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California Supreme Court Invents Constitutional Right to Affordable Bail

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KEY TAKEAWAYS

The California Supreme Court has held that, except in capital cases, trial judges must set bail at an amount that is "reasonably attainable" by the accused.

The court's *In re Kowalczyk* decision elevates a judge-made entitlement over the text, history, and structure of the state constitution.

The criminal justice system exists to protect the rights of the accused and to vindicate the rights of victims, punish criminals, and safeguard the public.

The California Supreme Court has once again mistaken judicial invention for constitutional interpretation. In April, the court held that, except in capital cases, the California Constitution guarantees criminal defendants a right to pretrial release on bail—and requires trial judges to set bail at an amount that is "reasonably attainable" by the accused.[1] That holding is as novel as it is alarming. It elevates a judge-made entitlement over the text, history, and structure of the state constitution; discounts the grave risks that some defendants pose to victims and the public; and disregards the repeated, unmistakable commands of the California electorate.

Californians have confronted this pattern before. Again and again, the state's high court has purported to discover sweeping rights for criminals in the California Constitution that the document's text does not fairly support—only to have the people restore

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constitutional order at the ballot box. Propositions 4, 8, 9, and 189 were not isolated political reactions. Each was a referendum passed in response to radical decisions that placed the interests of criminals above the rights of victims, the protection of the public, and the common-sense judgments of the citizenry. Each reflected the sovereign authority of the people to correct a court that had strayed from the constitution it was charged with interpreting.

The latest bail decision repeats that error in particularly stark form. During the past 44 years, California voters have amended their constitution not once but twice, both to make clear that trial judges may deny bail to a person charged with a felony and to establish a Victims' Bill of Rights—including mandatory detention for violent felons who pose a threat to others.[2] Those amendments cannot be reconciled with the court's new affordable bail standard. The court's contrary conclusion does not merely misread the charter; it diminishes the constitutional choices the people themselves have made.

This *Legal Memorandum* proceeds in three parts. Part I traces the California Supreme Court's recurring practice of constitutional innovation and the electorate's repeated use of the initiative and referendum process to reject it, with particular attention to Propositions 4, 8, 9, and 189. Part II examines the text, history, and purpose of California's bail provisions and Victims' Bill of Rights, showing how those provisions preserve judicial authority to deny bail when necessary to protect victims and public safety. Part III analyzes the court's April decision, identifies its doctrinal and practical defects, and explains why its "reasonably attainable" standard cannot be squared with the constitution as amended by the people.

The court's latest holding is contrary to the text of California's constitution, contrary to its history, and contrary to the settled will of the people. It should not be permitted to stand. The people of California—or, where constitutionally sufficient, their elected representatives—should correct the court once again and reaffirm a basic principle of ordered liberty: The criminal justice system exists not only to protect the rights of the accused, but also to vindicate the rights of victims, punish criminals, and safeguard the public.

Part I: Judicial Innovation v. the Electorate

California's original constitution of 1849 provided that "all persons shall be bailable, by sufficient sureties; unless for capital offences, when the proof is evident or the presumption great."[3] Another provision stated

that "excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonably detained."[4] In 1879, those two provisions were consolidated into Article I, Section 6 of the Constitution of 1879. That remained the case for almost 100 years.

In 1973, the California Supreme Court held in *In re Underwood* that the right to pretrial release was guaranteed for all defendants.[5] Displeased with the court's ruling, voters passed Proposition 7 in 1974, relocated the bail provisions to Section 12, and gave trial judges the discretion to release defendants on their own recognizance.[6]

In 1977, Governor Jerry Brown appointed Rose Bird as Chief Justice of the California Supreme Court. Bird was divisive and controversial in part because of her consistent votes against capital convictions[7] and a dissent she wrote opposing the inclusion of Proposition 8—the Victim's Bill of Rights—on the ballot in 1982.[8] She was eventually removed from office in 1986 by the voters.

By 1982, having had enough of rogue judges and violent criminals, California voters passed two propositions to amend the constitution to shorten the leash on judges and bolster victims' rights. The first was Proposition 4, a constitutional amendment that allowed courts to deny bail in felony cases under two additional circumstances. As amended, Section 12 stated:

> A person shall be released on bail by sufficient sureties, *except for*: (a) Felony offenses involving acts of violence against 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; (b) 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 person with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.[9]

The voters passed Proposition 4 by an overwhelming vote of 82.5 percent to 15.1 percent to prevent both the legislature and judges from changing the requirements that governed bail without the people's consent.[10]

The second was Proposition 8, which amended the state constitution by including a victim's bill of rights and restricting the rights of convicts.[11] Adopted by a vote of 56 percent to 43 percent, Proposition 8 repealed Section 12 of Article I and added Section 28, which included the following prefatory language: "The People of the State of California find and declare

that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the crime justice system to fully protect those rights, is a matter of grave statewide concern."[12] Section 28(e), entitled "Public Safety Bail," stated in part:

> A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great.... In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety shall be the primary consideration.[13]

Taken together, Propositions 4 and 8 sent a loud and clear message that the citizens of California were fed up with judges releasing violent felons, that mandatory release on bail was a bridge too far, that victims mattered, and that public safety—not defendant's "rights"—was the "primary consideration" that judges must take into account when setting bail.

In 1994, the voters passed Proposition 189, which, among other things, amended Article I, Section 12 by adding "felony sexual assault offenses on another person" to subsection (b).[14] A year later, in *In re York*, a case dealing with whether a court or magistrate may condition release from custody on a defendant's own recognizance, the California Supreme Court noted in a footnote that the bail provision language in Proposition 4 appeared to conflict with the language in Proposition 8 ("shall" in Proposition 4 vs. "may" in Proposition 8) and that, because Proposition 4 received more votes, its bail and own recognizance provisions were "deemed to prevail over those set forth in Proposition 8."[15] In other words, trial judges "shall" (i.e., must) release defendants on bail unless it is a capital case or one of the felony exceptions enumerated in subsections (b) or (c). Remarkably, the court did not cite any statute or state constitutional provision authorizing it to erase the will of the voters and nullify Proposition 8 because Proposition 4 received more votes.

In 2006, the California Supreme Court held in *People v. Standish* that, because the bail provisions of Propositions 4 and 8 were "directly at odds," Section 28(e) of Proposition 8 "never took effect."[16] So much for the 2,826,081 Californians who voted for Proposition 8.

Angered by crime rates and a state Supreme Court that did not put victims first, California voters passed Proposition 9, the "Victim's Bill of Rights Act of 2008," called Marsy's Law.[17] Proposition 9 specified that the

law, named for Marsy Nicholas, who was murdered by her ex-boyfriend in 1983, was "needed to remedy a justice system that fails to fully recognize and adequately enforce rights of victims of crime."[18] In the "Findings and Declarations" section, Marsy's Law says that "[t]he People of the State of California find that the 'broad reform' of the criminal justice system intended to grant these basic rights mandated in the Victims' Bill of Rights initiative measure passed by the electorate as Proposition 8 in 1982 has not occurred as envisioned by the people," a not-so-subtle swipe at the California Supreme Court and its abandonment of Proposition 8.[19]

Marsy's Law amended Section 28 of Article I of the state's constitution by enumerating victims' rights "in order to protect the legitimate rights of victims of crime."[20] Key among those rights were (1) the right to "have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant" under Section 28(b)(3) and (2) the right to public safety bail: "A person *may* be released on bail by sufficient sureties, except for capital crime when the facts are evident.... [I]n setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged.... [P]ublic safety and the safety of the victim shall be the primary considerations" under Section 28(f)(3).[21]

Notice how California voters again adopted language to reject the California Supreme Court, this time to rebut the court's creative erasure of the bail provisions of Proposition 8. By using "may" instead of "shall," the people made clear both that judges do indeed have the discretion to deny bail and that the safety of the victim must be the primary consideration.

Part II: Cash Bail and Victims' Rights

Cash bail rests on a straightforward proposition: Pretrial liberty and accountability need not be opposing principles. By placing a financial stake behind a defendant's promise to return to court, bail supplies a concrete incentive to appear while permitting release pending adjudication—not punishment before conviction. From the perspective of the California District Attorneys Association (CDAA) and other prosecutor associations across the country, traditional cash bail remains an important component of a pretrial system charged with protecting the public and securing defendants' appearance. Bail schedules give that system a practical framework: Predetermined, offense-based amounts provide a consistent starting point, make release requirements more predictable, and can allow eligible defendants to obtain release without waiting for an initial court appearance.

Properly understood, however, a schedule is a starting point, not a substitute for judicial judgment. Neither money nor a printed chart guarantees public safety or attendance; individualized review must account for the defendant's circumstances and ability to pay, available nonfinancial alternatives, and applicable constitutional protections. The sound argument for bail schedules is therefore not that they eliminate discretion, but that they discipline its exercise, providing an orderly framework within which courts can reconcile liberty, accountability, and public safety.

As a policy matter, the push to end cash bail is not new in our country. In 1961, progressives created the Manhattan Bail Project specifically to eliminate cash bail.[22] That project eventually grew into the Vera Institute and dozens of other organizations like Vera that are obsessed with ending cash bail. They even came up with spooky-sounding terms like "poverty penalty," suggesting that the only reason a person remained in jail pending trial was his or her inability to post bond, ignoring the facts of the crime alleged or history of failures to appear in court or long criminal records—the Achilles' heels of the movement. In 2017, former career public defender Robin Steinberg founded the Bail Project, an organization the provides free bail assistance to those who cannot afford to post bail, in California.[23]

In 2018, the California Senate passed S.B. 10, a law designed to eliminate cash bail in the state and replace it with mandatory risk assessments for detained suspects awaiting trial.[24] After the governor signed the bill, a unique mix of stakeholders banded together to repeal the legislation by referendum during the November 2020 election. Supporters of the "no" vote to repeal the controversial legislation included, in addition to the California Republican Party, the American Civil Liberties Union (ACLU) of Southern California, California Black Chamber of Commerce, California NAACP, and Crime Victims United of California, among other groups. The "yes" vote effort was backed by the California Democratic Party and included financial support from Patty Quillin ($1 million, the wife of Netflix CEO Reed Hastings; Steve and Connie Ballmer of Microsoft ($6 million total); and Tom Steyer, founder of Farallon Capital hedge fund and the NextGen Climate Action Committee ($500,000).[25] California Proposition 25 repealed S.B. 10 by a margin of 56.41 percent to 43.59 percent and effectively restored cash bail.[26]

That same year, George Gascon was elected Los Angeles County District Attorney, in large part because of an infusion of $2.5 million from George Soros, who gave the money to the California Justice & Safety PAC, which supported Gascon's campaign.[27] Upon election, Gascon set up a transition team populated with 38 anti–law-and-order activists and zealots tasked

with implementing his progressive (including anti–cash bail) agenda.[28] This was significant because the Los Angeles County District Attorney's Office is the largest DA's office in the country, with upwards of 900-plus prosecutors spread across the massive county. Since one of the hallmarks of the Soros rogue prosecutor movement was to eliminate cash bail, Gascon's "bail committee" was headed by Robin Steinberg and Dolores Caneles, Community Outreach Director for the Bail Project.[29]

Moments after Gascon was sworn into office, he issued a blizzard of policy directives. Special Directive 20-06, concerning "Pretrial Release Policy," claimed that "unaffordable cash bail" creates "a two-tiered system of justice," leads to "unnecessary incarceration," and "eviscerates the bedrock of our democracy and undermines our principles of justice, fairness and equality under the law."[30] Even though Proposition 25 had just failed, the directive said the D.A.'s Office "will not wait for statewide reform before imposing meaningful changes in the use of cash bail."[31] In what has become a mantra for the anti-bail cabal, the directive blurted out that "freedom should be free."[32]

The directive does not mention that certain criminals, especially career felons, pose a significant risk of danger to the community and that cash bail is a tool that works to ensure their appearance at future court dates. Nor does the directive mention the law (such as Marsy's Law), victims' rights in the California Constitution, or the fact that public safety is and should be the "primary consideration" when setting the appropriate amount of bail.

Gascon's diktat prohibited his prosecutors from taking into consideration an accused's criminal history, requesting cash bail for any misdemeanor, and relying solely on scored risk assessment tools for detention.[33] In a move that likely upset career prosecutors in his office, Gascon's directive prohibited them from opposing defense motions to remove or modify conditions of release, defense requests to waive client appearances at "non-essential" court proceedings, or defense requests seeking relief from bench warrants for defendants who fail to appear.[34] In other words, Gascon prevented his prosecutors from being prosecutors.

Other Soros-funded or Soros-inspired California prosecutors such as Chesa Boudin (San Francisco), Pamela Price (Alameda), and Diana Becton (Contra Costa) instituted similar anti-cash bail policies that predictably resulted in rising crime rates in their counties.[35]

Part III: *Humphrey* and *Kowalczyk*

Two years before Proposition 25 repealed S.B. 10 but after S.B. 10 was the law in California, the Court of Appeals for the First District of California

held in *In Re Kenneth Humphrey* that a trial judge (1) failed to make findings and inquiries regarding the financial ability of the defendant to post bail; (2) failed to consider whether less restrictive conditions of release were available; and (3) set bail based solely on the bail schedule rather than on an individualized inquiry.[36] As a result, the appeals court reversed and remanded the case to the trial court. The trial court conducted a new bail hearing and ordered Humphrey released on various non-financial conditions.

The issue was resolved, and there was no live case or controversy, but that did not stop the California Supreme Court from wading into the issue. Typically, the top appellate court in a state takes cases only where there is a live case or controversy. But not in California, where its Supreme Court injected itself into the bail debate by granting review *on its own motion* in the Humphrey case. In a 2021 opinion, the court noted that it granted review "to address the constitutionality of money bail as currently used in California as well as the proper role of public and victim safety in making bail determinations."[37]

Despite the fact that Humphrey had won his case and obtained the relief he sought, the court held that "where a financial condition is nonetheless necessary, the court must consider the arrestee's ability to pay the state amount of bail—and may not effectively detain the arrestee solely because the arrestee lacked the resources to post bail."[38] The court handed down its decision on March 21, 2021—four months after November 3, 2020, when the voters had soundly rejected Proposition 25 and its idea of eliminating cash bail and replacing it with a scheme based on risk assessment—and did not even mention the results of Proposition 25 in its opinion.

The court noted that in "unusual circumstances" when the "need to protect community safety may conflict with the arrestee's fundamental right to pretrial liberty...[to detain an arrestee] a court must find by clear and convincing evidence that no condition short of detention could suffice and then ensure [that] the detention otherwise complies with statutory constitutional requirements."[39] If Justice Antonin Scalia had been on the *Humphrey* court, he would have ridiculed the majority's "interpretive jiggery-pokery."[40]

Courts have no business opining on hypothetical issues or issuing policy statements under the fig leaf of a judicial opinion. Our Founders realized this and embedded limitations on the jurisdiction of United States federal courts in Article III, Section 2, Clause 1 of the U.S. Constitution. As the Supreme Court noted in *Flast v. Cohen*, the judicial power of the federal courts "is constitutionally restricted to 'cases' and 'controversies.'"[41] Those

two words "have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government."[42] Those two words "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[43]

Similar to the federal Constitution, the California Constitution divides the power of the government among the legislative, executive, and judicial branches, but it does not contain a case-or-controversy clause. Under Article VI, Section 12(a), the state's Supreme Court "may, *before decision*, transfer to itself a cause in a court of appeal."[44] Under Subsection (b), however, the "Supreme Court may review the decision of a court of appeal in any cause."[45] The California Supreme Court has interpreted this clause as allowing it to issue advisory opinions, and the "cause" it took up here was obvious: Draft an opinion that discovers a constitutional right to affordable bail and enshrine that right across the state despite the will of the people as recently affirmed by the result of Proposition 25. The court did not cite Section 12 as a justification to render an advisory opinion.

Amicus briefs in support of Humphrey included Chesa Boudin, a San Francisco Deputy Public Defender, various ACLU offices across California, the California Public Defenders Association, and the American Bar Association.[46] Amicus briefs supporting the People of California included elected district attorneys George Gascon, Summer Stephan, Michael Ramos, and (at least at first) Xavier Becerra, the state's Attorney General.[47]

The unanimous decision reads like a policy paper from the Bail Project. The decision notes that an "accused may be impaired to some extent in preparing a defense" and that "studies suggest that pretrial detention heightens the risk of losing a job," referencing two slanted law review articles critical of pretrial detention, one of which was published by Harvard Law School's Criminal Justice Program (CJP).[48]

The two issues not resolved in *Humphrey* were (1) whether Section 12 of the state constitution "can or should be" reconciled with the public safety bail provision of Marsy's Law in Section 28(f)(3) and (2) whether it is constitutionally permissible for a trial court to set bail above a defendant's ability to pay.

The court did not note that the lead author of the Harvard paper was Elana Fogel of the ACLU's Initiative to Combat Mass Incarceration[49] or that one of the two faculty co-directors of the CJP was Professor Carol Steiker, a zealous anti–death penalty advocate.[50] Nor did the court mention the fact that among other people who provided "generous insights and feedback" to the paper were none other than Patrisse Cullors, a radical

Marxist, avowed prison abolitionist, and co-founder of Black Lives Matter, and Alec Karakatsanis, a public defender and fellow traveler on the abolish-prisons train.[51]

To justify its opinion, the court wrote that "principles of equal protection and substantive due process likewise converge in the money bail context. The accused retains the fundamental constitutional right to liberty," citing the Supreme Court's opinion in *United States v. Salerno*.[52] The problem for the court is that *Salerno* did not say that. In fact, *Salerno* held (1) that the federal Bail Reform Act's authorization of pretrial detention on the basis of future dangerousness constituted a permissible regulation that did not violate substantive due process and was not impermissible punishment before trial and (2) that the Due Process Clause did not categorically prohibit pretrial detention imposed as a regulatory measure on the ground of community danger.[53] The page in *Salerno* that the California Supreme Court referenced in its opinion for the proposition that an accused "retains the fundamental right to liberty" was ripped out of context.

In analyzing the Bail Reform Act's procedures, the U.S. Supreme Court contrasted the "government's interest in preventing crime," which it described as "both legitimate and compelling," with the "other side of the scale…the individual's strong interest in liberty."[54] The Court noted the "importance and fundamental nature of this right" but then added that, "as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society."[55] Nevertheless, the California Supreme Court held in *Humphrey* that pretrial detention based solely on an accused's financial condition violates state and federal equal protection and due process principles.[56]

Those cases set the stage for the latest outrage from the California Supreme Court. In *In re Kowalczyk*, the court addressed two important questions left unresolved by *In re Humphrey*: whether Article I, Section 12, or Article I, Section 28(f)(3) of the California Constitution controls the denial of bail in noncapital cases and whether a trial court may set monetary bail above a defendant's ability to pay. The case arose after Gerald Kowalczyk used several lost credit cards at a fast-food restaurant and was charged with identity theft and related offenses. The allegations themselves were comparatively modest, but Kowalczyk's record was anything but modest: He had accumulated 64 prior convictions, had failed to comply with supervision while previously released on his own recognizance, and had convictions in multiple counties and states.

The trial court first set bail at $75,000 and later denied bail altogether, citing Kowalczyk's extensive criminal history, his poor record of compliance,

and the substantial risk that he would not appear for future proceedings. While Kowalczyk's habeas petition was pending, he accepted a plea agreement, received credit for time served, and was released.

The Court of Appeal initially dismissed the petition as moot, but the California Supreme Court transferred the matter back with instructions to decide the constitutional questions. The case thus became the vehicle for resolving a conflict among the Courts of Appeal over the meaning of California's competing bail provisions and the reach of *Humphrey*.

The dispute centered on two commands adopted at different times: Section 12's direction that a person "shall be released on bail," subject to enumerated exceptions for specified violent or threatening felonies, and Marsy's Law's later declaration in Section 28(f)(3) that a person "may be released on bail" and that public safety and victim safety "shall be the primary considerations" when bail is set, reduced, or denied.

The court held that the two provisions could be "harmonized," but only by treating Section 12 as the controlling limitation on judicial authority. In the court's view, Section 12 supplies the exclusive categories in which bail may be denied in a noncapital case: certain violent felonies, felony sexual assaults, and other felonies involving threats of great bodily harm, coupled with the constitutionally required findings.

Section 28(f)(3), the court reasoned, does not enlarge those categories. Instead, its use of the word "may" describes only the possibility that a defendant may or may not be released, while its references to public safety, victim safety, and "denying bail" operate only within Section 12's preexisting framework. Relying on the presumption against implied repeal, the court concluded that Marsy's Law neither displaced Section 12 nor gave judges broader authority to detain dangerous defendants charged with offenses outside Section 12's enumerated exceptions.

On the second question, the court held that when preventive detention is unavailable under Section 12, bail generally must be set at an amount reasonably attainable by the particular defendant. A court must first consider whether nonfinancial conditions—such as supervision, monitoring, or required check-ins—can reasonably protect the public, safeguard the victim, and assure the defendant's appearance. If monetary bail is necessary, the judge must conduct an individualized assessment that includes the seriousness of the offense, the defendant's criminal record, compliance history, flight risk, danger to others, financial resources, and the availability of less restrictive alternatives. The amount need not be convenient or easily affordable, and a defendant must substantiate a claimed inability to pay. But a judge may not deliberately set an insurmountable figure as an end run around Section 12's limits on detention.

Although its conclusion may be dressed in the familiar robes of harmonization, the court once again managed to find a creative way to write around what the people enacted. Marsy's Law did *not* say that public safety and victim safety should merely be considered after judges had exhausted the narrow detention categories contained in Section 12. It declared that a person "may" be released on bail; expressly governed the "setting, reducing, or denying" of bail; and commanded that public safety and victim safety "shall be the primary considerations." Those words were adopted against a well-developed constitutional history in which the difference between "shall" and "may" had already carried unmistakable significance. Rather than give the voters' chosen language its ordinary force, the court converted "may" into a vague statement of abstract possibility and reduced the public-safety mandate to a procedural appendage. That is not faithful harmonization. It is judicial revision.

The court's reliance on the presumption against implied repeal also obscures the central issue. No one needed to prove that Marsy's Law silently erased every word of Section 12. The task was to give meaningful effect to both provisions, including the later amendment's explicit reference to denying bail and its elevation of safety above all other considerations.

A genuinely harmonious reading would recognize that Section 12 preserves a general right to bail while Section 28(f)(3) grants courts discretion to deny it when compelling public-safety or victim-safety concerns demand that result. Instead, the court treated the older provision as a ceiling on the newer one, leaving the operative language of Marsy's Law with remarkably little independent work to do. The result is especially difficult to defend in a case involving a defendant with 64 prior convictions, repeated supervision failures, and a demonstrated history spanning multiple jurisdictions—the very sort of record that makes a categorical refusal to recognize broader judicial discretion appear detached from practical reality.

Just as troubling is the court's dismissive treatment of *amici curiae* on the other side, especially the California District Attorneys Association. The CDAA's amicus brief made the straightforward textual point that Section 28(f)(3)'s express reference to "denying bail" must do real work; otherwise, the phrase is substantially drained of meaning. The court brushed that argument aside as "unpersuasive," reasoning that "denying" bail refers only to defendants who are already eligible for detention without bail under Section 12. But that answer assumes the very conclusion the *amici* challenged.

It does not explain why the voters added broader, later language addressing the denial of bail, used "may" instead of "shall," and made public and victim safety primary if they intended no meaningful expansion of judicial authority.

The irony is difficult to miss. The *amici*'s arguments were grounded in the constitutional text, the history of California's competing bail provisions, the structure of Marsy's Law, and the electorate's unmistakable demand that victims and public safety come first. The California Supreme Court's contrary logic depends on redefining ordinary words, minimizing later-enacted language, and insulating its preferred result behind an unusually rigid application of the rule against implied repeal.

Having disconnected its analysis from the text and from the voters' evident purpose, the court then pronounced the more natural reading "unpersuasive." Once again, the people spoke through the initiative process, and once again, the court found a creative way to tell them that the words they enacted do not mean what they plainly say.

Conclusion

The California Supreme Court's outrageous decision in *In re Kowalczyk* cannot be allowed to stand. Once again, the court has mistaken judicial invention for constitutional interpretation, elevating a newly minted right to "reasonably attainable" bail over the text, structure, and history of California's constitution—and over the repeated commands of the people themselves. A constitution that makes public safety and victim safety the "primary considerations" cannot fairly be read to require judges to price dangerous or chronically noncompliant defendants out of detention.

The response should be immediate and sustained. Congress should hold oversight hearings that examine the consequences of judicially imposed "affordable bail" rules, including their effects on interstate crime, federal–state law-enforcement cooperation, victims, repeat offending, and failures to appear. California's legislature should likewise conduct public hearings; compel testimony from prosecutors, sheriffs, victims, and pretrial-services officials; and require transparent reporting on rearrests, absconding, supervision failures, and crimes committed by defendants released under the new rule.

Most important, Californians should return to the ballot box with a constitutional amendment that leaves no room for further judicial gamesmanship. The amendment should state in plain English that criminal defendants do not have a constitutional right to bail set at an amount they can afford when they are accused of a violent crime, present a serious danger to a victim or the public, pose a substantial flight risk, repeatedly violate release conditions, or have a long criminal record demonstrating chronic recidivism or noncompliance. It should also reaffirm that judges

may deny bail in those circumstances and that protection of victims and the public—not a defendant's financial convenience—remains the primary consideration.

Finally, Californians should use every lawful mechanism of judicial accountability that is available to them. If members of the court persist in rewriting voter-enacted constitutional commands, the public should seriously consider recall proceedings against the responsible justices, consistent with California law and with full respect for due process. Judicial independence is not judicial supremacy. The people are sovereign, and their Constitution is binding. No court is entitled to nullify either one by redefining ordinary words so that they mean their opposite.

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Endnotes

1. *See In re Kowalczyk*, 343 Cal. Rptr. 3d 680, 685 (Cal. 2026).
2. *See* Cal. Const. art. I, §§ 12, 28.
3. *Id.* at § 7.
4. *Id.* at § 6.
5. *See In re Underwood*, 9 Cal. 3d 345, 350 (Cal. 1973).
6. *See* California Proposition 7, Revisions to State Constitution's Declaration of Rights Amendment (1974), Ballotpedia.
7. *See* Frank Clifford, Voters Repudiate 3 of Court's Liberal Justices, L.A. Times (Nov. 5, 1986).
8. *See Brosnahan v. Brown*, 32 Cal. 3d 236, 263–97 (Cal. 1982) (Bird, C.J., dissenting).
9. *See* Cal. Const., *supra* note 2 (emphasis added).
10. *See* California Proposition 4, Denial of Bail for Certain Felony Cases Amendment (June 1982), Ballotpedia.
11. *See* California Proposition 8, Changes to Criminal Proceedings Initiative (June 1982), Ballotpedia.
12. *See* Cal. Const., *supra* note 2 at § 28.
13. *Id.* at § 28(e).
14. *Id.* at § 12(b).
15. *See In re York*, 9 Cal. 4th 1133, 1140 (Cal. 1995).
16. *See People v. Standish*, 135 P.3d 32 (Cal. 2006).
17. *See* California Proposition 9, Marsy's Law Crime Victim's Rights Amendment (2008), Ballotpedia.
18. *See* Victims' Bill of Rights Act, 2008 Cal. Stat. (codified at Cal. Const. art. 1, § 28).
19. *Id.*
20. *See* Cal. Const., *supra* note 2 at § 28.
21. *Id.* (emphasis added).
22. *See* Manhattan Bail Project: Official Court Transcripts October 1961–June 1962, Vera Inst. of Justice, https://www.vera.org/publications/manhattan-bail-project-official-court-transcripts-october-1961-june-1962.
23. *See* About, The Bail Project, https://bailproject.org/vision/.
24. *See* Cal. Dep't of Fin., SB 10 General Overview (Nov. 8, 2018).
25. *See* Yes on Prop 25, A Coalition of Justice Reform and Labor Organizations, Transparency USA.
26. *See* California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020), Ballotpedia.
27. *See* Charles Stimson & Zack Smith, *George Gascón: A Rogue Prosecutor Whose Extreme Policies Undermine the Rule of Law and Make Los Angeles Less Safe* (Jan. 28, 2021).
28. *See* George Gascón Announces Transition Team (Nov. 19, 2020), https://www.georgegascon.org/campaign-news/george-gascon-announces-transition-team/.
29. *Id.*
30. *See* Special Directive 20-06, Pretrial Release Policy, from Los Angeles District Attorney George Gascon to All Deputy District Attorneys (Dec. 7, 2020), https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-06.pdf.
31. *Id.*
32. *Id.*
33. *See* Special Directive 20-08: Sentencing Enhancements/Allegations (Dec. 7, 2020), https://www.georgegascon.org/wp-content/uploads/2020/12/SPECIAL-DIRECTIVE-20-08-.docx.pdf.
34. *See* Special Directive 20-06, *supra* note 30.
35. *See* Zack Smith and Charles D. Stimson, Meet Chesa Boudin, the Rogue Prosecutor Wreaking Havoc in San Francisco, Daily Signal, Aug. 11, 2021, https://www.heritage.org/crime-and-justice/commentary/meet-chesa-boudin-the-rogue-prosecutor-wreaking-havoc-san-francisco. See also Charles "Cully" Stimson and Zack Smith, Recall of Chesa Boudin in San Francisco Shows Rogue Prosecutor Movement for Failure That It Is, Daily Signal, Jun. 2, 2022, https://www.heritage.org/crime-and-justice/commentary/recall-chesa-boudin-san-francisco-shows-rogue-prosecutor-movement. See also Jerry Maleek Gearin, Progressive Prosecutors Ousted Due to Anti-Reform Push, San Quentin News, Mar. 11, 2025, https://sanquentinnews.com/progressive-prosecutors-ousted-due-to-anti-reform-push/. See also Richmondside Staff, Crime Victims' Families Behind DA Diana Becton Recall Say She Failed Them, Richmondside, Mar. 20, 2025, https://richmondside.org/2025/03/20/recall-district-attorney-diana-becton/.

36. *See In re Humphrey*, 11 Cal. 5th 135 (Cal. 2021).
37. *Id.* at 147.
38. *Id.* at 143.
39. *Id.*
40. *See* dissent by Justice Scalia in *King v. Burwell*, 576 U.S. 473, 506 (2015).
41. *See Flast v. Cohen*, 392 U.S. 83, 94 (1968).
42. *Id.*
43. *Id.* at 95.
44. *See* Cal. Const. art. VI, § 12.
45. *Id.* (emphasis added).
46. *See Humphrey*, *supra* note 36.
47. *Id.*
48. *See Humphrey*, *supra* note 36 at 147. Citing a paper from the Criminal Justice Policy Program (CJPP) at Harvard Law School, the Court noted that "[o]n any given day, nearly half a million people—none of whom has yet been convicted of a charged offense—sit in America's jails awaiting trial." Quoting the same paper, the Court wrote that "increases in pretrial detention rates are responsible for all of the net jail growth in the last twenty years."
49. *See* Elana R. Fogel, Duke Univ. Sch. of Law, https://law.duke.edu/fac/fogel.
50. *See* Carol S. Steiker, Harvard Law School, https://hls.harvard.edu/faculty/carol-s-steiker/.
51. *See* Alec Karakatsanis, Founder & Executive Director, Civil Rights Corps.
52. *See Humphrey, supra* note 36 at 150 (citing *United States v. Salerno*, 481 U.S. 739, 750 (1987)).
53. *See United States v. Salerno*, 481 U.S. 739, 747–52 (1987).
54. *Id.* at 749–50.
55. *Id.* at 750–51.
56. *See Humphrey*, *supra* note 36.