. Const., art. I, § 28, subd. (f)(3)) simply adds "protection of the public and safety of the victim" to the existing list of

considerations in article I, section 12, and in no way conflicts with them, particularly in light of Proposition 4's intent to consider public safety. (*People v Standish*, (2006) 38 Cal.4th 858, 875.)

Similarly, both state Constitution sections recognize that a trial court has discretion to grant OR release; article I, § 28, subdivision (f)(3) adds that discretion is "subject to the same factors considered in setting bail." That addition does not conflict with article I, § 12. Proposition 9 removed language that had prohibited OR release to defendants charged with serious felonies. (Ballot Pamp., Gen. Elec. (Nov. 4, 2008) text of Prop. 9, p. 130.) By keeping the language about considering bail factors when deciding whether to grant OR release, the electorate intended to enact that provision. The focus of the inquiry shifted toward public safety by adding to the existing language of Art. 1 § 12 and taking away mandatory denial of OR provision. The two sections, in almost all respects, can be harmonized.

3. The Apparent Conflict Between Article 1, § 12 and Art. 1, § 28 as Resolved by the Lower Court

As noted by *Kowalczyk*, the principal dispute centers

around the mandatory language of Art. 1 Sec. 12 that states that a person charged with a non-capital/nonviolent offense "s*hall be* released on bail by sufficient sureties," while section 28(f)(3) says that a person "*may be* released on bail by sufficient sureties." Art. 1 Sec 12 (originally section 7) was enacted in 1849. Proposition 9 was presented to the voters in 2008 at a time when the longstanding "constitutional right to be released on bail pending trial" in noncapital cases subject to two exceptions had been extant for approximately158 years. The term "may" in § 28(f)(3) is simply a declarative statement of this longstanding constitutional right that was in effect when the proposition was passed. (*Kowalczyk* at 682- 684.)

The *Kowalczyk* reconciliation of the "may" or "shall" conundrum relies on the plain meaning of the word "may" as expressing not just permissiveness but also a "possibility." *Ibid*. Under Art. 1 § 12, a person not charged with a disqualifying offense is eligible for bail and may be released. By stating a "person may be released. . . "Article 23(f)(3) simply restates the state of the law at the time Prop. 9 was enacted. (*Ibid.)* Proposition 9 simply added, before "setting,

reducing, or denying bail" the court must consider the additional and overarching factors of safety of the victim and the public.

B. To the Extent the Provisions Cannot be Harmonized, Art. 1, § 28(f)(3) is Controlling.

1. Statutory Construction Generally

The electorate is presumed to be aware of existing law, and to have voted intelligently upon a constitutional amendment. (*People v. Valencia* (2017) 3 Cal.5th 347, 369.) Courts when construing statutes are to ascertain the intent of the law makers so as to effectuate the purpose of the law." (*People v. Canty* (2004) 32 Cal.4th 1266, 1276, 14 Cal.Rptr.3d 1, 90 P.3d 1168 (*Canty*).) And courts start by examining the language of the constitutional provisions, "giving the words their usual, ordinary meaning." [citations omitted] (*Kowalczyk* at 667- 668.)

2. Article 1 §28 Expressly Gives the Court Discretion to Deny Bail

The *Kowalczyk* court rejected the People's assertion that Art.1 § 28's "may" language must be interpreted as a grant of judicial discretion to deny bail release in all noncapital cases, stating:

> Such construction, of course, would mean that section 28(f)(3) is in direct conflict with section 12 and its limited exceptions for denying bail release in certain noncapital cases. Setting aside for a moment the strong presumption against implied repeal, the People's construction finds no support in the text of section 28 or in the ballot materials accompanying Proposition 9.

(*Kowalczyk*, at p. 684.)

However, *Kowalczyk* did not discuss the addition of the word "deny" in phrase "grant, reduce, or deny bail" contained in Art. 1 § 28. The word "deny" is not used in Art. 1 §12.

At the time of Proposition 9, there were only two types of non- capital crimes that were eligible for a no bail setting. (Art. I, § 12 (a)-(c).) All of the exceptions are violent crimes and Art. 1 §12(b) and (c) require the additional proviso that the court find by "clear and convincing evidence" that there was a "substantial likelihood" that the persons release would result in great bodily harm to others or they had made a threat of great bodily harm and a substantial likelihood that, if released, the person would carry out the threat.

If the only crimes for which the court could deny bail are capital murders and two other scenarios where the

court makes findings regarding the likelihood the person will endanger others, then the consideration of public safety and safety of the victim to deny bail contemplated in Art. 1 §28 is patently redundant. The court expressly makes those findings when detaining someone with no bail under Art. 1, §12.

If each word, phrase and sentence is to be accorded significance, the addition of the word "deny" by the electorate *means something*. While the ballot material may not provide the support, the appearance of the word "deny" in light of Art. 1 §12's general right to bail suggests an intent on the part of the lawmakers to allow the court broad discretion to set, reduce, and deny bail in non-capital cases.

The issue was raised, and expressly not decided by this court in *In re White*, supra at 470. In *White* this court examined a case wherein the Defendant was charged with a crime that is an express exception to the Art. 1 §12 general right to bail. *Id* at 462. The Defendant challenged the trial court's findings that the "facts were evident [and] the presumption great" and that there was a "substantial

likelihood the person's release would result in great bodily harm to others." *Ibid.*

In finding no error, this court went on to state:

> That said, there's quite a bit we're *not* deciding today. A different part of the California Constitution — subdivision (f)(3) of article I, section 28 — directs courts to take into account the "safety of the victim" when "setting, reducing, or denying bail" and to make it, along with public safety, "the primary considerations." **Because concerns about victim safety would only reinforce the trial court's decision to deny bail here, we need not decide what role, if any, this provision has in the decision to deny bail under article I, section 12(b).**

(*Id* at 470.)

This is precisely the point. It's difficult to imagine a scenario where a court finds there's a substantial likelihood that the Defendant will harm others and concerns for victim safety *does not reinforce* the trial court's findings. Every finding under Article 1 §12's exceptions to the general rule of bail necessarily requires the court to consider both the public's safety and the victim's safety and requires the court to deny bail. In light of this, the addition of the word "deny" by the lawmakers in Article 1 §28 was not superfluous and was intended to vest the superior court with broad discretion to deny bail even

in non-capital cases.

Proposition 9 amended Art 1, § 28 to specifically provide that the court should consider the factors in "setting, reducing, or **denying** bail." If the setting of bail is mandatory, as seemingly expressed in Art. 1 § 12, then Proposition 9 specifically gave the power of "denying" bail to the superior court.

Moreover, Art. 1 § 12 states "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." While Art. 1 § 28 gives the trial court the discretion to not just 'fix" the amount of bail but to "[set], reduce or deny bail."

3. To the Extent the Provisions Cannot Be Reconciled, Art. 1 Sec.28 Should be Controlling Because it Supersedes Earlier Conflicting Provisions.

If the provisions cannot be harmonized, eligibility for pretrial release on bail is either mandatory, and thus a matter of right for the defendant, or it is discretionary, within the power of the trial court to grant or withhold.

Under this view, it cannot be both.

If the two provisions cannot be reconciled the later provision expressing the will of the People to place public safety and the integrity of the criminal justice system of primary importance should control.

a. Propositions 4 and 8

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

In the June 1982 primary election, two Propositions, 4 and 8, amended the constitutional provisions governing bail.

At the time, Proposition 4 received the larger share of votes, and thus took precedence over any conflicting provisions in proposition 8. (Cal. Const., art. XVIII, § 4; *In re York* (1995) 9 Cal.4th 1133 at 1140, fn. 4; *Standish, supra* at 874-875.) However, the proponents of Proposition 4 "made it clear they intended that public safety should be a consideration in bail decisions." (*Standish*, at p. 875.) Moreover, Proposition 4 brought public safety into play by amending article I, section 12 of the California Constitution and directing courts to consider the seriousness of the offense charged and defendant's prior criminal record—both relevant to public safety. In 1994, the people passed Proposition 189, which explicitly added felony sexual assault offenses to the violent offenses for which bail could be denied.

b. Proposition 9 Cemented Public Safety into the Constitution

In the general election in November of 2008, the electorate passed Proposition 9, the Victims' Bill of Rights Act of 2008: Marsy's Law. Proposition 9 made changes to article I, section 28 of the state Constitution, including the "Public Safety Bail" section (renumbered as subdivision (f)(3)). Specifically, Proposition 9 added the safety of the

victim as a consideration when setting, reducing, or denying bail. It also established a victim's right to have their safety and the safety of their family "considered in fixing the amount of bail and release conditions for the defendant." (Cal. Const., art. I, § 28, subd. (b)(3).)

The electorate is presumed to be aware of existing law, and to have voted intelligently upon a constitutional amendment. (*People v. Valencia* (2017) 3 Cal.5th 347, 369.) Moreover, by voting to expand the language of the public safety bail provision by adding victim safety (Cal. Const., art. I, § 28, subd. (f)(3)), the electorate clearly intended that provision to be governing law. (Ballot Pamp., Gen. Elec. (Nov. 4, 2008) text of Prop. 9,
p. 130.) Similarly, the electorate removed the provision which barred OR release for defendants charged with serious felonies. (*Ibid.*) Proposition 9 did not treat article I, § 28, subdivision (f)(3) as defunct. If the voters were amending an inoperative provision (Proposition 8), the act of amendment showed their intent to revive it.

Assuming the "shall" of Art. 1 § 12 cannot be harmonized with the "may" of Art. 1 § 28, the latter should

be controlling. Because Proposition 9 was enacted in the general election of 2008, it supersedes earlier, conflicting provisions. Art 1 §28's "may" language and its accompanying language vesting discretion in the superior courts is the current state of the law under the California Constitution.

II.

A SUPERIOR COURT MAY SET PRETRIAL BAIL ABOVE AN ARRESTEE'S ABILITY TO PAY

A. The Constitution Does Not Require Courts to Set Affordable Bail

Nothing in the texts or legislative histories of Article 1 §12 or Art. 1 §28 references or mandates a court to set "affordable" bail. To the contrary, the state constitutional and statutory provisions governing bail neither mention nor approve of any consideration of a defendant's financial resources. (Penal Code §1268 *et seq.*)

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

As noted by the *Kowalczyk* opinion, the proposition

that unaffordable bail is per se excessive was rejected by this Court well over a century ago in a pair of related cases *Duncan, supra,* 53 Cal. 410 (*Duncan I*) and *Duncan, supra, 54* Cal. 75 (*Duncan II*).) Although those cases dealt with the bail provision of the prior constitution (Cal. Const. of 1849, art. I, § 6), it also used the term "excessive."

In its entirety, article I, section 6 of the prior Constitution read: "Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonably detained." Mr. Duncan argued that the fact that he could not make bail rendered the amount per se excessive. (*Duncan II*, 54 Cal. at pp. 77-78.) The Court recognized the inherent problem in that argument:

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

(*Id.* at p. 78.)

In *Duncan II* the Court did not prohibit consideration of a defendant's finances, instead considering it one circumstance among many, while cautioning that ability to

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

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

Today, the probability of a defendant attending court is not the only consideration when setting bail, and not even the most important one. Additional factors include: the seriousness of the charges, the prior criminal record of the defendant, and public and victim safety. (Cal. Const., art. I,

§§ 12; 28, subd. (f)(3).) Importantly, the California Constitution demands that public and victim safety be a court's primary considerations when considering bail. (Art. I, § 28, subd. (f)(3).)

This shift in priorities magnifies the problem that the Court identified in *Duncan II*—that allowing a defendant's ability to pay control the amount of bail is not consistent with bail's purposes. A defendant whose bail is set in a negligible amount has little to lose by violating their terms of release. Setting bail based solely or primarily on a defendant's ability to pay does not take public safety into account.

Because the prohibition on excessive bail is a specific constitutional provision—found twice in our state Constitution and once in our national Constitution—it is the only limit on the amount of bail that should be considered. (Cal. Const., art. I, §§ 12, 28; Eighth Amendment.) Otherwise, general constitutional provisions would overrule specific ones, contrary to well-established norms of constitutional and statutory construction. (*Miller* v. *Superior Court* (1999) 21 Cal.4th 883 at 895.)

C. *Humphrey* does not Stand for the Proposition that every Bail Setting must be in an Amount the Defendant can Afford.

As noted by the *Kowalczyk* court, this court's opinion in *Humphery* ". . .meaningfully restricts, but does not purport to eliminate, the traditional power of a court to set bail at an amount that may prove unaffordable." (*Kowalczyk* at 689.)

Put simply, *Humphrey* requires the superior courts to conduct an "individualized determination" of the factors listed in the state constitutional and statutory bail provisions and to either (1) set bail in an amount the Defendant can afford and "the court finds reasonably necessary to protect compelling government interests" **or** (2) find detention necessary to protect the victim or public safety or ensure the defendant's return to court and find that there is no less restrictive alternative short of detention that will respect those interests. (*Humphrey, supra* at 155.)

Nothing prevents the superior court from making the finding that no option other than detention will serve the compelling government interests and setting bail at an

"unaffordable" amount.

Further, the *Humphrey* opinion allowed for the setting of unaffordable bail. To wit "if a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, *that no nonfinancial condition of release can reasonably protect those interests*" Implicit in this holding is the possibility that the court could reasonably find a *financial* condition that *will* assure the interests are protected.

Bail is still the law in California. *Humphrey* did not change this and did not purport to eliminate the posting of bail as a financial incentive for the defendant to return to court and ensure that the public is protected.

D. *In Re Brown* is Inapposite

The *Kowalczyk* court and the parties here discuss *In re Brown* (2022) 76 Cal. App.5th 296 at length. In particular, the Petitioner here lauds the *Brown* approach—where the court can, upon making proper findings

regarding public safety and the likelihood the defendant will return to court, detain a person with no bail. (Petition at pg. 20-21.) Petitioner makes this argument while also urging the court to adopt Article 1 §12, with its right to bail as the controlling provision in non-capital cases. As noted, *supra*, bail is either discretionary or mandatory it cannot be both. Article 1 §12 has consistently been interpreted as creating a right to bail and a decision to detain an individual without bail in cases where an exception does not apply would be at odds with this constitutional right.

Of note, but not discussed in *Brown* is that the defendant there - unlike *Kowalczyk*-was charged with a felony sexual assault offense. Had a hearing under Art. 1 §12(b) been held and the evidence held sufficient the court would have been within constitutional boundaries to detain the defendant without bail. Thus, the *Brown* court dealt with an entirely difference scenario, namely a defendant who was charged with serious sexual assault offenses while *Kowalczyk* dealt with the more common scenario faced by courts, the underlying crimes do not fall within the ambit

of Art. 1 §12, but the defendant's demonstrated pattern of criminality and recalcitrance demand the court do something to ensure his appearance. As noted, nothing in *Humphrey* prohibited the *Kowalczyk* court from deciding that no non-financial condition could reasonably assure the defendant would return to court, and the community would be kept safe and deciding the posting of bail was enough of incentive to ensure both of those purposes were met.

E. Detaining an Individual Because they are a Risk to Public Safety or Flight does not Equate to Detaining Someone "Solely" Because of Their Inability to Pay the Bail

A court, applying the balancing test demanded by Article I, § 28, subdivision (f)(3), would not be holding a defendant solely based upon his ability to pay; rather, a court, considering all relevant factors, is making a determination that either to protect the victim, the community, or ensure the defendant will return to court or all three, the person must be detained. Further, the court in setting bail is deciding an amount of bail that will reasonably protect those interests.

As noted by the Ninth Circuit in *U.S. v Fidler* (9th Cir. 2005) 419 F.3d 1026, a case that examined the Federal Bail Act, " if the record shows that the detention is not based solely on the defendant's inability to meet the financial condition, but rather on the district court's determination that the amount of the bond is necessary to reasonably assure the defendant's attendance at trial or the safety of the community. This is because, under those circumstances, the defendant's detention is "not because he cannot raise the money, but because without the money, the risk of flight [or danger to others] is too great [citation omitted.]" (*Id* at 1028.)

A bail determination made by a judge considering all the factors found in the constitution is a determination that without the financial incentive, that individual is at too great a risk of not returning to court, or presents a danger to the community. Once those findings are made, the superior court is expressly given discretion under the constitution to set it at an amount sufficient to protect the defendant's rights and the rights of the victim and the public.

CONCLUSION

Article 1, §12, and Article I, § 28, can be reconciled in most aspects. To the extent they cannot, § 28 is the later controlling provision and best reflects the intent of the lawmakers to return discretion to "grant, reduce, or deny" bail to the sound discretion of the trial courts.

Nothing in the state or federal constitutions mentions affordable bail and nothing in *Humphrey* precludes a court from properly conducting an individualized determination of the factors, including ability to pay bail, and concluding that unaffordable bail is an appropriate amount to protect the government's interests. This common sense approach best ensures the intent of the electorate in enacting Proposition 9 is respected, the community is protected, and the integrity of the criminal courts is preserved.

For the aforementioned reasons, this Court should affirm the decision of the California Court of Appeal for the First District.

Respectfully submitted this 18th day of November, 2023

GREG D. TOTTEN
Chief Executive Officer

/s/

Sean Daugherty
Supervising Deputy District Attorney
San Bernardino County
District Attorney's Office

CERTIFICATE OF COMPLIANCE

I certify that the attached **PROPOSED AMICUS CURIAE BRIEF OF CALIFORNIA DISTRICT ATTONREYS ASSOCIATION IN SUPPORT OF RESPONDENT** uses a 13-point Bookman Old Style font, and contains 5, 573 words.

Respectfully submitted this 18th day of November, 2023

GREG D. TOTTEN
Chief Executive Officer

/s/

Sean Daugherty
Supervising Deputy District Attorney
San Bernardino County
District Attorney's Office

SAN BERNARDINO COUNTY
OFFICE OF THE DISTRICT ATTORNEY

STATE OF CALIFORNIA	)	*In re Gerald Kowalczyk*
	)	No. S277910
COUNTY OF SAN BERNARDINO	)	

I, Johanna Soto, the undersigned say:

That I am a citizen of the United States, employed in the County of San Bernardino, State of California, over eighteen years and not a party to the within action.

That I served a copy of the attached document on interested parties by sending a copy of the:

PROPOSED AMICUS CURIAE BRIEF OF CALIFORNIA DISTRICT ATTONREYS ASSOCIATION IN SUPPORT OF RESPONDENT

APPLICATION OF PROPOSED AMICUS CURIAE CALIFORNIA DISTRICT ATTONREYS ASSOCIATION TO FILE AMICUS CURIAE BRIEF

(**X**) Depositing a copy thereof, enclosed in a sealed envelope for collection and mailing on that date following ordinary business practice at San Bernardino to:

Superior Court, County of San Mateo
For Hon. Susan Greenberg
Hall of Justice
400 County Center, 4th Floor,
Redwood City, CA 94063

( ) Faxing a copy thereof to the number listed below:

( ) Emailing a copy to the address below:

NAME:
EMAIL:

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

Executed at San Bernardino, California.
DATED: November 8, 2023

Johanna Soto
Paralegal

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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.

2. My email address used to e-serve: **SDaugherty@sbcda.org**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Kowalczyk Amicus Brief
APPLICATION	CDAAAmicusApplication
PROOF OF SERVICE	In re Gerald Kowalczyk- Proof of Service by Mail

Service Recipients:

Person Served	Email Address	Type	Date / Time
Kathryn Parker Complex Appellate Litigation Group LLP	paralegals@calg.com	e-Serve	11/8/2023 1:34:21 PM
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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

11/8/2023

Date

/s/Sean Daugherty

Signature

Daugherty, Sean (214207)

Last Name, First Name (PNum)

San Bernardino District Attorney

Law Firm