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August 13, 2024

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

VIA TRUEFILING

**RE: Amicus Letter of ACLU of Northern California,
Alameda County Public Defender,
Contra Costa Public Defender Office,
Orange County Public Defender's Office,
Law Offices of the Public Defender of
San Bernardino County,
San Francisco Public Defender's Office,
County of Santa Clara Public Defender's Office,
Santa Cruz County Office of the Public Defender, and
Stanislaus County Public Defender**

in Support of Petition for Review in *In re Sanchez*, No. S286045

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

The above-listed Amici submit this letter in support of the petition for review in the
above-captioned case pursuant to Rule of Court 8.500(g). The trial court's bail ruling is a typical
example of the state of affairs when it comes to pretrial bail in California courtrooms—even
though it is an example that should disturb us all. Because of a calendaring mix-up, an unhoused

defendant was detained on unaffordable bail of *five dollars*, without any attempt by the trial court to make the findings required by article I, section 12 of the California Constitution before a defendant may be detained. Were it not for the generosity of a stranger who stepped up to pay the unconstitutional bail, the trial court would have held the defendant in custody pending trial—just because she could not afford to pay \$5.00.

Despite this Court’s repeated efforts to ensure that Californians can vindicate their constitutional right to pretrial liberty, the trial courts have not listened. Instead, while representing and advocating for defendants around the state, Amici routinely witness courts detain defendants by circumventing this Court’s instructions to safeguard that liberty right.

This Court should grant the petition and hear this case together with *In re Kowalczyk*, No. S277910. *Sanchez* presents important factual components that will be critical to addressing the disuniformity and uncertainty that currently plague bail determinations: Although Ms. Sanchez is potentially eligible for detention without bail under section 12 based on the nature of her charges, she was effectively detained on unaffordable money bail in violation of section 12’s very terms. *Kowalczyk* presents different but complementary facts raising similar questions about depriving Californians of their most fundamental constitutional right: their liberty.

INTERESTS OF AMICI

The ACLU of Northern California (“ACLU NorCal”) is an affiliate of the national ACLU, a nationwide nonprofit, nonpartisan organization with approximately two million members dedicated to preserving and protecting the principles of liberty and equality embodied in the state and federal Constitutions and related statutes. ACLU NorCal has over 100,000 total members. As a legal organization and on behalf of its members, ACLU NorCal has an abiding interest and expertise in freedom from unnecessary confinement, the presumption of innocence,

criminal due process, and the right to bail in particular. In the bail context, ACLU NorCal has appeared as amicus to uphold the rights enshrined in Article I, section 12 of the California Constitution, including *In re Humphrey* (2021) 11 Cal.5th 135. ACLU NorCal has also been active in shaping legislation on bail at the state level. More generally, ACLU NorCal frequently litigates matters of State and Federal due process in the courts of California in an effort to ensure robust protection of the fundamental liberty interest in freedom from confinement.

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

The Contra Costa Public Defender Office represents thousands of indigent defendants each year, many of whom are similarly situated to Ms. Sanchez. The Public Defender is familiar with the briefing and issues in this case and seeks to participate in this matter to assist the Court in resolving the critical issues at stake.

The Orange County Public Defender's Office is a public agency charged with the legal representation of indigent criminal defendants in California's second most populous county. The Office consists of approximately 200 attorneys dedicated to the vigorous and competent

representation of criminal defendants in the Superior Court, Court of Appeal, and California Supreme Court. The Orange County Public Defender's Office has an interest in this matter because the outcome will likely affect a large number of criminal cases in Orange County.

The Law Offices of the Public Defender of San Bernardino County is a county department that is appointed to represent criminal or civil commitment defendants who cannot afford to hire an attorney. We defend the rights and dignity of our clients to ensure equitable access to justice through holistic representation while reunifying families and communities. In representing our clients and in participating as Amicus in the California courts, the Public Defender seeks to protect constitutional rights—like those enshrined in section 12—from overreaching and unlawful infringements.

The San Francisco Public Defender's Office represents over 20,000 indigent persons charged with crimes annually, many of whom are subject to pretrial custody and apply for release from detention on a daily basis. This Court's landmark Humphrey decision on pretrial detention originated in San Francisco, and the San Francisco Public Defender's Office, in conjunction with Humphrey's appellate counsel at the time, Civil Rights Corps, 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 County of Santa Clara Public Defender's Office represents clients charged with criminal offenses, Probate and LPS matters, as well as juveniles charged with criminal conduct in juvenile justice court. The Office is a public law firm of expert criminal lawyers who serve clients in a holistic and client-centered fashion. The Office's interest in this matter is in ensuring that its clients' fundamental constitutional rights are safeguarded in the pretrial bail process.

The Santa Cruz County Office of the Public Defender is established pursuant to Government Code sections 27700 to 27712 to provide legal representation to people charged with crimes or facing involuntary commitment in Santa Cruz County. Heather Rogers is the Public Defender of Santa Cruz County. Each year, the Public Defender represents people in over 6,000 cases including misdemeanors and felonies. The Public Defender is well-versed on all issues relating to California’s criminal legal system.

The Stanislaus County Public Defender is an integral part of the criminal justice system providing vigorous representation to indigents accused of crimes. The Public Defender’s duties are mandated by the Constitution of the United States, the Constitution of the State of California, and by statutes enacted by the California Legislature. The services provided by the office help assure the orderly administration of justice within our community and protect the liberty of those accused of crime as well as those who might someday find themselves accused. The Stanislaus County Public Defender aims to ensure that the right to counsel is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services. Our mission statement is to defend the rights and dignity of our clients and to ensure equitable access to justice. The Office represents thousands of defendants in the community every year. It is in defense of this population and their rights, and for the reasons set out in the following letter, that the Public Defender now urges the Court to provide relief to petitioner.

* * *

Amici expect that the briefing and presentation of this case would accurately capture the on-the-ground experience of bail adjudications in California, because Amici share that experience with Ms. Sanchez’s appellate counsel at Civil Rights Corps—who litigated *Humphrey* and last year obtained a landmark preliminary injunction concerning bail in Los

Angeles County. *Urquidi v. City of Los Angeles*, No. 22STCP04044, 2023 WL 10677687 (Cal. Super. Ct. May 16, 2023). Together with several of the Amici, CRC has established a partnership of CRC attorneys, California public defenders, and private attorneys offering pro bono services to indigent defendants. With CRC-led training and guidance, these partners challenge bail rulings that violate section 12 one-by-one, while waiting for and urging an answer from this Court on the question of unaffordable bail.

ARGUMENT

I. The State of Affairs Described by Petitioner Reflects the Unfortunate Reality Witnessed by Amici on the Ground.

By canvassing recent cases and studies, the petition demonstrates that California trial courts pervasively continue to detain criminal defendants in violation of their constitutional right to pretrial liberty. (Pet. 22-25). As Petitioner put it, “*Humphrey* has not put an end to this crisis.” (Pet. 22, discussing *In re Humphrey* (2021) 11 Cal.5th 135.)

Based on Amici’s experience advocating for defendants inside and outside the courtroom, Petitioner is correct. Day after day, defendants represented by the Public Defender Amici are detained on unaffordable bail with little or no attempt to heed *Humphrey* and the defendants’ section 12 rights. Even when trial courts go through the *Humphrey* paces, they almost never make the additional section 12 findings required to deny bail. (See Pet. 45-46.) Many justify this failure by using unaffordable bail to achieve the same result as a section 12 no-bail order. (See Pet. 46.) Or they just ignore section 12 altogether, detaining defendants who have not been charged with a qualifying offense and are therefore categorically ineligible for detention.

Trial courts also frequently fail to comply with the guardrails established to make sure their bail rulings protect defendants’ constitutional rights. They typically do not mention, much

less enforce, the government’s burden of proof or the standard of clear and convincing evidence that applies to both *Humphrey* and section 12 findings. (See Pet. 41-46.) They often conduct no express weighing of the evidence on the record and offer no explanation why the evidence points clearly and convincingly in favor of detention. (See Pet. 43-46.) The trial courts may cite some evidence from the defendant’s records or the charged conduct, but with rushed attention and frequent errors, like the trial court’s conclusions about Ms. Sanchez’s prior case, despite its inability to locate any record of that case or a failure to appear for it. (Pet. 43.) They often do not connect such evidence to their bottom-line findings, like the trial court’s conclusion that Ms. Sanchez is a flight risk now because she had apparently failed to appear in that prior case—while in the hospital. (See Pet. 43-44.) And do not mention the virtually universal failure to state the trial court’s reasoning in writing, despite this Court’s admonition that this is “the court’s obligation” to satisfy “traditional notions of due process.” (*Humphrey*, *supra*, 11 Cal.5th at p. 155.)

The fears that the Court expressed in *Humphrey* have come to pass: trial courts are systematically shirking their duty to make individualized findings, and just as this Court predicted, the result is often “careless or rote decisionmaking,” frustration of appellate “review of the detention order” that yields frequent ping-ponging between the trial and appellate courts, and diminished “public confidence in the judicial process.” (*Id.* at pp. 155-56.) In light of this inconsistency, researchers have proposed “codify[ing] a presumption of pretrial release in all cases.”¹ But of course, such codification should be unnecessary; that presumption is already

¹ “Editorial: California Still Violates the Constitution on Bail,” *Los Angeles Times* (Nov. 29, 2022), <https://perma.cc/WNG2-5Y6Y>, citing Alicia Virani et al., *Coming up Short: The Unrealized Promise of In re Humphrey* (Oct. 2022), <https://perma.cc/7SNS-9VDH>.

enshrined as a constitutional matter in section 12, and only the judicial process is to blame for the failure to achieve the Constitution’s declaration of rights. This Court must intervene.

II. This Court Must Address the Constitutionality of Unaffordable Money Bail Used As A Workaround to Detention.

Humphrey did not address whether trial courts may intentionally use the arbitrary and blunt tool of unaffordable bail to effectuate detention without making the findings required by section 12. In the intervening years, it has become even clearer that this Court must now answer that issue, because it causes widespread, frequent constitutional deprivations and because it simply does not achieve its purported goals.

Unaffordable bail is a much more widespread problem than outright detention, as Amici experience in daily efforts in California courtrooms to protect defendants’ pretrial liberty. (See Pet. 20 & n.5, citing Committee on Revision of the Penal Code, *Annual Report and Recommendations* 69 (2022), <https://perma.cc/GK94-X3WZ>.) Petitioner points out that in 2022, 85% of Los Angeles County detainees were held on unaffordable bail. (*Id.*) To make matters worse, according to the County’s Chief Information Office, the 2020-2022 data also show that “[u]nsurprisingly, ... high vulnerability groups are less likely to be granted pretrial release, and they are more likely to experience comparatively lengthy detention periods” even if ultimately released. (Fei Wu et al., *Los Angeles County Pretrial Data Center* (Jan. 29, 2024), <https://perma.cc/4A9U-VRXQ>.) Those include people experiencing severe mental illness or substance use disorder, as well as the chronically unhoused—groups that served mean detention lengths more than twice as long as the total pretrial population. (*Id.*; Fei Wu et al., *Reframing LA County Pretrial Data Analysis* (Apr. 24, 2024), <https://perma.cc/2ZE3-8VCV>.) In other words, the burdens of unconstitutional, unaffordable money bail fall disproportionately on the shoulders

of the most vulnerable Californians. And as this case demonstrates, a defendant's liberty is may only be restored because of happenstance factors, like the outside organizations, volunteers, and donors who work so hard to counter unconstitutional bail orders.

This all takes place against the backdrop of an inescapable truth: money bail does not work. As multiple criminal-justice experts testified recently in a case about pretrial detention in Los Angeles County, numerous studies across the country demonstrate that money bail is not an effective tool for protecting public safety or ensuring future court appearances—indeed, it likely has the unfortunate effect of increasing recidivism. *Urquidi v. City of Los Angeles*, No. 22STCP04044, 2023 WL 10677687, at *12-20 (Cal. Super. Ct. May 16, 2023). One expert explained (1) that “[t]here is no empirical evidence that secured money bail is more effective than unsecured money bail or non-monetary conditions at assuring public safety and law-abiding behavior” and (2) that “most empirical evidence shows that secured money bail is no more effective than unsecured money bail or non-monetary conditions of release at assuring court appearances.” *Id.* at *14. Indeed, money bail “seems to be criminogenic” in that sustained pretrial detentions increase the likelihood that defendants will be charged with new crimes in the future. *Id.* at *14. The Superior Court in *Urquidi* adopted this view at the preliminary-injunction stage, finding that the plaintiffs were “likely to show” that money-bail orders “do not further” purported government interests like addressing public safety or risk of flight. *Id.* at *23.

III. This Case Vividly Presents These Important Issues for the Court's Resolution.

Although the Court of Appeal in *Kowalczyk* went out of its way to discuss unaffordable bail, that mechanism was not used in that case or presented by the appeal. (*In re Kowalczyk* (2022) 85 Cal.App.5th 667, 688-89, *rev. granted*, 525 P.3d 263 (Cal. 2003).) Amici recognize, as the Petition noted (at 18 & n.4), that this Court's favored approach is to decide only the issues

presented by the facts of the case before it. If this Court follows that approach—and decides only the first issue granted in *Kowalczyk*, the only issue actually presented by that record—the unaffordable bail split will persist. (See Pet. 22, citing *Kowalczyk*, *supra*, 85 Cal.App.5th at 686-92; *In re Brown* (2022) 76 Cal.App.5th 296.)

But this is not a circumstance in which the Court should make narrow incremental rulings or await further percolation of the existing split of authority in the trial and appellate courts. On a question concerning the most fundamental of constitutional rights, this Court should not condone a regime where Californians lose their liberty based on their ability to pay and on the courthouse where they find themselves charged. It should instead squarely address the unaffordable bail issue here and now. In addition to *Kowalczyk*, the stunning—but all too common—facts of this case offer the Court that opportunity.

Ms. Sanchez’s case demonstrates the confusion that pervades California trial courts, including the arbitrary, ineffective use of unaffordable bail to bypass section 12 and achieve unconstitutional detention. In setting bail at an unaffordable \$5, the trial court here could just as well have imposed some other practically impossible condition, like detaining the defendant unless and until she could run a four-minute mile or memorize an encyclopedia. The unaffordable or unachievable condition is doing no independent work. Instead, in the end, it is violating the pretrial liberty right by effectuating a bail denial by circumvention. It is also an utterly irrational exercise in number-picking. What about the \$5 bail amount in this case was formulated to ensure public safety or deter flight? Why not \$1 or \$10?

The trial court here went one step further and opined that “because of [her] lack of a record,” it could offer Mr. Sanchez a “no bail” detention instead of setting bail at \$5.00. (Pet. 46.) How the trial court thought no bail would be a better alternative—or how it would be

justified by Ms. Sanchez’s *lack* of a record—is hard to fathom and, at least, deeply unclear.

Perhaps the trial court expected that by setting an amount higher than the defendant could afford, she would resort to friends, family, or bail-bond companies—and that, as a result, there would be community pressure to combat flight risk. But as explained above, that dynamic is not borne out in reality: money bail simply does not effectively deter flight. As this case shows, the bail imposed was *still* unaffordable even when considering friends and family, and Ms. Sanchez could have afforded a bail bond no more easily than the bail itself. (See Pet. 10, 45.) As for bail bonds, the for-profit bail-bond industry in California leaves families in sustained debt even after their cases are resolved, gouging them with interest and non-refundable fees.² Indeed, “[m]ost people would not be able to pay even a low down-payment on the fee for a typical California bail bond without incurring significant debt. Subsequent payments ensure the debt endures.”

(Human Rights Watch, *supra*, at p. 70.) At the very least, Ms. Sanchez was deprived of the meaningful, individualized consideration constitutionally mandated by section 12 before the Superior Court could deprive her of her liberty. The trial courts and California defendants need this Court to intervene and correct this faulty logic, and the *Sanchez* record provides the factual background and practical considerations necessary for that resolution.

² See Color of Change & American Civil Liberties Union, *Selling off Our Freedom: How Insurance Corporations Have Taken over Our Bail System* 34-43 (May 2017), <https://perma.cc/YUR6-R39Q>; Human Rights Watch, “*Not in It for Justice*”: *How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People* 6, 29-31, 39-41, 70-86 (Apr. 11, 2017), <https://perma.cc/9AER-RVWF>.

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CONCLUSION

Amici respectfully urge this Court to grant the petition, hear this case alongside *Kowalczyk*, and conclude that unaffordable money bail cannot be imposed without the findings required by article I, section 12 of the California Constitution.

August 13, 2024

Respectfully submitted,

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Stanislaus County Public Defender

August 13, 2024

PROOF OF SERVICE

I am a citizen of the United States, over eighteen years old, and not a party to this action. My place of employment and business address is Orrick, Herrington & Sutcliffe LLP, 51 West 52nd Street, New York, NY 10019.

On August 13, 2024, I served true copies of the within Amici Curiae Letter in Support of Petition for Review on the trial court and on the parties interested in this proceeding as follows:

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August 13, 2024

By Electronic service through TrueFiling: I am e-filing this document through the Court of Appeal's TrueFiling service. I am designating that electronic copies be served through a link provided by email from TrueFiling to the attorneys who are registered with TrueFiling for this case.

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

Executed by me on August 13, 2024, at New York, NY.

/s/ Amy S. Gerrish
Amy S. Gerrish