In the Supreme Court of the State of California

In re **KENNETH HUMPHREY,** On Habeas Corpus.	Case No. S247278

First Appellate District, Division Two, Case No. A152056
San Francisco County Superior Court, Case No. 17007715
The Honorable Joseph M. Quinn, Judge

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

OTHER AUTHORITIES

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OPENING BRIEF ON THE MERITS

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

Petitioner, the People of the State of California, respectfully submits this Opening Brief on the Merits following review ordered on the Court's own motion.

ISSUES ON REVIEW

In the Order of review, the Court limited the issues to be briefed and argued as follows:

1. Did the Court of Appeal err in holding that principles of constitutional due process and equal protection require consideration of a criminal defendant's ability to pay in setting or reviewing the amount of monetary bail?

2. In setting the amount of monetary bail, may a trial court consider public and victim safety? Must it do so?

3. Under what circumstances does the California Constitution permit bail to be denied in noncapital cases? Included is the question of what 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, whether these provisions may be reconciled.[1]

INTRODUCTION

Whether it is a dangerous but wealthy defendant who is released after posting bail or an indigent defendant who poses no safety risk but remains incarcerated because he cannot afford the amount of bail set, California's monetary bail system is not only unjust, but it also fails to make us safer. At its core, our bail system divides defendants into two classes–those who can afford pre-trial release on bail and those who have no option but to remain in custody–creating wealth-based inequities.

Recognizing these inequities, the Court of Appeal correctly held that courts must consider a defendant's ability to pay (rather than relying solely on a bail schedule) before setting or reducing any amount of monetary bail as a matter of due process and equal protection. The Court of Appeal added that courts must also consider less restrictive non-monetary conditions of release before setting monetary bail. Those twin determinations of assessing ability to pay along with less restrictive non-monetary alternatives, too, are necessary to satisfy due process and equal protection.

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[1] Subsequent references to "section 12" and "section 28" are to sections 12 and 28 of article I of the California Constitution.

These wealth-based inequities also fail to protect victims and the public because monetary bail's effectiveness is illusory. When the safety risk is high, a court will logically set a high amount of bail. A high amount of bail, though, does not uniformly protect safety: a dangerous but indigent defendant will be incarcerated, but an equally dangerous but wealthy defendant can purchase his freedom. The very notion of using monetary bail to prevent potential threats to public safety–in effect, to prevent new crimes–is also illogical under our system. Monetary bail simply cannot incentivize lawfulness because courts cannot forfeit bail when a defendant commits a new offense. As a result, those provisions that allow courts to consider public and victim safety in setting the amount of monetary bail run afoul of equal protection. A court, however, need not resort to bail to ensure the safety of victims and the community. Other constitutionally sound mechanisms found within sections 12 and 28 allow courts to deny bail in noncapital cases and preventatively detain dangerous defendants when necessary to protect victims and public safety. Such a solution is not only constitutional, but it is also more transparent and equitable.

FACTUAL AND PROCEDURAL HISTORY[2]

The initial complaint charged Respondent with first degree residential robbery (Pen. Code § 211), first degree residential burglary (Pen. Code § 459), inflicting an injury on an elder or dependent adult, other than great bodily injury (Pen. Code § 368, subd. (c)), and theft from an elder or dependent adult (Pen. Code § 368, subd. (d)).

On April 23, 2017, at approximately 5:43 p.m., the victim–an elderly 79-year-old man who required the use of a walker–returned to his

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[2] Petitioner draws the relevant facts and procedural history from the Court of Appeal opinion. (Cal. Rules of Court, rule 8.500(c)(2).) Since this case presents legal rather than factual issues, Petitioner provides an abbreviated summary.

apartment. After the victim opened the door to his apartment, Respondent followed the victim inside and demanded money. Respondent then told the victim to get on the bed, while threatening to put a pillowcase over the victim's head. When the victim told Respondent that he had no money, Respondent grabbed the victim's cell phone and threw it onto the floor. The victim then complied with Respondent's commands and handed Defendant $2 from his wallet. Respondent stole an additional $5 along with some cologne and fled.

At Respondent's arraignment, the trial court issued a criminal protective order for the victim and set Respondent's bail at $600,000 at the prosecutor's request and based on the bail schedule. The trial court noted that although Respondent's prior convictions were old, Respondent had a lengthy criminal history. Considering the seriousness of the offense and the vulnerability of the victim, the trial court denied Respondent's request to be released on his own recognizance.

At a subsequent bail hearing, the trial court noted that Respondent's current offense was similar to his prior offenses and described Respondent's acts here as "basically a home invasion[.]" After commending Respondent's willingness to participate in treatment and finding that Respondent had strong ties to the community, the trial court reduced Respondent's bail to $350,000.

The Court of Appeal granted Respondent's subsequent petition for writ of habeas corpus, holding that equal protection and due process require courts to inquire into a defendant's ability to pay and assess the available non-monetary alternatives before setting monetary bail. This Court granted review on its own motion and designated the District Attorney of the City and County of San Francisco as Petitioner.

ARGUMENT

I. DUE PROCESS AND EQUAL PROTECTION REQUIRE A COURT TO CONSIDER A DEFENDANT'S ABILITY TO PAY AND NON-MONETARY ALTERNATIVES BEFORE SETTING OR REVIEWING THE AMOUNT OF MONETARY BAIL

Where a defendant's liberty is tethered to the amount of money he has, it is incumbent on the courts to consider both a defendant's ability to pay and whether non-monetary alternatives might better ensure the defendant's appearance in court. By considering these individualized circumstances (rather than automatically setting a bail amount at arraignment based upon a bail schedule), courts can reasonably connect their decisions with the government's legitimate interest in ensuring the defendant's appearance. Relying on well-established authority, the Court of Appeal correctly held that trial courts must make both inquiries before setting or reviewing the amount of bail in order to satisfy due process and equal protection. (*In re Humphrey* (2018) 19 Cal.App.5th 1006, 1037 (*Humphrey*).)

As detailed by the Court of Appeal, courts have long held that due process and equal protection require courts to consider a person's ability to pay, along with any available alternatives, when a person's liberty depends solely on his indigency. (See, e.g., *Bearden v. Georgia* (1983) 461 U.S. 660, 672 (*Bearden*) [ability to pay and alternative measures]; *In re Antazo* (1970) 3 Cal.3d 100, 113-116 (*Antazo*) [alternative means]; *Hernandez v. Sessions* (9th Cir. 2017) 872 F.3d 976, 991-994 (*Hernandez*).)

Where a constitutional challenge arises from a person's indigency, "[d]ue process and equal protection principles converge[.]" (*Bearden, supra,* 461 U.S. at p. 665; see also *M.L.B. v. S.L.J* (1996) 519 U.S. 102, 120 [same].)

> Whether analyzed in terms of equal protection or due process, [. . . the issue] requires careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternatively means for effectuating the purpose[.]'

(*Bearden, supra*, 461 U.S. at pp. 666-667 quoting *Williams v. Illinois* (1970) 399 U.S. 235, 260 (Harlan, J., conc. opn.)

In *Bearden*, the Court considered whether the Fourteenth Amendment prohibited revocation of an indigent defendant's probation because the defendant failed to pay a probationary fine. (461 U.S. at p. 661.) Ultimately, the Court concluded that equal protection and due process require a court to inquire into a defendant's financial resources along with any alternative measures short of incarceration. (See *Bearden, supra,* 461 U.S. at pp. 671-674.) Otherwise, a person's incarceration may result solely because he lacks the funds to pay the fine. (*Id.*; see also *Turner v. Rogers* (2011) 564 U.S. 431, 447-449 (*Turner*) [civil proceedings].)

California, too, has long recognized that equal protection requires that a court consider a defendant's financial resources and available alternatives where incarceration may result from the non-payment of a monetary condition. (See, e.g., *Antazo, supra,* 3 Cal.3d at pp. 103-104, 113-116 [alternative methods relevant to determine whether imprisonment of indigent defendant necessary for non-payment of fines]; *People v. Goulart* (1990) 224 Cal.App.3d 71, 84 [equal protection requires a hearing on defendant's ability to pay restitution]; *In re Siegel* (1975) 45 Cal.App.3d 843, 846-848 [error for court to incarcerate on contempt for failure to pay fine without inquiring into ability to pay] overruled on other grounds *People v. Romero* (1994) 8 Cal.4th 728, 744, fn. 10; see also *Ex parte Duncan* (1879) 54 Cal. 75, 78 [inquiry into financial means relevant to setting the amount of monetary bail].) In *Antazo*, the Court considered

whether a convicted indigent defendant could be required to serve a term of imprisonment because he was unable to pay the fines previously imposed. (3 Cal.3d at pp. 103, 109-110.) The *Antazo* Court noted that the proper use of imprisonment "presupposes an ability to pay and a contumacious offender[,]" but observed that imprisonment there applied to those who were *unable* to pay. (*Id.* at p. 114.) The Court concluded that the defendant's incarceration resulted solely because of his indigency, which violated equal protection. (*Id.* at pp. 115-116.) In order to avoid this equal protection problem, the *Antazo* Court implicitly recognized that courts must inquire into available alternatives before incarcerating an indigent defendant. (*Id.* at pp. 114-116.)

Furthermore, the Ninth Circuit squarely held that courts must consider a person's ability to pay and any available alternatives before fixing the amount of bail as a matter of due process. (*Hernandez, supra,* 872 F.3d at pp. 981, 991, 994.) Otherwise, the amount of monetary bail set "is unlikely to result in a [bail] amount that is reasonably related to the government's legitimate interests." (*Id.* at p. 991.) For that reason, the Ninth Circuit agreed with the district court, which stated that "'when a person's freedom from governmental detention is conditioned on payment of a monetary sum, courts must consider the person's financial situation and alternative conditions of release when calculating what the person must pay to satisfy a particular state interest.'" (*Id.* at pp. 992-993.) Were a court not to consider a person's ability to pay the monetary sum, "there is a significant risk that the individual will be needlessly deprived of the fundamental right to liberty." (*Id.* at p. 993.)

California's statutory bail provisions, however, do not uniformly require that a court consider a defendant's financial circumstances in setting

the amount of bail. (*Humphrey*, *supra*, 19 Cal.App.5th at pp. 1024-1025.) Rather, Penal Code section 1270.1[3] provides that courts must consider a defendant's financial circumstances for certain enumerated offenses, including serious felonies and misdemeanor domestic violence, but that provision only applies when the court increases or decreases the bail amount from the scheduled amount. (Pen. Code § 1270.1, subds. (a)-(c); see also Pen. Code § 1269b, subd. (c).) In other circumstances, though, California's statutory provisions *do* require a court to consider a person's ability to pay. (See, e.g., Pen. Code § 1202.4, subd. (d) [a defendant's inability to pay is a factor, among others, to consider in setting the amount of the restitution fine]; Pen. Code § 1203.097, subd. (a)(7)(A)(i) [program fees based on ability to pay]; Pen. Code § 1203.097, subd. (c)(1)(P) [sliding fee schedule for batterer's program]; Pen. Code § 1464 [imprisonment for failure to pay penalty assessment may be waived when it imposes hardship]; Veh. Code § 42003 [willful violation of order to pay fines is punishable by incarceration, but, upon request of the defendant, the court shall consider the defendant's ability to pay]; Gov. Code § 29550.2 [if the person has the ability to pay, judgment of conviction shall include order to pay booking fee].)

When considering the weight of this authority and California's existing monetary bail provisions, equal protection and due process dictate that a court consider a criminal defendant's ability to pay in setting or reviewing the amount of monetary bail, particularly when there is no meaningful distinction between incarceration because an indigent defendant cannot afford to pay a probationary fine and incarceration solely because an indigent defendant cannot afford to post bail. (See *Griffin v. Illinois* (1956)

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[3] Other than sections 12 and 28, all other statutory references are to the Penal Code, unless otherwise noted.

351 U.S. 12, 18 [no meaningful distinction for an indigent defendant between the right to defend oneself at trial and a record for meaningful appellate review]; see also *Turner*, *supra*, 564 U.S. at pp. 447-449 [civil proceedings]; *Antazo*, *supra*, 3 Cal.3d at p. 116.) Furthermore, *Bearden* directs that a court make the inquiry; otherwise, a person may be incarcerated solely because he cannot afford the amount of bail. (*Bearden*, *supra*, 461 U.S. at pp. 671, 674; see also *Hernandez*, *supra*, 872 F.3d at p. 992.)

Ability to pay does not, however, end the court's inquiry. Rather, the court must assess the viability of non-monetary alternatives to ensure that the amount of monetary bail set necessarily meets the stated interest, particularly when the court sets the bail amount beyond the defendant's ability to pay. (*Bearden*, *supra*, 461 U.S. at p. 667 [equal protection and due process require inquiry into the "existence of alternative means"]; *Antazo*, *supra*, 3 Cal.3d at pp. 112-116; *Hernandez*, *supra*, 872 F.3d at pp. 992-993.) If not, the court cannot be assured that the resulting detention advances the stated interest. (*Hernandez*, *supra*, 872 F.2d at p. 991.)

The Court of Appeal here carefully identified and considered these due process and equal protection issues in setting monetary bail. In doing so, the Court of Appeal correctly held that a trial court must consider–before setting or reviewing monetary bail–the defendant's ability to pay and any non-monetary alternatives available to the court.

II. WHILE CALIFORNIA'S CONSTITUTIONAL AND STATUTORY PROVISIONS MANDATE SETTING THE AMOUNT OF BAIL BASED ON PUBLIC AND VICTIM SAFETY, DOING SO IMPLICATES EQUAL PROTECTION CONCERNS

By making liberty contingent upon wealth, California's monetary bail scheme inherently denies equal protection when bail is set to protect public and victim safety. A disconnect between the amount of bail set and its consequences, combined with the inequitable results of setting bail based

on safety risk alone, creates this equal protection problem. California's pre-trial detention system, on the other hand, narrowly serves the compelling governmental interests of preventing arrestees from committing further crimes and protecting victims and the community by preventatively incarcerating only those individuals who pose serious safety risks irrespective of wealth or indigency.

To understand how this equal protection problem arose, the evolution between the purposes behind monetary bail and its consequences must be considered. Traditionally, monetary bail served to ensure a person's appearance in court, a legitimate government interest. (*In re Underwood* (1973) 9 Cal.3d 345, 348 (*Underwood*) superseded by statute as stated in *In re York* (1995) 9 Cal.4th 1133, 1143, fn. 7 (*York*); *Stack v. Boyle* (1951) 342 U.S. 1, 5 [amount of bail set to assure presence of the defendant].) As the California Supreme Court stated in 1973, "[t]he purpose of bail is to assure the defendant's attendance in court when his presence is required[.]" (*Underwood, supra*, 9 Cal.3d at p. 348; see also *People v. Financial Casualty & Surety, Inc.* (2016) 2 Cal.5th 35, 42 ["The purpose of bail and its forfeiture, however, is to ensure the accused's attendance and obedience to the criminal court[.]"].) Bail, however, did not serve to punish defendants or to protect public safety. (*Underwood, supra,* 9 Cal.3d at p. 348.) In accordance with these principles, bail could be forfeited if a defendant failed to appear. (See Pen. Code § 1305, subd. (a) (Matthew Bender 1981).)

But in 1982 and then in 1987, both the electorate and the Legislature mandated that public safety, not the certainty of the defendant's appearance, be the primary factor in setting monetary bail. (Cal. Const., former art. I, § 28, subd. (e), now art. I, § 28, subd. (f)(3); *In re McSherry* (2003) 112 Cal.App.4th 856, 861, 862; Pen. Code § 1275 (West 1988); see also *Naidu v. Superior Court* (2018) 20 Cal.App.5th 300, 308, 312

[recognizing public safety as primary consideration in setting bail].) Still, section 12 included the "seriousness of the offense" as a factor in fixing bail. (Cal. Const., art. I, § 12.) In order to assess the seriousness of the offense, courts must consider any injury to the victim, any threats made, and the use of a deadly weapon–all factors indicative of a public safety risk. (Pen. Code § 1275, subd. (a)(2) (West 1988).) Subsequently, the voters amended section 28 to add victim safety as another primary consideration in setting monetary bail. (Cal. Const., art. I, § 28, subd. (f)(3).) Section 1305, however, was not amended to allow courts to forfeit bail if a defendant committed a new offense. (See Pen. Code § 1305, subd. (a) (Thomson West 2009).)

Recently, the federal district court concluded that setting monetary bail based only on a public safety risk bears no rational relationship to protecting public safety because monetary bail cannot be forfeited when a defendant commits a new crime. (*Reem v. Hennessy* (N.D. Cal. Dec. 21, 2017, Case No. 17-cv-06628-CRB) 2017 U.S. Dist. LEXIS 210430, *8, *13 (*Reem I*) citing Karnow, SETTING BAIL FOR PUBLIC SAFETY (2008) 13 Berkeley J. Crim. L. 1, 3, 8 (Karnow).) Because the courts lack the ability to forfeit bail based on a new crime, the amount of monetary bail itself "does nothing to incentivize [a defendant] not to commit crimes." (*Reem I*, *supra*, 2017 U.S. Dist. LEXIS 210430 at p. *9 citing Karnow, *supra*, at p. 2.) The illogical way the bail system in California works, however, does not in itself create an equal protection problem, the district court observed. (*Reem I*, *supra*, 2017 U.S. Dist. LEXIS 210430 at pp. *12-13.) Rather, "the disparate way in which it affects the wealthy and indigent does[.]" (*Id.* at p. *13.) The federal court concluded that California's bail provisions in their application present an equal protection issue because "[t]he state cannot

detain the indigent person based on public safety concerns while letting the wealthy person walk only because he has money." (*Id.* at pp. *13-14.)[4]

California law leads to the same conclusion reached by the federal district court in *Reem I*: California's monetary bail system raises equal protection issues where monetary bail is set to protect public and victim safety. Like the United States Constitution, the California Constitution prohibits laws that deny equal protection. (Cal. Const., art. I, § 7, subd. (a); see also Cal. Const., art. IV, § 16, subd. (a) [mandating uniform operation of the law].) In assessing an equal protection challenge, the rights implicated must first be identified. (See *People v. Olivas* (1976) 17 Cal.3d 236, 243-244 (*Olivas*).) At minimum, there is a presumption of constitutionality, and distinctions need only "'bear some rational relationship to a conceivable legitimate state purpose.'" (*Olivas*, *supra*, 17 Cal.3d at p. 243 quoting *Serrano v. Priest* (1971) 5 Cal.3d 584, 597 (*Serrano*); see also *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 (*Johnson*) [rational relationship test applied where no suspect class or fundamental right].) Under the rational basis challenge, "a party must '"negative every conceivable basis"' that might support the disputed statutory disparity." (*Johnson*, *supra*, 60 Cal.4th at p. 881.)

When "'suspect classifications'" or "'fundamental interests'" are implicated, however, strict scrutiny applies. (*Olivas, supra,* 17 Cal.3d at p. 243 quoting *Serrano*, *supra*, 17 Cal.3d at p. 597.) "'Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the

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[4] The district court pointed out that its decision did not address the validity of the constitutional and statutory provisions as a matter of state law. (*Id.* at p. *12, fn. 1.)

distinctions drawn by the law are *necessary* to further its purpose.'" (*Ibid.* (italics in original).)

Personal liberty is a fundamental interest under both the California and United States Constitutions. (*Olivas*, *supra*, 17 Cal.3d at p. 251.) Again, legislation enjoys a presumption of constitutionality. (*Ibid.*) But, "once it is determined that the classification scheme affects a fundamental interest or right the burden shifts; thereafter *the state* must first establish that it has a *compelling* interest which justifies the law and then demonstrate that the distinctions drawn by the law are *necessary* to further that purpose." (*Id.* (italics in original) citing *Serrano*, *supra*, 5 Cal.3d at p. 597; *Antazo*, *supra*, 3 Cal.3d at pp. 110-111; *Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785 vacated on other grounds (1971) 403 U.S. 915.)

There can be no doubt that "[t]he government's interest in preventing crimes by arrestees is both legitimate and compelling." (*United States v. Salerno* (1987) 481 U.S. 739, 749 (*Salerno*).) So, too, is the legitimate regulatory goal of preventing danger to the community. (*Salerno*, *supra*, 481 U.S. at p. 747 citing *Schall v. Martin* (1984) 467 U.S. 253, 264 (*Schall*); *Lopez-Valenzuela v. Arpaio* (9th Cir. 2014) 770 F.3d 772, 779.) Both the electorate and California Legislature have recognized these compelling interests by requiring courts to consider public and victim safety in setting the amount of monetary bail. (Cal. Const., art. I, § 28, subd. (f)(3); Pen. Code § 1275, subd. (a)(1); see also Cal. Const., art. I, § 12 [seriousness of the offense in fixing amount of bail].)

Monetary bail, though, bears no rational relationship to protecting public and victim safety in California because the bail amount cannot be forfeited once a defendant commits a new offense. (Pen. Code § 1305, subd. (a)(1); Karnow, *supra*, at pp. 2, 20; *Reem I*, *supra*, 2017 U.S. Dist. LEXIS 210430 at pp. *8, *13.) Thus, the amount of bail cannot serve to prevent any future criminal conduct or ensure safety. (Karnow, *supra*, at

pp. 2, 20, 29.) Thus, monetary bail that is set commensurate with the safety risk, particularly when that risk is high, cannot satisfy equal protection.[5]

Under the current monetary bail scheme, courts set high bail amounts when faced with a serious safety risk, thereby effectuating a detention in those instances where a defendant cannot afford the amount of bail set. (See Karnow, *supra*, at p. 7, fn. 43 ["judges concerned about the risk to public safety had often used artificially high bail to detain the defendant"].) A defendant's liberty in the public safety bail setting thereby becomes contingent on his economic means. If wealthy and the defendant posts bail, she will be released, even though her risk to public or victim safety is high. If indigent, however, the defendant cannot satisfy the high amount of bail and she remains incarcerated. Equal protection prohibits such a result.

The Pretrial Detention Reform Workgroup, in its recommendations to the Chief Justice, agreed that California's monetary bail system invidiously discriminates against indigent persons when monetary bail decisions are based on public and victim safety:

> California's current bail system unnecessarily compromises victim and public safety because it bases a person's liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias.

(Pretrial Detention Reform, Recommendations to the Chief Justice, Pretrial Detention Reform Workgroup (Oct. 2017) p. 57 (Pretrial Detention Reform).) The Workgroup further identified the very inequity referenced by the district court in *Reem I*: high-risk defendants charged with serious

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[5] Arguably, the requirement that a court order that a defendant obey all laws once bail is imposed may provide the incentive to do so (Pen. Code § 646.93, subd. (c)(4)), but, again, courts have no authority to forfeit bail or charge new offenses.

or violent felonies are able to post bail "regardless of the threat they may pose to public safety." (Pretrial Detention Reform, *supra*, at p. 25.)

The Court of Appeal, however, did not squarely consider the equal protection problem in setting monetary bail based solely on public or victim safety. Presumably, in light of section 1275 and sections 12 and 28, the Court of Appeal recognized, in addition to ensuring a defendant's appearance, that the protection of "the safety of victims and the community[]" is another legitimate consideration for the court. (*Humphrey*, *supra*, 19 Cal.App.5th at p. 1028.) While the Court of Appeal required that courts consider ability to pay in determining the amount of bail, the Court of Appeal did not specifically address how monetary bail should be set when a safety risk is the only danger posed. To the extent that the Court of Appeal touched on the issue, the court did acknowledge there exists no rational relationship between the amount of money bail and the interest of protecting public safety:

> Money bail, however, has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes. Money bail will protect the public only as an incidental effect of the defendant being detained due to his or her inability to pay, and this effect will not consistently serve a protective purpose, as a wealthy defendant will be released despite his or her dangerousness while an indigent defendant who poses minimal risk of harm to others will be jailed.

(*Humphrey*, *supra*, 19 Cal.App.5th at p. 1029.)

Petitioner recognizes that this Court has previously rejected equal protection challenges to the monetary bail system in California (see, e.g., *York*, *supra*, 9 Cal.4th at pp. 1152-1153; *In re Podesto* (1976) 15 Cal.3d 921, 931-932 (*Podesto*)), but those decisions did not address the issue raised here: whether setting monetary bail, at minimum, bears a rational relationship to the goal of protecting public and victim safety when bail cannot be forfeited upon the commission of a new crime. Nor could they.

York stated that the bail provisions of section 12 preempted those of section 28, so the Court had no occasion to discuss the equal protection implications of the setting of monetary bail based on public safety. *York* also made no mention of section 1275. As for *Podesto*, that decision predated the amendments to sections 28 and 1275 and only addressed the distinction between convicted misdemeanants and convicted felons, not wealth-based classifications. (*Podesto*, *supra*, 15 Cal.3d at pp. 931-932.)

Thus, to the extent that sections 12 and section 28 allow a court to consider the seriousness of the offense or public and victim safety in setting the amount of bail, those aspects violate equal protection under our system. This equal protection problem, however, does not extend to those portions of the same constitutional provisions that allow for public safety detentions, particularly those under section 28, because they focus on the defendant's safety risk and do not discriminate based on wealth. When the risk to public safety and the safety of the victim is high, detention without bail narrowly serves the compelling interests of preventing arrestees from committing new offenses and protecting safety. Preventative detention also treats both wealthy and indigent defendants alike by sequestering them from society so that they cannot pose any danger or commit additional crimes.

III. BOTH SECTIONS 12 AND 28 OF THE CALIFORNIA CONSTITUTION PERMIT DETENTION TO PROTECT PUBLIC AND VICTIM SAFETY IN NONCAPITAL CASES

Before 2008, section 12 provided the sole means to preventatively detain a defendant before trial. That landscape changed, however, with the enactment of Marsy's Law under Proposition 9 in 2008. Currently, both sections 12 and 28, as reconciled, provide the means to deny bail in noncapital cases and preventatively detain those defendants that pose serious safety risks.

A. California's Provisions for Pretrial Detention

Understanding California's current pretrial detention landscape requires a review of both the text of the applicable constitutional and statutory provisions and the historical backdrop against which they were enacted. (*Cal. Redevelopment Ass'n v. Matosantos* (2011) 53 Cal.4th 231, 265 (*Matosantos*).)

1. 1982 Election: Competing Bail and Detention Provisions

In 1982, the ballot provided voters with two competing provisions regarding detention and bail, namely Proposition 4, which addressed section 12, and Proposition 8, which addressed section 28 of the California Constitution.

Initially, section 12 provided that all persons shall be released on bail, excepting capital crimes when the facts are evident and the presumption great. Proposition 4 sought to expand detention to noncapital cases to include (with italics for additions):

> *(b) Felony offenses involving acts of violence 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;* [6] *or*
>
> *(c) Felony offenses where 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.*

(Ballot Pamp., Primary Elec., (June 8, 1982) text of Prop. 4, p. 17 (1982 Ballot Pamp. Prop. 4); Cal. Const., art. I, § 12, subds. (b) & (c).) While

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[6] In 1994, Proposition 189 amended this provision to include felony sexual assault offenses against another person. (Ballot Pamp., Gen. Elec., (Nov. 8, 1994) text of Prop. 187, p. 18.)

section 12 still prohibited excessive bail and permitted release on the person's own recognizance, the amendment required courts to consider the "seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing" in fixing bail. (1982 Ballot Pamp. Prop. 4, *supra*, p. 17; Cal. Const., art. I, § 12.)

Proposition 8, on the other hand, sought to enact "comprehensive provisions and laws" and "safeguards in the criminal justice system" to fully protect the rights of victims of crime, as "a matter of grave statewide concern." (Ballot Pamp., Primary Elec., (June 8, 1982) text of Prop. 8, p. 33 (1982 Ballot Pamp. Prop. 8).) Proposition 8 also specifically sought to provide courts with broader discretion to preventatively detain those persons who pose a serious danger to public safety (with italics for additions and underline for emphasis):

> *The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.*

(1982 Ballot Pamp. Prop. 8, *supra*, p. 33; see also 1982 Ballot Pamp. Prop. 8, *supra*, p. 54 [according to Legislative Analyst, amendment gives courts discretion "in deciding whether to grant bail[.]"].) Proposition 8 would have also provided a tool "to stop extremely dangerous offenders from being released on bail to commit more violent crimes." (1982 Ballot Pamp. Prop. 8, *supra*, p. 34 [arguments in favor].) At that time, Proposition 8 did not further define the word "victim."

In order to achieve these goals, the proposed law stated:

(e) Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. [. . .] *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.

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney shall be given notice and reasonable opportunity to be heard on the matter.

When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

(1982 Ballot Pamp. Prop. 8, *supra*, p. 33 [text of proposed law]; Cal. Const., former art. I, § 28, subd. (e), 4th par.) Proposition 8 therefore supplanted flight risk with public safety as the primary consideration in setting, reducing, or denying bail. Lastly, Proposition 8 expressly sought to repeal section 12. (1982 Ballot Pamp. Prop. 8, *supra*, p. 33 [text of proposed law].)

2. Amendment by the Legislature

Following the 1982 election, the Legislature amended Penal Code section 1275 in 1987 to mirror the bail-related provisions of Proposition 8. Before the amendment, section 1275 contained no provision for the protection of public safety and stated: "In fixing the amount of bail, the judge or magistrate shall take into consideration the seriousness of the

offense charged, the previous criminal record of the defendant, and the probability of his appearing at the trial or hearing of the case." (Pen. Code § 1275 (West 1982).) As amended section 1275 stated:

> 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 at a hearing of the case. The public safety shall be the primary consideration.

(Pen. Code § 1275 (West 1988) (italics added).) The amendment to section 1275 also included mandatory factors to consider in assessing the seriousness of the offense charged, including "the alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant." (*Ibid.*)

The 1987 amendments to section 1275 were drawn verbatim from the "Public Safety Bail" provisions of Proposition 8. (Conc. Sen. Amend. to Assem. Bill No. 630 (1987-1988 Reg. Sess.) Aug. 27, 1987.) According to the author of the bill to amend section 1275, the amendment "codifie[d] existing provisions of the Victim's Bill of Rights which provide that public safety shall be the primary consideration in regard to bail" and noted that the United States Supreme Court upheld public safety as "a valid basis upon which to set or *deny* bail." (Rep. Larry Sterling, sponsor of Assem. Bill No. 630 (1987-1988 Reg. Sess.) letter to Governor, Sep. 3, 1987 (italics added).) Presumably, the author referred to the 1987 decision *Salerno*, *supra*, 481 U.S. 739, which upheld federal public safety detention provisions under the Bail Reform Act of 1984 against the defendant's due process challenge. (481 U.S. at pp. 741, 748, 749, 752.)

3. Bail and Detention Provisions of Section 12 Prevail Over Those Contained in Section 28

Following the 1982 election and the Legislature's amendment to section 1275, courts assessed the two competing constitutional provisions–one which sought to repeal the other–enacted in the same election. Ultimately, this Court held that the bail and detention provisions of section 12 prevailed over those contained in section 28 because section 12 received more votes. (*People v. Standish* (2006) 38 Cal.4th 858, 876-878 (*Standish*); *York, supra,* 9 Cal.4th at p. 1140, fn. 4; see also Cal. Const., art. XVIII, § 4 ["If provisions of 2 or more measures approved in the same election conflict, those of the measures receiving the highest affirmative vote shall prevail."]; *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 255 (*Brosnahan*) citing Cal. Const., art. XVIII, § 4.)

Standish, more so than *York*, conducted a "section-by-section" comparison between sections 12 and 28 and concluded that a direct conflict existed. (*Standish, supra*, 38 Cal.4th at pp. 877-878.) First and foremost, section 28 specifically sought to repeal section 12 outright. (*Id.* at p. 877.) Section 28 would have also prohibited own recognizance release for any serious felony, while section 12 left intact a court's discretion to grant release for all offenses. (*Id.* at p. 877.) Last, section 12 stated that all persons, subject to limitations, "shall" be admitted to bail, while section 28 provided courts with discretion to release persons on bail in all cases subject to enumerated factors. (See *id.*) Because the provisions contained competing measures related to bail, release, and detention and section 12 received more votes than section 28, the Court concluded that the bail provisions of section 28 did not take effect. (*Id.* at pp. 877-878.)

In his dissent, Justice Chin identified how the 1982 amendments changed section 12. (*Standish, supra,* 38 Cal.4th at pp. 888, 892-893 (conc. & dis. opn. of Chin, J.).) Prior to 1982, section 12 "gave a defendant an

absolute right to bail in noncapital cases and gave *no* discretion to the court to deny bail, even where public safety was at stake." (*Id.* at p. 893 (italics in original).) The amendment to section 12, however, "'broaden[ed] the circumstances under which courts may deny bail[]'" and provided "'judges with a necessary legal tool to protect the public from repeat violent offenders.'" (*Id.* at p. 892 quoting 1982 Ballot Pamp. Prop. 4, *supra*, pp. 16, 18.) Thus, section 12 allowed "courts to deny release on bail in the interest of public safety[]" and placed "express public safety limitations on the constitutional bail provision[.]" (*Standish, supra,* 38 Cal.4th at p. 892.)

4. 2008 Election: Marsy's Law

The 2008 election presented quite a different scenario than the 1982 election had. Unlike 1982, the 2008 ballot contained just one provision related to bail and detention: Proposition 9, also known as the "Victim's Bill of Rights Act of 2008: Marsy's Law." (Ballot Pamp., Gen. Elec., (Nov. 4, 2008) text of Prop. 9, p. 128 (2008 Ballot Pamp. Prop. 9).) This amendment presented itself to the voters just two years after the *Standish* decision. (Cal. Const., art. II, § 8 [initiative includes power of the electorate to adopt amendments to the constitution]; Cal. Const., art. XVIII, § 3 ["electors may amend the Constitution by initiative"].) When amending section 28 in 2008, the electorate was deemed to know existing laws and any judicial construction, which included the prior enactment of section 28 in 1982 and *Standish*. (*In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11 (*Lance W.*).)

Proposition 9 added to section 28 that "[c]riminal activity has a serious impact on the citizens of California. The rights of victims of crime and their families in criminal prosecutions are a subject of grave statewide concern." (2008 Ballot Pamp. Prop. 9, *supra*, p. 129.) As to the findings to support the amendments, section 28 stated (with italics for additions and strike-throughs for deletions):

> *Victims of crime are entitled to have the criminal justice system view criminal acts as serious threats to the safety and welfare of the people of California.* ~~that the~~ *The* enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system ~~to~~ fully ~~protect~~ *protecting* those rights *and ensuring that crime victims are treated with respect and dignity*, is a matter of ~~grave statewide concern~~ *high public importance. California's victims of crime are largely dependent upon the proper functioning of government, upon the criminal justice system and upon the expeditious enforcement of the rights of victims of crime described herein, in order to protect the public safety and to secure justice when public safety has been compromised by criminal activity.*

(2008 Ballot Pamp. Prop. 9, *supra*, p. 129 [text of proposed law]; Cal. Const., art. I, § 28, subd. (a)(2).) The amendment also broadened enforceable rights and stated:

> *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 and that are enforceable through the enactment of laws and through good-faith efforts and actions of California's elected, appointed, and publicly employed officials. 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, appropriately* detained in custody, *brought before the courts of California even if arrested outside the State*, tried by the courts *in a timely manner, sentenced*, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.

(2008 Ballot Pamp. Prop. 9, *supra*, p. 129; Cal. Const., art. I, § 28, subd. (a)(4).)

In order to "preserve the victim's rights to justice and due process," section 28 was amended to state that victims shall be entitled "[t]o have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant." (2008 Ballot Pamp. Prop. 9, *supra*, p. 129; Cal. Const., art. I, § 28, subd. (b)(3).) Proposition 9 also

renumbered most of the provisions of section 28, including the public safety subdivision. Proposition 9 further amended the public safety subdivision to state (with italics for additions and strike-throughs for deletions):

> ~~(e)~~ *(3)* Public Safety Bail. A person may be released by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. [. . .] In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, *the safety of the victim*, 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. Public safety and *the safety of the victim* shall be the primary ~~consideration~~ *considerations*.

(2008 Ballot Pamp. Prop. 9, *supra*, p. 129 [text of proposed law]; Cal. Const., art. I, § 28, subd. (f)(3).) Thus, the amendment further added "the safety of the victim" as an additional, but primary consideration in "setting, reducing, or denying bail[.]" (2008 Ballot Pamp. Prop. 9, *supra*, p. 130.) As to own recognizance release, the amendment to section 28 retained the language that permitted release based on the court's discretion and subject to the factors considered in setting bail, but removed the language that prohibited release for a person charged with a serious felony. (2008 Ballot Pamp. Prop. 9, *supra*, p. 130.)

The impetus for Proposition 9 was a young woman named Marsy Nicholas, who was murdered by her former boyfriend. Proposition 9 noted that the family was shocked to encounter the defendant after his arrest, later "learning that he had been *released on bail* without any notice to Marsy's family and *without any opportunity for her family to state their opposition to his release*." (2008 Ballot Pamp. Prop. 9, *supra*, p. 129, § 2 (italics added).) Proposition 9 also sought to enforce those rights–including public safety bail and detention–that had not been enforced under 1982's Proposition 8:

> [T]he 'broad reform' of the criminal justice system intended to grant these basic rights mandated in the Victims' Bill of Rights initiative measure passed by the electorate as Proposition 8 in 1982 had not occurred as envisioned by the people. Victims of crime continue to be denied rights to justice and due process.

(2008 Ballot Pamp. Prop. 9, *supra*, p. 128, § 2.) According to the Legislative Analyst, the measure expanded the rights of victims to apply at pre-trial proceedings, where their views could be heard related to any release decisions. (2008 Ballot Pamp. Prop. 9, *supra*, p. 58.) The Legislative Analyst further stated that the amendment expanded the legal rights of crime victims to "specify that the safety of the victim must be taken into consideration by judges in setting bail for persons arrested for crimes." (2008 Ballot Pamp. Prop. 9, *supra*, p. 59.)

The arguments in favor of Proposition 9, like the text of the proposed law itself, referenced the release of Marsy's killer on bail and the danger he posed to public safety because he was not preventatively detained: "Marsy's killer was free on bail but her family wasn't even notified. He could've easily killed again." (2008 Ballot Pamp. Prop. 9, *supra*, p. 62 [arguments in favor].) In the end, the proponents argued that Proposition 9 "RESTORES JUSTICE, DUE PROCESS, HUMAN DIGNITY, AND FAIRNESS[,]" making "California safer." (2008 Ballot Pamp. Prop. 9, *supra*, p. 63 [rebuttal] & p. 62 [arguments in favor].) Proposition 9 made no mention of repealing section 12.

B. Section 28 Can Be Reconciled with Section 12 to Provide Additional Exceptions to the General Right to Bail and Provides Courts with the Discretion to Detain Those Individuals Who Pose a Serious Safety or Flight Risk

Although sections 12 and 28 directly conflicted when the electorate initially passed them in 1982, the 2008 amendment to section 28 presented

a considerably different scenario, permitting reconciliation between the two provisions. Ultimately, both provisions delineate exceptions to the general rule providing for bail and own recognizance release and permit courts to preventatively detain those defendants that pose serious safety risks.

The presumption against implied repeal requires courts "'to maintain the integrity of both [enactments] if they may stand together.'" (*Lance W., supra*, 37 Cal.3d at p. 887 quoting *Warne v. Harkness* (1963) 60 Cal.2d 579, 588.) Thus, when faced with two provisions, an obligation rests with the courts "to reconcile conflicts between . . . constitutional provisions to avoid implying that a later enacted provision repeals another existing . . . provision." (*Lance W., supra,* 37 Cal.3d at p. 886.) In that vein, this Court has emphasized the importance of harmonizing potentially inconsistent statutes and making a finding of implied repeal """only where there is no rational basis for harmonizing the two potentially conflicting statutes[.]""" (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955 (*State Dept. of Public Health*).) Foremost in this analysis, a court must "ascertain the intent of the electorate" so as to "effectuate that intent." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 978-979 (*Arias*).)

Further, the initiative and referendum procedures–"'one of the most precious rights of our democratic process'"–are drafted under the powers reserved by the people. (*Brosnahan, supra,* 32 Cal.3d at p. 262.) As a result, courts jealously guard this precious right and liberally construe the terms of an initiative, "resolving reasonable doubts in favor of the people's exercise of their reserved power." (*Ibid.*)

How section 28 may be harmonized with section 12 depends, in part, upon the canons of interpretation. "In interpreting the scope of [a] constitutional provision, [the court applies] '"the same principles that govern statutory construction,"' beginning with the text as the best indicator of intent." (*Matosantos, supra,* 53 Cal.4th at p. 265; *People v.*

Rizo (2000) 22 Cal.4th 681, 685 [voter initiatives].) "In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration." (*Lance W., supra,* 37 Cal.3d at p. 889.)

Courts must first look to the language itself, "giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571 (*Pearson*).) To that end, significance must be given, if possible, to "every word, phrase and sentence" in pursuit of the original intent. (*People v. Valencia* (2017) 3 Cal.5th 347, 357.) The meaning must also be considered in the context of the framework as a whole. (*People v. Vidana* (2016) 1 Cal.5th 632, 637.) If the language is unambiguous, the inquiry ends, as courts "presume the voters intended the meaning apparent from the language" itself. (*Pearson, supra*, 48 Cal.4th at p. 571.) "A literal construction of an enactment, however, will not control when such a construction would frustrate the manifest purpose of the enactment as a whole." (*Arias, supra,* 46 Cal.4th at p. 929.) "'The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (*Ibid.*)

If, however, the text is ambiguous, courts look to extrinsic aids to determine the voters' intent. (*Matosantos, supra,* 53 Cal.4th at p. 265.) Extrinsic aids may include the "historical backdrop against which the provision was drafted and adopted" (*Matosantos, supra*, 53 Cal.4th at p. 265), ballot explanations by the Legislative Analyst (*Lance W., supra*, 37 Cal.3d at p. 888), ballot summaries (*Pearson, supra*, 48 Cal.4th at p. 571), and ballot pamphlet arguments (*People v. Floyd* (2003) 31 Cal.4th 179, 187). Furthermore, voter initiatives must not be interpreted "in a way that the electorate did not contemplate: the voters should get what they enacted,

not more and not less.'" (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 909 quoting *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

Beginning with the text (*State Dept. of Public Health, supra*, 60 Cal.4th at p. 856), section 28 expressly requires courts to consider the protection of the public and the safety of the victim in "denying bail," amongst other enumerated factors. Indeed, the text of section 28 requires courts to make public safety and the safety of the victim their primary considerations in deciding whether to deny bail. True, the 2008 amendment made a few changes to the public safety subdivision itself. But, the amendment made significant changes throughout section 28, including those directly preceding the public safety subdivision. (Cal. Const., art. I, § 28, subd. (f).) Proposition 9 also presented these amendments to the electorate as part of a logical and coherent whole and they could not be understood without the remaining provisions. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349 [courts must assume voters considered and understood complete text of the proposed measure]; *Pearson, supra*, 48 Cal.4th at p. 571 [consider in context of entire initiative]; *Valencia, supra,* 3 Cal.5th 347 at p. 357 [consider every word, phrase, and sentence; warning against a construction that renders other words as surplusage].) Ultimately, section 28, by its own words, permits court to deny bail in noncapital cases.

In reconciling the respective texts of sections 12 and 28, the exceptions under section 12 would still exist, but they would not provide the exclusive means for a court to deny bail in noncapital cases. Rather, courts could also look to section 28's exceptions. In the context of detention, section 28 references those defendants who commit felonious acts that cause injury to innocent victims, along with the specific need to protect public safety as the chief goal. (Cal. Const., art. I, § 28, subd. (a)(4); *Salerno, supra*, 481 U.S. at pp. 747, 750.) Similarly, the public safety subdivision of section 28 designates victim and public safety as the primary

considerations in denying bail, which further indicates the intent that section 28 applies to felony offenses where the defendant poses a serious danger to the victim or public safety. (Cal. Const., art. I, § 28 subd. (f)(3).) As to felonious acts causing injury to victims, section 28 limits those offenses to acts where the victim "suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act." (Cal. Const., art I, § 28, subd. (e) [defining "victim"].) Finally, section 28 includes flight risk as one of the factors to consider in denying bail. (Cal. Const., art. I, § 28, subd. (f)(3).) If a defendant poses an unreasonable and unmanageable flight risk, but the court cannot detain that defendant, the court cannot ensure an expeditious enforcement of the victim's rights or honor the victim's right to a speedy trial. (See Cal. Const., art. I, § 28, subd. (a)(2).) In sum, section 28 provides additional exceptions when a defendant is arrested for: 1) felonious offenses causing victims to suffer direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a crime or delinquent act; 2) felonious offenses where the defendant poses a serious danger to the safety of the victim or public safety; and 3) felonious offenses where the defendant poses a serious flight risk. (Cal. Const., art. I, § 28, subds. (a)(4), (e) & (f)(3).)

Furthermore, the history behind section 12 itself confirms that sections 12 and 28 can be reconciled in this manner. Prior to 1982, section 12 gave a defendant charged with a noncapital offense the *absolute* right to bail. Section 12 thus gave no discretion to a court to deny bail in noncapital cases. With the 1982 amendment, however, section 12 provided "public safety limitations" on the general right to bail and bestowed some discretion on courts, based on the factors added relative to public safety. (See *Standish*, *supra*, 38 Cal.4th at pp. 892-893 (dis. opn. of Chin, J.).) In 2008, the amendments to section 28 did the same. While section 28 still

used the word "may" as opposed to "shall," the amendment added further exceptions, subject to enumerated factors. So, section 28, as amended, did not completely repeal the right to bail, but rather imposed public safety limitations, just as section 12 had in 1982. Thus, both sections 12 and 28 provide courts with the means to deny bail in noncapital cases when victim or public safety is at stake.

Moreover, the significant conflicts between sections 12 and 28 present in 1982 were no longer present in 2008, making reconciliation possible when it had not been before. For example, section 28 in 1982 specifically sought to repeal section 12, while the 2008 amendment to section 28 made no mention of repeal or section 12. In 1982, section 28 sought to prohibit courts from releasing defendants charged with serious felonies on their own recognizance, while the amendment in 2008 removed that restrictive provision. Instead, the amendment permitted release for all offenses, subject to the factors to be considered in setting, reducing, or denying bail.

Aside from the text, the intent behind the amendment to section 28 shows the electorate intended to furnish judges with additional means to detain persons who pose an unmanageable safety risk to either the victim or the public. Indeed, the ballot arguments in favor of Proposition 9 focused specifically on the concerns felt by the family of Marsy Nicholas when they saw her murderer free on bail at a local grocery store. The argument in favor of the proposition promised to prevent such events because judges would be required to consider the victim's safety and the safety of the victim's family in making release decisions. (2008 Ballot Pamp. Prop. 9, *supra*, p. 62 [argument in favor]; see also p. 129, § 2 [text of proposed law noting that family had no opportunity to state opposition to his release].) Under this backdrop, Marsy's Law sought to expand judicial authority to detain when necessary to protect victims and the public. (See *Lance W., supra,* 37 Cal.3d at p. 887 ["The general rule is that courts assume from a

new enactment a purpose to change existing law."].) By bestowing this authority on the court, the amendment to section 28 provided an additional and necessary tool to protect safety, as section 12 did in 1982. The 2008 amendment also placed public safety limitations on the constitutional bail provision, but did not eliminate that right entirely, just like section 12.

The timing of Proposition 9–two years after the Supreme Court's decision in *Standish*–further solidifies the electorate's intent to reenact the bail and detention provisions of Proposition 8 previously held inoperative by the Court. In fact, Marsy's Law sought to institute the broad reform that had not occurred as envisioned by the Victims' Bill of Rights in 1982. (2008 Ballot Pamp. Prop. 9, *supra*, p. 128.) Of course, one of the broad reforms that had not occurred in light of *Standish* was the modification to California's constitutional bail and detention provisions. "Although Marsy's Law did not directly address article I, section 12 of the Constitution, it did reenact, as section 28(f)(3), Prop. 8's provisions addressing bail and [own recognizance] release in nearly identical form." (Pretrial Detention Reform, *supra*, at p. 23.) Thus, Proposition 9 resurrected the dormant bail and detention provisions of section 28 and they can be reconciled as set forth above.

Proposition 9's stated intent regarding conflicts of law further demonstrates the voter's intent to broaden, rather than restrict the due process rights of victims and the public. Proposition 9 specifically intended "that if any provision conflicts with an existing provision of law which provides for greater rights of victims of crime, the latter shall apply." (2008 Ballot Pamp. Prop. 9, *supra*, p. 132, § 7.) By incorporating this provision, the electorate surely did not intend that the provisions of section 12 would prevail in detention determinations at the expense of the safety of the victim or the public. Proposition 9's intent to permit courts to detain

when necessary to protect the victim or the public is also consistent with the intervening legislative amendments to section 1275.

If preventative detention were limited just to section 12, courts could not effectuate the intent behind section 28's amendment, and such an interpretation would unnecessarily trample on the electorate's will. (*Brosnahan*, *supra*, 32 Cal.3d at pp. 261-262.) For example, in a case of extreme child neglect (Pen. Code § 273a, subd. (a)), the offense itself does not necessarily include violence, which would eliminate the possibility of preventative detention under section 12. Section 28, however, would permit preventative detention, and in specific cases with good reason because extreme child neglect can cause psychological injury to an innocent victim. Section 28 would also allow for public safety detention when, for example, a defendant is charged as a felon in possession of a firearm (Pen. Code § 29800, subd. (a)(1)), where that defendant had been previously convicted of assault with a firearm (Pen. Code § 245, subd. (a)(2)), the charging document alleges that prior conviction as a strike (Pen. Code § 667, subds. (d) & (e)), and that defendant was on parole at the time of the charged offense (Pen. Code § 1203.085, subd. (a)). Section 12 would, however, not permit such a result, even in the face of a clear public safety risk. Lastly, section 28 allows a court to detain a defendant, charged with a felony, who has demonstrated a consistent inability to abide by the court's orders to appear and therefore poses an unmanageable flight risk. When considering the protection of the public, the safety of the victim, the serious circumstances of the offense itself, the likelihood that defendant will appear in court, and any prior record, the court, consistent with section 28's intent, should have the discretion to detain the defendant.

1. If the sections cannot be reconciled, section 28 prevails

Alternatively, if sections 12 and 28 cannot be reconciled, section 28 prevails. "'If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones [citation].'" (*State Dept. of Public Health, supra,* 60 Cal.4th at p. 960; *Briggs v. Brown* (2017) 3 Cal.5th 808, 840 ["Although there is a presumption against repeals by implication, '[w]hen a later statute enacted by initiative is inconsistent and cannot operate concurrently with an earlier statute enacted by the Legislature, the later statute prevails'"]; see generally *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1038-1039 [same rules of construction apply to constitutional amendments].) When these general rules conflict, however, "the rule that the specific provisions take precedence over more general ones trumps the rule that later-enacted statutes have precedence." (*State Dept. of Public Health, supra,* 60 Cal.4th at p. 960.)

Not only is section 28 the later-enacted statute, but section 28 is just as specific as section 12. Indeed, both provisions are specific to detention and provide limited exceptions to the general rules of bail and release. (Compare, *State Dept. of Public Health, supra,* 60 Cal.4th at p. 964 [information from citations exception to general rule of confidentiality].) Nor is section 28 more general than section 12 because section 28 allows courts to consider additional factors, such as a defendant's prior record and flight risk, considerations absent from section 12's detention provisions. (See *People v. Murphy* (2011) 52 Cal.4th 81, 86 quoting *People v. Watson* (1981) 30 Cal.3d 290, 295-296 [the rule that a specific provision prevails over a more general one applies when "'each element of the general [provision] corresponds to an element on the face of the special

[provision]'" or [. . .] a violation of the special statute will necessarily result in a violation of the general statute].) Section 28's exception also applies to additional classes of offenses, including those felony offenses causing physical, psychological, or economic harm, felony offenses where the defendant poses a serious risk to the safety of the victim or the public, and felony offenses where the defendant poses a serious flight risk. (See § III, B, above.) Thus, both provisions are specific to bail and detention. Accordingly, section 28 would prevail over section 12 should this Court find an implied repeal.

C. Section 28, as Enacted, Satisfies Due Process Under *Salerno* Because Its Application Is Limited to Defendants Arrested for Serious Offenses Where the Defendant Poses a Serious Safety or Flight Risk

The preventative detention provisions of section 28 serve compelling, legitimate regulatory interests, including preventing danger to the community and preventing future criminal conduct by arrestees. (*Salerno, supra,* 481 U.S. at pp. 747, 749; *Schall, supra,* 467 U.S. at p. 264.) Such interests are plain not only from the language of amended section 28, but from the contents of the ballot pamphlet. By its own words, section 28 places public safety and the safety of the victim above all other considerations when denying bail and seeks to do so because criminal activity compromises public safety. (Cal. Const., art. I, § 28, subds. (a)(2) & (f)(3).) Section 28 furthermore references the need to protect public safety as the ultimate goal and the expectation that victim's rights are to be enforced expeditiously. (Cal. Const., art. I, § 28, subds. (a)(2) & (a)(4).) Additionally, the report of the Legislative Analyst and the official arguments in favor of the proposition show that the amendment to section 28 sought to empower victims by allowing them to provide input in pre-trial release decisions, particularly for those defendants who pose a serious

danger to the community. (2008 Ballot Pamp. Prop. 9, *supra*, pp. 58-59, 62.)

Pretrial confinement under section 28 is also rationally related to those government objectives and is not excessive. (*Salerno*, *supra*, 481 U.S. at p. 747; *Bell v. Wolfish* (1979) 441 U.S. 520, 538-539.) Section 28's application, as set forth above, is limited to serious felony crimes where the victim suffers direct or threatened physical, psychological, or financial harm, where the defendant poses a serious danger to victim or public safety, or where the defendant poses a serious flight risk. While these categories of offenses may be somewhat broader than those in section 12, they are still specific and more restrictive than those upheld under the federal Bail Reform Act. (See *Salerno*, *supra*, 481 U.S. at pp. 747, 750 [which included, among others, "serious drug offenses" and "certain repeat offenders."].) Accordingly, section 28 "carefully limits the circumstances under which detention may be sought to the most serious crimes" and "narrowly focuses" on the "overwhelming" interests of protecting safety and ensuring that a defendant appears in court. (See *Salerno*, *supra*, 481 U.S at pp. 747, 750.)

Section 28 further guides courts with enumerated factors to consider when deciding whether detention is appropriate in an individual case, just as the Bail Reform Act does. (18 U.S.C. § 3141, subd. (g); *Salerno*, *supra*, 481 U.S. at pp. 751-752; c.f. *Schall*, *supra*, 467 U.S. at p. 279.) These factors include the protection of the public, the safety of the victim, the seriousness of the offense charged, the defendant's prior criminal record, and the likelihood that the defendant will appear in court as required. (Cal. Const., art. I, § 28, subd. (f)(3).) Section 12, however, limits these factors to fixing a bail amount, and they do not serve as a guide in making detention decisions. (Cal. Const., art. I, § 12.) Section 1275, in conjunction with section 28, provides further guidance because section

1275 mandates that a court must consider any injury to the victim, threats made to the victim or any witness, and use of a firearm or any other deadly weapon in assessing the seriousness of the crime. (Pen. Code § 1275, subd. (a)(2).)

Section 28, coupled with other constitutional and statutory provisions, also limits the duration of a defendant's pretrial detention. (See *Salerno*, *supra*, 481 U.S. at p. 747.) Penal Code section 859b mandates that a preliminary hearing occur within 10 days of arraignment for a defendant charged with a felony; otherwise, an incarcerated defendant is entitled to a dismissal. (Pen. Code § 859b.) Similarly, if a preliminary hearing is continued beyond the 10 days and the prosecution establishes good cause, the defendant shall be released from custody. (Pen. Code § 859b.) Section 859b's directives reflect "'a clear legislative intention to prevent prolonged incarceration prior to a preliminary hearing.'" (*Standish*, *supra*, 38 Cal.4th at p. 870 quoting *Landrum v. Superior Court* (1981) 30 Cal.3d 1, 12.)

A defendant's right to a speedy trial, too, limits the duration of his pretrial detention. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; Pen. Code § 1382; see also Cal. Const., art. I § 28, subd. (b)(9) [speedy trial fundamental right for victims].) Furthermore, section 28, unlike section 12, requires courts to state the reasons for the decision denying bail on the record, which provides an adequate record for appellate review. (*Salerno*, *supra*, 481 U.S. at p. 752 [written statement of reasons]; Cal. Const., art. I, § 28, subd. (f)(3), 4th par.; see also Pen. Code § 1270.1, subd. (d); Pen. Code § 1270.2 [automatic review].)

While section 28 states no burden of proof and courts generally apply the preponderance of the evidence standard when no standard is expressly stated (see, e.g., *United States v. Portes* (7th Cir. 1985) 786 F.2d 758, 765 (*Portes*) [silence mean preponderance of the evidence standard]; see also Evid. Code § 115 ["Except as otherwise provided by law, the

burden of proof requires proof by a preponderance of the evidence."]), the clear and convincing standard can apply to section 28, which is the standard imposed by section 12. (See, e.g., *Santosky v. Kramer* (1982) 455 U.S. 745, 756-757, 769 [clear and convincing evidence standard for particularly important rights, such as the termination of parental rights]; *Addington v. Texas* (1979) 441 U.S. 418, 425-427, 433 [significant deprivation of liberty, such as an involuntary commitment, requires clear and convincing standard]; *In re Angela P.* (1981) 28 Cal.3d 908, 913, 919, 922 [due process requires clear and convincing evidence to terminate fundamental parental rights, even where statute is silent] superseded by statute on other grounds as stated in *In re Cody W.* (1994) 31 Cal.App.3d 221, 229; *Lilian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 319, 322, 324 [due process requires clear and convincing standard of proof where statute silent]; Evid. Code § 160 ["law" includes constitutional and decisional law]; see also *Brosnahan*, *supra*, 32 Cal.3d at p. 262 [any reasonable doubts should be construed in favor of constitutionality].)[7] Inherent in a finding of clear and convincing evidence, of course, is the conclusion that no other means can protect public safety.

Petitioner further notes that "defendants are not entitled to trial-type evidentiary standards at pre-trial detention hearings." (*Reem v. Hennessy* (N.D. Cal. Mar. 12, 2018, Case No. 17-cv-06628-CRB) 2018 U.S. Dist. LEXIS 40385, *8 (*Reem II*).)

> A court may rely on proffers, and may require evidence to be produced only selectively. However, due process requires

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[7] Federal courts, however, have concluded that decisions to detain based on flight risk are subject to a preponderance of the evidence standard. (See, e.g., *United States v. Santos-Flores* (9th Cir. 2015) 794 F.3d 1088, 1090 [detention order]; *United States v. Aitken* (9th Cir. 1990) 898 F.2d 104, 107; *United States v. McConnell* (5th Cir. 1988) 842 F.2d 105, 110.)

> courts to employ procedures that meet minimum standards of reliability.

(*Reem II*, *supra*, 2018 U.S. Dist. LEXIS 40385 at p. *8 citing *United States v. LaFontaine* (2d Cir. 2000) 210 F.3d 125, 131; see also *Salerno*, *supra*, 481 U.S. at p. 743 [noting "detailed proffer of evidence" presented at detention hearing]; *United States v. Winsor* (9th Cir. 1986) 785 F.2d 755, 756-757 [government may meet burden at detention hearing by proffer]; *Portes, supra,* 786 F.2d at p. 767 [due process clause does not require "traditional rules of evidence" to apply at detention hearings].)

To determine whether to seek detention, we in San Francisco have made individualized, case-by-case determinations, first assessing the nature of the offenses. We have sought detention under section 12 when warranted. We have, however, faced circumstances where public safety demands detention, but section 12 does not apply to the charged offenses. In those circumstances, we have judiciously sought preventative detention under section 28 based on the criteria set forth therein.[8]

CONCLUSION

The Court of Appeal recognized the inequities inherent in California's monetary bail system, but its ruling was effectively silent as to how a court can adequately carry out its obligation to safeguard public safety in determining whether to release a defendant prior to trial. This Court can provide this needed guidance. Section 28, as rightfully enacted by the electorate, provides courts with the means to detain dangerous defendants.

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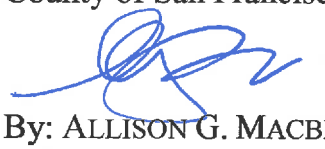
[8] Aside from any constitutional due process mandates, validated risk assessment tools also assist courts in making informed pretrial detention decisions. (Pretrial Detention Reform, *supra*, at p. 2.) San Francisco has implemented an evidence-based risk assessment tool in order to objectively determine which defendants may be safely released before trial. The Legislature can and should provide additional guidance in this area.

Accordingly, Petitioner respectfully requests that this Court hold that sections 12 and 28 can be reconciled to govern the denial of bail in noncapital cases because they both provide exceptions to the general right to bail.

Dated: June 21, 2018

Respectfully submitted,

GEORGE GASCÓN
District Attorney
County of San Francisco



By: ALLISON G. MACBETH
Assistant District Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 11,737 words. (Cal. Rules of Court, rule 8.520(c)(1).)

Dated: June 21, 2018

ALLISON G. MACBETH
Assistant District Attorney

DECLARATION OF SERVICE

I, Allison G. Macbeth, state:

That I am a citizen of the United States, over eighteen years of age, an employee of the City and County of San Francisco, and not a party to the within action; that my business address is 850 Bryant St., Rm. 322, San Francisco, California 94103. I am familiar with the business practice at the San Francisco District Attorney's Office (SFDA) for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the SFDA is deposited in the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic system or FileAndServeXpress electronic filing systems. Participants who are registered with either TrueFiling or FileAndServeXpress will be served electronically. Participants who are not registered with either TrueFiling or FileAndServeXpress will receive hard copies through the mail via the United States Postal Service.

That on June 21, 2018, I electronically served the attached OPENING BRIEF ON THE MERITS by transmitting a true copy through this Court's TrueFiling or FileAndServeXpress system. Because one or more of the participants have not registered with the Court's system or are unable to receive electronic correspondence, on June 21, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the SFDA at 850 Bryant Street, Room 322, San Francisco, California 94103, addressed as follows:

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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. Executed June 21, 2018, at San Francisco, California.

Allison G. Macbeth