Article 1, section 28 — not section 12 — controls bail under the California constitution

Overview

Confusion reigns about the constitutional status of bail because the California constitution contains two contradictory provisions on the subject. Article 1, section 12 provides that "[a] person shall be released on bail by sufficient sureties" except for certain enumerated exceptions.[1] But article 1, section 28 says "[a] person may be released on bail by sufficient sureties" except for capital crimes.[2] Worse: section 28 directs courts to make public safety and the safety of the victim the "primary considerations in bail decisions."[3] Some view bail as an absolute right under section 12, yet that is difficult to reconcile with the discretionary language of section 28.[4] The California Supreme Court recently sidestepped an opportunity to address this apparent conflict in *In re Humphrey*.[5] When the next opportunity arises, our state high court should hold that section 28 controls bail under the California constitution. The voters intended to make bail discretionary with 2008 Proposition 9 and impliedly repealed the section 12 right to bail.

Analysis

Section 28 was intended to make bail discretionary

The voters intended 2008 Proposition 9 to make bail discretionary in California. The interpretive task here is to determine what the parties who drafted the provision intended and to give it effect.[6] The analysis in California is the same for constitutional provisions and statutes.[7] The first step is to examine the text.[8] When voter intent is clear from the language of the provision, no further interpretation is needed.[9]

Authorities concur on the plain meaning of "may," the operative term in article 1, section 28: "[a] person may be released on bail by sufficient sureties." *May* means "[w]hat is within a person's discretion to do or not to do" and a "statute . . . that specifies a person or entity may do something does not, without more, create an obligation that the something in fact be done."[10] *May* connotes "permitted" or "a possibility."[11] This suggests that the voters intended to make bail discretionary by using a permissive term to describe when a person *may* be released on bail in section 28. Thus, courts are permitted to release persons on bail, but need not.

California Supreme Court decisions have the same effect. Courts have already interpreted the key term in section 28 to have a specific meaning, and when a lawmaker uses judicially-construed terms, courts presume that the term is used with the same meaning the courts have assigned.[12] Over a decade ago (and just two years before Proposition 9) our state high court held that "shall" in the article 1, section 12 context is mandatory, and "may" is permissive.[13] The court also held that section 28's bail provisions never became effective and that section 12 controlled because Proposition 4 (which amended section 12) received more votes in the 1982 election than Proposition 8 (a competing proposition that created section 28):

Proposition 4 stated that all accused persons 'shall' be admitted to bail, subject to certain limitations, while Proposition 8 would have rendered bail discretionary in all cases and would have extended the restrictions it imposed upon bail to [own recognizance] release. In view of these circumstances, we adhere to the view that the amendments to article I, section 12 proposed by Proposition 4 took effect, and that the provisions of article I, section 28, subdivision (e) proposed by Proposition 8 did not take effect.[14]

The electorate approved section 28 with the same discretionary language. Given the presumption that voters are aware of prior judicial constructions, the voters must have understood that "may" in section 28 meant that bail would be discretionary in all cases.[15]

Two other pieces of textual evidence in section 28 show that the electorate intended

to make bail discretionary. First, Proposition 9 changed the language of section 28 by removing this: "[N]o person charged with the commission of any serious felony shall be released on his or her own recognizance."[16] Because *shall* is mandatory, that sentence denied courts discretion to release persons solely on their promise to return to court. By excising that provision, Proposition 9 voters opted to remove a clear barrier to judicial discretion and chose instead to grant such discretion. Own recognizance release represents only a subset of pretrial release, but section 28 also says own recognizance release is "subject to the same factors considered in setting bail."[17] Proposition 9 aligned the treatment of bail with own recognizance release and granted courts broad discretion to grant or deny either. Removing a barrier to discretion shows that the voters intended to make bail discretionary.

That Proposition 9 made "victim safety" a factor courts must consider in bail decisions also suggests a discretionary process. The amended sections 28 states:

In setting, reducing *or denying* bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations.[18]

This contemplates a discretionary process with three possible outcomes: setting bail, reducing bail, or denying bail. Nothing in section 28 suggests that courts have discretion to deny bail only in a subset of bail decisions, such as violent felonies. Other than the factors that courts must consider, the only limitation on judicial discretion is a narrow exception for "capital crimes when the facts are evident or the presumption great."[19] Capital crimes are those offenses that are punishable by death.[20] The phrase "facts are evident and the presumption great" means evidence sufficient to sustain a guilty verdict on appeal. [21] Thus, under section 28 courts lose discretion to grant or deny bail in only one very narrow set of circumstances.

With Proposition 9 the voters intended section 28 to make bail discretionary in almost every case. That plain meaning of the text should control interpretation of

section 28. The result is that section 28 controls and bail is always discretionary except for the narrow capital crimes context.

The extrinsic evidence from Proposition 9 indicates voter intent to make bail discretionary

When the text is ambiguous courts will consider extrinsic evidence of voter intent.[22] For ballot initiatives like Proposition 9 courts will look to the ballot pamphlet.[23] And even where the text is clear, courts are not prohibited from considering legislative history.[24]

The history of Proposition 9 shows that voters did not intend to require courts to release people on bail. Both the official summary prepared by the Attorney General and the Legislative Analyst's analysis say that Proposition 9 would change the constitution to require judges to consider victim safety when making bail decisions, which necessarily requires judicial discretion. The ballot argument in favor of Proposition 9 and even its name (Marsy's Law) invokes a case where bail arguably should have been denied. The Findings and Declaration section of Proposition 9 references the unfulfilled "broad reforms" intended by Proposition 8 in 1982, demonstrating voter awareness that section 28 never went into effect and showing a desire to resurrect those reforms.

The first two bullet points of the Attorney General's summary describe bail in a way that assumes judicial discretion. The Attorney General's first summary point states: "Requires notification to victim and *opportunity for input* during phases of criminal justice process, including bail, pleas, sentencing and parole."[25] The Attorney General's second point states: "Establishes victim safety as consideration in determining bail or release on parole."[26] Those points only make sense if courts have discretion to deny bail — otherwise it would be meaningless to ask crime victims about their safety concerns.[27] The Attorney General also said that Proposition 9 establishes victim safety in *determining* bail, which contemplates a decision whether to grant, modify, or *deny* bail.[28] Because the Attorney General's summary and the measure's text refer to "bail" without a modifier, the ordinary

voter would understand that the changes proposed in Proposition 9 applied to bail in all cases.

The Legislative Analyst's analysis in the ballot pamphlet restates the points about bail made by the Attorney General, but also notes that the "Constitution would be changed to specify that the safety of a crime victim must be taken into consideration by judges in *setting* bail for persons arrested for crimes."[29] Use of the word "setting" could imply to voters that courts are required to grant release. But bail could be set at zero or at a prohibitively high amount. And the California Supreme Court has said that "when other statements in the election materials contradict the Legislative Analyst's comments we do not automatically assume that the latter accurately reflects the voters' understanding."[30] Because Proposition 9 stated that courts may set, reduce, or deny bail, the Legislative Analyst's comment about "setting" bail does not undermine voter intent to make bail discretionary.

The fact that the proponents titled Proposition 9 "Marsy's Law" evidences intent to abolish the right to bail.[31] The proponents encapsulated their theme in the measure's title: "The Victims' Bill of Rights Act of 2008: Marsy's Law." Marsy Nicholas was a college student murdered by her boyfriend in 1983.[32] The ballot argument describes Marsy's mother being "shocked" to encounter her daughter's accused killer in the grocery store free on bail just days after the murder.[33] Recounting that event immediately before listing the changes proposed by Proposition 9 suggests that similar things will no longer occur because bail can now be denied.[34] The reference to Marsy's murder as a case of bail wrongly granted under prior law that removed judicial discretion, juxtaposed with an argument that if Marsy's judge had possessed discretion and considered victim safety bail would have been denied, shows that Proposition 9 remedies this by granting courts discretion to consider victim safety and deny bail.

The Findings and Declaration section of Proposition 9 references the unfulfilled "broad reforms" intended by Proposition 8 in 1982. The electorate is presumed to be aware of existing laws and existing judicial construction.[35] Indeed, Proposition 9 states that voters were aware that Proposition 8 never went into effect: "the 'broad

reform' of the criminal justice system intended . . . by the electorate as Proposition 8 in 1982 has not occurred as envisioned by the people."[36] Thus, with Proposition 9 the voters intended to re-impose those reforms. The ballot arguments against Proposition 9 support this presumption.[37] Here, the ballot pamphlet argument against Proposition 9 invoked Proposition 8 by name, claiming that "many of the components in Prop[osition] 9 . . . were already approved by voters in Prop[osition] 8 in 1982" and concluded that therefore, Proposition 9 was a "truly unnecessary . . . duplication of effort."[38] The ballot pamphlet argument against Proposition 8 called Proposition 8 a "radical" change to the Constitution that "takes away everyone's right to bail."[39] Thus, extrinsic evidence from the Findings and Declarations section of the ballot pamphlet shows voter awareness that Proposition 9 would make bail discretionary in California.

Proposition 9 impliedly repealed section 12

Unlike Proposition 8 in 1982, the text of Proposition 9 was silent about repealing section 12. Given the intent of Proposition 9 voters to make bail discretionary, the first sentence of article 1, section 12 (which provided a positive right to release on bail) is impliedly repealed. There are two paths for overcoming the presumption against repeals by implication: two acts are so inconsistent that there is no possibility of concurrent operation; or the later provision gives undebatable evidence of an intent to supersede the earlier provision.[40] Both paths apply here. These two constitutional provisions are incompatible because the series of exceptions to the general rule that bail is a right in section 12 are incompatible with section 28: one makes bail mandatory and the other makes it discretionary. And Proposition 9 superseded the earlier provision because it reimposed the broad reforms in 1982 Proposition 8 — which replaced section 12 with a discretionary bail system.

Because Section 28 was a revision of the entire subject, it is proper for a court to say it was intended to be a substitute for the original.[41] This is not a case where a new provision merely touches on the same subject matter as an existing provision.[42] We first look to the text of the provisions to see if they can be harmonized.[43] Section 12

provides that "[a] person *shall* be released on bail," while section 28 provides that "[a] person *may* be released on bail."[44] Here the subject is identical: when bail may or must be granted. These provisions cannot be harmonized, because "shall" and "may" cancel each other. Thus, these sections are incapable of concurrent operation and cannot be harmonized. One must go.

Section 12 and section 28 establish fundamentally different approaches to the entire subject of bail that cannot operate together. Under section 12, bail is a right that persons accused of crimes are entitled to in most cases; limited judicial discretion is the exception to the rule. Under section 28, discretion is the general rule; judicial discretion is taken away in just one narrow exception. If a "rule no longer has any force, neither should its exceptions."[45] It follows that section 12's exceptions were also impliedly repealed. Harmonization is "not a license to redraft the statutes to strike a compromise that the Legislature did not reach."[46] Because there is no possibility of concurrent operation of a general rule that bail is both mandatory and discretionary, section 12 was impliedly repealed by section 28.

Conclusion

Both the text of section 28 and the extrinsic evidence from Proposition 9 demonstrate voter intent to make bail discretionary in California. Proposition 9 impliedly repealed section 12 because concurrent operation of two fundamentally different bail frameworks is mutually contradictory. A discretionary bail system carries significant risks to individual liberty and vests great power in the courts, but that policy decision is for the electorate. In California the electorate can rewrite their fundamental law through the initiative process. The voters did so with Proposition 9; accordingly, once there was an individual right to bail in California, but now there is none.

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1. Cal. Const., art. I, § 12. ↑
2. Cal. Const., art. I, § 28(f)(3). ↑

3. *Ibid.* ↑
4. *See In re White* (2020) at 457 ("[A]n arrestee's 'absolute right to bail' guaranteed by article I, section 12 of the California Constitution can be overcome by two exceptions"); Cotter, *Article I, Section 12 — Not Section 28 — Governs Bail in California*, SCOCAblog (July 17, 2019) ("Under section 12, bail is an 'absolute right' granted to criminal defendants with three narrow exceptions"). ↑
5. *In re Humphrey* (2021) 11 Cal.5th 135. ↑
6. 13 Cal.Jur.3d (2021) Constitutional Law, § 23. *See also Thompson v. Dept. of Corrections* (2001) at 48 ("In interpreting a constitution's provision, our paramount task is to ascertain the intent of those who enacted it"); *Nolan v. City of Anaheim* (2004) at 860 ("The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent"). ↑
7. 13 Cal.Jur.3d (2021) Constitutional Law, § 21. *See also Thompson* at 48 ("The principles of constitutional interpretation are similar to those governing statutory construction"); *People v. Rizo* (2000) at 378 ("In interpreting a voter initiative . . . we apply the same principles that govern statutory construction"). ↑
8. *See Persky v. Bushey* (2018) at 818 ("[W]e begin with the text as the first and best indicator of intent"). ↑
9. 13 Cal.Jur.3d Constitutional Law, § 23. ↑
10. *Bouvier Law Dict.* (Wolters Kluwer Desk Edition ed. 2012). ↑
11. *Black's Law Dict.* (11th ed. 2019). ↑
12. *People v. Lopez* (2005) at 873. ↑
13. *People v. Standish* (2006) at 791. ↑
14. *Id.* at 798. ↑
15. *See id.* at 791. ↑
16. Ballot Pamp., Gen. Elec. (Nov. 4, 2008), text of Prop. 9, p. 130. ↑
17. Cal. Const., art. I, § 28(f)(3). ↑
18. *Ibid.* (emphasis added). ↑
19. *Ibid.* ↑
20. *In re Bright* (1993) at 1672 (holding "capital crime" includes any offense statutorily punishable by death); *see also People v. Superior Court (Kim)*

(1993) at 941 (holding defendant charged with a crime listed in the Penal Code as a capital offense is not entitled to bail). ↑

21. *See In re White* at 463 ((interpreting the phrase "the facts are evident or the presumption great"): "This peculiar phrasing predates the Union, originating in the Pennsylvania Frame of Government of 1682. . . . Our court, in step with the broad consensus that has since emerged in other states, has interpreted this odd terminology to require evidence that would be sufficient to sustain a hypothetical verdict of guilt on appeal"). ↑
22. 13 Cal.Jur.3d Constitutional Law, § 36; *see also Cal. Cannabis Coalition v. City of Upland* (2017) at 934 ("If the provisions' intended purpose nonetheless remains opaque, we may consider extrinsic sources, such as an initiative's ballot materials"); *City and County of San Francisco v. County of San Mateo* (1995) at 563 ("If the provision's words are ambiguous and open to more than one meaning, we consult the legislative history, which in the case of article XIII A is the ballot pamphlet"). ↑
23. 13 Cal.Jur.3d Constitutional Law, § 36. ↑
24. *Center for Community Action and Environmental J. v. City of Moreno Valley* (2018) at 699. ↑
25. Ballot Pamp., Gen. Elec. (Nov. 4, 2008), summary of Prop. 9, p. 58 (emphasis added). ↑
26. *Ibid.* ↑
27. Civ. Code § 3532 ("The law neither does nor requires idle acts"). ↑
28. Ballot Pamp., Gen. Elec. (Nov. 4, 2008), text of Prop. 9, p. 130 ("When a judge or magistrate grants *or denies bail* or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes") (emphasis added). ↑
29. *Id.* at 59 (emphasis added). ↑
30. *San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) at 580; *accord*, *Delaney v. Superior Court* (1990) at 802–03 (rejecting as extrinsic evidence of voter intent statements by the Legislative Analyst that would have limited the scope of the words "unpublished information" to only "confidential information"). ↑
31. Even the tone and "theme" of ballot pamphlet arguments can be evidence of voter intent. *See Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991)

at 250 (observing that the "populist theme" of Proposition 13 ballot arguments "cannot easily be reconciled with plaintiff's interpretation of the measure"). ↑

32. Ballot Pamp., Gen. Elec. (Nov. 4, 2008), text of Prop. 9, p. 128. ↑
33. *Id.* at 129. ↑
34. Ballot Pamp., Gen. Elec. (Nov. 4, 2008), argument in favor of Prop. 9, p. 62. ↑
35. *People v. Gonzales* (2017) at 869. ↑
36. Ballot Pamp., Gen. Elec. (Nov. 4, 2008), text of Prop. 9, p. 128. ↑
37. Courts may view the fact that the proponents did not counter this argument as evidence of silent assent to that description of the measure's purpose. *Legislature v. Eu* (1991) at 505. ↑
38. Ballot Pamp., Gen. Elec. (Nov. 4, 2008), argument against Prop. 9, p. 63. ↑
39. Ballot Pamp., Primary Elec. (June 8, 1982), rebuttal to argument in favor of Prop. 8, p. 34. ↑
40. *Prof. Engineers in Cal. Government v. Kempton* (2007) at 830. ↑
41. *Ibid.* ↑
42. *See Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) at 573–74. ↑
43. See *State Dept. of Pub. Health v. Superior Court* (2015) at 956 (reversing appeals court decision that began its harmonization analysis with the common purpose of conflicting acts instead of beginning with the text). ↑
44. *Compare* Cal. Const., art. I, § 12 *with* Cal. Const., art. I, § 28(f)(3). ↑
45. *Prof. Engineers in Cal. Government* at 832. ↑
46. *State Dept. of Pub. Health* at 956. ↑