In the Supreme Court of the State of California

In re **BETTIE WEBB,** **On Habeas Corpus.**	Case No. S247074

Fourth Appellate District, Division 1, Case No. D072981
San Diego County Superior Court, Case No. SCS293150
Hon. Stephanie Sontag, Judge

AMICUS CURIAE BRIEF OF ATTORNEY GENERAL XAVIER BECERRA IN SUPPORT OF RESPONDENT

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ISSUE PRESENTED

Do trial courts possess inherent authority to impose reasonable bail conditions related to public safety on felony defendants who are released on monetary bail?

INTERESTS OF AMICUS CURIAE

The Attorney General is the state's chief law officer, with a duty "to see that the laws of the State are uniformly and adequately enforced." (Cal. Const., art. V, § 13.) In fulfilling that duty, he seeks to ensure respect for the law, promote fairness and equity in the administration of our criminal justice system, and promote correct interpretations of the choices made by the People and the Legislature in establishing rules to protect both defendants' rights and public safety.

The Attorney General participates in hearings regarding bail, detention, and conditions of release when the state Department of Justice undertakes individual prosecutions. In cases prosecuted at the trial level by District Attorneys, the Attorney General sometimes appears on behalf of state licensing boards to seek conditions of release that would protect consumers and members of the public from abusive behavior by defendants who are state-licensed professionals. In certain counties, the Attorney General also typically represents the interests of the People in appellate or writ proceedings regarding bail, detention, and condition-of-release determinations, even in cases prosecuted at the trial level by District Attorneys.

The Attorney General recently filed an amicus curiae brief in *In re Humphrey*, No. S247278, addressing, in part, constitutional constraints on a court's ability to impose unaffordable bail and the relevance, in that calculus, of courts' ability to safeguard the public safety by other means. One of those other means—which can make detention or high bail amounts

unnecessary in some cases—is effective conditions of release. As a result, the Attorney General has a significant interest in the question on which this Court has granted review here: whether California courts may "impose reasonable bail conditions related to public safety on felony defendants who are released on monetary bail." (Petn. for Review 1, fn. omitted.)[1] Although the Attorney General agrees with the District Attorney's general analysis of, and ultimate answer to, that question, he files this brief to bring additional analysis and authority to the Court's attention.

ARGUMENT

California courts have long operated under the "general understanding" that trial courts possess the "authority to impose conditions associated with release on bail." (*Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 642.)[2] "Common conditions of release include

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[1] In addition to holding that the superior court was without statutory authority to impose bail conditions in this case, the Court of Appeal also discussed whether the imposition of a search condition on someone who has posted reasonable bail would violate the Fourth Amendment or be otherwise unreasonable. (Typed opn. pp. 8-11.) Those questions are not fairly included within the issue set forth in the petition for review, and will not be addressed in this brief. (See Cal. Rules of Court, rule 8.520(b)(3); see also Petn. for Review 3.)

[2] See, e.g., *People v. Internat. Fidelity Ins. Co.* (2017) 11 Cal.App.5th 456, 462 ["the trial court has the power to impose reasonable bail conditions intended to ensure public safety"]; *In re McSherry* (2003) 112 Cal.App.4th 856, 863 ["a trial court has the right to place restrictions on the right to bail of a convicted misdemeanant as long as those conditions relate to the safety of the public"]; *People v. Allen* (1994) 28 Cal.App.4th 575, 583 ["trial courts have other arrows in their judicial quivers in addition to bail to insure defendant[s'] presence in court"]; Pretrial Detention Reform WorkGroup, Pretrial Detention Reform: Recommendations to the Chief Justice (Oct. 2017) p. 27, fn. 87 ["In a felony case, there is a general understanding that the trial court possesses inherent authority to impose conditions associated with release on bail"]; Cal. Judges Benchguide 55:

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geographical restrictions, electronic monitoring, house arrest, alcohol monitoring, and protective orders." (Pretrial Detention Reform, *supra*, at p. 27, fn. 87.) Despite widespread recognition that such authority exists, however, its source has not been precisely explained.

That ambiguity led the Court of Appeal here to a startling proposition. Neither the parties nor the decision below contest that, if respondent Bettie Webb had been released on her own recognizance, without the posting of monetary bail, then the trial court would have been empowered to impose reasonable conditions on her while she was released pending trial. (See typed opn. p. 6; ABM 15.)[3] Nor is there any dispute that the trial court would have had such powers if Webb had posted bail for a misdemeanor offense, or if she were charged with a felony offense and her bail was set above or below the amount specified for the charge in the Superior Court's bail schedule. (Typed opn. pp. 6-7; ABM 15.) The Court of Appeal held, however, that the trial court in this case had no power to impose conditions of release because the defendant was charged with a felony and posted bail at the scheduled amount.

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Bail and Own-Recognizance Release (CJER 2013) § 55.53 ["Magistrates may set bail on conditions that they consider appropriate" and that are "reasonable and related to public safety"]; Cal. Criminal Law: Procedure and Practice (Cont. Ed. Bar 2018) § 5.35 ["[m]agistrates have the authority to set bail on conditions that they consider appropriate" and that "serve the purpose of bail"]; Bateman, Matthew Bender Practice Guide: California Criminal Law (2018) § 1.06[1][b] ["courts regularly impose no contact or stay away orders on the defendant as a condition of bail"].

[3] Throughout this brief, OBM refers to the District Attorney's Opening Brief on the Merits, and ABM refers to Webb's Answering Brief on the Merits. Section 187 refers to section 187 of the Code of Civil Procedure. Unless otherwise specified, other statutory references are to the Penal Code.

That conclusion was wrong. It contradicts the legislative intent that is evident in statutes that apply to bail in particular and that is evident in the general grant of interstitial judicial authority contained in section 187 of the Code of Civil Procedure. It rests on a mechanical application of the *expressio unius* canon that, in violation of this Court's warnings, undermines rather than promotes legislative intent. And it ignores the constitutional and practical superiority of conditions of release over the main alternatives that courts would otherwise rely on: increases in bail amounts and additional orders of detention. The Legislature was well aware of the usefulness of conditions of release, and would not have withheld that power in cases where felony defendants post bail at the scheduled amount while granting it everywhere else.

I. CALIFORNIA JUDGES MAY IMPOSE REASONABLE CONDITIONS ON FELONY DEFENDANTS WHO POST SCHEDULED BAIL

A. California's Statutes Grant Courts the Ability To Impose Reasonable Release Conditions as Part of Bail

As a historical matter, the connection between conditions of release and the purposes of bail is so strong that, as long as the Legislature has not specifically prohibited the practice, it is doubtful that specific legislative authorization would be necessary for courts to impose conditions of release when defendants are on bail. (See *United States v. Smith* (8th Cir. 1971) 444 F.2d 61, 62 ["[T]he course of the common law in England and the development of the common law and statutory law in the United States demonstrate that the courts have the inherent power to place restrictive conditions upon the granting of bail."].) Regardless, in California, there is indeed legislative authority for the practice.

1. One source of that authority, as the District Attorney recognizes, is Section 187 of the Code of Civil Procedure. (See OBM 6-7.) That section

applies not only in civil but also in criminal cases. (See *People v. Ong* (1904) 141 Cal. 550, 553.) It provides that:

> When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

Superior court judges have jurisdiction to adjudicate criminal cases (Cal. Const., art. VI, § 10) and to grant bail (Cal. Const., art. I, §§ 12, 28, subd. (f)(3); Pen. Code § 1269b, subd. (b)). Imposing reasonable public-safety release conditions on bailed defendants in appropriate cases helps to "carry ... into effect" that jurisdiction in two ways.

First, conditions of release that lessen the likelihood of a defendant's flight preserve the court's ultimate jurisdiction to carry a defendant's case through to judgment. But as courts have long recognized, there is not a clean line between conditions of release that prevent a defendant from absconding and those that promote public safety—because the same behavioral problems that make defendants dangerous to society often contribute to the risk of flight. (See, e.g., *McIntosh v. Municipal Court* (1981) 124 Cal.App.3d 1083, 1085-1086 [reasoning that own recognizance (OR) condition requiring defendant to enter custodial drug treatment "is reasonably related to [ensuring] future court appearances by a defendant who uses drugs"], superseded on other grounds by *In re York* (1995) 9 Cal.4th 1133 [holding that OR conditions need not address risk of flight if they protect public safety]; *People v. Sylvestry* (1980) 112 Cal.App.3d Supp. 1 [approving of residential drug-treatment as condition of OR release].) Many public-safety release conditions protect the court's jurisdiction by

making it more likely that the defendant will remain subject to the court's power through the conclusion of the case.

Second, public-safety bail conditions work to enforce substantive rights. The Legislature has specified that protection of "the public safety" should be a court's "primary consideration" in "setting, reducing, or denying bail." (§ 1275, subd. (a)(1)); see *In re McSherry*, *supra*, 112 Cal.App.4th at pp. 861-862 [section 1275's public safety mandate applies not only to monetary bail amounts but also to bail conditions].) As the District Attorney points out, other provisions in California's bail law repeat this focus on public safety. (OBM 11, citing §§ 1269c, 1270, subd. (a), 1270.1, subd. (c).) Article I, Section 28 of the California Constitution likewise specifies that "[p]ublic safety and the safety of the victim shall be the primary considerations" in "setting, reducing, or denying bail" (Cal. Const., art. I, § 28, subd. (f)(3)), and states that "a victim shall be entitled to the ... right[] [¶] [t]o have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant" (*id.*, § 28, subd. (b)(3)).[4]

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[4] As we have explained elsewhere, the bail-related provisions of article I, section 28 ultimately supersede any contrary provisions of article I, section 12. (See Attorney General's Amicus Curiae Brief in *In Re Humphrey*, S247278, at pp. 15-30 (Attorney General's Br. in *Humphrey*).) California's Constitution therefore does not bar the State's Legislature and courts from employing bail to serve public-safety objectives, notwithstanding this Court's previous holding, in *In re Underwood* (1973) 9 Cal.3d 345, 348, that under the predecessor to article I, section 12 of the Constitution, the only permissible purpose of bail was to prevent a defendant's flight. Even if section 12 governed, however, neither Webb nor the opinion below contends that there is a constitutional prohibition on imposing conditions of release to achieve public-safety purposes. Indeed, the Legislature has mandated public-safety bail conditions on some defendants. (See § 646.93, subd. (c).) Neither Webb nor the decision below appear to call such statutes into question.

Section 187 authorizes courts to apply "workable means" to ensure the fulfillment of substantive rights. (*Phillips, Spallas & Angstadt, LLP v. Fotouhi* (2011) 197 Cal.App.4th 1132, 1142; see *ibid.* [judicial power under section 187 "'relates primarily to procedural matters ... but also may relate to situations in which the rights and power of the parties have been established by substantive law or court order but workable means by which those rights may be enforced or powers implemented have not been granted by statute'"]; *In re Amber S.* (1993) 15 Cal.App.4th 1260, 1264 [power under section 187 "'arises from necessity where, in the absence of any previously established procedural rule, rights would be lost'"].) Under current law, monetary bail by itself does little to protect victims or the public. That is because California's current statutes make monetary bail forfeitable only based on failure to appear, not based on the commission of a new offense or other breach of public safety. (§ 1305, subd. (a); see Attorney General's Br. in *Humphrey* at 14.) Bail without conditions of release fails to ensure the substantive rights set forth in section 1275 and the California Constitution, because it provides "little or no accountability to the court for pretrial behavior." (Pretrial Detention Reform, *supra*, p. 51.)

In contrast, when appropriate conditions of release are imposed in conjunction with bail, the Legislature's overriding goal of public safety is advanced. (See, e.g., *People v. Internat. Fidelity Ins. Co.*, *supra*, 11 Cal.App.5th at p. 459 [court ordered DUI defendant with suspended license not to drive, to attend Alcoholics Anonymous meetings, and to abstain from alcohol]; *In re Humphrey* (2018) 228 Cal.App.5th 1006, 1019 [describing robbery defendant's proposal, in motion for bail reduction or OR, for housing and drug treatment program to meet public safety concerns], review granted May 23, 2018, S247278; see also pp. 22-23, *infra*.) Indeed, the Legislature's appreciation of the value of such conditions for safeguarding public safety where a defendant is released on bail is evident

from the several circumstances in which the Legislature has mandated that such conditions be imposed or considered. (See pp. 15-16, *infra*.) Section 187 therefore supports the power to impose such conditions, because in the absence of such power the State's statutory and constitutional policy of promoting public safety and victims' rights would be compromised. (See, e.g., *In re McSherry, supra*, 112 Cal.App.4th at p. 863 ["it would defeat the Legislature's purpose to hold that a person who has been to prison once for kidnapping and abusing a child, has been sent to a state mental hospital for mentally disordered sex offenders and has been convicted of at least eight separate misdemeanors involving loitering in and around schools and places where children congregate, was absolutely entitled to remain on bail without any restrictions or conditions being placed upon his movements"].)[5]

2. A second source of authority, which the parties have not focused on, exists in the mandatory written pledges required under the Penal Code as a part of bail. A bail surety must make written assurance to the court that the defendant "will at all times hold himself or herself amenable to the orders and processes of the court, and, if convicted, will appear for pronouncement of judgment or grant of probation." (§§ 1278, 1287, 1458; see also § 1459 [similar].) The required promise that the defendant will "at all times" remain amenable to the "orders" of the court reflects judicial authority to issue such orders throughout the pretrial period—and the fact

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[5] The court's power to promote this public-safety goal under section 187 does not disappear simply because there may be other methods for protecting the public in some cases. Orders of detention are subject to their own constitutional limits, and in any event should be used only where other means of protecting the public would be insufficient. (See p. 18, *infra*.) Furthermore, section 187 is not limited to circumstances in which there is no other means for enforcing rights. (See *Phillips, Spallas & Angstadt, LLP v. Fotouhi*, *supra*, 197 Cal.App.4th at p. 1142.)

that "orders ... of the court" are listed in addition to the court's "processes" and pronouncement of judgment reflects the Legislature's determination that the court may do more than simply order the defendant to appear for hearings, trials, sentencing, and the like. Critically, the promise to obey such orders is required for bail in felony and misdemeanor cases alike, and regardless of whether the defendant's bail is set at the scheduled amount or another amount. (See § 1287 [felony case after indictment]; § 1278 [felony case after preliminary hearing]; § 1458 [misdemeanor case]; § 1459 [undertaking by insurance surety].)

3. Finally the Legislature's repeated authorization of a bail-plus-conditions approach in various circumstances shows an overall legislative determination that the combination of bail and conditions of release is appropriate to promote public safety.

Section 1270, subdivision (a), entitles misdemeanor defendants to OR release, unless "an own recognizance release will compromise public safety or will not reasonably assure the [defendant's] appearance." (§ 1270, subd. (a).) In that latter circumstance, the court is directed to "set bail and specify the conditions, if any, whereunder the defendant shall be released." (*Ibid.*) Section 1269c provides that, for felony offenses—or misdemeanor offenses of violating domestic violence restraining orders—where application has been made for bail below or above the scheduled amount, the court is authorized to set bail in an amount sufficient to ensure the defendant's appearance and the protection of a victim, "and to set bail on the terms and conditions that [the judicial officer] ... deems appropriate."[6] The term "conditions" also appears in section 1318, which requires defendants

[6] Sections 646.93 and 136.2 require courts to consider—and in some cases to impose—particular conditions in addition to bail in certain cases. (See §§ 136.2, subd. (e)(1); 646.93, subd. (e); p. 20, fn. 8, *infra*.)

released on OR to promise to "obey all reasonable conditions imposed by the court or magistrate" (§ 1318, subd. (a)(2))—and this Court has held that those "conditions" may include ones imposed for public safety reasons. (See *In re York*, *supra*, 9 Cal.4th at p. 1144.) Taken together, these statutes reflect the Legislature's recognition that conditions of release are a vital tool for achieving the overall goal of protecting public safety, regardless of the defendant's bail amount or OR status.

B. The Penal Code Provisions that Explicitly Mention Release Conditions in Some Circumstances Do Not Implicitly Deny Courts the Power To Impose Such Conditions in Others

Rather than interpret sections 1269c, 1270, and 1318 as showing the Legislature's general approval of the bail-plus-conditions model, the Court of Appeal interpreted the existence of those explicit provisions as reflecting an implicit decision to deny the power to impose conditions of release in other circumstances. (See typed opn. pp. 6-8.) That was incorrect.

1. "[T]he fundamental goal of statutory interpretation is to ascertain and carry out the intent of the Legislature." *People v. Cruz* (1996) 13 Cal.4th 764, 782. Canons of construction are interpretive "guides" that assist with that goal—but they should not be applied mechanically in a way that would frustrate the Legislature's intent. (*Ibid.*; see, e.g., *ibid.* [rule against surplussage and presumption of leniency would not be followed where the result of applying those principles would "produce an absurd result, or a result inconsistent with apparent legislative intent"].) The principle under which legislative enumeration of some things is generally interpreted as showing a decision to exclude things not enumerated is no different. "[I]ts wise application varies with the circumstances." (*Ford v. United States* (1927) 273 U.S. 593, 611.) It cannot be "applied invariably

and without regard to other indicia of statutory intent." (*In re J.W.* (2002) 29 Cal.4th 200, 209.)

As a result, "'the maxim *expressio unius est exclusio alterius* gives way where it would operate contrary to the legislative intent to which it is subordinate or where its application would nullify the essence of the statute.'" (*People v. Rojas* (1975) 15 Cal.3d 540, 551; accord, *Internat. Fed. Prof. & Technical Engineers v. Superior Court* (2007) 42 Cal.4th 319, 343 [expressio unius principle "is not applied if the result would be contrary to legislative intent"].) "'Likewise the rule is inapplicable where no reason exists why persons or things other than those enumerated should not be included, and manifest injustice would follow by not including them.'" (*People v. Rojas*, *supra*, 15 Cal.3d at p. 551; accord, *Internat. Fed. Prof. & Technical Engineers v. Superior Court*, *supra*, 42 Cal.4th at p. 343 [expressio unius principle is not applied if "no manifest reason appears for excluding one matter and including [the others]"].) Finally, "'[t]he rule as expressed in the maxim also fails if such interpretation leads to absurd and undesirable consequences.'" (*People v. Rojas*, *supra*, 15 Cal.3d at p. 551; see generally *In re J.W.*, *supra*, 29 Cal.4th at p. 210 [courts should not "give statutory language a literal meaning if doing so would result in absurd consequences that the Legislature could not have intended"].) Each of those circumstances is present here.

First, the overall intent of the State's bail laws is to promote public safety and ensure defendants' return to court. (See pp. 15-16, *supra*.) By withholding from trial courts the power to impose conditions of release in a large portion of the State's felony cases, the decision below hinders those goals (see pp. 13-14, *supra*), which is "contrary to legislative intent."

Second, there is "no conceivable reason" why the Legislature would have permitted conditions of release to be imposed as an adjunct to bail in misdemeanor cases but not felony cases, or for felony bail that is above or

below the scheduled amount but not at the scheduled amount. Why would conditions of release in addition to bail be useful in preventing flight in misdemeanor cases, but not in felony cases where the defendant's sentencing exposure and incentive to flee is greater? Why would the Legislature see conditions of release in addition to bail as useful to protect the public safety in a misdemeanor case in which the defendant must post bail because he or she is too dangerous for OR release, but not in a felony case in which the defendant is released on bail at the scheduled amount rather than OR? And why would the Legislature conceivably conclude that conditions of release help achieve the primary purpose of protecting the public safety where bail on a felony defendant is set a dollar below or above the scheduled amount, but not where bail is at the scheduled amount? Neither the opinion below nor Webb offers any hypothesis for why the Legislature would have intended such distinctions.

Finally, the Court of Appeal's interpretation leads to "absurd and undesirable consequences." Judicial decisions on release, bail, and detention must secure the State's vital interest in securing the "[p]ublic safety and the safety of the victim." (Cal. Const., art. I, § 28, subd. (f)(3); see also § 1275, subd. (a)(1) ["[t]he public safety shall be the primary consideration"].) At the same time, for both constitutional and policy reasons, decisions in individual cases should, as far as possible, ensure that only those defendants whose release would endanger victims or the public, or pose an unacceptable risk of flight, are detained before trial. For defendants who can be safely released, the State should strive for release to occur quickly. And in all events, the State should endeavor not to have a defendant's detention stem from his or her inability to afford a given amount of bail.

By allowing more defendants to be released on affordable bail without compromising public safety, conditions of release decrease the instances in

which detention will be ordered or high bail required. (*Cf. Clarke v. State* (1997) 228 Ga.App. 219, 220 ["in lieu of setting a higher bail, which may preclude a defendant from being released at all prior to trial, a trial court may choose to impose reasonable restrictions on a defendant's behavior"].) Indeed, for precisely this reason, conditions of release can be useful for defense attorneys trying to avoid unaffordable bail. (See, e.g., California Criminal Law: Procedure and Practice, *supra*, § 5.35 [encouraging defense counsel to "use imaginative thinking" to suggest "imposition[] of [certain] conditions coupled with a more modest bail sum"]; *id.* [discussing curfew conditions, inpatient rehabilitative programs, private counseling, electronic monitoring, GPS-enforced stay-away conditions, and alcohol monitoring]; Rucker & Overland, 1 Cal. Crim. Practice: Motions, Jury Instructions and Sentencing § 5:8 (4th ed. 2018) ["Counsel faced with a difficult release situation may want to consider requesting bail conditions in lieu of a high bail."].)

The Court of Appeal's view would reduce the availability of this vital tool. If conditions of release are unavailable for felony defendants who are allowed to post scheduled bail amounts, peace officers may respond by requesting higher bail in more cases. (See § 1269c.) Courts may more frequently grant such requests—causing above-schedule bail to be imposed in cases where scheduled bail amounts and proper conditions of release would otherwise have been adequate.[7] And even if the request is eventually

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[7] Webb apparently believes that the Legislature required courts to "use[] increases in money bail to incarcerate those accused of dangerous behaviors" even if the defendant could be safely released on scheduled bail under appropriate conditions. (ABM 16.) For reasons we have explained elsewhere, such an approach would not accord with modern understandings of due process and equal protection. (See Attorney General's Br. in *Humphrey* at 12-15.) Indeed, in the unlikely event that that was the Legislature's intent, the constitutional defect could require this Court to

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denied, the mere request for higher bail may delay the defendant's eventual release on the scheduled bail amount. (See § 1269c.)[8] The Court of Appeal's decision, in other words, would achieve precisely the opposite of what constitutional and policy considerations demand.

2. Instead of mechanically applying the expressio unius principle, as the Court of Appeal did below, the better approach is to recognize here, as other cases have done in comparable situations, that the statutory grant of

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consider reforming the statute to permit reasonable conditions as an adjunct to bail in all cases. (*See Kopp v. Fair Political Practices Com.* (1995) 11 Cal.4th 607, 660-661 ["a court may reform—i.e., 'rewrite'—a statute in order to preserve it against invalidation under the Constitution, when we can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute"]; *People v. Sandoval* (2007) 41 Cal.4th 825, 844 ["we have the authority to revise the [statute] in a manner that avoids constitutional problems, if we conclude that the Legislature's intent clearly would be furthered by application of the revised version rather than by the alternative of invalidation"].)

[8] These problems are not solved by the existence of provisions giving substantive and procedural guidance to judges considering particular kinds of conditions in certain cases. (See § 646.93, subd. (c) [in a stalking case, "[u]nless good cause is shown" to do otherwise, a "judge shall impose as additional conditions on bail" requirements for the defendant not to contact or approach alleged victims, not to possess firearms or other deadly or dangerous weapons, and for the defendant to "obey all laws"]; § 136.2, subd. (a)(1) [providing for protective orders "upon [the court's] good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur"].) Such provisions were not intended to address the broader range of public safety concerns that may arise in other cases. Nor is the need for conditions of release on bail obviated by the existence of the peace bond provisions of Sections 701 through 714. Peace bonds (which appear to have fallen into desuetude) are for use only when there is no allegation of "'any crime actually committed by the party.'" (*In re Way* (1943) 56 Cal.App.2d 814, 816.)

judicial authority in some circumstances did not imply an intentional withholding of that authority in another.

For example, in *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, this Court considered a trial court's authority to control the parties' contact with jurors while a case was on appeal. California courts had long been considered to have "inherent power[] to ensure jurors were protected, following their discharge from a trial, from threats to their physical safety and invasions of their personal privacy." (*Id.* at p. 1091.) The only statutes addressing the issue, however, did so in a limited way: requiring trial judges to "'inform the jurors that they have an absolute right to discuss or not to discuss the deliberations or verdict with anyone'" (*id.* at p. 1095, quoting Code Civ. Proc. § 206, subd. (a)), and directing courts to seal the names, addresses, and telephone numbers of jurors after a criminal trial (*id.* at p. 1096, discussing Code Civ. Proc. § 237). The trial court tried to protect jurors by another means: "prohibiting [the defendant's] appellate counsel from contacting trial jurors without first obtaining [the] court's approval." (*Id.* at p. 1087.) This Court held that the statutes providing two specific ways of protecting jurors did not bar a court from protecting them in this additional way, because the provision "establish[ing] one method of protecting jurors from unwanted contact by the losing party after trial ... [did] not purport to establish the exclusive method," and because the trial court's order advanced the Legislature's overall purpose of "'protecting the jurors' privacy, safety, and well-being.'" (*Id.* at pp. 1095-1096.)

Similarly, in *People v. Superior Court (Morales)* (2017) 2 Cal.5th 523, this Court considered a trial court's authority to issue preservation orders between when a criminal prosecution concludes and when habeas counsel is appointed. The Legislature had enacted a statute authorizing motions to preserve evidence "in the prosecution of a postconviction writ of habeas corpus." (*Id.* at p. 532 [discussing § 1054.9].) A defendant who had been

convicted and sentenced to death sought a judicial order requiring the prosecution to preserve evidence for his future habeas case. (*Ibid.*) Because he had not yet been assigned counsel to prosecute such a case, however, the statute did not by its own terms apply. (*Ibid.*) Although the State urged that the trial court therefore had no authority to order the preservation of materials, this Court regarded that interpretation of the court's authority "unduly narrow in this context." (*Id.* at p. 532.) Instead, "because the superior court has jurisdiction under Penal Code section 1054.9 to grant postconviction discovery to the extent consistent with the statute, the court has the inherent power under Code of Civil Procedure section 187 to order preservation of evidence that would potentially be subject to such discovery." (*Id.* at p. 534.)

Finally, in *In re McSherry*, *supra*, a defendant was convicted of three counts of loitering around schools and was given an 18-month sentence. (112 Cal.App.4th at pp. 858-859.) Because his convictions were for misdemeanors, the defendant was statutorily entitled to bail pending appeal. (*Id.* at p. 860, citing § 1272.) The trial court, aware that the defendant's record showed a predisposition to kidnap and commit sexual offenses against children, imposed conditions on the bail, including ordering the defendant to stay 500 feet away from children and from child-centered places like schools and playgrounds. (*Id.* at pp. 858-859.) When the defendant was arrested for violating those conditions, he petitioned for habeas corpus, arguing that trial court lacked authority to impose the conditions in the first place. (*Ibid.*) *McSherry* held that a court may impose "conditions on the granting of [post-conviction] bail" in a misdemeanor case so long as the conditions are "reasonable and related to public safety." (*Id.* at p. 858.) Section 1272 entitled convicted misdemeanor defendants with a pending appeal to be admitted to bail "'[a]s a matter of right,'" and said nothing about conditions in addition to monetary bail. (*Id.* at p. 860,

quoting § 1272.) Other statutes, however, made clear that a misdemeanor defendant pending trial should be released on bail plus conditions of release if OR release would inadequately protect the public safety. (*Id.* at p. 861, citing § 1270; see p. 15, *supra*.) *McSherry* deemed it "nonsensical" to believe "that a court has the power to impose bail conditions on a person who has merely been charged with a crime and before the nature of his involvement has been determined, but once the defendant has been found guilty and found to be deserving of the maximum sentence, then the court must release the defendant as a matter of right and is powerless to impose any conditions on his or her bail." (112 Cal.App.4th at pp. 861-862.) Instead, the court reasoned, section 1272 should be read to achieve the goal of protecting public safety, which the Legislature established as being "of paramount importance." (*Id.* at p. 862.) Although the *McSherry* court found fault with some of the details of the conditions of release that the trial court had imposed, it left no doubt that the trial court had authority to impose conditions that were reasonable. (*Id.* at p. 863.)

Here, as in *Townsel*, *Morales*, and *McSherry*, the Legislature has made clear that it has an overarching—and eminently sensible—goal: protection of the public, including through the imposition of reasonable release conditions where appropriate. Only an "unduly narrow" conception of legislative purpose would consider the enactment of statutes allowing courts to achieve that goal in specific circumstances as implicitly reflecting a decision to deny courts the ability to do so in other, virtually indistinguishable circumstances.

3. Of course, none of this would matter if the Legislature had explicitly prohibited courts from imposing conditions of release on felony defendants who post scheduled bail. But no such prohibition has been enacted.

As the Court of Appeal noted (typed opn. p. 14), section 1269b provides that, "[u]pon posting bail, the defendant or arrested person shall be discharged from custody as to the offense on which the bail is posted." (§ 1269b, subd. (g); cf. § 1295, subd. (a) ["upon delivering to the officer in whose custody defendant is a certificate of the deposit [of the bail amount with the clerk of the court], [a misdemeanor] defendant must be discharged from custody"]; ABM 22.) The imposition of conditions of release does not violate this provision. Where conditions of release have been imposed, the posting of bail still entitles the person to release—the released defendant will simply be bound to obey the reasonable conditions that the court has imposed. (See § 166, subd. (a)(4) ["Willful disobedience of the terms as written of any process or court order ..., lawfully issued by a court, including orders pending trial" is punishable as a misdemeanor].) "Discharge[] from custody" with conditions no more conflicts with section 1269b, subdivision (g), than does discharge with a protective order in cases subject to section 646.93 or section 136.2. (See p. 20, fn. 8, *supra*.)[9]

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[9] In contrast, an own-recognizance defendant "shall not be released from custody" unless he or she files "a signed release agreement" which includes the defendant's "promise to appear [in court]," "promise to obey all reasonable conditions" of release, "promise not to depart [California]," and "agreement ... to waive extradition." (§ 1318, subd. (a).) The lack of a corresponding provision requiring the defendant's written promise to obey conditions in bail cases does not imply a lack of judicial authority to impose such conditions any more than the lack of a counterpart to section 1318's promise to appear in court implies that defendants on bail may absent themselves from court. Additional promises and agreements are simply less necessary in bail cases. The instrument by which bail is posted includes a promise that the defendant "will at all times hold himself or herself amenable to the orders and processes of the court" (see p. 14, *supra*), and the posting of bail includes formalized procedures (the deposit of bail or an agreement with a bondsperson) and incentives (not to forfeit bail) that impress on the defendant the need to appear in court and obey the court's orders. In an OR case, where these features are not present, the writing

(continued...)

Webb relies on *In re Alberto* (2002) 102 Cal.App.4th 421, to argue that once a defendant is released from custody by posting the scheduled bail amount, the trial court may not change the release conditions unless there are "changed circumstances." (ABM 18, 21-22.) Section 1289 provides that "[a]fter a defendant has been admitted to bail upon an indictment or information, the Court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail." *In re Alberto* interpreted the "good cause" terminology as requiring "changed circumstances relating to the defendant or the proceedings, not ... the conclusion that another judge in previously setting bail committed legal error." (*In re Alberto*, *supra*, 102 Cal.App.4th at p. 430.) But section 1289, by its own terms, applies only where a court attempts to "increase or reduce the *amount* of bail." (Emphasis added.) It says nothing about conditions that are imposed in addition to bail. In a case such as Webb's, particular conditions of release imposed by the court after the defendant has already posted bail may or may not meet the reasonableness test—but their imposition does nothing to change the amount of money or security required for the defendant to gain release, and hence does nothing to violate *In re Alberto*'s understanding of section 1289.

Webb also argues that the imposition of conditions of release after a defendant has already posted bail effectively deprives her of the ability to choose whether it is worth posting bail if the release will be subject to those conditions. (ABM 17.) But defendants who post scheduled bail before their initial court hearing have always been subject to the possibility that

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(...continued)
signed by the defendant under section 1318 provides the "formality and solemnity" that would otherwise be lacking. (*People v. Carroll* (2014) 222 Cal.App.4th 1406, 1420.)

the bail amount might be later increased for a variety of reasons (such as the filing of an information or indictment), which not only would allow conditions of release to be imposed (see p. 15, *supra*), but also could result in loss of freedom if the defendant cannot afford the new amount. It seems highly unlikely that reasonable bail conditions would change a defendant's preference for release from custody. And, of course, if Webb found the conditions too onerous, she could always move to withdraw her request for release on bail and seek return of funds in exchange for her return to custody.[10]

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[10] On September 12, this Court invited the parties to submit supplemental briefing addressing the "effect, if any, [that] Senate Bill No. 10 (2017-2018 Reg. Sess.) ha[s] on the resolution of the issues presented by this case." S.B. 10 would eliminate monetary bail and provide express statutory authorization for conditions of release in criminal cases. However, the Secretary of State has received petition signatures for a referendum to overturn S.B. 10, and those signatures are in the process of being verified. (See https://www.sos.ca.gov/elections/ballot-measures/initiative-and-referendum-status/initiatives-and-referenda-pending-signature-verification/.) If a qualifying number of signatures are verified, then S.B. 10 will be inoperative at least until the referendum is voted on in November 2020. For the moment, S.B. 10's relevance to this case lies mainly in its demonstration of the Legislature's continuing recognition that conditions of release are a way to protect public safety and address defendants' flight risk. (See, e.g., S.B. 10, § 4 [adding §§ 1320.10, subd. (b)-(c), 1320.13, subd. (e)(1), 1320.17, 1320.18, subd. (e)(1)].)

CONCLUSION

The decision of the Court of Appeal should be reversed.

Dated: December 27, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Amicus Curiae Brief of Attorney General Xavier Becerra uses a 13 point Times New Roman font and contains 6,527 words.

Dated: December 27, 2018

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Bettie Webb**
Case No.: **S247074**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 27, 2018, I served the attached **AMICUS CURIAE BRIEF OF ATTORNEY GENERAL XAVIER BECERRA IN SUPPORT OF RESPONDENT** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 27, 2018, at San Francisco, California.

M. Campos
Declarant

M. Campos
Signature

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