No. S247278

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Kenneth Humphrey,

on Habeas Corpus.

Application for Leave to File *Amici* Brief and Proposed Brief of *Amici Curiae* ACLU of Northern California, ACLU of Southern California, ACLU of San Diego and Imperial Counties and California law professors in Support of Respondent Kenneth Humphrey

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After Decision by the Court of Appeal
First Appellate District, Division 2, Case No. A152056

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APPLICATION

Pursuant to Rule 8.520(f) of the California Rules of Court, the American Civil Liberties Union ("ACLU") of Northern California, ACLU of Southern California, ACLU of San Diego and Imperial Counties and California law professors, academics and clinical instructors who study and teach in the areas of criminal procedure, criminal justice policy and constitutional law (collectively "*Amici*") respectfully apply for permission to file the *Amici Curiae* brief contained herein.

This case presents the question of, among other things the limits of preventive detention under the California Constitution. The proposed *Amici Curiae* brief will assist the Court in deciding this matter by giving a historical accounting of the two sections of the California Constitution that purport to govern preventive detention—article I, section 12 and article I, section 28—and explaining why, under the law governing construction of ballot initiatives, Section 12 definitively sets the limits on preventive detention.

Amici are the three California affiliates of the national ACLU, a nationwide nonprofit, nonpartisan organization with over 1.75 million members dedicated to preserving and protecting the principles of liberty and equality embodied in the state and federal Constitutions and related statutes. The ACLU of California entities, which together have an approximate membership of 300,000, have a longstanding interest in

preserving the constitutional rights of persons involved in the criminal justice system and have often submitted amicus briefs to this Court in such cases. The ACLU of California affiliates have a strong interest in and familiarity with bail and pretrial release in California and the limits on pretrial detention under the state and federal Constitutions.

Amici are also the following California law professors, academics and clinical instructors who study and teach about aspects of criminal procedure, constitutional law or the California criminal justice system and who have an abiding interest in the fair administration of justice:

- Erwin Chemerinsky, Dean & Jesse H. Choper Distinguished Professor of Law, U.C. Berkeley, School of Law
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No party, or counsel for any party, in this matter has authored any part of the accompanying proposed *Amici Curiae* brief. Nor has any person or entity made any monetary contributions to fund the preparation or submission of this brief.

Respectfully submitted,

Dated: October 9, 2018

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

By: _____
MICAELA DAVIS

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INTRODUCTION

Amici address the issue of preventive detention under the California Constitution, presented by the Court as the following: "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."

To answer these questions, the Court must determine whether the voters, by adopting Proposition 9 in 2008, intended to expand the authority of courts, under section 28 of article I of the California Constitution, to order preventive detention. As *Amici* make clear, the voters did not intend such a result. Any holding to the contrary would undermine the broad right to pretrial release under section 12 and overturn two decisions of this Court declining to give effect to section 28—despite the fact that neither the text of Proposition 9 nor the ballot pamphlet materials alerted voters to this significant change.

Proposition 9, the Victims' Bill of Rights Act of 2008, amended section 28 to add, *inter alia*, a provision requiring courts to consider victim safety in making pretrial release determinations and to notify victims of bail

hearings. In doing so, it restated the text of section 28 subdivision (e)[1], which purported to expand courts' detention authority. That text, however, had never taken effect, because this Court declared it inoperative due to its conflict with the right to pretrial release set forth in section 12.

The proponents of Proposition 9 recognized that they could accomplish the goal of making pretrial release discretionary in all cases by repealing section 12 and section 28(e) and adding new language to section 28. In fact, they submitted versions of the measure to the Attorney General for title and summary that did just that. Had they circulated, qualified and enacted one of those versions, there would be no question regarding the effect. Instead, the proponents attempted to hide elephants in mouseholes. Nothing in Proposition 9—not the text of the measure and not the ballot pamphlet materials—informed voters that by adding victim safety as a consideration in determining pretrial release and notifying victims of bail hearings, they would effectively be curtailing the right to pretrial release and replacing it with a broad grant of authority to courts to order preventive detention. As this Court has held, "the voters should get what they enacted, not more and not less." *Robert L. v. Superior Court*, 30 Cal. 4th 894, 909 (2003) (citation omitted). In this case, the record makes clear that the

[1] The proposed text renumbered the original Section 28 subdivision (e) as subdivision (f)(3).

voters did not intend to overturn more than a quarter century of law enforcing the right to pretrial release by greatly expanding courts' detention authority.

Amici also address the Court's supplemental question: "What effect, if any, does Senate Bill No. 10 (2017-2018 Reg. Sess.) ("SB10") have on the resolution of the issues presented by this case?" As *Amici* explain, SB10 does not impact the Court's determination of the matter of preventive detention, because the legislation has no bearing on the core issue of which provision of the California Constitution governs the denial of pretrial release. Moreover, SB10 contains an explicit provision restricting the use of preventive detention to the limits set by the California Constitution, as determined by California courts of review, which issue the Court is addressing here.

BACKGROUND

The history of the enactment of California's constitutional provisions relating to pretrial release is critical to understanding which section sets the outer limits on preventive detention. In order to aid the Court, *Amici* set out the relevant history here.

A. Section 12

The California Constitution, under article I, section 12, authorizes pretrial detention in a narrow class of cases.

Section 12 provides: a person "shall be released on bail . . . except

for" three enumerated circumstances: 1) cases involving capital crimes; 2) cases involving violent felonies where there is clear and convincing evidence of likely harm to others; and 3) cases involving other felony offenses where there is clear and convincing evidence of a threat and likely harm. Cal. Const., art. I, § 12 ("Section 12").

The provision also prohibits excessive bail, allows a court to release a defendant on his or her own recognizance at the court's discretion, and requires the court, "[i]n fixing the amount of bail," to "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." *Id.*[2]

As the Court of Appeal correctly held, "Section 12 . . . 'was intended to abrogate the common law rule that bail was a matter of judicial discretion by conferring an absolute right to bail except in a narrow class of cases.'" *In re Humphrey*, 19 Cal. App. 5th 1006, 1022-23 (2018) (quoting

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[2] *Amici* treat the concept of bail, as it has historically been construed, as conferring a right to release, rather than simply a right to have a monetary amount set, and as referring to both monetary and non-monetary conditions of release. *See, e.g.*, *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951) (discussing bail in the context of the "traditional right to freedom before conviction" and "[t]he right to release before trial"); Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, U.S. DOJ, National Institute of Corrections, 19-35 (Aug. 2014), *available at*: https://nicic.gov/fundamentals-bail-resource-guide-pretrial-practitioners-and-framework-american-pretrial-reform.

In re Law, 10 Cal. 3d 21, 25 (1973)); *id*. at 1046 (holding that "Section 12 [] establish[es] the right to pretrial release on bail except in enumerated circumstances" and "limits the cases in which a defendant is *not* entitled to release to those involving capital crimes" and certain felonies when the risk of harm is indicated by an appropriate level of proof). The right has been enshrined in the California Constitution since its adoption in 1849, *see People v. Turner*, 39 Cal. App. 3d 682, 684 (1974), although it has been amended several times by initiative.

B. Changes to the California Constitution in 1982 – Propositions 4 and 8

1. Section 12 prior to 1982

Originally, the California Constitution's provisions on pretrial release said only:

> All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required.

Turner, 39 Cal. App. 3d at 687 (Molinari, J., dissenting) (quoting Cal. Const., art. I, § 6 as it existed up until 1974).[3] This Court held that under

[3] In the original California Constitution of 1849, the provisions limiting denial of bail and prohibiting excessive bail were in two different clauses; the two clauses were combined in the California Constitution of 1879, and remained in that form until the constitutional revisions of 1974. *See* West's Ann. Cal. Const. 1849 art. I, § 6 ("Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonably detained."); West's Ann. Cal. Const. 1849, art. I, § 7 ("All persons shall be bailable by sufficient sureties;

this provision there were no grounds to deny a person bail based on an alleged danger to public safety; instead the Constitution mandated a right to release unless the defendant was charged with a capital offense. *In re Underwood*, 9 Cal. 3d 345, 348-51 (1973).

In 1974, voters approved an initiative, Proposition 7, based on recommendations from the California Constitution Revision Commission[4] and revised the constitutional provision on pretrial release to read:

> A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. A person may be released on his or her own recognizance in the court's discretion.

Id. (quoting Cal. Const., art. I, § 12 as it existed after the 1974

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unless for capital offences, when the proof is evident or the presumption great."); *In re Underwood*, 9 Cal. 3d 345, 348 n.3 (1973) ("The full text of article I, section 6 is: 'All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor confined in any room where criminals are actually imprisoned.'").

[4] In the 1960's the California Constitution Revision Commission led the process of recommending revisions to the California Constitution, *Californians for an Open Primary v. McPherson*, 38 Cal. 4th 735, 753 (2006), including recommending that language of Section 12 be changed to provide for own-recognizance release to bring the Constitution in line with actual practice. *People v. Standish*, 38 Cal. 4th 858, 890-91 (2006) (Chin, J., dissenting).

amendments); Ballot Pamp., Gen. Elec. (Nov. 5, 1974), Prop. 7, analysis, p. 26 and text, p. 71.

2. Proposition 4

In June 1982, the voters were presented with two initiatives to expand the authority of the courts to deny pretrial release and preventively detain an individual. The first was Proposition 4 which was placed on the ballot by the California Legislature. *Standish,* 38 Cal. 4th at 877.

Proposition 4 retained the broad right to bail and pretrial release, while authorizing preventive detention in a limited set of felonies where the risk of physical harm to another person or persons is found to be great. Ballot Pamp., Primary Elec. (June 8, 1982), Prop. 4 ("Prop. 4 Pamp."), analysis, p. 16. The Proposition further specified the level of proof needed to establish the risk of harm to justify preventive detention. *Id*. Finally, Proposition 4 expanded the factors in Section 12 that the court must consider in making pretrial release determinations. *Id*.

The proposed text stated:

> SEC. 12. A person shall be released on bail by sufficient sureties, except for:
>
> *(a)* ~~capital~~ *Capital* crimes when the facts are evident or the presumption great~~.~~*;*
>
> *(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; or*
>
> *(c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.*
>
> Excessive bail may not be required. *In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.*
>
> A person may be released on his or her own recognizance in the court's discretion.

Prop. 4 Pamp., text, p. 17 (emphasis in original).

The competing initiative, Proposition 8 (discussed in more detail below), would have repealed the language of Section 12 in its entirety, and would have instead granted courts broad authority to preventively detain a defendant pretrial. *Standish*, 38 Cal. 4th at 877-78.

Both initiatives passed. The California Supreme Court subsequently held that because the provisions of the two initiatives regarding pretrial release were in conflict, and, because Proposition 4 received more votes, the "amendments to article I, section 12 proposed by Proposition 4 took effect, and that *the provisions of article I, section 28, subdivision (e) proposed by Proposition 8 did not take effect*." *Standish*, 38 Cal. 4th at 877-78 (emphasis added); *see also In re York*, 9 Cal. 4th 1133, 1140, n. 4

(1995).

In adopting Proposition 4, the voters intended to grant courts *limited* authority to preventively detain defendants pretrial—authority the courts did not have prior to approval of Proposition 4, except in capital cases—while still maintaining a strong right to and presumption of pretrial release in the majority of cases.[5] The requirement that the court make specified findings in denying bail was particularly important to the initiative. Prop. 4 Pamp., title and summary, p. 16 (explaining that the initiative "[a]dds provisions to the Constitution prohibiting release of persons on bail when court makes specified findings"). The ballot materials made it exceedingly clear that the limitations on pretrial detention would remain strict under Proposition 4. Prop. 4 Pamp., analysis, p. 16 ("this measure would allow the courts to deny bail in felony cases under [the] two additional sets of circumstances [Section 12 (b) and (c)]"); *Id*., rebuttal to argument against Prop. 4, p. 19 ("Proposition 4 [which added subdivisions (b) and (c) to Section 12] contains ample due process protections for the defendant. Its provisions allow denial of release on bail only for . . . [categories of felony offenses under appropriate standard of proof]."). This intention is consistent

[5] In 1994, the voters passed Proposition 189, which amended article I, section 12 one more time by adding felony sexual assault offenses on another person to the felonies eligible for preventive detention under Section 12(b). *See Standish*, 38 Cal. 4th at 892, n. 7.

with case law under the U.S. Constitution, which provides that an arrestee may be deprived of her fundamental liberty interest only in the most narrow of circumstances and only with the proper procedural safeguards. *See Stack v. Boyle*, 342 U.S. 1 (1951); *United States v. Salerno*, 481 U.S. 739 (1987). Section 12 adheres to these principles by outlining the limitations on and procedures necessary to deny an individual pretrial release in California. This includes restricting the categorical eligibility for pretrial detention to the most serious charges where there is evidence of specific likely harm, and by requiring a stringent level of proof. Cal. Const., art. I, § 12.

3. Proposition 8 – "The Victims' Bill of Rights"

Article I, section 28 ("Section 28") was added to the California Constitution in 1982 by Proposition 8, a measure known as "The Victims' Bill of Rights." *Standish*, 38 Cal. 4th at 874; Cal. Const., art. I, § 28. The initiative stated that it would "[a]mend[] [the state] Constitution and enact[] several statutes concerning procedural treatment, sentencing, release and other matters for accused and convicted persons." Ballot Pamp., Primary Elec. (June 8, 1982), Prop. 8 ("Prop. 8 Pamp."), title and summary. p. 32. According to the measure's preamble, the changes in the law were designed to "ensure[] a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights." Prop. 8 Pamp., text, § 3, p. 33.

Proposition 8 also sought to revise significantly the state's pretrial

release procedures, broadly expanding the authority of the trial court to preventively detain an individual, by making bail discretionary in all cases. *See* Prop. 8 Pamp., analysis, p. 54 ("This measure would . . . give the courts discretion in deciding whether to grant or deny bail."). Proposition 8 proposed two major changes in the law: 1) repealing Section 12; and 2) entirely replacing the rules regarding pretrial release with a new section, Section 28, subdivision (e), which would set forth considerations for the court in making pretrial release determinations, including consideration of the protection of the public. *See* Prop. 8 Pamp., text, p. 33.

The proposed text of the ballot materials included both the repeal and the replacement provisions. As to Section 12, the proposed text stated: "Section 12 of Article I of the Constitution is repealed," and it was followed by Section 12 in strike-out text:

> ~~SEC. 12. A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required.~~
>
> ~~A person may be released on his or her own recognizance in the court's discretion.~~

Prop. 8 Pamp., text, p. 33.

The proposed text for Section 28(e) 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. Excessive bail may not be required. In setting, reducing or denying bail, the

> judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety shall be the primary consideration.
>
> A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. However, no person charged with the commission of any serious felony shall be released on his or her own recognizance.
>
> 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.

Prop. 8 Pamp., text, p. 33.

The voters approved Proposition 8, although as noted above, the repeal of Section 12 and "[S]ection 28, subdivision (e) proposed by Proposition 8 did not take effect" because these provisions directly conflicted with Proposition 4, which received more votes. *Standish*, 38 Cal. 4th at 877-878. As a result, Section 12 remained in effect and subdivision (e) of Section 28 did not become effective.

C. Changes to the California Constitution in 2008 – Proposition 9 "Marsy's Law"

Section 28 was revised in 2008 when the voters passed Proposition 9, the "Victims' Bill of Rights Act of 2008: Marsy's Law." Ballot Pamp., Gen. Elec. (Nov. 4, 2008) Prop. 9 ("Prop. 9 Pamp.") text, p. 128. The measure, which was officially titled "Criminal Justice System. Victims' Rights. Parole. Initiative Constitutional Amendment," was broadly focused on "(1) expand[ing] the legal rights of crime victims and the payment of restitution by criminal offenders, (2) restrict[ing] the early release of inmates, and (3) chang[ing] the procedures for granting and revoking parole." Prop. 9 Pamp., analysis, p. 58.

The proposed text of the law included in the ballot materials was prefaced by a paragraph explaining: "This initiative measure amends a section of the California Constitution and amends and adds a section of the Penal Code; therefore existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new." Prop. 9 Pamp., text, p. 128 (emphasis in original). Among the many amendments to Section 28 included in Proposition 9, two subdivisions relate to pretrial release.

First, Proposition 9's proposed text included as one of the 17 codified victims' rights in Section 28(b)(3), the right "*[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." Prop. 9 Pamp., text, p. 129 (emphasis in original). The text was italicized to indicate that it was a new addition to Section 28.

Next, the proposed text renumbered the original Section 28 subdivision (e) as subdivision (f)(3) and set out the text as follows:

> ~~(e)~~ (3) 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. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, *the 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 the trial or hearing of the case. Public safety *and the safety of the victim* shall be the primary ~~consideration~~ *considerations*.
>
> 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 *and the victim* 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.

Prop. 9 Pamp., text, p. 130 (emphasis in original).

Proposition 9 thus made three changes to the text of Section 28(e) as it had been presented to the voters in 1982 through Proposition 8:

1) The safety of the victim was added as a primary consideration in making pretrial release determinations;
2) The original language that prohibited release on own recognizance when someone is charged with a serious felony was stricken; and
3) The victim was added alongside the prosecutor as a party who must be given notice of a hearing regarding bail.

As presented on the ballot, the text of Proposition 9 did not alert the voters that the Court had declared the language in the original Section 28(e) inoperative, nor did it italicize any of the original language in Section 28(e) to indicate that voters' approval of the language would make it effective. Thus, the voters had no notice that their approval of Proposition 9 would resurrect language in Section 28 that had been held to be inoperative.

Critically, Proposition 9 differed from Proposition 8 in two ways. First, it did not repeal Section 12. Second, Proposition 9 removed one of the key conflicts between Section 12 and the original Section 28(e) by striking the provision that prohibited release on own recognizance in the case of serious felonies. *See Standish*, 38 Cal. 4th at 877-878 (describing

the conflicting provisions in Propositions 4 and 8).

ARGUMENT

I. Proposition 9 voters intended to require courts to notify victims of bail hearings and to consider victims' safety in making pretrial release determinations

In construing provisions enacted by initiative, the intent of the voters "is the paramount consideration" for the Court. *Legislature v. Eu*, 54 Cal. 3d 492, 505 (1991) (citation omitted). The Court looks first to the language of the [initiative]," in determining voter intent, and where ambiguity in the language exists, to the initiative's "ballot summaries and arguments" to determine "the voters' intent and understanding of a ballot measure." *See Prof'l Engineers in California Gov't v. Kempton*, 40 Cal. 4th 1016, 1037 (2007) (citations omitted).

Proposition 9's text and legislative history show that in passing the initiative, the voters intended to require courts to consider victim safety in making bail determinations and to notify victims of bail hearings; the voters did not intend to expand courts' preventive detention authority beyond Section 12. Although text is generally the first line of inquiry in statutory construction, in this case, the Court must first determine what the text really is. In order to do that, *Amici* begin with the ballot materials to understand what language the voters were told they would be approving if they voted for Proposition 9.

A. Proposition 9's ballot materials do not show an intent to expand preventive detention

According to the Legislative Analyst's overview of the measure, the main outcomes of Proposition 9 would be to: "(1) expand the legal rights of crime victims and the payment of restitution by criminal offenders, (2) restrict the early release of inmates, and (3) change the procedures for granting and revoking parole." Prop. 9 Pamp., analysis, p. 58. The small portion of the ballot summary and analysis that discussed bail informed the voters that the initiative would require courts to consider victim safety when making pretrial release decisions and ensure that victims would be given notice of bail hearings. There was no reference to Section 12, to eliminating the presumptive right to bail, or to any proposed exceptions to the right to pretrial release.

In the six pages of Proposition 9's ballot summary and analysis, there are a total of four one-sentence references to bail or pretrial release, two indicating that the initiative will ensure that victim safety is considered in pretrial release decisions, and two indicating that the initiative will ensure that victims are notified of pretrial release proceedings. Prop. 9 Pamp., title and summary, p. 58; analysis, p. 59. Specifically, the Attorney General's Title and Summary and the Legislative Analyst's Analysis, explain that:

1) the initiative "[r]equires notification to victim and opportunity for

input during phases of criminal justice process, including bail …" Prop. 9 Pamp., title and summary, p. 58;

2) the initiative would "[e]stablish[] victim safety as a consideration in determining bail," *id.*;

3) the initiative expands victims' legal right to be notified of proceedings "to include all public criminal proceedings, including the release from custody of offenders after their arrest, but before trial." Prop. 9 Pamp., analysis, p. 58-59; and

4) "[t]he Constitution would be changed to specify that the safety of the crime victim must be taken into consideration by judges in setting bail for persons arrested of crime." *Id*. at 59.

The Title and Summary and Analysis are statutorily-imposed requirements designed to "educate voters about the effect of proposed initiatives and to protect them from being misled or confused." *People v. Valencia*, 3 Cal. 5th 347, 375 (2017). These ballot descriptions are critical to determining voter intent, because "as a practical matter, voters often rely on the experts employed by the Attorney General and the Legislative Analysist to summarize proposed initiatives to discuss their significant effects." *Valencia*, 3 Cal. 5th at 384 (concurrence, Kroger, J.). Although a ballot pamphlet is not expected to explain every aspect of an initiative, where the matter is one of "substantial import," the "voters could reasonably expect that . . . the ballot materials would mention it." *Id.* at

364, n. 6; *see also Giles v. Horn*, 100 Cal. App. 4th 206, 225–26 (2002) ("It is extremely unlikely that such as a major limitation on [a part of the law] would be added . . . without any discussion in the ballot pamphlet.").

The Attorney General's omission of what would otherwise have been a key provision in the initiative—the purported expansion of the court's preventive detention authority—"suggests no such change was contemplated." *Valencia*, 3 Cal. 5th at 371 (finding that the failure of Proposition 47's Title and Summary to mention the Three Strikes Reform Act, indicated that the voters did not intend to apply the dangerousness standard for resentencing under Proposition 47 to resentencing under the Three Strikes Reform Act). This conclusion is bolstered by the Legislative Analyst's failure to identify any costs associated with what likely would have been a significant increase in pretrial detention due to courts' expanded authority to deny pretrial release. *See id.* at 365 (explaining that because the Elections Code requires the Legislative Analysist to prepare a fiscal impact for each initiative, its failure to include a projected cost for increased resentencing under the Three Strikes Reform Act, indicated that the Analyst did not consider it part of Proposition 47); *compare* Prop. 8 Pamp., analysis, p. 55 (anticipating costs associated with Proposition 8 due to the increased jail population as "more persons accused of crimes could be denied bail"). In sum, the fact that Proposition 9's purported expansion of the court's detention authority was opaque to the Attorney General and

Legislative Analyst, leads to the conclusion that it was "almost certainly opaque to the average voter as well." *Valencia*, 3 Cal. 5th at 372.

The fact that neither the arguments for or against the initiative characterized the measure as repealing the right to bail in Section 12 or expanding courts' detention authority, provides even further support for the conclusion that the voters did not intend that result. *See Eu*, 54 Cal. 3d at 504-05 (reaffirming the Court's view that the ballot materials' arguments for and against an initiative are important "indicia of the voters' intent other than the language of the provision itself"). The only reference to bail contained in the "Arguments in favor of Prop 9," stated only that Proposition 9 would "require that a victim and their family's safety must be considered by judges making bail decisions for accused criminals." Prop. 9 Pamp., arguments in favor, p. 62. By contrast, the rebuttal to arguments in favor of Proposition 8 specified that "Proposition 8 … [t]akes away everyone's right to bail" and compared it to "Proposition 4, which target[ed] only violent felons . . ." Prop. 8 Pamp., rebuttal to argument in favor, p. 34. The voters were simply not put on notice that Proposition 9 would repeal the right to pretrial release.

The ballot pamphlet's only references to pretrial release thus make clear that by passing Proposition 9, the voters intended to mandate consideration of victim safety in pretrial release determinations and provide the victim notice of pretrial release proceedings.

The lack of any evidence of intent to expand courts' detention authority in the Proposition 9 ballot pamphlet materials is all the more stark when compared to that of Proposition 4, which in 1982 added the Section 12 carveouts for two specific categories of noncapital cases. There, the Attorney General's Title and Summary contained unmistakable language explaining that the initiative "[a]dds provisions to the Constitution prohibiting release of persons on bail when court makes specified findings." Prop. 4 Pamp., title and summary, p. 16. The Legislative Analyst was similarly clear:

> "The proposal … would broaden the circumstances under which the courts may deny bail. Specifically, [the] measure would allow the courts to deny bail in felony cases under two additional sets of circumstances:
>
> 1. Bail could be denied in felony cases involving acts of violence against another person when (a) the proof of guilt is evident or the presumption of guilt is great and (b) there is a substantial likelihood that the accused's release would result in great bodily harm to others;
>
> 2. Bail could be denied in felony cases when (a) the proof of guilt is evident or the presumption of guilt is great and (b) the accused has threatened another with great bodily harm and there is a substantial likelihood that the threat would be carried out if the person were released."

Prop. 4 Pamp., analysis, p. 16. These ballot materials also make apparent that expanding detention authority would have been a straightforward issue

to present to voters if the proponents desired to do so.

It is true, as Petitioner notes, that the people's initiative power is "jealously guard[ed]" by the courts, requiring "a liberal construction" so as to effectuate the voters' intent. *See Associated Home Builders etc., Inc. v. City of Livermore*, 18 Cal. 3d 582, 591 (1976). The rules of construction, however, do not authorize the Court to disregard the intent of the electorate—manifest by of 82 percent of the Proposition 4 voters— to strictly limit preventive detention, particularly when that disregard would be based solely on ambiguous language in a subsequent initiative.[6] *See Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 53 Cal. 3d 245, 249-50 (1991).

B. The text of Section 28 displayed in Proposition 9 was misleading

1. The text of Section 28(f)(3) should have informed voters that it was inoperative

As explained above, this Court held that original Section 28(e) never went into effect. *Standish*, 38 Cal. 4th at 877-878. Any attempt to "reviv[e] [the] void" Section 28(e) could thus have "only occur[red] by a reenactment of the legislation following the usual legislative process and its accompanying safeguards against precipitous action." *Brown v.*

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[6] *See California Proposition 4, Rules Governing Bail (June 1982),* BALLOTPEDIA, https://ballotpedia.org/California_Proposition_4,_Rules_Governing_Bail_(June_1982) (last visited Oct. 7, 2018).

Superior Court, 33 Cal. 3d 242, 255 (1982) (dissent, Richardson, J.).

The voters were never told that they were being asked to reenact Section 28(f)(3) by voting for Proposition 9. If that was the consequence of their vote, it was entirely hidden from them.

Petitioner's argument that the drafters appropriately included the language in a non-italicized form because the language technically existed in the Constitution, even though it remained inoperative, Petitioner's Reply Brief, dated Sept. 7, 2018 ("Reply") at 13, ignores the fact that an inoperative law operates as if it had never been passed at all. *Cummings v. Morez*, 42 Cal. App. 3d 66, 73 (1974). Simply because a court cannot, due to the separation of powers, write inoperative language out of a statute, does not mean that the language maintains any authority; instead, it "remain[s] a dead letter upon the statute book, or, in other words, no law at all." *Martin v. Berry*, 37 Cal. 208, 219 (1869). Because the Court ruled that Section 28(e) had never taken effect at all, *Standish*, 38 Cal. 4th at 877-878, the language was thus required to go through proper reenactment procedures, including adequate notice to voters, in order to be become law.

The kind of notice that voters must be given is specified in the Elections Code, which requires that "provisions of [a] proposed measure differing from existing laws affected shall be distinguished in print, so as to facilitate comparison." Cal. Elec. Code § 9086(f). In addition, the prefatory language in the Proposition 9 voter guide told voters that "new

provisions proposed to be added are printed in *italic type* to indicate that they are new." Prop. 9 Pamp., text, p. 128 (emphasis in original).

With respect to Proposition 9, only a handful of words within what is now Section 28 subdivision (f)(3) were italicized:

> 1) the phrase "*the safety of the victim*" to describe what a court must consider in making pretrial relese determinations;
>
> 2) the phrase "*and the safety of the victim*" and the term "*considerations*," to indicate that victim safety was to be among the court's primary considerations in making pretrial release determinations; and
>
> 3) the phrase "*and the victim*" with regards to the parties to be notified of bail hearings.

Prop. 9 Pamp., text, p. 130. Because the remainder of the text was not italicized, the voters were not informed that passing Proposition 9 would result in a revival of the defunct language, nor that the revival would significantly alter a fundamental right protected by the Constitution.

The conclusion that the non-italicized portion of Section 28(f)(3) is not a reliable indicator of voter intent is supported by this Court's holding that reenactment to satisfy technical requirements is not conclusive of broader intent. In *Yoshisato v. Superior Court*, the Court was called upon

to determine whether the voters had "intended to adopt a comprehensive scheme that would prevail over any other measure enacted by a lesser affirmative vote at the same election," through passage of an initiative that in fact amended only certain parts of the Penal Code. 2 Cal. 4th 978, 989 (1992). The Court's analysis involved an examination of the reenactment rule, which provides that "a section of a statute may not be amended unless the section is re-enacted as amended." Cal. Const., art. I, § 9. The Court found that because the "intent of the enacting body is the paramount consideration," and because nothing in the ballot materials indicated an intent to enact a comprehensive scheme through the discrete amendments, the Court would not interpret it in that manner, despite the fact that the entire statute had been reenacted to satisfy the reenactment rule. *Yoshisato*, 2 Cal. 4th at 989-90 (citations omitted).[7]

The Court decided *Yoshisato* in the context of determining the interaction of two ballot measures passed at the same time. *Id*. at 989. But, *Yoshisato's* holding is equally applicable to Proposition 9's enactment where there is nothing in the Proposition's ballot materials to indicate that

[7] At least one court has specifically suggested that non-substantive amendments cannot serve to reenact substantive provisions of an invalid statute. *See People v. Barros*, 209 Cal. App. 4th 1581, 1590 (2012) (observing that a bill that made a "nonsubstantive technical amendment to [an invalid statute] as it continued to appear in the annotated codes," could likely not have "served to reenact the substantive provisions" of the invalid statute).

the voters intended to revive any of subdivision (f)(3) outside of the victims' safety and notice provisions, let alone that they intended that the language would result in an expansion of courts' preventive detention authority and the implied repeal of section 12. As this Court has said, the risk of voter confusion is lessened when the voter pamphlet "contain[s] an elaborate and detailed explanation of the various elements" of the Proposition. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 231 (1978). Proposition 9's discussion of bail contained no such explanation.

Petitioner's arguments that the misleading ballot materials had no impact on the voters are unavailing. Petitioner claims that because voters are presumed to be aware of existing laws, the Proposition 9 voters would have known that Section 28(f)(3) was inoperative, and thus would have understood that an affirmative vote would have enacted the inoperative language. Reply at 14. However, under Petitioner's theory, the voters would have been equally aware that the Elections Code requires italicization of any to-be-enacted language, to properly inform the voters of the effect of an affirmative vote. *See* Cal. Elec. Code § 9086(f). The voters would also have been aware that any change that would substantially alter a constitutional right would have been discussed in the initiative's summary and analysis. *Valencia*, 3 Cal. 5th at 364, n. 6 (holding that although a ballot pamphlet is not expected to explain every aspect of an initiative,

where the matter is one of "substantial import," the "voters could reasonably expect that . . . the ballot materials would mention it"); *id*. at 365, 371-72; *California Redevelopment Ass'n. v. Matosantos*, 53 Cal. 4th 231, 260-61 (2011) ("[T]he drafters of legislation do[ ] not . . . hide elephants in mouseholes.") (citation omitted)).

Petitioner's argument that any potential voter confusion resulting from the ballot pamphlet was mitigated by news coverage about Proposition 9, presupposes that all of the issues purportedly before the voters were in fact discussed in the coverage. Although Petitioner cites to editorials that generally discuss Proposition 9, Reply at 22 (citing webpage that links to editorials), none of the editorials cited mentions any proposed change in the state's bail or detention procedures, except to highlight victims' right to be notified of bail hearings or to explain that victims' safety would be a consideration in bail determinations. Many of those sources in fact focus nearly exclusively on what the media outlets deemed to be the main purposes of the initiative—the barring of early release for sentenced prisoners and changes to the parole process.[8] The same is true of

[8] *See e.g. No on Proposition 9,* L.A. TIMES (Sept. 26, 2008), http://www.latimes.com/opinion/editorials/la-ed-9prop26-2008sep26-story.html (*Amici's* Request for Judicial Notice, dated Oct. 9, 2018 ("RJN"), Ex. I) (victims would have rights in parole hearings; law enforcement required to give information cards to victims); *Editorial: Proposition 9 Would Increase Prison Costs; Vote No*, THE MERCURY NEWS (Oct. 14, 2008), https://www.mercurynews.com/2008/10/14/editorial-proposition-9-would-increase-prison-costs-vote-no/ (RJN, Ex. J) (bars early

all of the additional Proposition 9 coverage identified by *Amici*.[9]

This cursory media coverage contrasts with the more comprehensive coverage that the Court has found actually mitigates voter confusion. For example, in *Amador Valley*, the Court addressed a challenge to Proposition 13 of 1978 based on plaintiff's claim that the initiative's summary, which did not explicitly refer to the initiative's two-thirds vote requirement to impose special taxes, misled the voters. 22 Cal. 3d at 242-43. The Court held that the initiative "summary's omission of any reference to the two-thirds vote requirement was not critical [in part, because] … the initiative

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release of sentenced prisoners); *Props. 6 and 9 are Budget Busters,* SF GATE (Oct. 9, 2008), https://www.sfgate.com/opinion/article/Props-6-and-9-are-budget-busters-3266152.php (RJN, Ex. K) (restrictions on early release for sentenced prisoners and tighter rules on parole); *Fiscal Disaster in California,* THE N.Y. TIMES (Oct. 9, 2008), https://www.nytimes.com/2008/10/10/opinion/10fri2.html (RJN, Ex. L) (would give victims outsized influence in criminal cases and restrict early release of sentenced prisoners).

[9] *See e.g.* Art Campos, *Victims' Rights Effort Advances,* SACRAMENTO BEE, April 29, 2008, at B2 (RJN, Ex. M) (Marsy's Law would allow crime victims input on setting bail); Patrick McGreevy, *Initiatives Tug at Voters' Convictions,* L.A. TIMES (June 29, 2008), http://articles.latimes.com/2008/jun/29/local/me-ballot29/2 (RJN, Ex. N) (Marsy's Law requires that crime victims be notified and allowed to have input during bail proceedings); *Crime Victims Advocates and Law Enforcement Leaders Unite in Support of Prop. 9 – Marsy's Law: The Crime Victims' Bill of Rights Act of 2008,* BUSINESS WIRE (Sept. 23, 2008), https://www.businesswire.com/news/home/20080923006578/en/Crime-Victims-Advocates-Law-Enforcement-Leaders-Unite (RJN, Ex. O) (Proposition 9 requires that victim's safety be considering when judges make bail decisions; required victims to be notified and allowed to participate in bail proceedings).

measure was extensively publicized and debated, *in all of its several aspects*." *Id.* at 243 (emphasis added); *id*. at 231 (explaining that "advance publicity and public discussion of [the constitutional provision to be put in place by Proposition 13] and its predicated effects were massive," and thus "dilute[d] the risk of voter confusion"). Here, the purported expansion of courts' detention authority in Proposition 9 was not publicized at all. The news coverage of Proposition 8, by contrast, discussed the extreme changes that would be made to the right to pretrial release and potential constitutional issues with those changes.[10]

[10] John Kendall, *Prop. 8 – Serving Justice or Assaulting It?* L.A. TIMES, May 3, 1982 at B3 (RJN, Ex. P) (Prop. 8 would "repeal the pre-trial right to bail now guaranteed by the state Constitution"); Sara Terry, *California's Proposition 8: Voter Rebellion Against Crime,* THE CHRISTIAN SCIENCE MONITOR, June 7, 1982 at 16 (RJN as Ex. Q) (Proposition 8 "makes bail discretionary"); Aric Press & Joe Contreras, *A 'Victims' Bill of Rights,'* NEWSWEEK, June 14, 1982, at 64 (RJN, Ex. R) (The bail-reform clause in Proposition 8 may contradict the constitution's ban on excessive bail; even traffic violators could be denied bail); Philip Hager, *If Passed, Prop. 8 Likely to End Up in the Courts,* L.A. TIMES, May 24, 1982, at B3 (RJN, Ex. S) (Proposition 8 would "abolish the right to bail" in non-capital cases; "would make bail discretionary").

Finally, Petitioner's claim that the voters were duly informed as to the impact of the proposed law because "the proposed law and ballot pamphlet [] made repeated references to the related issues of bail and detention," Reply at 18, 23, is wrong as a matter of construction and fact. A "reference" to detention is not a clear message to voters that the initiative would repeal a longstanding constitutional right and institute a new preventive detention scheme. And even if a reference sufficed to indicate such intent, any mentions of detention in the materials are sparse. In fact, the only literal mention of pretrial detention in the pamphlet refers to the fact that county jails could comply with population caps by "decreasing the use of pretrial detention of suspects," Prop. 9 Pamp., analysis, p.61, and the one additional reference to custody in the pretrial context occurs in the discussion about victims being notified of hearings regarding "the release from custody of offenders after their arrest." *Id*., p. 59.

2. The proponents of Proposition 9 knew how to write a measure that would expand courts' detention authority

There is irrefutable evidence that Proposition 9's proponents knew how to draft a measure that would restore the inoperative provisions of Proposition 8, but decided not to do so.

Prior to settling on the final version of Proposition 9, the proponents submitted four alternative versions of the initiative to the Attorney General. *See* Initiative Proposals 07-0096, 07-0095, 07-0088 Amdt. #2S., 07-0097 Amdt. #3S (*Amici's* Request for Judicial Notice, dated Oct. 9, 2018 ("RJN"), Exs. A-D; T, ¶¶ 4-11).[11] All four of these alternative versions would have explicitly repealed Section 12, just as Proposition 8 did, which was indicated by placing Section 12 in struck-through type.

In addition, in the the first three versions, the drafters proposed additional changes to Section 28(e), broadly *expanding* the prohibition on own recognizance release. *See* Initiative Proposals 07-0096, 07-0095, 07-0088 Amdt. #2S (RJN, Exs. A-C at pgs. 6-7). In each of these iterations, *all* of the language in the 1982 version of Section 28(e) that the Court had held inoperative was set in strike-through type. *Id.* The language was then included in the proposed Section 28(f) and set in italicized type, unmistakably signaling that the text would be new content in the Constitution. *Id*. The fourth version submitted to the Attorney General

[11] RJN, Ex. A (Excerpts of Proposal 07-0096 "The Victim's Rights and Protection Act: Marsy's Law – Version 3," dated Dec. 7, 2007); RJN, Ex. B (Excerpts of Proposal 07-0095 "The Victim's Rights and Protection Act: Marsy's Law – Version 2," dated Dec. 7, 2007); RJN, Ex. C (Excerpts of Proposal 07-0088 Amdt. #2S, "The Victim's Rights and Protection Act: Marsy's Law," dated Dec. 5, 2007); RJN, Ex. D (Excerpts of Proposal 07-0097 "The Victims' Rights Protection Act of 2008: Implementation and Enforcement Tools for Victims, Prosecutors, and Judges," dated Dec. 24, 2007).

largely mirrored the final version that became Proposition 9 with the notable exceptions that the fourth version also explicitly repealed Section 12 and retained the prohibition on own-recognizance release for people charged with serious felonies that appears in the original Section 28(e). RJN, Ex. D. Of all of the versions, only the fifth version, Proposal 07-0100, qualified for the ballot and went to the voters as Proposition 9. *See* RJN, Exs. F; T, ¶¶ 4, 13.

Thus, the alternative versions of Marsy's Law demonstrate that proponents knew how to apprise voters that voters would be giving new effect to all of the language in the original Section 28(e) if they wanted to do so. The fact that the proponents ultimately chose not to include a Section 12 repeal leads inexorably to the conclusion that they made a purposeful decision to omit the controversial repeal of the constitutional right to bail. *See Senate of State of California v. Jones*, 21 Cal. 4th 1142, 1149, n. 2; 1151, n. 5 (1999) (taking note of the alternative measures proponents had submitted in making a determination that the initiative violated the single-subject rule). To hold that the initiative should be construed as effectuating a Section 12 repeal, despite the apparently tactical omission of the repeal, would improperly incentivize initiative proponents to deceive and confuse voters. *Id.* at 1160 (noting the proponents' tactical decision to combine separate issues into one initiative; holding that the measure violated the single-subject rule, the purpose of which is to

minimize voter deception and confusion).

C. The text of Section 28 does not expand preventive detention authority

1. Section 28(f)(3) does not vest courts with an independent detention authority; it simply sets forth factors for the court to consider in making pretrial release determinations

Even if all of Section 28 (f)(3) were to be considered as persuasive evidence of voter intent, the language in subdivision (f)(3) cited by Petitioner as creating a detention authority does no such thing.

Section 28(f)(3), as purportedly amended and reenacted, provides in relevant part:

> (3) 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. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the 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 the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations.

First, as the parties both agree, the first sentence of Section 28(f)(3)—"[a] person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great"—does not evidence voter intent to create an unlimited detention authority. As Respondent explains, read literally, the phrase means that there is no

right to release in any case. Respondent's Brief on the Merits, dated Aug. 6, 2018 ("Resp't. Br.") at 40. Unlike Section 12's requirement that all persons "shall be released on bail" except for the limited exceptions set forth there, this clause provides only that a person "may be released on bail." Under this reading, Section 28(f)(3) would result in a direct conflict with and repeal of Section 12, which provides a right to release for all defendants except for the narrow exceptions approved by the voters in 1982. Both parties agree that this is not the proper interpretation, because the Proposition 9 voters did not intend to repeal Section 12. Resp't. Br. at 40; Reply at 35.

Petitioner argues that although Section 28(f)(3) does not create an unlimited detention authority, it still creates a more expanded authority than Section 12. The only basis, however, for Petitioner's argument, is its contention that use of the term "denying" on its own constitutes a detention authority, Reply at 26, and that the remainder of (f)(3) sets forth specific categories of offenses for which bail may be denied. Reply at 16, 27, 34. The text does not support this interpretation.

The fact that Section 28(f)(3)'s text requires a court to consider victim and public safety as *factors* in making pretrial release determinations, does not delineate additional *categories* of offenses over which a court may deny release. Similarly, the fact that Section 28(f)(3) lists likelihood of appearance as a *factor* the court must consider in setting,

reducing or denying bail, does not in and of itself confer an independent detention mechanism based on flight risk. Reply at 28. In sum, the provision's delineation of factors that the court is required to consider in making pretrial release determinations does not give the court a power to detain; that authority already exists in Section 12 and is delineated by it.

2. Section 28 as a whole does not evidence any intent to repeal Section 12 or provide for an additional and expansive detention authority

Apparently acknowledging the ambiguity in the text of Section 28(f)(3) itself, Petitioner next argues that the overall text of Proposition 9 and language of Section 28 in its entirety show an intent to expand detention authority. Petitioner's Opening Brief on the Merits, dated June 21, 2018 ("Pet'r. Br.") at 38-40; Reply at 16-17; 28-29. Petitioner's tortured construction does not withstand scrutiny.

Petitioner asserts that Section 28's preamble refers to an intention to provide "an additional mechanism for courts to detain defendants." Reply at 29 (referring to Cal. Const., art. I, § 28, (a)(4)). But the language it cites for this proposition does no such thing. Instead, Section 28(a)(4) provides that the rights of victims "encompass the expectation . . . that persons who commit felonious acts causing injury to innocent victims will be . . . appropriately detained in custody." Cal. Const., art. I, § 28, (a)(4). That language does not provide a standalone detention authority and instead signifies that arrestees are to be appropriately detained under courts'

existing detention authority—which is contained in Section 12. Such appropriate detention is accomplished by requiring courts to consider victims' safety in making pretrial release determinations and by providing victims with notice of and opportunity to be heard at bail hearings.

Nor does Section 28's preamble indicate an intent to permit a new detention authority for those determined to be a flight risk. Pet'r. Br. at 39, 44. Petitioner argues that because the preamble references crime victims' dependence on expeditious enforcement of victims' rights, a court must be able to detain a defendant who poses a flight risk. *Id*. at 39, 44 (citing Cal. Const., art. I, § 28, (a)(2)). But this assertion ignores the many tools at a court's disposal to ensure appearance shy of detention. It also overreaches in its conclusion that the ambiguous preamble text about victims' dependency on expeditious resolution of criminal cases, indicates an intent for a new detention authority.[12]

Although Petitioner cites to Proposition 9's preamble as expressing

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[12] Nor is Petitioner's reliance on a victim's right to expeditious resolution of a criminal trial sufficient to justify detention under *Salerno*. Pet'r. Br. at 39. Although it is true that appearance in court can be a legitimate regulatory goal of a preventive detention scheme under the federal Constitution, that legitimacy is not predicated on a victim's right to an expeditious resolution of criminal proceeding, but rather on the court's own interest in adjudicating criminal cases. *See Salerno*, 481 U.S. at 753 (agreeing with the premise that "a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants"); *Bell v. Wolfish*, 441 U.S. 520, 534 (1979) (noting that the parties do not disagree that "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials").

intent to expand the right to deny bail, the only mention of bail reveals nothing more than an intent to provide victims with notice of bail hearings. The Findings and Declarations explain that "Marsy's mother was shocked to meet [the accused murderer] at a local supermarket, 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." Prop. 9 Pamp., text, p. 129. The description of this incident thus shows a focus on rectifying victims' right to notice and the opportunity to be heard; it does not suggest that the family's adverse experiences flowed from the court's inability to detain the defendant under Section 12 or from threats by the accused against Marsy's family.

Petitioner's repeated reference to the requirement that the Court must adopt a construction of a law that will render this provision constitutionally valid under the federal Constitution, Reply at 25, 27, 29, 31, is a red herring. It is undisputed that the Court will construe laws in a manner that satisfies federal constitutional requirements if it is necessary to save them from invalidity due to a federal constitutional conflict. But, by framing the question in these terms, Petitioner ignores the equally applicable axiom that "[t]his court has no power to rewrite [a] statute so as to make it conform to a presumed intention which is not expressed." *California Teachers Assn. v. Governing Bd. of Rialto Unified Sch. Dist.*, 14 Cal. 4th 627, 633 (1997) (citation omitted). The issue before the Court is

whether the Proposition 9 voters intended to replace the broad right to release in Section 12 with an expanded detention authority under Section 28—not whether the text of Section 28 can be construed in some way that would render it acceptable under the federal Constitution.

Even if the federal constitutional analysis were germane to the issues in front of the Court, Petitioner misses a key point. The United States Supreme Court in *Salerno* upheld the constitutionality of the Federal Bail Reform Act in substantial part because the Government had sufficiently demonstrated its compelling interest in detention by showing that the Act "narrowly focuse[d] on a particularly acute problem in which the Government's interests are overwhelming." *Salerno*, 481 U.S. at 750. The Government demonstrated the particularized risk to public safety because the "Act operate[d] only on individuals who have been arrested for a specific category of extremely serious offenses" whom "Congress specifically found . . . [were] far more likely to be responsible for dangerous acts in the community after arrest." *Id*. In approving of the category of the targeted group of defendants, the Court cited to the United States Senate's report that referenced studies showing high rates of re-arrest of individuals on pretrial release in multiple jurisdictions across the country. *Id*. (citing S. Rep. No. 98–225, at 6 (1983)).

Recently, the Ninth Circuit applied the *Salerno* test to strike down a preventive detention statute in Arizona where the record contained no

showing that undocumented immigrants, who were collectively the subject of the preventive detention law, posed an unmanageable flight risk or a greater flight risk than lawful residents. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 783 (9th Cir. 2014). The court noted that although there was no strict requirement to produce evidence of unmanageable flight risk, "the absence of any credible showing that the [ ] laws addressed a particularly acute problem is one factor quite relevant to demonstrating that the laws are not carefully limited." *Id*. at 784.

Here, although Petitioner points to general statements that public safety is a legitimate regulatory goal upon which a preventive detention scheme may be based, Reply at 27, Petitioner offers no facts or findings presented to the voters demonstrating the need for a greater preventive detention authority than that which existed under Section 12. The ballot materials did not contain any statistics, anecdotal evidence or legislative findings showing that defendants on pretrial release were subject to high rates of re-arrest or failures to appear, nor that these defendants posed a particular risk to victims or their families. To the contrary, the only anecdotal justification for the initiative's bail provisions was the story of Marsy's family, which, as explained above, emphasized that the family suffered harm because family members had not been notified that the defendant would be released on bail, nor they been given an opportunity to be heard on the issue. Prop. 9 Pamp., text, p. 129. There was no mention

of the accused killer committing new crimes while on release, nor threatening Marsy's family. Thus, although public safety can be a legitimate regulatory goal to justify preventive detention under the federal Constitution, no such showing of acute necessity was made here to justify an expanded preventive detention authority under Section 28.

Finally, Proposition 9's ballot pamphlet materials contained nothing to inform voters of the intent to create additional categories of persons who could be denied bail, nor was there any express language to that effect in the text of the measure. In the face of the lack of any direct evidence in the Proposition 9 ballot pamphlet that voters intended to expand courts' detention authority, Petitioner attempts to graft the intent of the Proposition 8 voters onto the Proposition 9 voters, arguing that the Proposition 9 voters' "express intent included enacting the 'broad reform' that had not occurred under" Proposition 8. Reply at 15 (referring to Proposition 9's uncodified preamble). This argument fails because the initiatives were, simply put, different. Proposition 8 expressly repealed Section 12; Proposition 9 decidedly did not. Proposition 9 also changed the original language contained in Proposition 8 regarding pretrial release by repealing the prohibition on own-recognizance release for people charged with serious felonies. It thus removed a limitation on pretrial release approved by the voters who supported Proposition 8 and, in so doing, removed language that directly conflicted with the existing Section 12. Therefore, it cannot be

the case that the voters intended to effectuate the same reforms through both initiatives. The voters who passed Proposition 9 necessarily must have had a different intent than those who voted for Proposition 8; that different intent was for the new Section 28(f)(3) to take effect subject to Section 12, rather than in place of Section 12, as Section 28(e) under Proposition 8 would have done.

II. Construing Section 28 as expanding the preventive detention limits in Section 12 would result in a repeal of Section 12, which the voters did not intend

A. Section 28's meaning must be construed in the context of the entirety of the California Constitution

It is well-settled that "'[t]he words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.'" *Valencia*, 3 Cal. 5th at 357 (quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379, 1387 (1987)). Thus, even when language "appears to have a clear and plain meaning when considered in isolation, [it] may nonetheless be rendered ambiguous when the language is read in light of the statute as a whole or in light of the overall legislative scheme." *Id*. at 360 (citing *Building Industry Assn. v. City of Camarillo*, 41 Cal. 3d 810 (1986); *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 53 Cal. 3d 245 (1991); *People v. Hazelton*, 14 Cal. 4th 101 (1996)).

The Court's prior analysis of competing constitutional provisions is instructive. In *Kennedy Wholesale, Inc.*, in the context of determining the constitutionality of Proposition 99, which authorized certain tobacco taxes, the Court was required to construe the meaning of a California constitutional provision within the entirety of the Constitution. 53 Cal. 3d at 248-49. At issue was the California constitutional provision Article XIII A, Section 3, put in place by Proposition 13, which provides that "any change in State taxes . . . must be imposed by an Act passed by no less than two-thirds of all members elected to each of the two houses of the Legislature." *Id*. at 248. The plaintiff argued that this language meant that only the California Legislature, rather than the voters, could approve a change in taxes, and thus that the voters could not have levied the Proposition 99 tobacco taxes via initiative. *Id.* at 248-49. The Court held that although Section 3's plain language could be interpreted as limiting taxation approval to the legislature, it was ambiguous when read in the context of the entire state Constitution, specifically in light of Article IV, Section 1's reservation to the people of "the powers of initiative and referendum." *Id*. at 249. Construing Section 3 to give exclusive power of taxation to the California Legislature, the Court held, would amount to an implicit repeal of Article IV, Section 1, even though Section 3 did "not even mention the initiative power, let alone purport to restrict it." *Id*. Because "the law shuns repeals by implication," the Court concluded that

"Section 3's silence regarding its effect on the reserved power of initiative present[ed] a latent ambiguity," resolution of which required review of other indicia of the voters' intent, such as the ballot materials. *Id*. at 249-50. The Court found nothing in the ballot materials to support the inference that the voters intended to limit their power to raise taxes, and thus held that Section 3 did not in fact do that. *Id*. at 250.

Here, even if the language of Section 28 was unambiguous—and it is not—the provision must be read in the context of the entire California Constitution, in particular, in light of Section 12, which is the only other state constitutional provision to address the right to pretrial release. Thus, interpreting Section 28 as permitting detention outside the limitations imposed by Section 12 would amount to an implied repeal of Section 12, which the law shuns. *Id.* at 249-50.

There is no need, nor any justification, for interpreting Proposition 9 as an implied repeal of Section 12. Section 28(f)(3) is easily harmonized with that of Section 12. The latter requires the court to "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" in making pretrial release determinations. Cal. Const., art. I, § 12. Because nothing in Section 12 suggests that the list of considerations in making pretrial release determinations, including setting conditions of release, is an exclusive one, the language in Section 28(f)(3)

can and should be read to add "the safety of the victim" to the above listed factors and to require courts to prioritize that factor over the others. *Kopp v. Fair Pol. Practices Com.*, 11 Cal. 4th 607, 615 (1995) ("A court may reform a statute to satisfy constitutional requirements if it can conclude with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute to invalidation of the statute."). This factor, like those in Section 12, dictates a consideration the court is to take into account when making pretrial release determinations, including a determination as to conditions of release. Under this interpretation, Section 28 would thus be given effect within the parameters of Section 12, the latter of which sets forth a comprehensive scheme—complete with categorical limitations and strict standards of proof—for denying pretrial release. *See Professional Engineers in California Gov't*, 40 Cal. 4th at 1048 (holding that when enacting a proposition, voters are presumed to be aware of existing law). The initiative's legislative history and text show that this result, rather than Petitioner's proposal, would effectuate the intent of the voters.

B. Petitioner's proposed interpretation of Section 28 would eliminate Section 12 as a practical matter

Expressly and affirmatively admitting that the Proposition 9 voters did not intend to repeal Section 12, Reply at 35, Petitioner argues that

Sections 12 and 28 can co-exist. But Petitioner fails to explain what is left of Section 12 under an interpretation where Section 28 authorizes expansive detention based on safety concerns.

The plain language of Section 12 is clear: all persons "shall be released on bail" except in one of the carefully delineated exceptions to that provision. The use of the term "shall" manifests a categorical right to pretrial release under the California Constitution subject to the limited exceptions set forth therein.

Petitioner's argument that the use of the term "shall be released" in Section 12 is actually permissive, rather than mandatory, Reply at 32-33, fails to take into account both Proposition 8's ballot materials and the Court's analysis of that initiative. In construing the terms of Propositions 4 and 8, the Court explained that "'the presumption [is] that the word 'shall' in a statute is ordinarily deemed mandatory and 'may' permissive.'" *Standish*, 38 Cal. 4th at 869 (quoting *California Correctional Peace Officers Assn. v. State Personnel Bd.*, 10 Cal. 4th 1133, 1143 (1995)). In finding an irreconcilable conflict between Proposition 4 (which put into place current Section 12) and Proposition 8, the Court highlighted that "Proposition 4 stated that all accused persons 'shall' be admitted to bail, subject to certain limitations, *ibid.*, while Proposition 8 would have rendered bail discretionary in all cases . . ." *Id.* at 877 (quoting Prop. 8 Pamp., text, p. 33). The Court thus recognized that the permissive nature of

Section 28 conflicted with Section 12's language, which required mandatory release, subject to exceptions.

Petitioner argues that following the 1982 amendment, "the word 'shall' is not mandatory because the right to release on bail in Section 12 is now limited by the exceptions" in Section 12. Reply at 33. But that assertion is not supported by law or logic. This Court specifically held that in the pre-Proposition 4 iteration of Section 12, which contained a carveout for capital crimes, the clause "[a]ll persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption [is] great," still provided "an *absolute right to bail* except in a narrow class of cases." *In re Law*, 10 Cal. 3d at 25 (emphasis added) (citing article I, section 6, of the California Constitution, precursor to Section 12). Although the post-Proposition 4 version of Section 12 contains more carveouts for those eligible for pretrial detention, *In re Law's* same interpretation applies: the right to release is absolute except in a narrow set of circumstances.

Thus, the term "shall" must mean that release is mandatory for an arrestee who is not included in one of Section 12's limited carveouts. If the term was permissive, Section 12 would provide that release is possible, though not required, for any person, except, categorically, those who fall within the carveouts. Petitioner provides no support for the proposition that the voters' decision to create two carefully delineated carveouts to the

otherwise absolute right to bail, makes the entire scheme permissive.

In contrast, Section 28 uses the term "may" to describe when persons can be released on bail, which eliminates the presumption of release. Petitioner's argument that a right to release is maintained under Section 28(f)(3), but merely cabined by the categorical exceptions in Section 28(f)(3), is unpersuasive for the reasons stated above: a listing of considerations for pretrial release determinations is not equivalent to a declaration of categories of offenses eligible for detention. Nor does this interpretation square with Proposition 8's ballot materials or Court's prior analysis. As explained above, Proposition 8 made clear that its passage would make bail decisions discretionary. *See* Prop. 8 Pamp., analysis, p. 54 ("This measure would amend the State Constitution to give the courts discretion in deciding whether to grant bail."). Although Proposition 8 also involved a Section 12 repeal, if the proposition had gone into effect and if Section 12 had in fact been repealed, the new language of Section 28 would have made bail determinations discretionary. The ballot materials for Proposition 8 did not discuss any categorical limitations of the type Petitioner now suggests should be read into Section 28. Nor did they state that the text would limit discretion in any way. Petitioner's argument that Section 28 should now be read differently in order to save it against Section 12 falls flat.

Although Petitioner argues that Sections 12 and 28 can co-exist,

under Petitioner's interpretation there is no Section 12 detention that would not already be included under Section 28's expansive detention scheme. Under Section 28, a court could detain any person if it deemed that person a risk to victim or public safety. Any such determination would necessarily include the detention eligibility carveouts in Section 12 for felony defendants who were found to present a risk to others' safety if released. Section 28, as construed by Petitioner, swallows Section 12 whole.

Petitioner's interpretation of Proposition 9 thus works to repeal the right to bail enshrined in the California Constitution since 1849 and vastly expand a court's authority to deny pretrial release based on vague standards that were "'not expressed or strongly implied in either the text of the initiative or the analysis or argument in the official ballot pamphlet.'" *Valencia*, 3 Cal. 5th at 364 (quoting *Farmers Ins. Exch. v. Superior Court*, 137 Cal. App. 4th 842, 857–58 (2006)). This Court "cannot presume" that this is what the voters intended. *Id*. The Court "may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." *Robert L.*, 30 Cal. 4th at 909 (citation omitted).

Holding that Section 28 takes effect subject to Section 12's limitations on detention allows the Court to effectuate the intent of the Proposition 9 voters, while avoiding a conflict between the two constitutional provisions, *both* approved by the voters. *Serrano v. Priest*, 5

Cal. 3d 584, 596 (en banc) (1971) ("Elementary principles of construction dictate that where constitutional provisions can reasonably be construed to avoid a conflict, such an interpretation should be adopted.") (citation omitted); *see also W. Oil & Gas Ass'n. v. Monterey Bay Unified Air Pollution Control Dist.*, 49 Cal. 3d 408, 420 (1989) (holding that courts will not find implied repeal unless "the later provision gives *undebatable evidence* of an intent to supersede the earlier").

III. If Section 12 and 28 cannot be reconciled, Section 12 prevails as the more specific provision

The Court need not find that Sections 12 and 28 are in conflict. But, if it does, Section 12, as the more specific constitutional provision, must prevail. *See State Dep't of Pub. Health v. Superior Court*, 60 Cal. 4th 940, 960–61 (2015) (affirming that if there is a conflict, the more specific provision prevails even if it was enacted first); *California Med. Ass'n v. Brown*, 193 Cal. App. 4th 1449, 1461 (2011) (holding that it is a "well-established rule of statutory construction [that] a specific statute controls over a general statute covering the same subject") (citation omitted).

Section 12 is the more specific provision on pretrial release because in passing the Proposition 4, the voters demonstrated that they thought "carefully and specifically" about the safeguards necessary for a deprivation of constitutional rights through the creation of carefully delineated categories of exceptions and a clear standard of proof for the

court's pretrial release determinations. *State Dep't of Pub. Health*, 60 Cal. 4th at 961 (holding that the detailed language of the first provision compared to generalities of the second, demonstrated that the legislature thought more carefully about the first). In contrast, the language of Section 28 contains no express categorical exceptions for the denial of bail, no express standard of proof, nor any comparable thought to the safeguards necessary to enforce the authority of preventive detention. If the Court finds the two sections in conflict, it must strike down Section 28(f)(3) in order to give effect to the intent of the voters in passing Proposition 4, which enacted the language contained in Section 12.

IV. SB10 does not impact the Court's resolution of the preventive detention issue

SB10 does not impact the Court's determination of the preventive issue because the legislation has no bearing on the core question of which provision of the California Constitution governs the denial of pretrial release. The question before the Court is whether the voters intended, in passing Proposition 9, to expand courts' preventive detention authority beyond the limits of Section 12. The resolution of that issue turns on an examination of the history and the text of Proposition 9 as presented to the voters in 2008, not on any recent legislation.

Moreover, the California Legislature explicitly restricted courts' use of preventive detention under SB10 to the limits set forth in the California

Constitution as interpreted by this Court. Senate Bill No. 10 (2017-2018 Reg. Sess.) (Section 1. "It is the intent of the Legislature by enacting this measure to permit preventive detention of pretrial defendants . . . only to the extent permitted by the California Constitution as interpreted by the California courts of review."); Cal. Pen. Code § 1320.20(d)(1) (effective Oct. 1, 2019) (". . . [T]he court may order preventive detention of the defendant pending trial or other hearing only if the detention is permitted . . . under the California Constitution.")). Thus, it is the Court's determination on the California constitutional issues that informs SB10, not the other way around.

CONCLUSION

For the foregoing reasons, the Courts should hold that Section 12 sets the outer limits on preventive detention under the California Constitution.

Dated: October 9, 2018

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

By: _____
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CERTIFICATE OF WORD COUNT

I certify pursuant to California Rule of Court 8.204 that this Brief of *Amici Curiae* contains 12,476 words, including footnotes, but excluding the cover, application, tables, signature blocks, and this certification, as calculated by the word count feature of Microsoft Word.

Dated: October 9, 2018 By: _____

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PROOF OF SERVICE

I, Danielle Flores, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City of San Francisco, County of San Francisco, California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of the American Civil Liberties Union Foundation of Northern California, and my business address is 39 Drumm Street, California 94111.

On October 9, 2018, I served the following document(s):

Application for Leave to File *Amici* Brief and Proposed Brief of *Amici Curiae* ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego and Imperial Counties and California law professors in Support of Respondent Kenneth Humphrey

In the Following Case:
In re Humphrey,
on Habeas Corpus.
No. S247278

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 9, 2018 at San Francisco, California.

Danielle Flores,
Declarant