CASE NO. S277910

IN THE SUPREME COURT OF CALIFORNIA

In Re GERALD KOWALCZYK,
on Habeas Corpus.

BRIEF OF AMICI CURIAE CIVIL RIGHTS CORPS AND THE ACLU OF NORTHERN CALIFORNIA IN SUPPORT OF PETITIONER

Court of Appeal Case No. A161977 (First Appellate District), Superior Court Case No. 21-NF-003700-A (County of San Mateo), Hon. Susan Greenberg, Hon. Elizabeth Lee, Hon. Jeffrey Finigan

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ISSUE PRESENTED

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?

INTERESTS OF AMICI CURIAE

Civil Rights Corps ("CRC") is a non-profit organization dedicated to challenging systemic injustice in the United States' legal system. CRC works with survivors of violence, individuals accused and convicted of crimes, families and communities, and government officials to create a legal system that promotes safety, equality, and freedom.

CRC has developed unique and unparalleled expertise on the bail system in the United States. It has spent years studying the history of the bail system in American courts and modern practices regarding bail. It has also worked with state supreme courts, attorneys general, local judges, state and local legislators, scholars, prosecutors, pretrial-services agencies, and public defenders to design and implement effective and fair bail practices. In addition, CRC has litigated constitutional issues relating to bail systems across the country. That includes California, where CRC has litigated numerous cases, including *In re Humphrey* (2021) 11 Cal.5th 135, 156 (*Humphrey*). CRC pursues constitutional litigation to ensure that individuals are not detained pretrial simply because they are poor or otherwise detained in violation of their constitutional rights.

In fact, CRC litigated the first question under review in this case—*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?*—in *In re Humphrey,* and argued the question before this Court. CRC was also previously counsel for Mr. Kowalczyk and briefed and argued this question in the Court of Appeal. At the request of his court-appointed counsel, CRC withdrew from representing Mr. Kowalczyk on May 8, 2023. (Mot. to withdraw (May 8, 2023), S277910.)

The ACLU of Northern California ("ACLU NorCal") is an affiliate of the national ACLU, a nationwide nonprofit, non-partisan 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 the matter of *In re Humphrey* (2018) 19 Cal. App. 5th 1006, in which they briefed the first question under review in this case extensively. 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.

INTRODUCTION

Since it was first ratified in 1849, the California Constitution has contained a right-to-bail clause. Enshrined now in article I, section 12, that provision guarantees the right to "release[] on bail by sufficient sureties" to all but those who fall within three enumerated exceptions. (Cal. Const. art. I § 12.) California's voters have, twice, carefully considered and sparingly narrowed that right, including in 1994 when they defeated a voter initiative designed to repeal it and grant courts authority to detain people pretrial in any case. (Pet. Add'l Br. (July 27, 2022) A162977, pp. 16-21.)

The Court of Appeal correctly held that section 12 continues to govern pretrial detention in California. (*In re Kowalczyk* (2021) 85 Cal.App.5th 667, 682-686 (*Kowalczyk*); *see also* Pet. Add'l Br. (July 27, 2022) A162977 [arguing that section 12 continues to govern pretrial detention in California].) But the Court of Appeal went further and held that courts could simply bypass the restrictions California voters have set on pretrial detention by imposing unaffordable money bail in order to detain people in circumstances where detention is prohibited. (*Kowalczyk, supra*, 85 Cal.App.5th at pp. 686-692.) That question—whether courts may set unaffordable money bail in order to detain people who could not constitutionally be detained outright—was not certified for review and had not been briefed by either party. Nevertheless, because the Court of Appeal's decision was predicated on this issue, amici address that second holding.

The *Kowalczyk* court is alone in holding that courts may bypass constitutional limits on detention by setting unaffordable bail. Every other appellate court to have considered the question—including this one—has held that unaffordable money bail orders are

the functional equivalent of formal detention orders, and must be governed by the same constitutional standards. (Part II, *infra*.) More specifically, at least fourteen other state courts—each governed by materially identical right-to-bail clauses—have considered whether courts may set unaffordable money bail in order to detain a bailable defendant. *All* have held that they may not. (Part I.C, *infra*.)

The rule amici advance in this brief—that courts may not bypass the right to bail by imposing unaffordable money bail to detain a pretrial defendant, rather than issuing a formal detention order—comports with the plain language of section 12, its legislative history, the body of case law governing the setting of money bail, and common sense. Under the Court of Appeal's ruling, the exacting limitations on pretrial detention imposed by section 12, enshrined by the California Constitution's original framers, and repeatedly affirmed by California's voters, would be utterly meaningless in practice.

This Court should join all the other courts that have considered this question and hold that courts may not set unaffordable money bail in order to detain those who have the right to release on bail under article I, section 12.

SUMMARY OF ARGUMENT

I. The California Constitution does not allow courts to set unaffordable money bail in order to detain someone who has the right to release on bail. Section 12's plain language limits orders of detention to those who fall within a set of specifically enumerated circumstances. Allowing courts to bypass these standards by setting unaffordable money bail in lieu of a transparent detention order would render those limitations meaningless in practice. It would also vitiate the intent of the constitution's drafters, who guaranteed the

right to pretrial release to all defendants who do not fall within the right-to-bail clause's enumerated exceptions. Such a rule would also be anomalous: to amici's knowledge, *every* state court with a materially identical right-to-bail clause that has considered the question has concluded that courts may not set unaffordable money bail in order to detain someone who has a right to bail.

II. This Court's decision in *Humphrey* compels the same conclusion. In *Humphrey*, this Court held that unaffordable money bail is the "functional equivalent" of an order of detention and that all orders resulting in someone's pretrial detention must comply with the state and federal constitutional requirements governing detention orders. (*Humphrey, supra,* 11 Cal.5th at p. 146.) And, assuming that *Humphrey ever* allows courts to set unaffordable money bail (a question this Court need not answer here), courts can only do so knowing that detention will result and first finding that the person's *detention is necessary*.

It is not possible, as the Court of Appeal suggested, for a court to satisfy both section 12 and *Humphrey* by setting unaffordable money bail and subjectively intending it to address flight or public safety risk separate and apart from the bail amount's role as an order of detention. First, *Humphrey* explicitly requires courts to either set conditions of release that will not result in detention or to order someone detained after finding, among other things, that their *detention* is necessary. Second, unaffordable money bail can never be "necessary" as anything other than a detention order: it cannot operate as an incentive because it is unattainable and would be too speculative a finding to ever satisfy strict scrutiny.

III. The Court of Appeal's holding that courts may use unaffordable money bail to detain those whom they could not order

detained outright—made without the benefit of briefing on the question—rests upon the misapplication of two strands of case law.

The first is a pair of 19th century California cases holding that money bail is not *per se* excessive merely because it is unaffordable, from which the Court of Appeal extrapolated that unaffordable money bail also would not violate the right-to-bail clause. But the excessive-bail clause prohibits setting money bail excessively in relation to the charged offense, regardless of whether or not the person has the ability to pay. In contrast, the right-to-bail clause prohibits pretrial detention for all but those who fall within its enumerated circumstances. Thus, a court order may violate the right-to-bail clause without violating the excessive-bail clause, and the cases cited by the Court of Appeal are inapposite.

The Court of Appeal next invoked a pair of federal cases concerning the federal Bail Reform Act, a statute governing the setting of bail in federal court, for the principle that federal courts are permitted to set unaffordable money bail in cases where they could not order detention outright. That was incorrect. Properly understood, the Act requires that, once a court concludes an unaffordable amount of bail is necessary, it must proceed with a formal detention hearing and issue a detention order if the standards for detention are met, and release the person if they are not. In any event, the federal Bail Reform Act does not control this Court's interpretation of California's right-to-bail clause.

The federal rule is thus consistent with the one proposed by this amicus and by every other court to have considered the question: courts may not bypass specific restrictions on pretrial detention by setting unaffordable money bail when they could not order detention outright.

ARGUMENT

I. Courts May Not Order People Detained Pretrial Outside the Bounds of Section 12

Courts may not bypass the specific restrictions on pretrial detention in section 12 by setting money bail in an amount they know to be unaffordable rather than issuing a no-bail-allowed order of detention. Where someone is entitled to release on bail under section 12, "the court may neither deny bail nor set it in a sum that is the functional equivalent of no bail." (*In re Christie* (2001) 92 Cal.App.4th 1105, 1109.) This is clear from section 12's plain language, the history of the provision's enactment, and case law from other state courts interpreting materially identical provisions.

A. The plain language of section 12 forbids courts from ordering people detained pretrial except in limited, enumerated circumstances

When interpreting constitutional provisions, a court's goal is to "determine and effectuate the intent of those who enacted the constitutional provision," and this inquiry begins "by examining the constitutional text, giving the words their ordinary meanings." (*Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 418.) The relevant text of article I, section 12 reads:

> 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 [emphasis added].)

By its plain language, section 12 clearly delineates the limited circumstances under which pretrial detention is permissible, entitling all others to release on bail. The term "shall" denotes a mandatory requirement. (*People v. Standish* (2006) 38 Cal.4th 858, 869.) The word "except," when used as a preposition before a list, signals a closed universe of exceptions—here, to the right to release on bail. (*In re O'Connor* (2022) 87 Cal.App.5th 90, 104 ["We may look to dictionary definitions to determine the ordinary meaning of the language in a constitutional provision."] [citing *In re Gadlin* (2020) 10 Cal.5th 915, 933]; "except." *Merriam-Webster.com*. Merriam-Webster, 2023. Web. 22 Sept. 2023 [defining "except", when used as a proposition as "with the exclusion or exception of"].) "[R]eleased on bail" self-evidently means freedom from confinement. ("release." *Merriam-Webster.com*. Merriam-Webster, 2023. Web. 22 Sept. 2023 [defining "release" when used as a transitive verb as "to set free from restraint, confinement, or servitude"].) And, as explained below, the phrase "by sufficient sureties" is a legal term of art that describes the mechanism through which release is to be accomplished. (Part I.B, *infra*.) It has never,

aside from the decision below, been interpreted to swallow the rule by enabling detention in unenumerated circumstances. (*Ibid*.)

Thus, the plain language of section 12 forbids detention—whether by a transparent detention order, or by unaffordable money bail (*see Humphrey, supra,* 11 Cal.5th at p. 146 [unaffordable money bail is the "functional equivalent of a pretrial detention order"])—for misdemeanors or non-enumerated felonies, or where there is insufficient evidence of guilt or dangerousness. This unambiguous language is dispositive. (*See People v. Valencia* (2017) 3 Cal.5th 347, 357 [if ordinary meaning of constitutional provision is "clear and unambiguous, there is no need for construction"] [citing *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735].)

Even if the constitutional text were *not* as plain as it is in this case, two canons of construction would compel the same reading. (*See People v. Garcia* (2016) 62 Cal.4th 1116, 1124 ["Canons of construction . . . [are] tools that can help us do what we always aspire to do when construing a statute: avoid redundancies, reach a reasonable conclusion about the meaning of terms, and give effect to the Legislature's purpose"]; *see*, *e.g.*, *Morse v. Municipal Court* (1974) 13 Cal.3d 149, 159 [interpretation of legislative intent based on plain meaning is "reinforced by an application of several pertinent canons of construction"].)

First, *expressio unius est exclusio alterius* is the principle that, when a provision includes a list, courts are to presume that list is exhaustive. (*Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 513-15 [discussing the canon generally]*; In re J.W.* (2002) 29 Cal.4th 200, 209*; Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) Here, section 12 lists three circumstances in which courts are authorized to order someone detained pretrial. This Court should

presume that list is exhaustive, meaning that the drafters of section 12 contemplated pretrial detention only under the circumstances outlined in subsections (a), (b), and (c).

Second, courts should not adopt an interpretation that renders language in a legal provision meaningless, (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105), or surplusage (*see Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 390 ["We do not . . . construe statutory provisions so as to render them superfluous."] [*citing Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22].) Permitting superior courts to detain a defendant pretrial in *any* case by setting unaffordable money bail would render section 12's articulation of the limited circumstances under which courts may issue a transparent detention order meaningless.

As this Court recently held in *In re White*, section 12 dictates that a presumptively innocent person may only be ordered detained prior to trial if a court finds that "the record contains not only evidence of a qualifying offense sufficient to sustain a hypothetical verdict of guilt on appeal", but also "clear and convincing evidence establishing a substantial likelihood that the defendant's release would result in great bodily harm to others." (*In re White* (2020) 9 Cal.5th 455, 471 (*White*).)

Yet, if the State could simply set unaffordable money bail in order to detain people who do not qualify for detention under section 12, it could avoid the requirement that, as a prerequisite to pretrial detention, it must put forward evidence as to the person's guilt that would be sufficient to sustain a conviction on appeal. (*White, supra,* 9 Cal.5th at p. 471.) It would grant the State the power to detain people in cases where they are not charged with a "qualifying offense" (*ibid.*), such as misdemeanors and nonviolent felonies. And

it would permit detention even where a court has not found a "substantial likelihood that the defendant's release would result in great bodily harm to others." (*Ibid.*)

In short, allowing courts to bypass section 12's limitations on pretrial detention by utilizing a different, but equally effective, means of detention contravenes the plain language of section 12 and the canons of construction governing its interpretation—not least, the requirement that courts not render the constitutional language completely irrelevant in practice.

B. The history of section 12's enactment confirms it was intended to prevent courts from using unaffordable money bail to detain people who have a right to release

Section 12's history makes clear that it was intended to prevent courts from ordering a person detained outside its enumerated exceptions, whether by a transparent detention order or setting unaffordable bail. That is because the term "bail" has long been synonymous with "release," and the drafters of section 12 intended to codify this understanding.

The binary distinction between "bail" (granting pretrial release, with or without conditions) and "no bail" (ordering pretrial detention) is rooted in English common law. For nearly 900 years between the Norman invasion of Britain in the 11th century and the emergence of commercial sureties in the 1890s, "bail" simply meant release from custody; it was not necessarily associated with monetary payment. [1] (*ODonnell v. Harris County Tex.* (S.D. Tex.

[1] "Bail" and "surety" are distinct terms of art but have merged in common usage over time. "Surety" historically referred to the person who assumed responsibility for the accused and who would be held liable if they failed to appear. (*ODonnell, supra,* at 1069.) After the

2017) 251 F. Supp. 3d 1052, 1068-1069; *see also State v. Brown* (N.M. 2014) 338 P.3d 1276, 1283-1285; Schnacke, *A Brief History of Bail,* 57 No. 3 The Judge's Journal, 4 (Summer 2018) 5-7.) During this period, bail did not require the transfer of funds or posting of collateral. Instead, any monetary "bail" was unsecured, meaning that an upfront payment was not required, but that a debt would be incurred if the person failed to appear.[2] (Nat. Inst. of Corrections, *Money as a Criminal Justice Stakeholder* (Sept. 2014), p. 18 [citing Lermack, *The Law of Recognizances in Colonial Pennsylvania,* 50 Temp.L.Q. 475, 497, 504-505; Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* (1991), 4-5.)

The state constitutional right-to-bail clauses instituted by the early-American colonies and later adopted by California's constitutional framers represented "an intentionally dramatic

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first known commercial surety company opened in San Francisco in 1896, "surety" gradually became conflated with the commercial money bail industry, and "bail" came to colloquially refer to the upfront payments required to secure a person's release. (Nat. Inst. Of Corrections, *supra,* at pp. 24-27; *see Leary v. United States* (1912) 224 U.S. 567, 575 ["The distinction between bail and suretyship is pretty nearly forgotten."].)

[2] In fact, requiring money bail at all is a relatively recent phenomenon. Even nearly a century after the personal surety system was abandoned in favor of a commercial surety system, money bail was not required in most cases. A nationwide study conducted by the Department of Justice revealed that, in 1990, people charged with felonies were released on recognizance far more often than they were released on a financial condition. (Reaves, *Felony Defendants in Large Urban Counties, 2009 Statistical Tables,* U.S. D.O.J. Bureau of Justice Statistics (Dec. 2013), 1 [63% and 37%, respectively].) Nineteen years later, those proportions had flipped, and courts required money bail in 61% of felony releases. (*Ibid.*) By 2009, roughly 9 out of 10 people detained pretrial remained in jail only because they could not afford the money bail required for their release. (*Id.* at 15.)

departure from the English model" of bail, in a direct repudiation of rampant pretrial detention that had existed in England. (Funk & Mayson, *Bail at the Founding,* Harv.L.Rev. (2023, forthcoming), 73.)[3] The right to bail was first codified in 1275 in the Statute of Westminster I, which required English courts—without judicial discretion—to order the release of "bailable" defendants and to detain all others. (National Institute of Corrections, *supra* at pp. 14.) Eventually, English common law produced a third, discretionary category, allowing "a broad range of magisterial discretion between narrow bands of cases in which bail was either prohibited or mandatory." (Funk & Mayson, *supra,* at p. 27.)

During the colonial era, several American colonies implemented a non-discretionary system akin to the original Statute of Westminster, but which dramatically expanded the right to bail. (Funk & Mayson, *supra*, at p. 19.) What ultimately became the consensus text across state constitutions, including California's—that "[a]ll prisoners are bailable by sufficient sureties, except in capital cases where the proof is evident or the presumption great"—was included in the constitutions of virtually every state that entered the Union after the Founding. [4] (*Id.* at pp. 25-26 [citing Verrilli, *The*

[3] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4367646 (accessed Nov. 8, 2023).

[4] For California's adoption of this model, see *White*, *supra,* at 463 ["This peculiar phrasing [of Section 12] predates the Union, originating in the Pennsylvania Frame of Government of 1682."]; *In re Humphrey* (2018) 19 Cal.App.5th 1006, 1022 ["Section 12 . . . was intended to abrogate the common law rule that bail was a matter of judicial discretion by conferring an absolute right to bail except in a narrow class of cases."][internal citations omitted].)

Eighth Amendment and the Right to Bail: Historical Perspectives, 82 Colum.L.Rev. 328, 351 (1982)].)

Under the new American model, mandatory detention was eliminated, and magistrates retained the discretion to detain only those who were accused of capital crimes. (Funk & Mayson, *supra,* at p. 27.) Thus, state constitutional provisions guaranteeing a right to bail by sufficient sureties were "intended to free almost every criminal defendant on a bail within their means" and, "[p]ursuant to the extant legal authorities, magistrates were under an obligation to find a way to release defendants who had a right to bail." (*Id.* at pp. 27-28; *see also* Chitty, *A Practical Treatise on the Criminal Law,* Vol. 1 (1st Am. ed 1819), 102 ["where they are bound by law to bail the prisoner" judges must not "under the pretence of demanding sufficient surety, make so excessive a requisition, as in effect, to amount a *denial of bail*"] [emphasis in original].) Writing in 1819, the eminent proceduralist Joseph Chitty described the longstanding common-law rule concerning setting bail for bailable defendants as follows: "bail only is to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge." (Chitty, *supra,* at p. 131.) Of course, this is precisely the artifice the decision below approves.

Further, at English common law, the phrase "by sufficient sureties" referred not to conditions of release, but to the person into whose custody a criminal defendant would be released pretrial, and who could, in theory, be liable for the debt if they failed to appear for court. (Funk & Mayson, *supra,* at p. 74 ["A sufficient surety was a respectable person of "good fame" whose pledge (that a defendant would appear for court and behave in the meantime) could be trusted"].) Since no money was required up front—and since the

debt was rarely collected, even when the person failed to appear—"virtually any surety was a sufficient surety in the eyes of a court." (*Id.* at p. 72.) In fact, well into the nineteenth century, it was a criminal offense "punishable . . . by the common law" for a magistrate to, "under the pretense of demanding sufficient surety," require conditions of bail that "in effect, [amounted to] *a denial of bail*" for a bailable defendant. (Chitty, *supra,* at p. 103 [emphasis in original].) Thus, contrary to the Court of Appeal's holding, the right to release on bail was not intended to be contingent upon someone's ability to produce "sufficient sureties" to the satisfaction of the court, such that they could be forced to remain in custody. (*Kowalczyk, supra*, 85 Cal.App.5th at pp. 662-663.) Rather, the right to release on bail put the onus on courts to craft a surety requirement that could address flight concerns without resulting in the person's detention. (Funk & Mayson, *supra,* at p. 27 ["magistrates were under an obligation to find a way to release defendants who had a right to bail"].)

California's constitutional framers incorporated this understanding of the right to bail as a means of ensuring release. The right to bail was enacted explicitly because the framers felt that a prohibition on excessive bail alone was insufficient to guarantee release. (Browne, *Report of the debates in the Convention of California, on the formation of the state constitution, in September and October* (1850), 579 [framers argued that, without the right to bail, "[a]n innocent man may be *kept in prison*"] [emphasis added].)

Here, this Court's duty in examining the historical context of section 12 is to discern "the intent of those who enacted the constitutional provision." (*Richmond, supra,* at 418.) The clear intent of those who enacted the right to bail in California's

Constitution was to remove the broad discretion bestowed upon English magistrates, and instead allow judges to detain people pretrial in only a narrow subset of cases specifically delineated by the People. Put simply, setting unaffordable money bail to detain someone outside the circumstances of section 12, subdivisions (a), (b), and (c) is precisely what the framers sought to prevent in establishing a right to "release on bail."

It is nevertheless true, as the Court of Appeal emphasized, that practice has often diverged significantly from those described above. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 687 ["At the time our state Constitution was drafted in 1879, people were routinely confined in jail for want of bail . . . Section 12 and its predecessors sought to curtail this all-too-common situation by expressly recognizing a right to bail in most cases, and by prohibiting the imposition of excessive bail."]; *see also* Willis & Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California,* Vol. 1 (1881), 310, 313, 317, 344 [1879 constitutional framers repeatedly invoked the injustice of poverty-based pretrial detention in debate over whether to adopt the grand jury system]; Cf. *Humphrey, supra,* 11 Cal.5th at p. 142 [acknowledging that longstanding constitutional principle that pretrial detention should only be imposed where necessary was "a different story in practice" because of ubiquitous wealth-based detention].) Even at the time of California's founding, some courts violated the spirit and letter of the right to release on bail by requiring sureties the person was unable to produce rather than releasing them on nonfinancial conditions, on their own promise to appear, or under the suretyship of another without an attached financial condition. More specifically, "the most marginalized" bailable defendants who lacked sufficient reputational

capital in a world of rigid class, race, and gender hierarchies were sometimes detained pretrial if other members of the community who had sufficient reputational capital were unwilling to serve as sureties on their behalf. (Funk & Mayson, *supra,* at 73-74; *Id.* at p. 62 ["admission to bail was a function of class, not cash"].) This differential treatment was only exacerbated as bail shifted from a personal surety system to a commercial surety system, requiring upfront payments either to a for-profit bail-bond company or the court itself. (Nat. Inst. of Corrections, *supra,* at p. 16.)

As this Court recognized in *Humphrey,* however, the mere fact that we can identify a longstanding or widespread practice does not mean that practice was countenanced by the law. (*Humphrey, supra,* 11 Cal.5th at p. 142.) As the United States Supreme Court has explained, it is often the job of future courts to make clear that certain "old infirmities[,] which apathy or absence of challenge has permitted to stand," are not consistent with our modern understanding of fundamental legal principles. (*Williams v. Illinois* (1970) 399 U.S. 235, 245.) This is particularly true when those practices are relics of a historical time when the legal system was less sensitive, or, as was too often the case, actively hostile, to the plight of the poor and racial minorities. The constitution "must have priority over the comfortable convenience of the status quo." (*Ibid.*)

C. Every state court to have interpreted language substantially identical to section 12 has prohibited the use of unaffordable money bail to detain people who have a right to release on bail

As noted, the language of section 12 derives from Pennsylvania's 1682 Frame of Government, and nearly every state to enter the Union after the founding has substantially identical constitutional language. (Part I.B, *supra*.) Although the Court of

Appeal suggested that their holding was "in line with case law interpreting these sister state constitutions", *every* other court to interpret this language—including invoked by the Court of Appeal—has held that courts may not set unaffordable money bail in order to detain someone who has a state-constitutional right to release on bail by sufficient sureties.[5] (*Kowalczyk, supra*, 85 Cal.App.5th at p. 663, fn. 7 [citing cases from Iowa, Illinois, New Mexico, and Arizona]; Part I.C, *infra* [citing cases from Iowa, Illinois, New Mexico, and Arizona].)

Courts have reached this result in different ways. Many have held that setting intentionally unaffordable money bail violates the right to release on bail itself. (*State ex. rel. Torrez v. Whitaker* (N.M. 2018) 410 P.3d 201, 219 ["Setting a money bond that a defendant cannot afford to post is a denial of the constitutional right to be released on bail for those who are not detainable . . . under the New Mexico Constitution."]; *State ex rel. Corella v. Miles* (Mo. 1924) 262 S.W. 364, 365 ["[t]he bail bond must be fixed with a view to giving the prisoner his liberty, not for the purpose of keeping him in jail. If, in order to keep him in custody, the bond is ordered at a sum so large that the prisoner cannot furnish it the order violates [the right to bail under the Missouri Constitution]. For that is saying the offense is not bailable when the Constitution says it is."]; *Dubose v.*

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[5] Each of these courts' state constitutions contains, or contained at the time of the opinion, materially identical language to article I, section 12 requiring that all persons "shall be bailable by sufficient sureties" except for enumerated exceptions. (N.M. Const. art. II § 13; Mo. Const. art. I § 20; Ohio Const. art. I § 9; Vt. Const. chapter II § 40; Wyo. Const. art. I § 14; Minn. Const. art. I § 7; Iowa Const. art. I § 12; Ill. Const. art I § 9; Ariz. Const. art 2 § 22; N.J. Const. (1947) art. I § 11; Ark. Const. art. II § 8; Fla. Const. (1885) art. I § 9; Ind. Const. art I § 17; Or. Const. art. I § 14.)

McGuffey (Ohio 2021) 179 N.E.3d 780, 784 ["[I]t is unconstitutional to achieve a de facto denial of bail without satisfying the rules for a true denial of bail" under state constitution]; *State v. Hance* (Vt. 2006) 910 A.2d 874, 880 ["[W]e have consistently held that the [state constitution's right-to-bail clause] precludes using bail for the purpose of detaining the accused (as opposed to ensuring his or her appearance)."]; *Simms v. Oedekoven* (Wyo. 1992) 839 P.2d 381, 385-386 ["[I]mposing a financial condition that results in pretrial detention . . . would violate the [right to release on bail under] the Wyoming Constitution."]; *see also State v. Brooks* (Minn. 2000) 604 N.W.2d 345, 350 ["[W]hen viewed in its historical context, it becomes clear that the" right to release on bail "limits government power to detain an accused prior to trial"]; *State v. Briggs* (Iowa 2003) 666 N.W. 2d 573, 583 ["[I]f the [bailable] accused shows that the bail determination absolutely bars his or her utilization of a surety in some form, a court is constitutionally bound to accommodate the accused's predicament"].)

Some state supreme courts have instead found that intentionally unaffordable bail is *per se* "excessive,"[6] and runs afoul of their state excessive bail clause because a money bail amount that frustrates the point of bail is by definition "excessive."[7] (*People ex.*

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[6] These holdings do not contradict the line of excessive bail cases invoked by the Court of Appeal holding that money bail is not *per se* excessive merely because it is unaffordable, as discussed further in Part IV.A, infra. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 668 [citing *Ex Parte Duncan* (1879) 53 Cal. 410 and *Ex Parte Duncan* (1879) 54 Cal. 75].) To *amici's* knowledge, no California appellate court has ever issued an opinion deciding whether it violates the state excessive bail clause to intentionally set unaffordable money bail in order to effectuate someone's detention.

[7] Although there is no right to bail under the federal constitution, federal courts have also held that the federal excessive bail clause

rel. Sammons v. Snow (Ill. 1930) 340 Ill. 173 N.E. 8,9 ["[E]xcessive bail is not to be required for the purpose of preventing the prisoner from being admitted to bail"]; *Gusick v. Boies* (Ariz. 1951) 233 P.2d 446, 448 [same]; *State v. Johnson* (N.J. 1972) 294 A.2d 245, 253 [same].)

And still others have held that intentionally unaffordable money bail orders are unlawful without specifying whether this arises from the right to release on bail, the prohibition on excessive bail, or some combination of the two. (*Foreman v. State* (Ark. 1994) 875 S.W. 2d 853, 854 [holding it was an abuse of discretion for judge to "purposely set [pretrial] bond out of [bailable defendant's] reach"]); *Mendenhall v. Sweat* (Fla. 1934) 269 So. 390, 281-82 [when someone has the right to release on bail "the amount of bail should not be fixed in so excessive an amount as to preclude . . . the accused being able to furnish" it]; *Hobbs v. Lindsey* (Ind. 1959) 162 N.E. 2d 85, 88 [holding bail is excessive where "such bail was designed to *prevent* the accused being let to bail rather than to effect for him the right to bail which is constitutionally guaranteed." [emphasis in original]]; *Gillmore v. Pearce* (Or. 1987) 731 P.2d 1039,

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prohibits setting money bail in an amount *intended* to prevent someone's release. (*Galen v. County of Los Angeles* (9th Cir. 2007) 477 F.3d 652, 660 [affirming a finding of excessive bail where money bail was set beyond defendant's ability to pay "purposefully to guarantee continued confinement"]; *see also Stack v. Boyle* (1951) 342 U.S. 1, 9 (conc. opn. of Jackson, J.) [setting money bail in order to intentionally detain a defendant pretrial "is contrary to the whole policy and philosophy of bail."] *Bandy v. United States* (1960) 81 S. Ct. 197, 198 ["It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom"].) Because California's state constitution independently prohibits ordering intentionally unaffordable money bail to detain someone who is not eligible for pretrial detention, this Court need not decide whether such an order also violates the federal excessive bail clause.

1044 [money bail "is not to be set so as to make it impossible, as a practical matter, for a prisoner to secure release"].)

Although the precise basis of these holdings varies, their substance does not. The Court of Appeal decision in this case is the only instance *amici* have found of a court permitting the use of unaffordable money bail to detain someone pretrial who could not be ordered detained outright. This holding is at odds with the plain language of section 12, the historical context, and every other court's interpretation of substantively analogous constitutional language.

II. Under the Procedures Required by *Humphrey*, An Unaffordable Money Bail Order Could Only Be An Order of Detention

In *In re Humphrey,* this Court confirmed that the common practice of conditioning pretrial release on a person's ability to pay monetary bail violated both the state and federal equal protection and due process clauses. Although this Court explicitly left for another day the question of whether article I, section 12 contains additional standards governing pretrial detention beyond the due process and equal protection floor announced in *Humphrey* (*Humphrey, supra,* 11 Cal.5th at fn. 7), that opinion compels the holding that courts may not set unaffordable money bail in order to detain someone who could not be detained outright under section 12.

That is because at the core of the Court's decision in *Humphrey* is the holding that unaffordable money bail is the "functional equivalent of a pretrial detention order." (*Humphrey, supra,* 11 Cal.5th at p. 151.) Nor does *Humphrey* stand alone in this reasoning: every state and federal appellate court to have considered this constitutional question has agreed that an unaffordable financial condition of release is the equivalent of a detention order and must

be treated as such. (*See, e.g., Brangan v. Commonwealth* (Mass. 2017), 80 N.E.3d 949, 963 [unattainable money bail "is the functional equivalent of an order for pretrial detention, and the judge's decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty"]; *Valdez-Jimenez v. Eighth Jud. Dist. Ct. in & for County of Clark* (Nev. 2020) 460 P.3d 976, 984-85; *State v. Brown* (N.M. 2014) 338 P.3d 1276, 1292 ["Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."]; *United States v. Leathers* (D.C. Cir. 1969) 412 F.2d 169, 171 [per curiam] ["the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all"]; *United States v. Leisure* (8th Cir. 1983) 710 F.2d 422, 425.)

In *Humphrey*, this Court further held that "unless there is a valid basis for detention" under *both* the equal protection and due process standards articulated it in that case *and* "state statutory and constitutional law specifically addressing bail," courts must set a financial condition of release at an amount the person can reasonably pay. (*Humphrey, supra,* 11 Cal.5th at pp. 154-155.) Because section 12 governs when courts may order someone detained pretrial, a court setting money bail in an amount that effectuates pretrial detention must do so in accordance with section 12's enumerated requirements for detention.

Moreover, under the procedures prescribed in *Humphrey,* courts must affirmatively inquire into a person's ability to pay so that they will "*know* whether requiring money bail in a particular amount is likely to operate as the functional equivalent of a detention order." (*Humphrey, supra,* 11 Cal.5th at 135 [emphasis added].) Then, before issuing any order that will result in the person's pretrial

detention, the court must find that the person's actual "*detention* is necessary." (*Id.* at 156 [emphasis added].) Even assuming that *Humphrey* did not forbid courts from setting unaffordable money bail (contra *In re Brown* (2022) 76 Cal.App.5th 296, 309 [under *Humphrey,* any court-ordered money bail must be set at affordable amount] (*Brown*)), a court could never issue an unaffordable money bail order under *Humphrey*'s requirements *unless* it stated on the record that it was doing so to detain the person pretrial. As discussed above, this is precisely that the kind of detention state constitutional right-to-bail provisions forbid outside their enumerated categories. (Part I.B-C, *supra*.) Otherwise, those provisions—and the specific procedural and substantive conditions that the California Constitution places on the state to justify the detention of a presumptively innocent person—would be meaningless. (Part I.A, *supra*.)

The lower court nevertheless suggested that the state might satisfy both *Humphrey* and section 12 by setting unaffordable money bail for a bailable defendant so long as it was, as a subjective matter, not for the purpose of detention. According to this theory, a court could set unaffordable money bail based on a belief that money bail in the amount set is, *in and of itself*, necessary to ensure public safety or the accused's return to court. (*Kowalczyk, supra*, 85 Cal.App.5th at pp. 687-690.) But *Humphrey* squarely forecloses this theory*:*

> An arrestee may not be held in custody pending trial unless the court has made an individualized determination that (1) the arrestee *has the financial ability to pay,* but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests or (2) *detention is necessary* to protect victim or public safety, or ensure the defendant's appearance, and there is clear and

> convincing evidence that no less restrictive alternative will reasonably vindicate those interests.

(*Humphrey, supra,* 11 Cal.5th at p. 156 [emphasis added].) In other words, *Humphrey* permits only two options: conditions of release that will not result in the person's detention, or an intentional order of detention in accordance with specifically enumerated constitutional standards.

Implicit in this holding is the recognition that money bail in an amount that the accused cannot afford is never necessary to accomplish something other than outright detention, and therefore cannot satisfy narrow tailoring as *Humphrey* requires.[8] That implication is well founded. First, and most obviously, money bail in an amount the accused cannot pay cannot logically serve as a future incentive to return to court, because it is *per se* unaffordable, so there is no possibility of forfeiture. By definition, the incentive could not operate. And since, under state law, money bail is not forfeited upon the commission of additional crimes, it bears no connection to public safety, either. (*In re Humphrey* (2018) 19 Cal.App.5th 1006, 1029; *Reem v. Hennessy* (N.D. Cal. 2017) No. 17-CV-06628-CRB, 2017 WL 6539760, at *3-4.) Rather, unaffordable money bail could serve these purposes only because it is the functional equivalent of a

[8] (*See, e.g., ODonnell v. Harris Cnty., Texas* (S.D. Tex. 2017) 251 F.Supp.3d 1052, 1109 ["Secured money bail ensures better results than unsecured appearance bonds only when the secured money bail operates as an order of detention because the defendant cannot pay. Those who are detained because they cannot pay secured money bail necessarily make their court appearances and do not re-offend. But that success is because of the detention, not because of the financial security. And it applies only to those who cannot pay the secured financial conditions of release."].)

detention order.[9] Thus, there is no basis to find that *separate and apart from its function as a de facto detention order*, a specific amount of money bail that is unattainable to the accused has any value in promoting public safety or return to court.

Second, any finding that a *particular* unaffordable amount of money bail is "necessary" separate from its function as a detention order would be speculative in a way that precludes the narrow tailoring required under *Humphrey*. (*See, e.g., Kowalczyk, supra*, 85 Cal.App.5th at p. 690 [approvingly citing case law suggesting that detention via unaffordable money bail may be supported by "court's determination that the *amount of the bond* is necessary to reasonably assure the defendant's attendance at trial or the safety of the community"] [emphasis added] [internal citations omitted].) Financial incentives operate in relation to someone's access to money. The risk of losing $50,000 means something different to someone who has only $50,000 in life savings than it does to a billionaire. And it means nothing at all to someone in a state of abject destitution. Axiomatically, a person cannot risk losing something they do not have. Equally plainly, such a person would only be able to risk losing $50,000 if their financial situation *changed*. But there is no way for a court setting $50,000 bail to know *how* or *how much* the person's financial situation might change in the future, and therefore how great an incentive the risk of

[9] As the New Mexico Supreme Court recently explained, "we should not be ignorant as judges of what we know as people. It is common knowledge among judges and others who have worked in our courts that in the vast majority of cases imposition of high-dollar bonds for any but the most wealthy defendants is an effort to deny defendants the opportunity to exercise their constitutional right to pretrial release." (*State ex rel. Torrez v. Whitaker, supra*, 410 P.3d at p. 219 [citation omitted].)

losing $50,000 would prove to them in the aftermath. Perhaps their family and friends would be able to cobble together the fee to pay a private bail bond company, perhaps a community bail fund posts the entire sum, no strings attached—or perhaps they win the lottery. These outcomes would produce very different incentives, which is why there is no basis on which a court could reliably conclude that any given amount of money that a person cannot pay now is *necessary* in some future hypothetical world where the person were in a different—but unknown—position.

Although these may also be reasons to conclude that unaffordable money bail could *never* meet strict scrutiny, as the Court of Appeal in *Brown* suggested (*Brown*, *supra*, 76 Cal.App.5th at p. 309), this Court need not reach that question in order to hold that section 12 governs pretrial detention, regardless of the mechanism (unaffordable bail or no-bail-allowed order) courts employ to achieve detention. All this Court need do is reiterate its clear holdings in *Humphrey* that unaffordable money bail is the "functional equivalent" of a no-bail-allowed order, and that courts may not set unaffordable bail when they could not order someone detained outright. (*Humphrey*, *supra*, 11 Cal.5th at p. 151.)

III. The Cases Cited by the Lower Court Do Not Justify Setting Unaffordable Money Bail in Order to Detain Those Who Cannot Be Ordered Detained Outright Under Section 12

The Court of Appeal's ruling that courts could bypass the right-to-bail clause by setting unaffordable money in order to detain someone ineligible for detention rests upon two strands of irrelevant case law. First, the court asserted that the right to release on bail has never been understood as mandating affordable money bail. (*Kowalczyk, supra*, 85 Cal.App.5th at p. 687.) As evidence, it cited

several cases holding that unaffordable money bail is not a *per se* violation of a *separate* clause of the constitution prohibiting excessive bail. (*Id.* at 688.) Second, based on its misapplication of federal Bail Reform Act cases, the court determined that *Humphrey* permits unaffordable money bail orders because its prohibition on detaining someone pretrial "solely" because they lacked the resources to pay money bail does not apply if a superior court determines that no lesser alternative to detention will keep the public safe or assure the accused's appearance. (*Id.* at 688-690.) Neither rationale is correct.

A. The Court of Appeal mistakenly relied upon a line of excessive bail cases to invoke the unlawful and now-defunct practice of issuing sub-rosa detention orders

In holding that the right to release on bail does not require actual release, the Court of Appeal relied on a line of cases interpreting a separate clause of the constitution prohibiting excessive bail. The court extrapolated from these cases' holdings—that bail is not *per se* "excessive" merely because it is unaffordable—that section 12 has "never been understood as mandating affordable bail." (*Kowalczyk, supra*, 85 Cal.App.5th at p. 663.) The Court of Appeal's reliance on the "excessive bail" clause to hold that a court's setting unaffordable bail in order to detain a bailable defendant does not violate the right to bail was confused.

First, the prohibition against "excessive" bail has a distinct meaning separate and apart from section 12's right-to-bail clause. Although, as discussed in Part I.C, *supra*, many state and federal courts have held that intentionally unaffordable bail runs afoul of the excessive bail clause because detention is not a lawful purpose for which bail can be set for any defendant, the excessive bail clause is

not concerned with *which* defendants are entitled to pretrial release. That is governed by the right-to-bail clause.

More specifically, California appellate courts have held that "excessiveness" is an objective measure of the relation of a financial condition of release to the seriousness of a charge or other circumstance of the offense, *not* to the relative wealth (or indigence) of the particular defendant. (*See, e.g., In re Burnette* (1939) 35 Cal.App.2d 358, 360 [finding bail was not excessive because the California Supreme Court had set the same amount of money bail in a different case where a defendant was facing the same charges, although the previous defendant could afford the amount and Burnette could not]; *Ex parte Duncan* (1879) 53 Cal. 410, 411 (*Duncan I*) [appellate courts would find bail excessive only when it is "*per se* unreasonably great and clearly disproportionate to the offense involved"][citing *Ex parte Ryan* (1872) 44 Cal. 555, 558].) That is why, as the Ninth Circuit has explained, a court might conclude that a money bail amount is "excessive" even when the person accused can afford to pay it. (*Galen, supra,* 477 F.3d at p. 661 [citations omitted].) And vice versa: a bail amount might not be "excessive" given the severity of the offense charged, even when it is out of reach for an indigent defendant, as the Court of Appeal in this case noted. (*Kowalczyk*, *supra*, 85 Cal.App.5th at p. 688 [citing *Ex Parte Duncan* (1879) 54 Cal. 75 (*Duncan II*)].) The point is that separate constitutional provisions require that bail must be proportional both to the financial means of the particular defendant and to the circumstances of the offense charged—and the excessive bail clause concerns only the latter.

The excessive bail cases cited by the Court of Appeal are entirely consistent with holding that a *different* clause of section 12—

the right-to-bail clause—prevents courts from ordering someone detained pretrial, no matter how that detention is accomplished, outside the specific, enumerated circumstances. Indeed, as discussed in Part I.B, *supra*, the explicit purpose of California's right to bail was to grant protections beyond those offered by the excessive bail clause precisely *because* that clause was not thought to limit in which cases detention could be sought.

This dual line of cases—that unaffordable money bail is not *per se* excessive, on the one hand, but may not *intentionally* be set at an unaffordable amount on the other—created an on-the-ground reality where judges' *sub rosa* detention orders of bailable defendants were undisturbed by higher courts so long as they used unaffordable money bail without saying explicitly that they were doing so intentionally. [10] (*See generally* Schnake, *Changing Bail Laws* (2018) Center for Legal and Evidence Based Practices, pp. 21-22; Nat. Inst. of Corrections, *supra,* at pp. 1, 49; Part I.B, *supra* [describing the emergence of poverty-based pretrial detention contravening the right to bail].) But that practice—of which the Court of Appeal mistakenly suggests the *Duncan* cases approve—was *illegal*. As discussed in Part I.C, in those cases where a state court stated its intent to detain a bailable person clearly on the record, the unaffordable bail order was reversed. And, as discussed in Part II, this court foreclosed the ability of courts to issue such orders clandestinely in *Humphrey* when it held that a judge cannot issue an order resulting in pretrial detention *unless* it makes its intention to

[10] This scheme was only possible in California because, before *Humphrey* was decided by this court in 2021, California courts were not required to justify or explain the basis for any money bail order, regardless of whether or not it would result in pretrial detention. (*Humphrey, supra*, 11 Cal.5th at 152-56.)

detain clear on the record. The *Duncan* cases were decided 142 years before that holding.

Simply put: the excessive bail cases cited by the Court of Appeal do not stand for the proposition that the right to bail—nor any provision of the California Constitution—has ever permitted intentionally unaffordable bail orders where detention is prohibited. Such orders have always been unlawful.

B. The lower court misapplied cases interpreting a federal statute to incorrectly suggest that indigence is not the "sole" cause of detention when the court detains people using an unaffordable bail order

Although *Humphrey* forbids detaining people "solely because" of their "financial resources," (*see Humphrey*, *supra*, 11 Cal.5th at p. 149) the Court of Appeal held that unaffordable money bail orders do not violate this rule so long as the superior court determines that an affordable amount of money bail will not assure the public safety or the accused's return to court. (*Kowalczyk, supra*, 85 Cal.App.5th at pp. 688-90.) "Though the person's inability to post the court-ordered bail amount necessarily results in the person's detention," the Court of Appeal conceded, the "determinate cause" of detention in these circumstances is not the person's indigence, but the court's decision to detain them. (*Id*. at 690.) In other words: unaffordable money bail orders do not violate *Humphrey*'s prohibition on pretrial detention due to inability to pay, so long as courts detain them by setting bail they know the person will be unable to pay.

The suggestion that people who cannot pay money bail are not jailed "solely because" of their "financial resources" is sophistry, and it finds no support in the law. The Court of Appeal relied on two cases interpreting the federal Bail Reform Act, but neither supports its contorted analysis of *Humphrey*. (*Kowalczyk, supra*, 85

Cal.App.5th at p. 690.) Preliminarily, the Bail Reform Act does not control the setting or denial of bail in California state courts. But the Court of Appeal's reliance on *United States v. McConnell* (5th Cir. 1988) 842 F.2d 105, 108-10, and *United States v. Fidler* (9th Cir. 2005) 419 F.3d 1026, 1028, is misplaced in any event. The Court of Appeal took these federal decisions to stand for the proposition that if "[a] person's inability to post the court-ordered bail amount *necessarily results in* the person's detention," inability to pay is not "the determinate cause of detention," so long as the court finds the money bail amount resulting in detention to be necessary. (*Kowalczyk, supra,* 85 Cal.App.5th at p. 690.)

But this gloss ignores that the Bail Reform Act forbids the setting of unaffordable bail. (18 U.S.C. § 3142(c)(2) ["The judicial officer may not impose a financial condition that *results in* the pretrial detention of the person."][emphasis added].) That is, federal district courts may not set unaffordable bail; instead, once they determine that money bail is necessary in an amount that a particular defendant cannot pay, they must "proceed with a detention hearing and, subject to the requisite findings, issue a detention order" if they find there is a basis for detention, or release them if there is not. (*United States v. Westbrook* (5th Cir. 1986) 780 F.2d 1185 fn.3, 1188; *see also* S. Rep. No. 98-225 (1983), reprinted at 1984 U.S.C.C.A.N. 3182, 3199, 1983 WL 25404 at *16 [Senate Report indicating that if a financial condition cannot be met courts must either reduce bond or—if the case is eligible for detention under § 3142(f) and the court finds detention necessary under § 3142(e)—order detention]; *United States v. Mantecon-Zayas* (1st Cir. 1991) 949 F.2d 548, 550 ["once a court finds itself in this situation—insisting on terms in a "release" order that will cause the defendant

to be detained pending trial—it must satisfy the procedural requirements for a valid *detention* order"]; *United States v. Maull* (8th Cir. 1985) 773 F.2d 1479, 1482 ["Maull argued before the magistrate that he could not post a one million dollar bond. When the district court concluded that there was a serious risk of flight, knowing, as it did, of Maull's claim, it acted within the intent expressed by Congress in proceeding to a detention hearing."].) So, of course, it is never the case that intentionally unaffordable bail is the proximate cause of detention in federal court—federal courts must, of necessity, proceed to issuing a detention order.

Nor is it significant that *Fidler* and *McConnell* both denied relief to defendants who were incarcerated on unaffordable money bail, given the specific relief requested: a reduction in bond and outright release, respectively, and not the formal detention hearing to which each was statutorily entitled. (*McConnell, supra*, 842 F.2d at pp. 107, 109 fn.5; *Fidler*, *supra*, 419 F.3d at 1027 [noting that Fidler was challenging "his continued custody"].) By denying their requests, the courts held only that a person is not entitled to release if grounds for detention exist; neither endorsed the sort of wealth-based detention, applied outside the bounds of permissible detention orders, imagined by the Court of Appeal.[11]

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[11] Although *dicta* in a footnote in *Fidler* about the procedure for challenging unaffordable bail orders can be read to suggest that a detention hearing is *not* required upon a showing of an inability to pay (*id.* at p. 1028 fn.1) such a reading would flatly contradict the legislative history cited above and render *Fidler* an outlier among federal authorities. The Ninth Circuit and other courts have instead read *Fidler* to *support* the conclusion that the Bail Reform Act prohibits unaffordable bail. (*See United States v. Diaz-Hernandez* (9th Cir. 2019) 943 F.3d 1196, 1199; *United States v. Clark* (W.D. Mich. Nov. 20, 2012) No. 12-CR-156, 2012 WL 5874483, at *3 ["If [*Fidler*] were to be read to say only that a court may circumvent the

In conclusion, the federal Bail Reform Act, properly construed, forbids the use of unaffordable money bail to detain someone pretrial. If a court finds that no combination of nonfinancial conditions of release and affordable money bail are adequate, it must issue a transparent order of detention consistent with the law governing those orders. This is precisely the rule for which amici advocate. That rule is consistent with the Second District Court of Appeal's opinion in *Brown* holding that courts must either set money bail in an amount an arrestee can pay or enter a no-bail order under applicable state law (*Brown, supra,* 76 Cal.App.5th at p. 308)—namely article I, section 12. It is also consistent with the holding this court made in *Humphrey*—as well as every other appellate court that has considered the question—that unaffordable money bail orders are equivalent to an explicit order of detention and must be governed by the same standards. (Part II, *supra*.)

CONCLUSION

This Court should reverse the Court of Appeal's decision in part and hold that section 12 continues to govern pretrial detention in noncapital cases and that courts may not set unaffordable bail to detain someone who does not fall within its explicitly enumerated exceptions to the right to release on bail.

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procedural safeguards of a full detention hearing by attaching heavy financial conditions to a release order that a defendant could not meet, using as excuse that without such financial imposition the risk of flight would be too great, the court would clearly be defying the intent of Congress . . . . Fortunately, the reading of the statute is seldom so circumscribed."].)

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

According to the word-count function of the computer program used to prepare it, the foregoing brief contains 10,988 words, excluding the portions exempted by California Rule of Court 8.520(c)(3).

/s/ Carson White

PROOF OF SERVICE

I, Kassandra Dibble, 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 kdibble@aclunc.org. On November 8, 2023, I served the attached,

BRIEF OF AMICI CURIAE CIVIL RIGHTS CORPS AND THE ACLU OF NORTHERN CALIFORNIA IN SUPPORT OF PETITIONER

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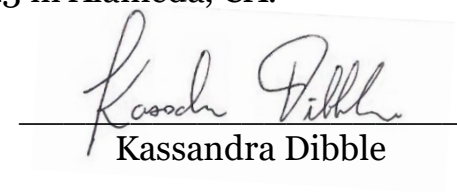
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 8, 2023 in Alameda, CA.



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