CASE NO. S247278

IN THE SUPREME COURT OF CALIFORNIA

In Re KENNETH HUMPHREY,

on Habeas Corpus.

RESPONDENT'S REPLY TO AMICUS BRIEFS

Court of Appeal Case No. A152056 (First Appellate District)
Superior Court Case No. 17007715 (County of San Francisco),
Hon. Joseph M. Quinn

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Pursuant to Rule of Court 8.520(f)(7), respondent Kenneth Humphrey replies to the new points raised by amicus briefs filed in support of petitioner or neither party.

ARGUMENT

I. THE ATTORNEY GENERAL'S EXTREME ANSWER TO THE THIRD QUESTION SHOULD BE REJECTED

As Humphrey's merits brief explained (at 30-53), denials of bail in non-capital cases are governed by article I, section 12(b)-(c) of the California Constitution, not article I, section 28(f)(3). The Attorney General disagrees. Though employing both a conciliatory tone and hand-wringing rhetoric about the difficulty of the question presented and of the supposedly plausible arguments on both sides, he adopts a radical position—one well beyond even petitioner's (misguided) proposal. Specifically, the Attorney General's brief argues (*e.g.*, at 28) that Proposition 9 implicitly repealed section 12 in its entirety, eliminating the right to bail in *all* cases and allowing *any* defendant, even ones charged with misdemeanors, to be detained prior to trial as a matter of California law. *See also id.* at 25-26 (criticizing petitioner's assertion that the constitution authorizes detention only for felony charges as "fail[ing] to give effect to the most fundamental difference between section 28 and section 12, which is the substitution of 'may' for 'shall' in the phrase '[a] person may be released on bail.'" (second alteration in original)). Given

that the right to bail dates to California's creation, this would be an incredibly far-reaching change.

The Attorney General's grounds for seeking such a revolution are not sound. As his brief recognizes (*e.g.*, at 19), this Court has held that "constitutional provisions adopted by the people are to be interpreted so as to effectuate the voters' intent," *Board of Supervisors v. Lonergan*, 27 Cal. 3d 855, 863 (1980). And as Humphrey's merits brief explained, a proper analysis of voters' intent shows, for two reasons, that section 12 continues to control when bail may be denied. *First*, the text of Proposition 9 and the supporting ballot materials—compelling indicators of voter intent—make clear that Proposition 9 did not ask voters to re-enact all of section 28(f)(3), which this Court had previously declared inoperative, and so voters did not fully re-enact it. Resp. Br. 30-39. *Second*, even if voters did re-enact all of section 28(f)(3), the "strong" presumption against implied repeal, *e.g.*, *City & County of San Francisco v. County of San Mateo*, 10 Cal. 4th 554, 567 (1995), shows that they did not intend to silently replace section 12 with section 28(f)(3). Resp. Br. 40-44. Indeed, as the ACLU's amicus brief explains (at 41-44), the presumption is particularly strong here given that prior versions of Proposition 9 included language expressly repealing section 12—language *deleted* from the version actually put to the voters.

The Attorney General's responses to these points, and his own arguments about why the Court should embrace his position, lack merit.[1]

A. As just noted, Humphrey's merits brief first argued (at 30-39) that voters did not intend to re-enact the entirety of section 28(f)(3). That is clear, Humphrey explained, both from the text of Proposition 9—including the fact that most of section 28(f)(3) was not in italics, as the law required proposed new text to be—and from the supporting ballot materials, which likewise gave no hint that that section was being proposed for enactment in its entirety (for example, informing voters that this Court had held section 28(f)(3) inoperative).

The Attorney General acknowledges (Br. 17-19) all the facts underlying this argument. But, he claims, the argument is "inconsistent with ... the intent of the voters." *Id.* at 24 (quotation marks omitted). This claim rests on the premise that Humphrey's argument "treat[s] Proposition 9's bail provisions as either a nullity or something very close to it." *Id.* That is false. As Humphrey's merits brief explained (at 35), this Court can give effect to the two provisions in 28(f)(3) that appeared in Proposition 9 in italics, i.e., as text actually proposed to the voters for enactment. Those provisions—requiring that (1) victims receive notice and an opportunity to

[1] The Attorney General's discussion (*e.g.*, Br. 21-22) blurs Humphrey's two separate arguments. Whether the Attorney General does this to elide the fact that he ignores key parts of Humphrey's second argument, *see infra* p.15, or for some other reason, the two arguments are alternatives, and are properly analyzed separately.

be heard before anyone arrested for a serious felony is released on bail, and (2) making victim safety the primary consideration when setting bail—are significant. Indeed, the official ballot title and summary for Proposition 9 emphasized the importance of the latter, informing Californians that one of the proposition's key changes was "[e]stablish[ing] victim safety as [a] consideration in determining bail." Resp. Br. 33-34 (second brackets added). Adopting only these two additions in no way renders the bail provisions of Proposition 9 anything close to a "nullity."

The Attorney General also complains (Br. 23) that the text italicized in Proposition 9 "has no meaning without the surrounding words." But as Humphrey's brief explained (at 35), this Court can read the substance of the two italicized provisions into article I, section 12. The Attorney General acknowledges this suggestion (Br. 21-22), and notably gives no reason it is infeasible or impractical. Such a reconciliation would simply mean requiring notice to the victim in certain circumstances and treating victim safety as the primary consideration when making release and detention decisions, thereby fully capturing all of the additions that Proposition 9 proposed into existing law in section 12. It is remarkable that the Attorney General offers no reason why this reconciliation should not be made, given that it captures each of the additions actually put to voters.

Even putting aside the Attorney General's false premise, his argument—that relying on the text of Proposition 9 and the supporting

ballot materials would be inconsistent with voters' intent—is like arguing that a statute should not be read in accordance with its plain text because doing so would be inconsistent with the legislature's intent. Such an argument would be rejected out of hand, because the plain text *shows* what the legislature's (or here the voters') intent was. *See, e.g.*, *People v. Valencia*, 3 Cal. 5th 347, 379 (2017) (when "interpret[ing] voter initiatives," this Court "begin[s] with the text as the ... *best indicator of intent*" (emphasis added)). The Attorney General instead just declares what he wants the voters' intent to have been, and then argues that any other outcome must be rejected as inconsistent with his declaration. That is not a proper mode of analysis.

Perhaps recognizing this, the Attorney General cites four features of Proposition 9 that he claims support his view of voter intent. But those four do not, either individually or together, remotely outweigh the contrary evidence—which may be why the Attorney General never articulates *how* the four support his position. He merely recites them and then baldly claims that "under these circumstances" (Br. 24), Humphrey's proposed interpretation is not faithful to voters' intent. That is wholly inadequate.

The first feature the Attorney General cites (Br. 23) is that the phrase "Section 28 of Article I of the California Constitution is amended to read" appears at the start of the relevant part of Proposition 9. *Voter Information Guide for 2008 General Election* 129, https://repository.uchastings.edu/cgi/

viewcontent.cgi?article=2265&context=ca_ballot_props (visited Dec. 7, 2018). But that does not help the Attorney General, because the use of different typefaces in the actual proposition text showed that only *some* of that text was intended to be part of that "amend[ment]." The Voter Information Guide confirmed this by expressly telling voters at the outset that—as state law required, *see* Resp. Br. 33—"new provisions proposed to be added are printed in *italic type* to indicate that they are new." *Voter Information Guide*, *supra*, at 128.

The second feature the Attorney General cites (Br. 23) is that the language in section 28(f)(3) was presented as "rights that are shared with all of the People of the State of California." *Voter Information Guide*, *supra*, at 130. As an initial matter, it is quite discordant for the Attorney General to invoke language about shared rights, given that he is arguing for the *elimination* of the right to bail. In any event, the language the Attorney General cites does nothing to show which rights were being referred to, i.e., whether they were just the ones in italics (as the Voter Information Guide expressly told voters) or those in roman font as well. Like the first feature, then, this one does nothing more than beg the question (which the Attorney General then answers based on his policy preferences).

The Attorney General's third cited feature (Br. 23-24) is the statement—in a different section of Proposition 9—that victims have a right to have people "who commit felonious acts causing injury to innocent

victims ... appropriately detained in custody," *Voter Information Guide*, *supra*, at 129. But that right is consistent with Humphrey's argument that denials of bail are controlled by section 12, because that section authorizes detention of such defendants. The right is, however, starkly *in*consistent with the Attorney General's view that pretrial detention is—because of Proposition 9—not limited to people charged with felonies.

In making this argument, moreover, the Attorney General quotes only a portion of the relevant provision, apparently to make it seem that the passage focused on bail. In reality, the passage broadly recognized victims' rights at all points in the criminal-justice process. *See Voter Information Guide*, *supra*, at 129 ("*These rights encompass the expectation shared with all of the people of California* that persons who commit felonious acts causing injury to innocent victims will be *appropriately and thoroughly investigated, appropriately* detained in custody, *brought before the courts of California even if arrested outside the State*, tried by the courts *in a timely manner, sentenced*, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.").

Finally, the Attorney General notes (Br. 24) that Proposition 9 expressed "dissatisfaction that *certain* reforms ... had not occurred." (emphasis added). But that general statement fails to specify which reforms had not occurred, or indeed even whether they were related to bail. Proposition 9 was, after all, an omnibus bill that purported to reform many

aspects of the criminal-justice system, such as the policies governing restitution, sentencing, plea bargaining, and victim's statements. That is why the ballot materials barely mentioned bail at all. *See* Resp. Br. 31-35.

While these points suffice to reject the Attorney General's invocation of the four features, it is also worth noting that all four lie outside section 28(f)(3). The Attorney General thus presents no direct counterweight to the unambiguous way in which the text of that section was presented to the voters. None of his four features even *mentions* section 28(f)(3)—or bail, for that matter. They thus cannot possibly outweigh the clear manner in which the text of 28(f)(3), the bail provision, was presented to voters, i.e., as not being submitted to the voters for wholesale re-enactment, and with a complete absence of any request for or suggestion of reenactment in the supporting materials.[2]

B. Humphrey's merits brief alternatively argued (at 40-53) that section 12(b)-(c) governs the denial of bail even if section 28(f)(3) was enacted in its entirety, because otherwise section 28(f)(3) would have implicitly repealed section 12, and the strong presumption against implied repeal is not overcome here. The Attorney General pays lip service to the

[2] The Attorney General does not endorse petitioner's two arguments for why voters should be deemed to have re-enacted all of section 28(f)(3) in 2008—perhaps agreeing with Humphrey's explanation (Resp. Br. 36-39) of why both arguments lack merit.

presumption (Br. 22, 30), but then urges the Court to disregard it, without giving any sound reason for doing so.

Though his arguments are strikingly vague, the Attorney General appears to believe that applying the presumption against implied repeal here would not "honor[] voter intent." Br. 30. But again, the Attorney General is assuming what the voters' intent was, and then measuring his assumption against the presumption against implied repeal. That is improper because the presumption is a tool for determining *what that intent was*. *See, e.g.*, *Medical Board of California v. Superior Court*, 88 Cal. App. 4th 1001, 1013 (2001) ("We may also look to the canons of statutory construction to guide our quest for legislative intent[, including] ... the presumption against implied repeals[.]"). It therefore makes no sense to say that the presumption does not apply because applying it would lead to a result inconsistent with voter intent. The Attorney General must instead identify evidence of contrary intent sufficient to *overcome* the presumption.

He does not do so. That is unsurprising, because this Court has made clear that the presumption is rebutted only if the later-in-time enactment provides "*undebatable evidence* of an intent to supersede the earlier." *Western Oil & Gas Association v. Monterey Bay Unified Air Pollution Control District*, 49 Cal. 3d 408, 419-420 (1989) (emphasis added); *accord Tuolumne Jobs & Small Business Alliance v. Superior Court*, 59 Cal. 4th 1029, 1039 (2014). And that standard is particularly

hard to meet here, because as the Attorney General recognizes (Br. 22), the presumption is

> reinforced here by the related points that the 2008 election materials never mentioned repeal of section 12, or even any possible conflict between the new measure and that existing provision; never advised voters that the bail language of section 28 had been held inoperative by the courts in light of the history of competing initiatives in 1982; and never explained exactly what effect the amendments to the then-inoperative language were intended to have.

Nor are these even the only points that "reinforce" the presumption. As Humphrey's merits brief explained (at 41-45), three other facts do so as well: (1) when voters first approved what became section 28(f)(3), it included language expressly repealing section 12, language that the authors omitted from Proposition 9 (apparently intentionally, *see* ACLU Br. 41-44); (2) it "would be unusual in the extreme" for voters to enact a fundamental change—such a repealing the century-old right to bail—implicitly, *California Redevelopment Association v. Matosantos*, 53 Cal. 4th 231, 260-261 (2011); and (3) repealing the general right to bail would raise due-process questions. The Attorney General says nothing about any of these points. That silence confirms that there is no reasonable basis to hold that the presumption against implied repeal has been overcome here.

C. In addition to his responses to Humphrey's two arguments, the Attorney General offers three arguments of his own that he says support his proposal to eliminate the longstanding and fundamental state right to bail. Each is meritless.

1. The Attorney General urges the Court (Br. 26) to "take into account how section 12 was understood in 2008." What he is referring to is his assertion that for years, trial courts routinely violated the equal-protection and due-process rights of pretrial arrestees—particularly poor ones—by detaining them through the imposition of unaffordable secured bail without any inquiry into whether particular conditions of release would suffice. *Id.* at 9-10. The Attorney General agrees that "core aspects of this system are not consistent with a contemporary understanding of equal protection and due process," and likewise agrees that the system was "properly criticized as neither fair nor safe." *Id.* at 11. Nonetheless, he says the Court should resolve this case by replicating the outcomes of that system as closely as possible (while adhering to the "contemporary understanding of equal protection and due process," *id.*), because doing so is most faithful to voters' intent. *See id.* at 28. In other words, he asks this Court to try to perpetuate the results of a system that he acknowledges involved rampant, unconstitutional discrimination because the voters supposedly approved of those results. This would be a troubling argument coming from a private litigant. But to have the state's chief law-enforcement official make it to the state's highest court is particularly disturbing.

The Attorney General's argument fails for several reasons. To begin with, the Attorney General provides no support for his assumption that

voters both knew about and approved of how things worked "[i]n practice," AG Br. 10, i.e., that judges routinely denied the right to pretrial release by unconstitutionally imposing unaffordably high money bail. Although it is true that voters are presumed to know the law, that is, the content of statutes, regulations, judicial decisions, and so on, the Attorney General offers no basis to assume that ordinary voters knew how the law was being applied (or misapplied) in courtrooms throughout the state. This is especially so because—as remains true today—de facto detention orders are often not adequately explained on the public record. *See In re Humphrey*, 19 Cal. App. 5th 1006, 1029, 1040, 1049 (2018); *see also, e.g.*, *Reem v. Hennessy*, 2017 U.S. Dist. LEXIS 210430, at *4 (N.D. Cal. Dec. 21, 2017). And even if the voters were aware of this practice, such awareness in no way suggests that they approved of detention on account of indigency.

Even assuming the Attorney General's twin assumptions of knowledge and approval were valid, his argument still would not make sense. The Attorney General's core assertion (Br. 27) seems to be that because of the use of secured bail to detain arrestees pretrial without appropriate findings and safeguards, "the practical difference between section 12 and the amended section 28(f) [was] less sharp at the time that Proposition 9 was presented to the voters in 2008." The Attorney General does not explain why this matters to his overall position. Indeed, if there were little difference in the voters' minds regarding the two provisions, that

would *undermine* the crux of the Attorney General's argument that voters affirmatively intended a *change* in California law to eliminate the right to bail. And, to be sure, the Attorney General's new "no practical difference" claim is the opposite of the consensus among all the parties in this case, who recognize that such a change is a significant one for individual rights in California. His argument therefore seeks a major state constitutional ruling based on an unsupported assertion about the mental state of voters that he now agrees would be mistaken (i.e., that a change did not matter very much) and based on supposed voter approval of discrimination against the indigent.

In any event, the Attorney General's factual assertion that voters did not perceive a "practical difference" between sections 12 and 28(f) cannot be squared with the only objective evidence on the question. Specifically, when voters were presented with both of those provisions at the same time in 1982, section 12 received nearly 1.5 million more votes than section 28. *Compare* California Proposition 4, Rules Governing Bail (June 1982), *at* https://ballotpedia.org/California_Proposition_4,_Rules_Governing_Bail_(June_1982), *with* California Proposition 8, Victims' Bill of Rights (June 1982), *at* https://ballotpedia.org/California_Proposition_8,_Victims%27_Bill_of_Rights_(June_1982) (each visited Dec. 7, 2018). If voters truly thought the two initiatives were identical, the same coalition would have voted for both.

2. Likewise infirm is the Attorney General's argument (Br. 26) that his proposal should be adopted because it would "leave the Legislature flexibility to make reasonable policy judgments in this complex and evolving area." *Accord id.* at 12 ("leaves the Legislature free to frame a modern system of pretrial release"), 28 ("best respects the role of the Legislature"). But the entire rationale of constitutional provisions that confer rights on the people—such as article I of the California Constitution—is to take certain matters *away* from the legislature. Indeed, under the Attorney General's logic, one could argue that if there were an amendment to the U.S. Constitution that could be construed to reduce First Amendment rights, it should be read that way because then Congress would have greater ability to legislate in the areas of free speech, free press, free exercise of religion, and so on. That is manifestly wrong. As the U.S. Supreme Court has explained, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), *quoted in Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015). The People of California did so in 1849 when they created a right to bail and again in 1982 when they reaffirmed that right with a handful of exceptions. It is wholly illegitimate to argue that a constitutional amendment about

individual rights should be interpreted in a way that *weakens* such rights because then the legislature can have more power to deal with the matter.

3. Finally, in response to Humphrey's argument (Resp. Br. 53) that non-monetary conditions of release can frequently address concerns about public safety or flight risk, the Attorney General says in a footnote (Br. 27 n.14) that such conditions "are not always effective," or "a court may conclude they are not sufficient in a particular case." But no approach is "always effective," which is why that is not the question. The question is how to balance the individual's rights against the government's interests in public safety and appearance at trial. The Attorney General's argument just ignores the significant harms that result from weakening the individual's rights and thus permitting widespread detention, including loss of jobs and housing—and the increase in crime such losses often engender—inability to care for young children or elderly parents, and violence and infectious disease that are rampant in local jails. *See, e.g.*, Pretrial Services Amicus Br. 8-11, Faith Leaders Amicus Br. 16-20, ABA Amicus Br. 24-25. As to the point that a court might deem conditions of release insufficient in particular cases, that (like many of the Attorney General's points) simply begs the question before the Court: whether the voters have decided that under the state constitution, pretrial detention is unavailable in particular cases.

In short, the Attorney General provides no sound basis for this Court to adopt his radical proposal to eviscerate the state right to bail. That proposal should be rejected.[3]

II. VARIOUS AMICI'S ARGUMENTS FOR REVERSING THE COURT OF APPEAL ON THE FIRST OR SECOND QUESTION LACK MERIT

In answer to this Court's first question presented, Humphrey's merits brief explained (at 16-27) that the Court of Appeal correctly held that due-process and equal-protection principles require consideration of a defendant's ability to pay when a trial court requires money bail. And in answer to the Court's second question, the brief explained (at 27-30) that trial courts in California may not constitutionally consider public or victim safety in setting monetary conditions of release. Although petitioner agrees on both counts (Opening Br. 18-19), several amicus briefs take a different position on one or both questions. They are incorrect.

A. Question One

1. The Crime Victims United Charitable Foundation's brief urges the Court (at 10-14) not to decide the first question presented at all, because Humphrey's pretrial detention (it claims) can be sustained on another ground. Specifically, the Foundation argues that given his prior

[3] The handful of other amici that oppose Humphrey's reading of the California Constitution do not meaningfully grapple with the arguments in his merits brief. *See* San Bernardino DA Br. 34-40; Criminal Justice Legal Foundation Br. 11-21; Crime Victims United Charitable Foundation Br. 16-18. As to those amici, Humphrey rests on his prior briefing.

convictions, Humphrey could have been detained under Penal Code §1275(a), and that the Court of Appeal was required, "under the Constitutional Avoidance doctrine, to ... avoid the complex constitutional issue" (Br. 12) by denying habeas corpus on that basis. Even if that were true, this Court would be justified in answering the first question presented, given the question's importance. But it is not true.

Contrary to a key premise of the Foundation's argument (*see* Br. 13), §1275(a) does not codify the requirements for denying bail under article I, section 12. In particular, it does not reflect section 12's requirement that the trial court find "clear and convincing evidence" that a defendant's release would likely result in great bodily harm to others. And as the Court of Appeal explained, here "the [trial] court did not make such findings" because "the district attorney did not produce ... convincing evidence" that would support them. *Humphrey*, 19 Cal. App. 5th at 1025. The Court of Appeal was thus required to address the constitutional question, because the "trial court record" was *not* "enough for the Court of Appeal to conclude that Humphrey's pretrial detention was supported by sufficient evidence," Crime Victims Foundation Br. 14.[4]

[4] Indeed, when the trial court re-evaluated the issue on remand, it released Mr. Humphrey on non-financial conditions, including admittance to a residential program for seniors, electronic monitoring, home detention, drug testing, and a stay-away order.

2. The Criminal Justice Legal Foundation contends (Br. 30) that the Court of Appeal erred in ordering a remand at which the trial court "must consider [Humphrey's] ability to pay," because "the trial court already has considered the [possibility of own-recognizance] release," and thus the remand is unnecessary. That argument fails because the Court of Appeal's holding was not simply that the trial court "must consider [Humphrey's] ability to pay." *Id.* The holding instead was that the trial court had to do so *because* then it would know whether imposing money bail would result in pretrial detention—in which case the court could not impose money bail without making the findings and following the procedures required for a pretrial-detention order. *See Humphrey*, 19 Cal. App. 5th at 1014, 1037. The trial court's consideration of release on recognizance was thus not a substitute for what the Court of Appeal (correctly) required.[5]

3. The San Bernardino District Attorney's amicus brief includes (at 16-31) several arguments about the first question presented. None has merit.

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[5] The argument is independently meritless because it rests on the applicability of Penal Code §1270.1(c). Section 1270.1 is constitutionally suspect because it "leaves in the hands of the defendant a matter that is the trial court's responsibility to ensure—that a defendant not be held in custody solely because he or she lacks financial resources." *Humphrey*, 19 Cal. App. 5th at 1036.

a. The DA's brief first asserts (at 16) that "consideration of a defendant's finances may well be prohibited by our state Constitution." *Accord id.* at 30-31. That would be irrelevant even if it were true, because if the U.S. Constitution requires such consideration (as Humphrey submits and the Court of Appeal concluded), then any contrary prohibition in the state constitution would be preempted by the Supremacy Clause, *see* U.S. Const. art. VI, cl. 2.

b. The DA's brief next argues (at 16-20) that unaffordable money bail is not per se excessive. The reason that matters, according to the DA (*id.* at 19-20), is that "the prohibition on excessive bail is a specific constitutional provision," and thus "it is the only limit on the amount of bail that should be considered."

This contention is foreclosed by U.S. Supreme Court precedent. The Court has repeatedly explained that "[c]ertain wrongs ... can implicate more than one of the Constitution's commands," *Soldal v. Cook County*, 506 U.S. 56, 70 (1992), and therefore has "rejected the view that the applicability of one constitutional amendment preempts the guarantees of another," *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993). More specifically, the Court has recognized—in addressing a challenge to a federal bail statute under both the Eighth and Fourteenth Amendments—that there is a "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt."

United States v. Salerno, 481 U.S. 739, 749-750 (1987). Put simply, the U.S. Constitution separately bars excessive bail and financial conditions of release that a court imposes without consideration of a defendant's ability to pay (that is, de facto detention orders of the indigent without the requisite procedures and findings).[6]

c. Finally, the DA's brief contends (at 20-24) that even if due-process and equal-protection principles are relevant here, only rational-basis scrutiny is required. That too is wrong. Both the U.S. Supreme Court and other courts have recognized that *Salerno* applied heightened scrutiny. In one case, for example, the Supreme Court cited *Salerno* as part of its "line of cases which interprets the ... guarantee of 'due process of law' to ... forbid[] the government to infringe certain 'fundamental' liberty interests ... unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-302 (1993); *see also Foucha v. Louisiana*, 504 U.S. 71, 80-83 (1992); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780-781 (9th Cir. 2014) (en banc); *United States v. Deters*, 143 F.3d 577, 583 (10th Cir. 1998); *Simpson v. Miller*, 387 P.3d 1270, 1277 (Ariz. 2017), *cert. denied*, 138 S. Ct. 146 (2017); Resp. Br. 19-20 (citing additional cases). Similarly, the Court applied heightened

[6] The same point refutes the DA's citation (Br. 24) of *Gerstein v. Pugh*, 420 U.S. 103 (1975), in arguing that "pretrial detention is authorized if there is probable cause." *Gerstein* was a Fourth Amendment case, *see id.* at 126; it did not address the independent Fourteenth Amendment rights to pretrial liberty or against wealth-based detention.

scrutiny in thrice striking down state laws that imprisoned people just because they were poor. *See Bearden v. Georgia*, 461 U.S. 660, 665 (1983); *accord Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-241 (1970). The ruling in each of these cases was driven by the availability of alternative ways for the state to serve its legitimate interests. *See Williams*, 399 U.S. at 241, 244; *Tate*, 401 U.S. at 399; *Bearden*, 461 U.S. at 671-672. That shows that heightened scrutiny was applied, because under rational-basis review, it is "irrelevant ... that other alternatives might achieve approximately the same results." *Vance v. Bradley*, 440 U.S. 93, 102 n.20 (1979). This explains why the Fifth Circuit has squarely held that heightened equal-protection scrutiny applies to the imposition of wealth-based detention. *See ODonnell v. Harris County*, 892 F.3d 147, 161-162 (5th Cir. 2018) (op. on reh'g); *Frazier v. Jordan*, 457 F.2d 726, 728-729 (5th Cir. 1972).

The two cases the DA offers in response—*In re York*, 9 Cal. 4th 1133 (1995), and *Schilb v. Kuebel*, 404 U.S. 357 (1971)—are inapposite because neither involved the infringement of either the right against wealth-based detention or the right to pretrial liberty. *York* instead addressed whether indigent defendants who were *released* pretrial could be required to adhere to "reasonable conditions," like warrantless drug testing. *See* 9 Cal. 4th at 1152. And *Schilb* addressed whether a county could permissibly retain a 1% fee of bail amounts to cover administrative costs. *See* 404 U.S.

at 358-359, 364-366. It is thus unsurprising that neither case applied the heightened scrutiny that the U.S. Supreme Court cases cited above require with deprivations of physical liberty.[7]

B. Question Two

The same three amicus briefs discussed above also urge reversal on the second question presented, as do two others. None of their arguments that California courts may constitutionally consider public or victim safety in setting monetary conditions of release from detention is persuasive.

1. The Crime Victims Foundation's brief argues (at 14-16) that the California Constitution and S.B.10 mandate consideration of public and victim safety when setting "bail." But even putting aside that neither the state constitution nor a state law can supersede what the U.S. Constitution requires, *see* U.S. Const. art. VI, cl. 2, the second question presented is about whether these factors can be considered in setting *money* bail, not bail generally. (Amicus's confusion in this regard is evident from its reliance on S.B.10, which—as amicus states (Br. 14, 16)—eliminates

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[7] Because heightened scrutiny applies, the DA's extended argument that California's system would survive rational-basis review (Br. 25-28) is irrelevant. The DA also contends in passing (*id.* at 28-29) that requiring trial courts to inquire into ability to pay when setting money bail would greatly burden them. That argument fails for three reasons: (1) It is likely not true (many jurisdictions require such an inquiry before appointment of counsel, yet the DA offers no evidence that those jurisdictions' trial courts have been overwhelmed); (2) it would not matter even if it were true, because government convenience is not an excuse for disregarding constitutional rights; and (3) any such burden could be avoided by using non-monetary conditions of release.

money bail.) Humphrey agrees that courts can consider public and victim safety in imposing non-monetary conditions of release (or in deciding whether pretrial detention, where permitted, is required). *See* Resp. Br. 30 (citing *Humphrey*, 19 Cal. App. 5th at 1044). That does nothing, however, to answer Humphrey's (and petitioner's) explanation for why courts cannot consider those factors in imposing money bail.

2. The San Bernardino DA's brief similarly contends (at 31-33) that trial courts must consider public safety when setting the amount of money bail because they are required to do so by article I, section 28(f)(3) of the California Constitution. But again, the U.S. Constitution prohibits such consideration because the imposition of money bail to protect public or victim safety flunks even rational-basis scrutiny—the reason being that under California law, money bail is not forfeited if a defendant re-offends (in other words, harms public or victim safety) while out on money bail. Resp. Br. 27-30; *Reem*, 2017 U.S. Dist. LEXIS 210430, at *8. As a result, the Supremacy Clause would preclude the enforcement of any contrary provision of state law (though as Humphrey has explained (Resp. Br. 30-53), section 28(f)(3) does not govern the bail analysis).

3. The Criminal Justice Legal Foundation's brief argues (at 22) that "[t]rial courts must consider issues of public and victim safety when setting monetary bail" because no presumption of innocence applies in the setting of bail. The Foundation regards the presumption as relevant to the

second question because of its belief (*id.* at 25) that "the Court of Appeal ... premised its entire opinion on defendant being 'presumptively innocent' prior to trial." That is wrong, but in any event the presumption is not before this Court. And even if the Foundation's argument about the presumption were right, that would not matter. What matters is the *correct answer* to the second question presented. And that answer has nothing to do with the presumption of innocence. As explained in the previous paragraph, the correct answer is (again as petitioner agrees) that trial courts cannot consider public and victim safety when setting money bail because the imposition of money bail to protect public or victim safety flunks even rational-basis scrutiny. Nothing in the Foundation's brief addresses, let alone rebuts, that simple point.

4. The San Diego DA's brief takes a more extreme approach, urging the Court (at 2-7) to rewrite the Penal Code to require forfeiture of money bail not only for failure to appear but also "for new crimes" (*id.* at 6), thus avoiding a supposed conflict with the bail provisions of the state constitution, *see id.* (section 1305's "failure to require bail forfeiture in cases of new crimes ... does not reflect the Constitution's mandate that public safety be paramount in bail issues"). But there is no such conflict. The constitution provides that public and victim safety should be the paramount considerations when imposing "bail." Art. I, §§12, 28(f)(3). That word encompasses both monetary and non-monetary conditions of

release—the latter of which trial courts *can* constitutionally require with public and victim safety as the paramount considerations, *see* Resp. Br. 30 (citing *Humphrey*, 19 Cal. App. 5th at 1044). That Penal Code §1305 forfeits money bail only for failure to appear, therefore, does not require "invalidation of California's Constitution," DA Br. 2, nor requires that "[t]he will of the Legislature and electorate … be casually swept aside, *id.* at 4.

The San Diego DA's brief also argues (at 7) that even under current law (that is, without any judicial rewriting of statutes), the amount of money bail does have a rational relationship with preventing crime, in two ways. *First*, she says it deters a defendant out on money bail in one jurisdiction from committing a crime in another jurisdiction, because being arrested and jailed for that new crime could make the defendant miss a court appearance in the first jurisdiction, in which case the money bail would be forfeited. To begin with, however, this assumes a set of facts that will not be present in most cases: (1) the defendant was arrested for the new crime, (2) the defendant was unable to make bail on it (despite having made bail the first time), and (3) a required court appearance on the original case occurred during the time the defendant was still in jail on the new offense. And even as to that scenario, the DA does not explain why the first jurisdiction would forfeit the defendant's bail when he did not voluntarily miss a court appearance but was legitimately unable to attend

because he was in jail (and assuredly would have his lawyer or a family member alert the court to that fact). Unsurprisingly, the DA offers no authority for the position that a commercial surety would have to forfeit a monetary bond if the person was arrested in another jurisdiction; indeed, current law is to the contrary. *See* Cal. Penal Code §1305(f) (any forfeiture must be vacated if the defendant is in custody in another jurisdiction, unless the prosecuting agency seeks extradition); *see also id.* §1305(c)(1) (any forfeiture of bail for failure to appear is revoked so long as the defendant appears in court within 180 days from the forfeiture).

Second, the DA's brief says (at 7) that money bail deters crime because under Penal Code §1275(a)(1), "the commission of a new offense while out on bail will be factored into the setting of bail in the new case." That simply does not follow. Section 1275(a)(1) applies equally *whether the defendant is out on money bail, non-monetary bail, or recognizance release.* Whatever deterrent effect section 1275 has, then, it has that effect (and to the same extent) whether or not money bail has been imposed. The same point answers the DA's related claim (Br. 7) that money bail deters crime because under Penal Code §12022.1, defendants who commit a felony "while on bail" for a felony charge are subject to a two-year sentencing enhancement. *Accord* Golden State Bail Agents Association Br. 18. Like section 1275, section 12022.1 applies to anyone who "has been released from custody on bail or on his or her own recognizance." Cal.

Penal Code §12022.1(a)(1). It applies, in other words, regardless of whether money bail has been imposed (and, if it has, regardless of the amount). Imposing money bail, or imposing it at a higher amount, thus has no added deterrent effect, i.e., no rational relationship to protecting public safety (which is why the Equal Protection Clause forbids consideration of safety in setting money bail).

5. The Golden State Bail Agents Association (GSBAA) makes a different deterrence argument, contending (Br. 18) that committing a crime while on bail can lead to the loss of the monetary "premium fee" paid to a commercial bail bondsman, and that this potential loss creates an incentive for good behavior. This argument fails because it assumes that the fee *is* refunded to the defendant if no additional crimes are committed. That assumption is wrong.

As the word suggests, the bail-bonds fee is the price a defendant pays a bail agent so that the agent will post the full amount of monetary bail. And save in unusual circumstances, that fee is not refundable. *See, e.g.*, *Indiana Lumbermens Mutual Insurance Co. v. Alexander*, 167 Cal. App. 4th 1544, 1547 (2008) ("Because [the bail-bond company] was at risk for paying the entire posted bail if Alexander absconded at any time, the law permitted [it] to make the premium nonrefundable."). GSBAA's own website (https://gsbaa.org/resources/) confirms this: For visitors to the site who want "Bail Education," GSBAA links to the website of the Bail

Resource Center and Career Academy. And that site's frequently-asked-questions page explains that:

> bail agent[s] will usually ask for 10 percent of the full bail amount as security to obtain the release. For example, if the bail is $5,000, the premium (the amount paid to the bondsman) will be $500.... The bail agent is, in effect, lending the indeminitor $5,000 for a fee of $500. *There generally is no refund when the services of a bail agent are used.*

http://link2education.com/faqs/ (emphasis added) (visited Dec. 7, 2018). This is unsurprising. If GSBAA's insinuation that the 10 percent fee normally gets refunded were correct, it would be hard to understand how bail agents stay in business.

III. ARGUMENTS RAISED BY AMICI THAT GO BEYOND THE QUESTIONS PRESENTED SHOULD NOT BE ADDRESSED

Several amici ask this Court to answer questions beyond those on which this Court directed briefing when it granted review. These additional questions include (1) whether unaffordable money bail is "excessive," San Bernardino DA Br. 20; (2) exactly what bail-related procedures should be followed if *Humphrey* is affirmed, *e.g.*, *id.* at 28-29; San Diego DA Br. 8-15; and (3) what is the precise meaning of the phrase "sufficient sureties" in Article I, sections 12 and 28, GSBAA Br. 9-14.

This Court should decline to answer these questions (and any others beyond the three this Court specified). Rule of Court 8.516(a) restricts litigants to "the issues to be briefed and argued" that this Court has specified. And this Court routinely enforces this limitation. For example,

in *Zhang v. Superior Court*, 57 Cal. 4th 364 (2013), the Court rejected a request to consider a question "not raised in the trial court, the Court of Appeal, or the petition for review," *id.* at 379 n.7. Similarly, in *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4th 541 (2011), this Court refused to address issues neither resolved in Court of Appeal nor included in petition for review, *see id.* at 567-568. There is no reason for a different approach here. If the Court believes that any of amici's additional issues warrants consideration, it should consider them in a case in which they have been properly raised and briefed by the parties.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: December 7, 2018

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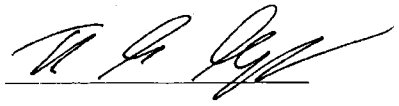
CERTIFICATE OF COMPLIANCE

According to the word-count function of the computer program used to prepare the foregoing brief, the brief contains 7,034 words, excluding the portions exempted by California Rule of Court 8.520(c)(3).



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DECLARATION OF SERVICE

I, Armando Miranda, state:

That I am a citizen of the United States, over eighteen years of age, an employee of the City and County of San Francisco, and not a party to this action. My business address is 555 Seventh Street, San Francisco, California 94103. I am familiar with the business practice at the Office of the San Francisco Public Defender for collecting electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system is deposited in the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic system. Participants who are registered with TrueFiling will be served electronically. Participants who are not registered will receive hard copies through the mail via the United States Postal Service.

That on December 7, 2018, I electronically served the attached RESPONDENT'S REPLY TO AMICUS BRIEFS by transmitting a true copy through this Court's TrueFiling system. Because one or more of the participants has not registered with the Court's system or are unable to receive electronic correspondence, on December 7, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at Office of the San Francisco Public Defender at 555 Seventh Street, San Francisco, California 94103, addressed as follows:

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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 December 7, 2018, at San Francisco, California.

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