

The California Supreme Court can fix our broken bail system

By Nicholas Cotter and David A. Carrillo | January 06, 2021

Since the voters repealed Senate Bill 10 (which would have replaced the state's cash bail system with risk assessment) in the November 2020 election, California lacks clear guidelines on bail. That's a serious problem for judges, who risk applying the law inconsistently in thousands of bail hearings each year. This week the California Supreme Court heard argument in [In re Humphrey S247278](#), which provides an opportunity to fix this problem by reconciling the California constitution's two bail provisions, and maybe even abolish cash bail.

The legal inconsistency is that California constitution Article I, section 12 makes bail an absolute right with three exceptions — but article I, section 28 makes bail discretionary, with public safety as a primary consideration. When a judge grants bail, these provisions operate together; the problem is that they conflict when a judge denies bail altogether, because one requires granting bail and the other requires denial. If the California Supreme Court reaches this issue (and judging by the oral argument, it may not), these seemingly conflicting provisions can and should be harmonized: if a defendant would be denied bail under one of section 12's narrow exceptions, judges should apply the section 28 factors to see if bail may nonetheless be granted.

The key is to read these sections serially. The court can reconcile the bail provisions by holding that section 12 provides an absolute right to bail in almost all cases, and section 28 only applies when a defendant falls into one of section 12's exceptions. Nothing in section 12's text or structure requires denying bail — instead, it makes denying bail permissive and allows judges to grant bail “by sufficient sureties.” Section 28, in turn, elaborates on and clarifies section 12 by listing five factors for courts to consider when assessing bail: public protection; victim safety; the seriousness of the offense charged; the defendant's criminal history; and the likelihood of the defendant appearing at trial. Because section 12 gives courts discretion to grant bail, the California Supreme Court can hold that section 28's five factors are intended to help courts decide whether to grant or deny bail in one of section 12's exceptions.

This interpretation is reasonable, and it reconciles and gives effect to two apparently conflicting constitutional provisions. Reading sections 12 and 28 together allows for concurrent operation and permits them to coexist: section 12 operates broadly, while section 28 provides additional guidance when a section 12 exception applies. Similarly, nothing about section 28's history suggests that it was intended to eliminate section 12. And although section 28 was enacted after section 12, courts avoid interpreting newer provisions to repeal an older one.

As Erwin Chemerinsky [recently noted](#), the court should reject the state's bizarre argument that section 12 “essentially no longer exists” and “has been silently erased.” Constitutional provisions don't evaporate. Everyone knows that all presumptions are against repeals by implication, interpretations giving effect are preferred to those that make provisions void, and sections relating to the same subject are construed together to give both consistent effect.

We watched the oral argument, and while reading those tea leaves is always an uncertain process, several things stood out. The state took more questions, from more justices, and faced

some skepticism about its implied repeal argument, particularly from Justice Cuéllar (who asked the most questions). Most of the discussion focused on whether and how the court might harmonize sections 12 and 28, so we expect the decision to turn on this issue. But it may not be decided at all — the Chief Justice emphasized that the court reviewed this case on its own motion and questioned whether the court must confront the conflict. The court might refrain from deciding this issue, leaving it to the legislature and the electorate to clarify their intent. Even so, as [Bob Egelko observed](#), the justices seemed to agree that discriminating based on a defendant’s financial status is impermissible.

That consensus on cash bail’s equal protection problem means that the court could hold that money bail is unconstitutional. Neither section 12 nor section 28 explicitly requires *cash* bail. The California constitution only requires “sufficient sureties” — a term it leaves undefined — and allows for own-recognizance release. The [plain meaning](#) of surety (“a basis of confidence or security”) includes money — and other things. California courts have long recognized non-cash methods of posting bail, because bail is fundamentally a contract and consideration can always be non-monetary.

Eliminating money bail is consistent with constitutional principles of due process and equal protection. Removing money from the pretrial release calculus puts similarly situated criminal defendants on level ground, regardless of finances. But as matters stand now, a rich defendant can post bond and an indigent defendant cannot. That is wrong. When charged with the same crime the rich and the poor should be equal before the law. The only way to do that in the bail context is to remove money as a factor. Indeed, at argument the state appeared to agree that setting bail to keep one in jail and set another free is impermissible differential treatment.

No one should argue for eliminating surety bail entirely; that would undercut an accused’s due process protections. Bail is a long-standing absolute right. The question is whether and how cash bail will survive. If the California Supreme Court reconciles these sections as we suggest, the bail inquiry will change but not disappear: article I, section 12 guarantees bail, and section 28 guides courts in assessing it. Conditions of release simply change from money to other appropriate safeguards, such as court-ordered supervision or admission into treatment programs. This will ensure that defendants are not subject to pre-trial incarceration only because of their inability to pay. Wealth may not be a suspect classification, but the fact remains that the wealthy can post bond while the indigent await trial in lockup. That should offend basic notions of fairness.

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