IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE GERALD JOHN KOWALCZYK,
on Habeas Corpus,

No. S277910

On review from the decision of the Court of Appeal,
First Appellate District, Division Three, Case No. A162977,
dismissing a petition for writ of habeas corpus as moot
San Mateo County Superior Court Case No. 21-SF-003700-A
The Honorable Susan Greenberg, Superior Court Judge
The Honorable Elizabeth K. Lee, Superior Court Judge
The Honorable Jeffrey R. Finigan, Superior Court Judge

APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NON-TITLE RESPONDENT

KENT S. SCHEIDEGGER
State Bar No. 105178
*KYMBERLEE C. STAPLETON
State Bar No. 213463
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
Telephone: (916) 446-0345
Fax: (916) 446-1194
Email: Kym.Stapleton@cjlf.org

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE GERALD JOHN KOWALCZYK,
on Habeas Corpus,

APPLICATION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF NON-TITLE RESPONDENT

To the Honorable Chief Justice of the Supreme Court of the State of California

The Criminal Justice Legal Foundation (CJLF) respectfully applies for permission to file a brief amicus curiae in support of respondent pursuant to rule 8.520(f) of the California Rules of Court.[1]

Applicant's Interest

CJLF is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of

1. No party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae CJLF made a monetary contribution to its preparation or submission.

victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the defendant contends that the California Constitution's bail provisions and this court's precedent require trial courts to set money bail in an amount that an arrestee can afford even when the danger to public or victim safety is high and there is a great risk that the arrestee may not appear for future court hearings. Such a rule would result in a drastic change to California's system of pretrial release and is contrary to the interests of victims of crime that CJLF was formed to protect.

Need for Further Argument

CJLF is familiar with the arguments presented on both sides of this issue and believes that further argument is necessary.

Date: November 8, 2023

Respectfully Submitted,

KYMBERLEE C. STAPLETON
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Constitution

Initiative

State Statutes

Secondary Authorities

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE GERALD JOHN KOWALCZYK,
on Habeas Corpus,

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NON-TITLE RESPONDENT

SUMMARY OF FACTS AND CASE

In January 2021, petitioner Gerald Kowalczyk, ordered a cheeseburger at a Five Guys restaurant in Burlingame, California. (Answer Brief on the Merits (AB) 9.) Kowalczyk sought to pay for his cheeseburger with six different credit cards in succession. (*Id.* at p. 10.) After each failed attempt to pay for his food with a credit card, he would toss it onto the floor and try again with another card. (*Ibid.*) His attempt to pay with the sixth and final credit card was successful. (*Ibid.*) Soon after completing his purchase, Kowalczyk, who was well known to the manager and had frequented the restaurant "numerous times before," approached an employee at the cash register and asked for a refund. (*Ibid.*) When the employee refused Kowalczyk's request, he left the restaurant without the cheeseburger and without the six credit cards. (*Ibid.*)

Burlingame police officers were subsequently summoned to the restaurant to investigate. (*Ibid.*) At least three of the credit cards that Kowalczyk left behind belonged to other people. (*Ibid.*)

When officers contacted the rightful owners of each card, each of them stated that their credit cards had been lost months earlier. (*Ibid*.)

A few weeks after Kowalczyk's fraudulent purchase at Five Guys, Belmont police officers encountered him at a grocery store. (*Ibid*.) He was detained and searched by the officers. (*Ibid*.) Officers found a driver's license belonging to Mya Figueroa inside of his backpack. (*Ibid*.) Ms. Figueroa owned one of the credit cards that Kowalczyk fraudulently used and discarded at Five Guys. (*Ibid*.)

Kowalczyk was subsequently charged with three felony counts of identity theft, one felony count of vandalism, one misdemeanor count of petty theft of lost property, and one misdemeanor count of identity theft. (*In re Kowalczyk* (2022) 85 Cal.App.5th 667, 672.) His bail was set by the court in the amount of $75,000. (*Ibid*.) He filed a motion for release on his own recognizance (OR) with drug conditions and electronic monitoring. (*Ibid*.) The prosecution opposed his motion and requested his bail remain set at $75,000 because his extensive criminal history (many of which were committed while on probation) rendered him dangerous to the public, and thus no less restrictive nonfinancial conditions of release would suffice. (*Id*. at pp. 672-673.)

In early May 2021, the trial court denied his motion and ordered that he be detained without bail. (*Id*. at p. 673.) The trial court "emphasized protection of the public as the primary concern ...." (*Ibid*.) The court further added that he "was a chronic reoffender whose Rap sheet documented 64 prior convictions and was over 100 pages long .... [Kowalczyk] received the maximum score of 14 on the Virginia Pretrial Risk Assessment Instrument, and the pretrial services report indicated [he] failed to abide by supervised OR conditions in the last five years." (*Ibid*.) The trial court was also "concern[ed] that [Kowalczyk] might abscond,

noting his convictions spanned multiple states and multiple counties in California... [and because he]—who was unhoused and unemployed—made no showing of any incentive to remain and attend future court appearances." (*Ibid.*)

In mid-May and again in mid-June 2021, Kowalczyk moved to reduce bail or for OR release, both of which were denied. (*Id.* at pp. 673-674.) In July 2021, he filed a habeas petition with the Court of Appeal challenging his detention. (*Id.* at p. 674.) While his petition was pending, his case was resolved and he was released from custody. (AB 13.) The Court of Appeal dismissed his petition as moot. (*Kowalczyk*, 85 Cal.App.5th at p. 674.) This court granted Kowalczyk's petition for review and transferred the case back to the Court of Appeal with directions to vacate the dismissal order and to issue an opinion addressing which constitutional provision governs the denial of bail in noncapital cases. (*Ibid.*)

On November 21, 2022, the Court of Appeal held that both article I, section 12, subdivisions (b) and (c), and article I, section 28, subdivision (f)(3)[2], are reconcilable and both constitutional provisions govern the denial of bail in noncapital cases. (*Id.* at pp. 685-686.) The court further held that if an arrestee is charged with an offense that falls outside of the circumstances in which bail can be denied under section 12, then the arrestee has a general right to pretrial release either on money bail or OR. (*Id.* at p. 691.) If the court decides that money bail is necessary under the circumstances, and that no nonfinancial conditions of release will suffice, the court is not prohibited from setting bail in an amount that may be more than an arrestee can afford if the court makes specific findings that the "monetary condition is truly

---

2. Unless otherwise noted, "section 12" and "section 28" refer to article I, section 12 and article I, section 28 of the California Constitution.

necessary to sufficiently protect the state's compelling interests in public and victim safety and in ensuring appearances in court." (*Id*. at pp. 691-692.)

The Court of Appeal then dismissed Kowalczyk's petition for writ of habeas corpus as moot. This court granted Kowalczyk's petition for review on March 15, 2023.

SUMMARY OF ARGUMENT

With few exceptions, pretrial release on bail is a right in California. Over 40 years ago, California voters demanded that victim and public safety must be the primary considerations examined by a court when making all bail decisions. Noncapital felonies, both violent and nonviolent, were added to the list of excepted offenses by Proposition 4. The denial of bail is always a matter of judicial discretion, which is guided by both the evidentiary requirements of section 12 and the enumerated considerations of section 28, subdivision (f)(3).

Once it is determined that the accused is eligible for pretrial release, a court must determine what type of pretrial release is appropriate under the circumstances — money bail or release on OR. Both options again require a court to examine the threat posed to public and victim safety if the accused is released. Release on OR is a discretionary alternative to money bail that does not depend on the accused's financial status. In *In re Humphrey* (2021) 11 Cal.5th 135, this court held that the accused cannot be detained pretrial "solely because" he or she lacks the financial resources to pay money bail. If the court finds that OR release is not appropriate under the individual circumstances of the case, and money bail is nonetheless necessary, it must consider the accused's ability to pay and determine whether nonfinancial conditions of release may suffice to assure his or her presence in court and to protect public and victim safety. *Humphrey*, how-

ever, does not require courts to set money bail in an amount the accused can afford in all cases. Rather, *Humphrey* simply requires courts to tailor each bail decision to the relevant circumstances of each case, which, in some circumstances, may be above the accused's ability to pay.

ARGUMENT

When this court granted review, it limited the issues to: "(1) Which 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), ... or, in the alternative, can these provisions be reconciled? (2) May a superior court ever set pretrial bail above an arrestee's ability to pay?"

Amicus agrees with Respondent with regard to their main argument that section 28, subdivision (f)(3) should control the denial of bail in noncapital cases. As a result, amicus defers to Respondent's arguments and analysis and will not further discuss those grounds for affirmance of the Court of Appeal's judgment. Respondent, however, advances in the alternative that "should this Court choose to adopt the Court of Appeal's reconciled application of sections 12 and 28(f)(3) ... this Court should make clear that neither [*In re*] *Humphrey* [(2021) 11 Cal.5th 135], nor the reconciled application of sections 12 and 28(f)(3) prohibit the setting of unaffordable bail." (AB 9.) Amicus agrees and will instead focus its analysis on Respondent's alternative argument and will expound upon the Court of Appeal's reconciled analysis and holding.

I. Both article I, section 12, subdivisions (b) and (c) and article I, section 28, subdivision (f)(3) govern the denial of bail in noncapital cases.

Trial courts are tasked to resolve matters of bail and pretrial release daily. The first question a court must address, when confronted with an individual accused of committing a criminal offense, is bail eligibility. In other words, whether pretrial release is an option. If the answer is no, the accused must be detained. If the answer is yes, the query turns to the types of pretrial release available to the accused. This then opens up the door to an inquiry that focuses on the accused's financial status, whether nonmonetary alternatives to money bail are sufficient and, if necessary under the circumstances, setting an amount of money bail. Under California law, all questions of bail eligibility require analyzing issues of public and victim safety.

A. Bail Rights in California.

Historically in California, all persons accused of committing noncapital crimes were "bailable" before conviction. (Cal. Const. of 1849, art. I, § 7; *People v. Tinder* (1862) 19 Cal. 539, 541-542; Witkin, Cal. Criminal Procedure (1st ed. 1963) § 149, p. 142.) Article I, section 7 of the first California Constitution provided: "All persons shall be bailable, by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great."[3] Because the United States Constitution only prohibited "excessive bail" (and thus no actual right to bail), the drafters of

---

3. In 1682, Pennsylvania's newly adopted constitution provided that, "all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great." Pennsylvania's provision became the model for nearly all state constitutions adopted after 1776. (Schnacke, Jones, & Brooker, The History of Bail and Pretrial Release (PIJ 2010) pp. 4-5; see also *In re White* (2020) 9 Cal.5th 455, 463.)

the California Constitution specifically added former section 7 to the Constitution "to make clear that unlike the federal rule, all except the one class of defendants were bailable."[4] (*In re Underwood* (1973) 9 Cal.3d 345, 349-350, and fn. 6; see also *In re Law* (1973) 10 Cal.3d 21, 25 [absolute right to bail in all but a narrow class of cases].) This broad proclamation, however, had its limits.

For many years, California courts restrained an arrestee's "absolute" right to bail in noncapital felony cases by imposing their own judicially created "public safety" exception. (*Underwood*, 9 Cal.3d at p. 348, citing *Bean v. County of Los Angeles* (1967) 252 Cal.App.2d 754; see also *In re Hanley* (1912) 18 Cal.App. 1, 4; Witkin, *supra*, § 151, pp. 143-144.) This unwritten exception was challenged in *Underwood*. In that case, the trial court denied bail to a defendant charged with multiple counts relating to the manufacturing, possession, and attempted detonation of a "live" pipe bomb, which were all noncapital offenses. The trial court denied bail on public safety grounds, reasoning that "[t]he time has come where we must restrain violence and death as much as possible. If it is necessary to resolve it by denying bail to those who can or are able to perpetrate murders and violence and crimes of that nature" then the court would so. (*Underwood*, *supra*, 9 Cal.3d at p. 347.)

On appeal, this court reversed and expressly rejected the state's argument that an implied public safety exception existed within California's constitutional and statutory framework governing the general right to bail. (*Id.* at p. 349.) This court held that the right to pretrial release on bail is the rule for noncapital offenses "[i]rrespective of the villiany of the accused or the heinousness of his offense ...." (*Id.* at p. 350, fn. 7, quoting *In re*

---

4. Former section 7 was redesignated as section 6 in the California Constitution of 1879. (Cal. Const. of 1879, art. I, § 6.)

Keddy (1951) 105 Cal.App.2d 215, 219-220.) This court further held that the sole purpose of California's bail system was to assure the defendant's appearance in court to stand trial for the charged offenses. (*Id*. at p. 348.) In so holding, however, this court was careful to note that " '[i]f the constitutional guarantees are wrong, let the people change them — not judges or legislators.' " (*Id*. at p. 350, quoting *Keddy*, 105 Cal.App.2d at p. 220.)

The people took heed of this court's advice, and in 1982 California voters overwhelmingly demanded that victim and public safety be the primary factors considered by a judge when deciding whether the criminally accused may be released from custody pretrial. Both Propositions 4 and 8 were drafted in direct response to *Underwood,* and both were placed on the June 1982 primary election ballot. (Ballot Pamp., Primary Elec. (June 8, 1982) analysis of Prop. 4 by the Legislative Analyst, p. 16 ("1982 Voter Guide"); *id*., argument in favor of Prop. 4, p. 18; *id.*, analysis of Prop. 8 by the Legislative Analyst, pp. 32, 54.)

Proposition 4, a legislative constitutional amendment, sought to amend section 12 so as to "broaden the circumstances under which the courts *may deny bail."* (1982 Voter Guide, analysis of Prop. 4 by Legislative Analyst, p. 16, italics added.)[5] The measure

---

5. Section 12 was originally added to the California Constitution by Proposition 7 in 1974. Proposition 7 was a legislative constitutional amendment entitled "Declaration of Rights" that substantially revised article I upon recommendations of the California Constitution Revision Commission. (Ballot Pamp., Gen. Elec. (Nov. 5, 1974) analysis of Prop. 7 by the Legislative Analyst, p. 26 ("1974 Voter Guide"); *id.*, argument in favor of Prop. 7, p. 28.) In that election, Proposition 7 repealed former section 6 as it had existed since 1879 (see *supra*, footnote 4), moved it to section 12, and added to it a provision giving courts the discretion to grant or deny OR release without limitation. (*People v. Standish* (2006) 38 Cal.4th 858, 890-891(conc. & dis. opn. of Chin, J.); 1974 Voter

added two additional categories of noncapital felony offenses that provided judges with the further discretion to deny pretrial release on bail when: "(1) Acts of violence on another person are involved and court finds substantial likelihood the person's release would result in great bodily harm to others. (2) The person has threatened another with great bodily harm and court finds substantial likelihood the person would carry out the threat." (1982 Voter Guide, official title and summary prepared by the Attorney General, p. 16.)

Also in the June 1982 election, voters were presented with Proposition 8, entitled the "Victims' Bill of Rights," which sought to "strengthen procedural and substantive safeguards for victims in our criminal justice system." (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 247.) Proposition 8 added section 28 to the California Constitution, which encompassed multiple rights for crime victims that "were aimed at achieving more severe punishment for, and more effective deterrence of, criminal acts, protecting the public from the premature release into society of criminal offenders, providing safety from crime to a particularly vulnerable group of victims, namely school pupils and staff, and assuring restitution for the victims of criminal acts." (*Ibid.*) Most notably for purposes of this case, Proposition 8 added a provision entitled "Public Safety Bail." (1982 Voter Guide, text of Prop. 8, § 3, subd. (e), p. 33.) The initiative proposed to repeal section 12 in its entirety and substitute section 28, subdivision (e) as the sole constitutional provision governing bail. (1982 Voter Guide, text of Prop. 8, § 2, p. 33; *Standish*, *supra*, 38 Cal.4th at p. 874.)

The electorate passed both Propositions 4 and 8. However, Proposition 4 received more yes votes than Proposition 8, which

---

Guide, text of Prop. 7, Tenth and Twenty-second at pp. 27, 71.)

eventually led to litigation over which of the two initiatives relating to bail and pretrial release governed. (*Standish*, *supra*, 38 Cal.4th at pp. 876-877.) In *Standish*, this court compared the two measures section by section and held that they were in direct conflict in at least three ways: (1) Proposition 8 sought to repeal section 12, whereas Proposition 4 sought to amend it; (2) Proposition 8 sought to rescind the court's discretion to grant OR release for serious felonies, whereas Proposition 4 left the decision within the court's discretion; and (3) Proposition 8 rendered pretrial release on bail discretionary and extended the restrictions imposed on bail to OR release, whereas Proposition 4 continued to make all offenders "bailable" subject to certain express exceptions. (*Id*. at p. 877.) Because Proposition 4 received more yes votes, the amended section 12 took effect, and the provisions of section 28, subdivision (e) as proposed by Proposition 8 did not. (*Id*. at pp. 877-878; see also *Brosnahan*, *supra*, 32 Cal.3d at p. 255.) However, because the bail provision of former section 28, subdivision (e) was the only provision that directly conflicted with section 12, it did not go into effect, but the remainder of section 28 did go into effect. (*People v. Barrow* (1991) 233 Cal.App.3d 721, 723; see also *Brosnahan*, at p. 255.)

In 2008, California voters sought to build upon and expand the section 28 rights given to crime victims when they passed Proposition 9, 2008 Cal. Stat. A-298. Proposition 9, known as the "Victims' Bill of Rights Act of 2008: Marsy's Law," significantly amended section 28 and in so doing, renumbered and amended the "Public Safety Bail" provisions of Proposition 8 that *Standish* had declared invalid. (Ballot Pamp., Gen. Elec. (Nov. 4, 2008) text of Prop. 9, § 4.1, pp. 128-130 ("2008 Voter Guide").) The changes made by Proposition 9 to Proposition 8's defunct "Public Safety Bail" provisions as presented to, and voted into law by, the electorate read:

"~~(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 on the record and included in the court's minutes." (*Id*., § 4.1, subd. (f)(3), p. 130; 2008 Cal. Stat. at p. A-303.)

This court now asks, when bail is denied in a noncapital case, whether the section 28, subdivision (f)(3) "Public Safety Bail" provisions of Proposition 9 govern or whether the bail provisions of section 12 govern, or, in the alternative, whether the two provisions can be reconciled.[6] The Court of Appeal held that the two are reconcilable. (*Kowalczyk*, 85 Cal.App.5th at pp. 682-686.) As discussed *supra*, it is Respondent's primary position that section 28, subdivision (f)(3) governs the denial of bail and their

---

6. This question was expressly left open in *In re Humphrey* (2021) 11 Cal.5th 135, 155, fn. 7.

well-reasoned answer brief on the merits provides this court with ample grounds for adopting their position. As also discussed *supra*, Respondent further argues in the alternative that it would also be a "reasonable outcome" for this court to agree with the Court of Appeal and hold that the two constitutional provisions are reconcilable so long as this court makes "clear that neither *Humphrey*, nor the reconciled applications of sections 12 and 28(f)(3) prohibit the setting of unaffordable bail." (AB 9.) In support of Respondent's alternative argument, amicus posits that the two provisions can be reconciled and that their reconciled application does not prohibit the court from setting money bail in an amount that may be above an arrestee's ability to pay.

B. Section 12 and Section 28, Subdivision (f)(3) Are Reconcilable.

The Court of Appeal held that the section 28, subdivision (f)(3) "Public Safety Bail" provisions of Proposition 9 are reconcilable with the bail provisions of section 12 and each can be given "full effect." (*Kowalczyk*, 85 Cal.App.5th at p. 686.) Amicus agrees and avers that the conflicts identified in *Standish* between section 12 (Proposition 4) and section 28, subdivision (e) (Proposition 8) were rectified by the drafters of Proposition 9.

Proposition 9 made two significant changes to Proposition 8's section 28, subdivision (e). First, unlike Proposition 8, Proposition 9 did not expressly seek to repeal section 12. In fact, there is no mention of section 12 anywhere in the measure or in the literature accompanying the measure. The Court of Appeal was correct to recognize that there is a "strong presumption against repeal by implication." (*Id.* at p. 685, citing *Western Oil & Gas Ass'n. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419-420.) This is especially true "where the prior act has been generally understood and acted upon." (*Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, 176.) As discussed *supra* in Part I.A., the right to release on bail as embodied within

section 12 was added to California's first Constitution in 1849 to make certain that all but a narrow class of people were "bailable." (*Underwood*, *supra*, 9 Cal.3d at p. 350, and fn. 6.) "To overcome the presumption [against implied repeal] the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together." (*Penziner*, 10 Cal.2d at p. 176.)

Second, Proposition 9 deleted the language identified as problematic in *Standish* that prohibited OR release of people accused of committing serious felonies so that now the decision to grant or deny OR release is fully within the court's discretion under both section 12 and section 28, subdivision (f)(3). Thus, the only remaining "conflict" as recognized by *Standish* potentially remains in the first sentence of both provisions: Section 12 states that "[a] person *shall* be released on bail ... ," whereas section 28, subdivision (f)(3) states "[a] person *may* be released on bail ...." (Italics added.)[7]

If the first sentences are read in isolation, they appear to remain in conflict with each other. Section 12 mandates bail, whereas section 28, subdivision (f)(3) makes bail discretionary. As *Standish* noted while interpreting a bail statute, "shall" is ordinarily deemed mandatory and "may" is deemed permissive. (38 Cal.4th at p. 869.) The Court of Appeal acknowledged this familiar principle of constitutional interpretation and narrowed the

---

7. The other conflict *Standish* identified within the third conflict relates to the factors a court must consider when making OR release decisions. But, as will be discussed, *infra*, OR release is discretionary under both provisions and these factors help guide a judge's decision. (See *In re York* (1995) 9 Cal.4th 1133, 1144) [court has authority to consider the danger to public safety when making OR release decisions].)

question to "[w]hat is the meaning of the seemingly permissive language in section 28(f)(3), and can it be reconciled with the mandatory language in section 12, which embodies a long-standing 'constitutional right to be released on bail pending trial' in noncapital cases subject to two exceptions?" (*Kowalczyk*, *supra*, 85 Cal.App.5th at pp. 682-683.)

When the two introductory sentences are read within the context of both bail provisions as a whole, and within the context of the case law, plus the electorate's intent in enacting both measures in subsequent elections, it appears that section 28, subdivision (f)(3) complements, rather than frustrates, section 12, subdivisions (b) and (c), and they both provide authority for a court to deny pretrial release on bail.

As it currently stands, section 12 provides:

> "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 on 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 evidence 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." (Cal. Const., art. I, § 12.)

The "facts are evident" or "the presumption great" standards found in section 12 limit the bailable nature of a charged, but unproven, offense. (*In re Podesto* (1976) 15 Cal.3d 921, 931; see also *In re White* (2020) 9 Cal.5th 455, 463 ["evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal"].) With respect to noncapital felonies, in addition to mandating that "the facts are evident or the presumption great," section 12, subdivision (b) requires clear and convincing evidence that the charged offenses involved "acts of violence" or "felony sexual assault" on another person and "a substantial likelihood the person's release would result in great bodily harm to others." Section 12, subdivision (c) requires clear and convincing evidence that the accused "has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released."

"Clear and convincing evidence requires a specific type of showing — one demonstrating a 'high probability' that the fact or charge is true." (*White*, 9 Cal.5th at p. 467.) The specific circumstances must be examined on a case-by-case basis, and "[t]he evidence must be so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind." (*In re Nordin* (1983) 143 Cal.App.3d 538, 543, quoting *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193, internal quotation marks omitted.) These two exceptions and the evidence required to prove both are additional limitations that substantially narrow the number of noncapital felony defendants for whom pretrial release on bail can be denied.

As previously discussed, the general rule is that pretrial release on bail is a right in California. Capital crimes were the sole exception to the general rule and remain an exception under both constitutional provisions today. (*People v. Tinder* (1862) 19 Cal. 539, 542; Cal. Const., art. I, § 12, subd. (a), § 28, subd. (f)(3).) In 1982, the electorate overwhelmingly decided when they voted in favor of Proposition 4 that judges should also be able to deny release on bail to people accused of certain noncapital felony offenses when specified additional requirements are met.[8] As a result, pretrial release on bail for these noncapital felony offenses is also a matter of judicial discretion. (*White*, *supra*, 9 Cal.5th at pp. 469-470.)

The driving force behind Proposition 4's addition of subsections (b) and (c) to section 12 was to protect and promote public safety. This is evidenced by the argument in favor of Proposition 4 in the voter information materials:

> "Present law does not allow judges in making bail decisions to consider public safety or the likelihood that one who is accused of a felony will commit violent acts while out on bail awaiting trial. Proposition 4 will change this law and provide the judges with a necessary legal tool to protect the public from repeat violent offenders." (1982 Voter Guide, argument in favor of Prop. 4, p. 18.)

Although "[i]t is not the intention of the law to punish an accused person by imprisoning him in advance of his trial" (*Ex parte Duncan* (1879) 54 Cal. 75, 77), preventative detention of dangerous individuals pretrial without bail "is a legitimate regulatory goal." (*United States v. Salerno* (1987) 481 U.S. 739, 747.)

---

8. Section 12 was slightly amended by Proposition 189 in 1994 to add felony sexual assault offenses to the list of crimes excepted from the right to bail. (Supp. Ballot Pamp., Gen. Elec. (Nov. 8, 1994) official title and summary prepared by the Attorney General, p. 6.)

Proposition 4 and Proposition 8 shared the same overall goal which was to protect public and victim safety. Proposition 8 ran into trouble when it included a provision that sought to repeal section 12. The attempted repeal, among other reasons, rendered the two propositions in direct conflict, which led to the demise of Proposition 8's bail provision.

The inclusion of Proposition 9 in the 2008 general election ballot revived the defunct "Public Safety Bail" provisions. Section 28 provides victims with the constitutional right "[t]o be reasonably protected from the defendant" and "[t]o be heard ... at any proceeding ... involving a post-arrest release decision...." (Cal. Const., art. I, § 28, subds. (b)(2), (b)(8).) To effectuate these rights, section 28, subdivision (f)(3) mandates that all pretrial release decisions (grant or denial) must primarily focus on the danger an accused poses to the victim and the public. Victims are given the right to notice, appear, and speak at the hearings in which pretrial release is being considered. Section 28 gave victims a voice. They now have the right to appear in court and explain why the accused's release would compromise the safety of themselves or others.

When analyzing whether bail should be denied, section 28, subdivision (f)(3) requires consideration of (1) the seriousness of the offense charged, (2) the previous criminal record of the arrestee, and (3) the probability of his or her appearing at the trial or hearing on the case.[9] In addition to these three factors, section 28, subdivision (f)(3) further articulates and mandates that the court consider what is already enmeshed within section 12, subdivisions (b) and (c)—the protection of the public and the safety of the victim. (Cal. Const., art. I, § 28, subd. (f)(3).)

---

9. Section 12 requires consideration of these same three factors when the court is "fixing the amount of bail, ..." (Cal. Const., art. I, § 12.)

As discussed *supra*, section 12, subdivisions (b) and (c) lay out the categories of excepted noncapital felony offenses. Section 12, as enacted by Proposition 4, was in effect when Proposition 9 was presented to the electorate in 2008. "Both the Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them." (*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332, citing *Viking Pools, Inc v. Maloney* (1989) 48 Cal.3d 602, 609; see also *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 934 ["we generally presume electors are aware of existing law"].) Thus, when the voters went to the polls on November 4, 2008, they presumably understood that the California Constitution guarantees a right to "release[] on bail by sufficient sureties," to all persons unless the crime he or she committed falls within one of three narrow categories of felony offenses. (Cal. Const., art. I, § 12.) If the arrestee's crime fell within one of those three categories, then voters understood that pretrial release may be denied. In those circumstances, section 28, subdivision (f)(3) acknowledges that "[a] person *may* be released on bail by sufficient sureties," and the constitutional provision enumerates five factors that must be evaluated by a judge when making a release decision, and solidifies that public and victim safety "shall be the primary considerations." (Cal. Const., art. I, § 28, subd. (f)(3), italics added; see also Pen. Code, § 1275.)

As stated by the Court of Appeal,

> "[g]iven that section 12 was fully operative when Proposition 9 was presented to the voters and approved, the most natural reading of section 28 (f)(3)'s phrase '[a] person *may* be released on bail by sufficient sureties' is that the phrase is a declarative statement of existing law.... [T]he phrase acknowledges that a person may or may not be released on bail,

> consistent with the dictates in section 12 that a person is generally entitled to bail release in noncapital cases except under the circumstances articulated in section 12 (b) and (c) ...." (*Kowalczyk*, *supra*, 85 Cal.App.5th at pp. 683-684.)

While "most natural" is debatable, this interpretation is plausible, and it avoids the difficulty of implied repeal.

Thus, both section 12 and section 28, subdivision (f)(3) can govern the denial of bail in noncapital cases. Reading them together in this manner promotes, rather than frustrates, the purpose and intent of the electorate in the past and currently.

II. Pretrial bail can be set in an amount that may be above an arrestee's ability to pay when it is necessary to further the state's compelling interests in adequately assuring an arrestee's appearance in court and in protecting victim and public safety and there are no other nonmonetary conditions of release that can reasonably protect those interests.

Section 12 details the three types of felony offenses that are excepted from an arrestee's general entitlement to pretrial release on bail. Even if an arrestee's offense falls within one of section 12's exceptions, and the court finds the evidentiary requirements to deny release on bail are met, a trial court is never required to deny bail. (*White*, *supra*, 9 Cal.5th at p. 469 [denial of bail lies entirely within the discretion of the court].) If the evidence is clear and convincing that it would be dangerous to the victim and/or the public if the accused were to be released, the court can choose to deny release on bail. (See *ibid.*; see also Pen. Code, § 1275, subd. (a).) If, on the other hand, the court finds that the evidence is not clear and convincing, or, if after an "individualized consideration" of the factors articulated in section 12, section 28, subdivision (f)(3) and Penal Code section 1275, the court decides that the balance weighs in favor of pretrial release, then "[a] person shall be released on bail by sufficient sureties ...."

(Cal. Const., art. I, § 12; see also *In re Humphrey* (2021) 11 Cal.5th 135, 152.) A court's decision to allow for pretrail release under these latter circumstances triggers the second question now being asked by this court: "May a superior court ever set pretrial bail above an arrestee's ability to pay?"

A. The Humphrey Decision.

If an arrestee can be "admitted to bail," *i.e.*, pretrial release is not precluded, California currently authorizes four different methods of pretrial release, only one of which has a monetary requirement: (1) OR; (2) OR under supervision; (3) money bail; and (4) pretrial diversion.[10] (*Humphrey*, *supra*, 11 Cal.5th at p. 147.) The California Penal Code governs the day-to-day administration of bail practices and pretrial release. It incorporates the provisions of the California Constitution and sets forth detailed standards and procedures to help guide the exercise of the court's pretrial release authority and decisions.

In *Humphrey*, *supra*, this court examined the constitutionality of money bail and the role public and victim safety play in making bail determinations. In that case, 66-year-old Kenneth Humphrey was arrested and charged with first-degree residential robbery, first-degree residential burglary, inflicting injury on an elder adult, and theft from an elder adult. (*Id*. at pp. 143-144.) He was also charged with four prior strikes and four prior serious

---

10. "[P]retrial diversion refers to the procedure of postponing prosecution of an offense filed as a misdemeanor either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication." (Pen. Code, § 1001.1.) "If the divertee has performed satisfactorily during the period of diversion, the criminal charges shall be dismissed at the end of the period of diversion." (Pen. Code, § 1001.7.) This brief will not address pretrial diversion because it is not applicable to the facts of this case.

felony convictions for robbery or attempted robbery. (*Id.* at p. 144.)

Humphrey's request for release on his OR without financial conditions was denied at his arraignment. (*Ibid.*) His criminal history was lengthy and the trial court noted that even though his previous convictions were older, the seriousness of the crime, the vulnerability of the victim, and the recommendation against OR release from pretrial service's Public Safety Assessment Report guided the judge's decision to deny OR release. (*Ibid.*) Bail was then set at $600,000 pursuant to the county bail schedule. (*Ibid.*) At a subsequent bail hearing, Humphrey again sought OR release or, alternatively, a reduction in his bail amount. (*Id.* at p. 145.) The trial court again denied OR release, but chose to reduce his bail to $350,000. (*Ibid.*) Humphrey's attorney informed the court that his client could not afford the high bail amount. (*Ibid.*) The court did not inquire into Humphrey's ability to afford bail, nor into whether any nonfinancial conditions of release could address public safety concerns or assure his appearance in court. (*Ibid.*)

On review, this court ultimately found that it is unconstitutional to detain an arrestee pretrial "solely because" he or she lacks the financial resources to pay money bail and, when setting bail, courts must consider an arrestee's ability to pay in conjunction with the "efficacy of less restrictive alternatives." (*Id.* at pp. 151-152.) In so holding, this court formulated the following "general framework" for courts to follow when deciding what form of pretrial release is appropriate under the individual circumstances of each case:

(1) "In those cases where the arrestee poses little or no risk of flight or harm to others, the court may offer OR release with appropriate conditions. (See Pen. Code, § 1270.)" (*Id.* at p. 154.)

(2) "Where the record reflects the risk of flight or a risk to public or victim safety, the court should consider whether nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial." (*Ibid*.)

(3) "If the court concludes that money bail is reasonably necessary, then the court must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and — unless there is a valid basis for detention — set bail at a level the arrestee can reasonably afford." (*Ibid*.)

(4) "And if a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect those interests." (*Ibid*.)

The *Humphrey* court made it clear that all bail determinations made pursuant to this framework first requires an "individualized consideration" of: the protection of the public, the safety of the victim, the seriousness of the offense, the arrestee's previous criminal record, and the probability of the arrestee's appearance at trial. (*Id*. at p. 152, citing Cal. Const., art. I, §§ 12, 28, subds. (b)(3), (f)(3); Pen. Code, § 1275, subd. (a)(1).) The court must also consider evidence of the arrestee's past court appearances, the maximum potential sentence that may be imposed, and danger to others if released. (Pen. Code, § 1270.1, subd. (c).)

With these considerations in mind, a judge is required to "careful[ly] consider[]" each "individual arrestee's circumstances," "strik[e] the proper balance between the government's interests and an individual's pretrial right to liberty," and decide if the arrestee should be released on OR (with or without supervision)

or on money bail. (*Id*. at p. 156; *In re York* (1995) 9 Cal.4th 1133, 1141; Pen. Code, §§ 1270, 1275, 1318.)

Humphrey, however, does not require a court to set money bail in an amount an arrestee can afford in all cases. Rather, *Humphrey* simply prohibits courts from blindly adhering to a uniform countywide bail schedule without further inquiry into, and the balancing of, all relevant circumstances of each arrestee's case. *Humphrey's* sliding scale approach requires courts to tailor each bail decision from least restrictive (OR) to most restrictive (money bail).

B. Release on One's Own Recognizance is a Discretionary Alternative to Money Bail.

Once a court has thoroughly evaluated the evidence presented and all of the required relevant factors, pursuant to *Humphrey's* general framework, the first two pretrial release options a court should consider is whether to allow the arrestee's release on OR or OR with nonfinancial conditions. (*Humphrey*, *supra*, 11 Cal.5th at p. 154.) If a judge concludes that OR release is appropriate under the circumstances of the case (*i.e.*, low risk of flight and little risk to public and victim safety), an arrestee can be released regardless of financial status. In doing so, a court can further impose reasonable conditions designed to prevent and deter further crime. (Pen. Code, § 1318, subd. (a).)[11]

---

11. "[I]n view of the inability of certain defendants to post bail, the Legislature clearly had a rational basis for concluding that public safety would be enhanced if such defendants, when afforded the leniency of a bail-free release, were required to comply with those reasonable conditions that a court or magistrate, in his or her discretion, believed to be necessary in order to deter further criminal conduct." (*York*, 9 Cal.4th at p. 1152.)

OR release and release on bail are "alternative and complementary systems" that encompass procedures that are "separate and distinct." (*Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1330-1331, quoting *Van Atta v. Scott* (1980) 27 Cal.3d 424, 452.) Release on OR is always a matter of judicial discretion. (Cal. Const., art. I, §§ 12, 28, subd. (f)(3); Pen. Code, § 1270.) The OR clause was added to the California Constitution in 1974 as a " 'desired alternative to the bail system, which frequently works an injustice on those who cannot afford to post a bail bond.' " (*Standish*, 38 Cal.4th at p. 890, italics omitted (conc. & dis. opn. of Chin, J.)

In cases involving certain serious felonies, a hearing must be held in open court before an arrestee can be released on OR. (Pen. Code, § 1270.1.) At this hearing, the court is to consider "the potential danger to other persons, including threats that have been made by the detained person and any past acts of violence. *The court shall also consider* any evidence offered by the detained person regarding the detained person's ties to the community and *ability to post bond*." (Pen. Code, § 1270.1, subd. (c), italics added.)

In this case, the trial court denied Kowalczyk's request for OR release because it had public safety and flight risk concerns. (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 673.) Kowalczyk's rap sheet was over 100 pages long, documenting 64 prior convictions, four of which were for driving under the influence. (*Ibid*.) His convictions "spanned multiple states and multiple counties in California." (*Ibid*.) Kowalczyk, who was unemployed and unhoused, received the maximum score of 14 on the Virginia Pretrial Risk Assessment Instrument and his pretrial services report stated that in the previous five years, Kowalczyk had failed to abide by his supervised OR release conditions that had been imposed upon him in those other cases. (*Ibid*.) Kowalczyk's extensive criminal history and his total disregard of prior OR release

conditions provided the trial court with ample reasons to deny his request for OR release in this case and was completely within the court's discretion.

C. "Sufficient Sureties."

If after a trial court finds that OR release is not appropriate under the individual circumstances of the case, and instead finds that "a financial condition is nonetheless necessary," the court can set money bail in an amount it considers necessary to assure the arrestee's appearance at trial and for the safety of the victim or public. (*Humphrey*, *supra*, 11 Cal.5th at p. 143.)

Both section 12 and section 28, subdivision (f)(3) permit pretrial release from custody on bail "by sufficient sureties." "A 'surety' is '1. Someone who is primarily liable for paying another's debt or performing another's obligation' or '2. A formal assurance; esp., a pledge, bond, guarantee, or security given for the fulfillment of an undertaking.' " (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 687, quoting Black's Law Dictionary (11th ed. 2019) p. 1742, col. 2, p. 1743, col. 2.) This latter phrase is significant because money bail in and of itself serves a single purpose — to provide incentive for the accused to appear at all future court hearings. (*Ex parte Ruef* (1908) 8 Cal.App. 468, 471.) This is true whether the accused pays the full amount of bail in cash or property him or herself (or via a friend or family member), or relies on a commercial bail bond for financial assistance. If the accused absconds, the monetary penalty can be significant. (See Pen. Code, §§ 1305-1308.) If, on the other hand, the accused appears at all future court hearings, then the posted bail is returned and the bail bond is discharged. (Karnow, *Setting Bail for Public Safety* (2008) 13 Berkeley J. Crim. L. 1, 4.)

The Court of Appeal construed the phrase "sufficient sureties" by reading it within section 12 as a whole and in conjunction

with section 28, subdivision (f)(3)'s public and victim safety considerations and found that "a person has a right to be released upon the posting of a sufficient security which a court, in its discretion, determines is adequate to accomplish the purposes of bail, i.e., to protect public and victim safety and to ensure a defendant's presence in court." (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 687.) If an arrestee can only afford $10, is that amount considered "sufficient security" to provide incentive for the arrestee to appear at all future court hearings and to protect victim and public safety? Probably not.

This court acknowledged that "just as neither money bail (nor any other condition of release) can guarantee than an arrestee will show up in court, no condition of release can entirely *eliminate* the risk that an arrestee may harm some member of the public." (*Humphrey*, *supra*, 11 Cal.5th at p. 154.) The inability to predict whether an arrestee released pretrial on money bail is going to abide by the conditions of release is unsettling. For this reason, even though *Humphrey* requires a trial court to consider an arrestee's ability to pay, the opinion does not prohibit a court "from setting bail at an amount beyond a[n] ... [arrestee's] means when necessitated by the circumstances presented." (*Kowalczyk*, 85 Cal.App.5th at p. 689.)

Judicial creation of a constitutional right to be released on insufficient sureties would be contrary to the plain language of both section 12 and section 28, subdivision (f)(3) and illegitimate. *Humphrey* did not create one, and the court should not create one in this case.

D. Kowalczyk Was Not Being Held Pretrial "Solely Because" He Lacked the Financial Resources to Post Money Bail.

When a court sets money bail that may be above an arrestee's ability to pay after finding that the risk of flight is high and

public or victim safety would be compromised, then the arrestee is not being held "solely because" he or she lacks the financial resources to post bail which is all that *Humphrey* prohibits.

In *Humphrey*, this court found that:

> "In unusual circumstances, the need to protect community safety may conflict with the arrestee's fundamental right to pretrial liberty—a right that also generally protects an arrestee from being subject to a monetary condition of release the arrestee can't satisfy—to such an extent that no option other than refusing pretrial release can reasonably vindicate the state's compelling interests. In order to detain an arrestee under those circumstances, a court must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements ....
>
> "Detention in these narrow circumstances doesn't depend on the arrestee's financial condition. Rather, it depends on the insufficiency of less restrictive conditions to vindicate compelling government interests: the safety of the victim and the public more generally or the integrity of the criminal proceedings." (*Humphrey*, *supra*, 11 Cal.5th at p. 143.)

Undoubtedly, courts have a difficult task in setting cash bail that permits release yet also ensures the safety of the victim and public. (Karnow, *supra*, 13 Berkeley J. Crim. L. at pp. 1-2.) The only method of ensuring public and victim safety is to preventatively detain an arrestee until a jury of his or her peers renders a verdict of guilty or not guilty. However, as discussed, in California " 'liberty is the norm' " and preventive detention is the exception. (*Humphrey*, *supra*, 11 Cal.5th at p. 156, quoting *United States v. Salerno* (1987) 481 U.S. 739, 755.)

In regard to money bail, the California Constitution simply states that "[e]xcessive bail may not be required." (Cal. Const., art. I, § 12; Cal. Const., art. I, § 28, subd. (f)(3).) "It is well settled, even in cases involving bail after indictment and before convic-

tion, that bail is not to be deemed excessive merely because the person under indictment cannot give the bail required of him." (*In re Application of Burnette* (1939) 35 Cal.App.2d 358, 360-361.) Long ago, this court recognized that

> "the extent of the pecuniary ability of a prisoner to furnish bail is a circumstance among other circumstances to be considered in fixing the amount in which it is to be required, but it is not in itself controlling. If [it were], then the fact that the prisoner had no means of his own, and no friends who were able or willing to become sureties for him, even in the smallest sum, would constitute a case of excessive bail, and would entitle him to go at large upon his own recognizance." (*Ex parte Duncan* (1879) 54 Cal. 75, 78.)

Under *Humphrey*, if the court finds that "money bail is reasonably necessary," the court must examine the arrestee's ability to pay and consider nonfinancial conditions of release. (11 Cal.5th at p. 152.) Such nonfinancial conditions may include electronic monitoring, stay away orders, or drug and alcohol testing and treatment. (*Id.* at p. 154.) In this case, the trial court considered Kowalczyk's inability to pay bail, and also considered his request for OR release with drug conditions and electronic monitoring, and found that because of Kowalczyk's "unprecedented 'level of recidivism,' ... no nonfinancial or financial conditions could accomplish the goals of protecting the public or ensuring [his] appearance at future court proceedings." (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 673.)

Thus, consistent with *Humphrey,* the trial court thoroughly considered Kowalczyk's lack of financial resources and determined that his potential danger to the public and the risk he may not appear at future hearings made it so "no condition short of detention could suffice" and that his "[d]etention in these narrow circumstances [did not] depend on the arrestee's financial condition. [But] [r]ather, ... on the insufficiency of less restrictive

conditions to vindicate compelling government interests: the safety of the victim and the public ... or the integrity of the criminal proceedings." (*Humphrey*, *supra*, 11 Cal.5th at p. 143.)

CONCLUSION

The judgment of the Court of Appeal for the First Appellate District, Division Three dismissing Kowalczyk's petition for habeas corpus as moot should be affirmed.

Date: November 8, 2023

Respectfully Submitted,

KYMBERLEE C. STAPLETON
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, subd. (c)(1)

I, Kymberlee C. Stapleton, hereby certify that the attached **BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NON-TITLE RESPONDENT** contains 8,673 words, as indicated by the computer program, WordPerfect, used to prepare the brief.

Date: November 8, 2023

Respectfully Submitted,

KYMBERLEE C. STAPLETON
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816.

On the date below, I electronically filed the attached document **APPLICATION FOR PERMISSION TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NON-TITLE RESPONDENT** by transmitting a true copy using the TrueFiling system. All participants in the case are registered TrueFiling users and will be served by the TrueFiling system.

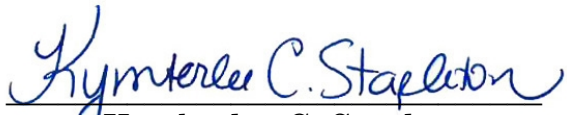
Marsanne Weese
Rose Mishaan
Law Offices of Marsanne Weese
marsanne@marsannelaw.com
rose@marsannelaw.com
Attorneys for Petitioner

Stephen M. Wagstaffe
District Attorney of San Mateo Co.
Joshua Martin
Deputy District Attorney
jxmartin@smcgov.org
Attorneys for Non-Title Respondent

In addition, I sent a copy via U.S. mail to:

San Mateo County Superior Court
For: Honorable Susan Greenberg
Department 3, Courtroom 2B
Southern Court
400 County Center
Redwood City, CA 94063

Executed on November 8, 2023, Sacramento, California.



Kymberlee C. Stapleton