ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

January 6, 2023

The Honorable Chief Justice Guerrero
The Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

VIA TRUEFILING

RE: *Amicus* Letter in Support of Petition for Review in *In re Kowalczyk*, Supreme Court of California Case No. S277910

Dear Chief Justice Guerrero and Honorable Associate Justices of the California Supreme Court:

The American Civil Liberties Union Foundations of Northern California and Southern California, the San Francisco Public Defender's Office, the Alameda County Public Defenders, and the California Public Defenders Association ("*amici*") submit this letter in support of the petition for review in *In re Kowalczyk* (2022) 85 Cal.App.5th 650[1]. (*See* Cal. Rules of Court, rule 8.500(g).) The decision below works a sweeping change in the law of bail, authorizing pretrial detention by means of setting intentionally unaffordable bail in circumstances far beyond those countenanced by article I, section 12 of the California Constitution. This Court's review is particularly urgent because the *Kowalczyk* decision threatens tens of thousands with unlawful detention. Though article I, section 12 sets strict limits on when courts may detain arrestees pretrial, the Court of Appeal held that courts may circumvent those restrictions so long as they do not deny bail outright and instead set bail that is unaffordable. *Kowalczyk* thus elevates form over substance in defiance of constitutional text, this Court's decision in *In re Humphrey* (2021) 11 Cal.5th 135, and the history of bail in California and beyond. *Amici* urge this Court to grant review, "secure uniformity of decision," "settle an important question of law," and reverse. (Cal. Rules of Court, rule 8.500(b)(1).)

[1] This opinion is currently cited on Westlaw as appearing at 85 Cal.App.5th 667 (2022). That is incorrect, as the decision begins on page 650 and concludes on page 667.

INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, and nonpartisan membership organization. The ACLU is dedicated to furthering the principles of liberty and equality embodied in the United States Constitution and this nation's civil rights laws.

The ACLU of Northern California and Southern California are affiliates of the national ACLU. These affiliates work to advance the civil rights and civil liberties of Californians in the courts, in legislative and policy arenas, and in the community. The ACLU of Northern and Southern California have frequently participated as *amicus* in matters concerning the right to pretrial release under the California Constitution, including before this Court in *Humphrey*, and before the Court of Appeal in *Kowalczyk*.

The San Francisco Public Defender's Office is charged with representing thousands of indigent persons charged with crimes annually, many of whom are subject to pretrial custody and apply for release from detention on a daily basis. In addition, the landmark *Humphrey* case on pretrial detention originated in San Francisco, and San Francisco Public Defenders, in conjunction with *Kowalczyk*'s appellant counsel, Civil Rights Corp, litigated the case up to this Court. As such, the San Francisco Public Defender's Office has a strong stake and interest in the Court clarifying the constitutional parameters of pretrial detention.

The Alameda County Public Defender represents thousands of clients annually and provides defense counsel in more than 90% of the criminal case filings in Alameda County. With a population of 1.66 million, Alameda County is the seventh most populous county in the state. The vast majority of the Alameda County Public Defenders' cases begin with a bail hearing. Decisions in these bail hearings, even post- *Humphrey,* are far from uniform. As a result, the kind of bail hearing an individual gets depends largely upon the judge drawn. This creates unfair disparities and many clients languish in custody for offenses that are outside of article 1, section 12's strict limits on a court's ability to order pretrial detention. As such, the Alameda County Public Defenders and their clients have a strong interest in seeing this Court resolve the issue in this matter.

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

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

ARGUMENT

I. *Kowalczyk* dramatically expands the circumstances under which courts may impose detention pretrial.

The Court of Appeal's decision greatly enlarges the circumstances under which trial courts may detain arrestees. Under California Constitution, article I, section 12 (hereafter "section 12"), a court's ability to order pretrial detention is tightly circumscribed:

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

(Cal. Const., art. I, § 12.) Section 12 thus establishes "that defendants charged with noncapital offenses are generally entitled to bail" with "exceptions in particular circumstances when a defendant is charged with at least one felony offense." (*In re White* (2020) 9 Cal.5th 455, 462.)

Kowalczyk obliterates this limitation. While the Court of Appeal recognized that section 12 controls the circumstances in which courts may issue detention orders, it held that detention is also permissible "when a person may not be able to post bail as set." (*Kowalczyk, supra,* 85 Cal.App.5th at p. 660.) Following *Humphrey*, a court knows when the bail it sets for a particular arrestee is unaffordable, because *Humphrey* held that courts must always "consider the individual

arrestee's ability to pay." (*Id.* at p. 666 (citing *Humphrey*, *supra,* 11 Cal.5th at p.154).) Nevertheless, the Court of Appeal held that courts may set unaffordable bail whenever "no other conditions of release, including affordable bail, can reasonably protect the state's interests in assuring public and victim safety and the arrestee's appearance in court." (*Id.* at pp. 664-665.) There is, of course, no substantive difference between a court's issuance of a detention order and its setting of unaffordable bail—both result in detention—and *Kowalczyk* therefore authorizes an end-around of section 12's limitation on pretrial detention. How significantly this expands the detention authority of trial courts is demonstrated by the facts of *Kowalczyk* itself. The petitioner in this matter was unhoused, had no history of violence, and was arrested on minor charges. Yet the court initially set unaffordable bail to ensure his detention before ordering detention outright. (*Id.* at p. 651.) The *Kowalczyk* holding permits this outcome, allowing detention where release would not pose a risk of physical harm to anyone, including in misdemeanor cases. Detention under these circumstances is a far cry from those listed in section 12, and thus, *Kowalczyk* invites a momentous increase in pretrial detention with significant attendant costs. (*See Humphrey, supra*, 11 Cal.5th at pp. 147-148 [recognizing effects of detention including prejudice to the arrestee's defense, livelihood, and family life at significant cost to taxpayers].)

II. *Kowalczyk* is wrongly decided.

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

A. The *Kowalczyk* Decision

Kowalczyk proceeded by answering three previously unresolved questions: (1) whether article I, section 28(f)(3), which also pertains to bail, is operational; (2) if so, whether it may be reconciled with section 12; and (3) under what circumstances courts may order detention pretrial. (*Kowalczyk, supra*, 85 Cal.App.5th at pp. 657-665; *see Humphrey*, *supra,* 11 Cal.5th at p. 155 fn.7 ["[W]e leave for another day the question of how . . . article I, sections 12 and 28, subdivision (f)(3) of the California Constitution [] can or should be reconciled, including whether these provisions authorize or prohibit pretrial detention of noncapital arrestees outside the circumstances specified in section 12, subdivisions (b) and (c)"].) The court first held section 28(f)(3) "fully

operational" as a valid ballot initiative, citing its duty to "jealously guard" the initiative process. (*Kowalczyk*, 85 Cal.App.5th at p. 658 (citation and quotation marks omitted).)

Next, the court held that sections 12 and 28(f)(3) may be reconciled. The critical question was whether the language of section 28(f)(3)—that "[a] person *may* be released on bail," (Cal. Const., art. I, § 28, subd. (f)(3) (emphasis added))—amended article 12's imperative that arrestees "shall" be released on bail except in the circumstances identified in subdivisions (a) through (c), (Cal. Const., art. I, § 12.) The Court of Appeal rejected that section 28(f)(3) entails "a grant of judicial discretion to deny bail release in all noncapital cases," reasoning that neither the text of section 28(f)(3), nor the underlying ballot materials, suggested any intention to repeal section 12. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 661 [citing "the strong presumption against repeal by implication"].)

As to the third question, *Kowalczyk* held that courts may detain an arrestee pretrial either through a formal detention order under the circumstances listed in section 12, subdivisions (a)-(c), or by setting unaffordable bail "to protect public and victim safety [or] to ensure a defendant's presence in court." (*Kowalczyk, supra*, 85 Cal.App.5th at p. 663.) *Kowalczyk* grounded this holding in section 12 itself, stating that the language, "[a] person shall be released on bail by sufficient sureties, except for [the circumstances identified in subdivisions (a) through (c)]," (Cal. Const., art. I, § 12), must be "construed in conjunction with section 12's requirement that trial courts fix the amount of bail upon consideration of [factors]" that reflect "the purposes of bail, *i.e.*, to protect public and victim safety and to ensure a defendant's presence in court." (*Ibid.*) Section 12's requirement that courts consider these factors in setting bail, *Kowalczyk* stated, renders the right to release on bail subordinate to the purposes of bail. (*Id.* at pp. 662-63.) In this manner, *Kowalczyk* concluded that section 12 authorizes detention not only by means of bail denial under subdivisions (a) through (c), but also under any circumstances that would cut against "the constitutionally-based policy purposes of bail"—to assure public safety and prevent flight. (*Ibid.*)

B. Interpretive Errors Below

Kowalczyk's reasoning is multiply flawed. *First*, the decision is incompatible with *Humphrey*'s holding that unaffordable bail is "the functional equivalent of a pretrial detention order," and therefore that "the arrestee's state and federal substantive due process rights to pretrial liberty" apply to both equally. (*Humphrey, supra,* 11 Cal.5th at p. 151.) To be sure, *Humphrey* was

concerned with the propriety of detention "solely because the arrestee lacked the resources to post bail," (*id.* at p. 143 (citation and quotation marks omitted)), whereas *Kowalczyk* concerns the propriety of detention in circumstances beyond those listed in section 12, subdivisions (a) through (c). But this is a distinction without a difference—*Humphrey*'s holding that unaffordable bail and bail denial are constitutionally equivalent holds no matter the proffered basis for detention. Indeed, a different district of the Court of Appeal so held in the recent decision of *In re Brown* (2022) 76 Cal.App.5th 296. *Brown* correctly noted that "use of an unreasonably high, unaffordable bail to protect the public and past victims from the defendant . . . is directly at odds with the requirements for a constitutionally valid bail determination as articulated in *Humphrey*." (*Id.* at p. 306.) In holding otherwise, *Kowalczyk* elevated form over substance and defied *Humphrey*.

Second, and relatedly, *Kowalczyk* ignored *Humphrey*'s holding that wealth-based detention offends the state and federal right to equal protection. The Court of Appeal defended its expansion of pretrial detention on the basis that:

> *Humphrey* repeatedly acknowledged that an outright pretrial detention order would not offend the due process clause in those rare instances in which a court concludes, by clear and convincing evidence, that no nonfinancial condition in conjunction with affordable money bail can reasonably protect the state's compelling interests in public safety or arrestee appearance.

(*Kowalczyk, supra*, 85 Cal.App.5th at p. 665 (citation omitted).) But *Humphrey* also held that "[d]etaining an arrestee [by means of unaffordable bail] accords insufficient respect to the arrestee's crucial state and federal equal protection rights against wealth-based detention[.]" (*Humphrey, supra*, 11 Cal.5th at p. 151.) As former Justice Cuéllar recently explained to the Governor's Committee on Revision of the Penal Code, *Humphrey*'s equal protection holding is the moral core of the opinion, as "conditioning [ ] detention on an arrestee's financial resources . . . is not what California stands for. That's not what our constitution is about." (Committee on Revision of the Penal Code, Meeting on November 29, 2022, Part 1, 22:38-23:52.) The right to equal protection is not coterminous with the right to due process—they have different parameters and requirements. (*See*, *e.g.*, *People v. McKee* (2010) 47 Cal.4th 1172, 1188-93, 1196-1208 [Sexually Violent Predator Act did not violate due process, but did offend equal protection]; *Griffin v. Illinois* (1956) 351 U.S. 12, 21-22 [states "may deny the right of appeal altogether" but may not condition the right of appeal on wealth-based classification].) As a result, *Kowalczyk*'s holding

that setting unaffordable bail is permissible because it purportedly complies with due process completely fails to account for *Humphrey*'s holding as to equal protection.

Third, ordinary principles of textual interpretation refute *Kowalczyk*'s reading of section 12. In interpreting the constitution, courts "look first to the language of the constitutional text, giving the words their ordinary meaning." (*Thompson v. Dept. of Corrs.* (2001) 25 Cal.4th 117, 122 (citation and quotation marks omitted).) The plain meaning of "[a] person shall be released on sufficient sureties, except for: [subdivisions (a) through (c)]," is that release is mandated, and detention prohibited, except in the listed circumstances; the plain meaning of "[i]n fixing the amount of bail, the court shall take into consideration [particular factors]" is that the listed factors must inform a court's bail calculation when release is required, *i.e.* in all circumstances except those listed in subdivisions (a) through (c). (*See In re York* (1995) 9 Cal.4th 1133, 1139 ["section 12 . . . establishes a person's right to obtain release on bail . . . , identifies certain categories of crime in which such bail is unavailable, . . . [and] sets forth the factors a court shall take into consideration in fixing the amount of the required bail"].) *Kowalczyk*'s tortured reading of this language finds no basis in its plain meaning.

Fourth, *Kowalczyk* is logically incoherent. The Court of Appeal recognized that the circumstances permitting denial of release under section 12, subdivisions (a) through (c) may not be enlarged by implication. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 661.) The Court of Appeal relied on this proposition in holding that because there is no evidence that section 28(f)(3) was intended to repeal section 12, section 28(f)(3) did not expand the circumstances under which courts may detain arrestees pretrial. (*Id.*) Yet, as noted, *Kowalczyk* also held that courts may impose pretrial detention beyond the circumstances identified in section 12, subdivisions (a) through (c), based only on section 12's requirement that courts consider the purposes of bail in setting bail amounts. (*Id.* at p. 660.) And the text requiring courts to consider the purposes of bail in setting bail amounts contains no express repudiation of the strict limits on pretrial detention contained in subdivisions (a) through (c). In other words, despite decrying expansion of detention authority beyond subdivisions (a) through (c) based on the alleged, implicit intent of some other constitutional language, the Court of Appeal did exactly that.

Finally, *Kowalczyk*'s reading of section 12 is contradicted by the history of that section and the constitutional role of bail in both California and the federal system. The history of section 12

reveals that from the beginning, bail was conceptualized and operated as a mechanism for release, not detention. Thus, since adoption of the State Constitution in 1849, California has enshrined the right to bail as a right to release in all but a limited category of cases. (*See People v. Turner* (1974) 39 Cal.App.3d 682, 684.) California courts have long recognized that the intent behind section 12 and its precursors was "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 Law* (1973) 10 Cal.3d 21, 25.)

The same holds true of bail under the United States Constitution. As Justice Jackson opined:

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until . . . trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. . . . To open a way of escape from [] handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death . . . .

(*Stack v. Boyle* (1951) 342 U.S. 1, 7-8 (conc. opn. of Jackson, J.). Under the federal system, bail thus functions in tandem with the maxim that "[i]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception." (*United States v. Salerno* (1987) 481 U.S. 739, 755.)

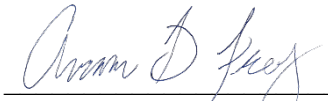
Kowalczyk turns this conception on its head. By authorizing courts to utilize unaffordable bail to bypass the limitations of section 12, subdivision (a) through (c), the Court of Appeal advanced a vision of bail as a means of detention. That is at odds with the significance of bail under both California and United States constitutional precedent, and *Kowalczyk*'s holding should be rejected for this reason, as well.

CONCLUSION

The Court of Appeal's decision defies the text of the California Constitution and established precedent and places thousands at risk of pretrial detention for no reason other than unaffordable bail. *Kowalczyk* thus creates confusion in the trial courts by expanding exceptions to section 12 and undercutting this Court's recent decision in *Humphrey*. At bottom, *Kowalczyk* is rooted only in what the Court of Appeal termed "the constitutionally-based policy purposes of bail," (*Kowalczyk, supra*, 85 Cal.App.5th at p. 663)—a simple policy argument that public safety and risk of flight warrant broader detention authority than that found in section 12. But

constitutional provisions may not be amended in this way. In balancing personal liberty against the public welfare, section 12 draws a clear line that only the people, through constitutional amendment, may change. To uphold the longstanding limitation on pretrial detention enshrined in section 12, and to safeguard against wrongful deprivations of liberty, this Court should grant review and reverse.

Respectfully submitted,



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PROOF OF SERVICE

I, Sara Cooksey, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is scooksey@aclunc.org. On January 6, 2023, I served the attached,

***Amicus* Letter in Support of Petition for Review in *In re Kowalczyk,* Supreme Court of California Case No. S277910**

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

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Proof of Service continued on next page

BY MAIL: I mailed a copy of the document identified above by depositing the sealed envelope with the U.S. Postal Service, with the postage fully prepaid.

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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 on January 6, 2023 in Fresno, CA.

Sara Cooksey

Sara Cooksey, Declarant