No. S247278
(Court of Appeal No. A152056)
(Superior Court of California, San Francisco County Case No. 17007715,
Hon. Joseph M. Quinn, Judge)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

KENNETH HUMPHREY,

On Habeas Corpus.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE GOLDEN STATE BAIL AGENTS ASSOCIATION IN SUPPORT OF NEITHER PARTY

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APPLICATION TO FILE AMICUS BRIEF

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rule of Court 8.520(f), the non-profit Golden State Bail Agents Association respectfully requests leave to file the attached amicus brief in support of neither party. This brief is timely, as it is filed within 30 days after the last reply brief was filed.

1. **Statement of Interest.**

The Golden State Bail Agents Association (GSBAA) is a trade association representing the California bail industry. The purpose of the association is to promote the understanding of the bail industry's important role in California's criminal justice system and to protect the rights of its members. The Association is headquartered in Sacramento, California, but has members throughout California.

No party or counsel for any party, other than counsel for GSBAA, have authored the proposed brief in whole or in part or funded the preparation of the brief.

2. **Need for Further Briefing.**

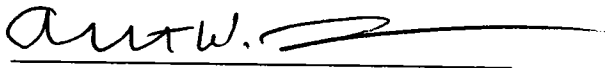
This Court, has recognized the valuable role amici play in litigation because they are nonparties who often have a different perspective from the principal litigants, and has acknowledged that their different perspectives

enrich the judicial decisionmaking process. (*Connerly* v. *State Personnel Bd. (California Business Council for Equal Opportunity)* (2006) 37 Cal.4th 1169, 1177.)

Amicus believes that further briefing is necessary to confront matters not fully addressed by the parties' briefs. Amicus has significant experience in the commercial bail bond industry and bail law. This brief will materially add to the issues before the Court, without repeating the parties' arguments.

Dated: October 4, 2018

Respectfully Submitted,



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INTRODUCTION

The California Constitution guarantees criminal defendants the right to bail by sufficient sureties, with some exceptions. This means that defendants must be allowed to secure their freedom from pretrial detention by posting a monetary bail bond. The right to monetary bail is a check on the power of the State to detain defendants for political, discriminatory or other improper reasons.

The monetary bail system is constitutional if it is reformed to provide an individualized bail hearing for indigent defendants within 48 hours of arrest that considers their ability to pay monetary bail and non-monetary alternatives, provides notice, an opportunity to be heard and to submit evidence for a reasoned decision by an impartial decision-maker. The bail schedule allows those that can afford to post bail to get released quickly which frees up jail bed space and saves the county money, while

those who are unable to afford bail will be granted a hearing within 48 hours to have their bail reviewed.

The recent passage of SB 10 does not moot this case and is unconstitutional to the extent that it conflicts with the right to bail by sufficient sureties.

ARGUMENT

A. Bail by Sufficient Sureties Means Defendants Have a Right to Pretrial Release by a Bail Bond.

Both article I, sections 12 and 28(f)(3) of the California Constitution provide a right to bail by sufficient sureties, unless one of the exceptions listed in those sections applies. We agree with respondent's argument that section 28(f)(3) remains inoperative. (Respondent's Brief on the Merits (RBM), p. 30.) However, if section 28(f)(3) went into effect, we agree with the parties' arguments that the words "shall" in section 12 and "may" in section 28(f)(3) can be reconciled and harmonized by interpreting those words as guaranteeing a right to bail by sufficient sureties unless an exception applies. (Petitioner's Reply Brief on the Merits (PRBM), p. 35; RBM, p. 45.)

It is ironic that the parties and the Court of Appeal discuss the right to bail at length, but none of them discuss the right to bail "by sufficient sureties." The only time sufficient sureties is mentioned in Court of

Appeals decision or parties briefs is when they are quoting the language of California constitution. The Court of Appeals and the parties act as if sufficient sureties has no meaning. However, as discussed below, significance must be given to every word and phrase of the constitutional right to bail. (PRBM, p. 25; *People* v. *Valencia* (2017) 3 Cal.5th 347, 357.)

There are no California cases that have fully defined the meaning of the phrase "sufficient sureties". We must look to the language itself, "giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole." (*People* v. *Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.) The court in *People* v. *Valencia* pointed out that:

> "[I]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters). [Citation.] To that end, we generally must accord[] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose, and have warned that [a] construction making some words surplusage is to be avoided." (*People* v. *Valencia* (2017) 3 Cal.5th, supra, at p. 357, internal quotation marks omitted.)

Here, Black's Law Dictionary defines "surety" as "[a] person who is primarily liable for paying another's debt or performing another's obligation." (Black's Law Dictionary 1579 (9th ed. 2009.) This is not much different from the way "surety" was defined when the California Constitution was ratified in 1879. An 1891 edition of Black's Law

dictionary defined "surety" as "one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor." (Black's Dictionary of Law 1142 (1st ed. 1891).) This 1891 definition is identical to the definition in the California Civil Code as enacted in 1872 and amended and adapted to the California Constitution of 1879:

> "A surety is one who at the request of another and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor." (Civ. Code §2831, as enacted in 1872 and amended and adapted to the California Constitution of 1879.)

In 2000, the Supreme Court of Minnesota reviewed the history of bail by sufficient sureties:

> "Although the American colonies initially accepted many aspects of the English bail system, some eventually shied away from the Statute of Westminster's confusing categorization of who was bailable. [Citation.] Instead, these colonies redefined the right to bail. [Citation.] Pennsylvania, for example, adopted the Great Law of 1682, which provided that all Prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where the proof is evident or presumption great. [Citation.] This language, which was ultimately incorporated into the Pennsylvania Constitution, became the model for almost every state constitution adopted after 1776. [Citations.] Consequently, approximately two-thirds of state constitutions, including Minnesota's [and California's], contain similar or identical language. [Citation.]
> ...
>
> Because our bail system, with some modification, is largely patterned after the English system, American courts at least

> until the nineteenth century, utilized the personal surety system. But, as modern society evolved, it became increasingly difficult to find reliable persons known by both the courts and the accused. [Citation.] As a result, the personal surety system evolved into the commercial bondsman system that exists today. [Citation.]" (*State* v. *Brooks*, (Minn. 2000) 604 N.W.2d 345, 350, internal quotation marks omitted.)

As noted by the *Brooks* court, the purpose of the bail by sufficient sureties clause is to limit government power to detain defendants prior to trial. (*State* v. *Brooks*, *supra* at 350.) California constitutional rights to bail are broader than federal rights (*In re Underwood* (1973) 9 Cal.3d 345.) It is this broader purpose that distinguishes the right to bail by sufficient sureties guaranteed by the California constitution from those granted by the Eighth Amendment of the United States Constitution.

California courts had a modern understanding of bail bonds prior to the 1879 ratification of the California Constitution and at least as far back as 1859:

> "In the case of Bean v. Parker et al., it was held that the sureties on a bail-bond were not liable unless the same was signed by the principal. We think it essential to a bailbond, said the Supreme Court of Massachusetts, that the party arrested should be a principal; it is recited that he is; and the instrument is incomplete and void without his signature. The remedy of the sureties against the principal would wholly fail, or be much embarrassed, if such an instrument as this should be held binding." (*City Of Sacramento* v. *Dunlap* (1859) 14 Cal. 421, 423, internal quotation marks omitted.)

This is confirmed by the Chief Justice's Pretrial Detention Reform Workgroup:

> "However, by the 19th century, the United States had switched to a surety system in which secured bonds were typically administered through commercial sureties and their agents, and the deposit of money or the pledge of assets became a principal condition of release. Several factors contributed to this development, including the near-absolute right to bail set forth in the Judiciary Act of 1789 and in most state constitutions, the unavailability of friends and relatives who might serve as personal sureties, and the still vast American frontier that enabled defendants to flee from prosecution." (Pretrial Detention Reform, Recommendations to the Chief Justice (Oct. 2017) p. 10, internal quotation marks omitted.)

Article I, §6 of California's 1879 constitution contained the right to bail by sufficient sureties. Commercial sureties were commonly used for bail when the California Constitution was ratified in the late 19th century.

A monetary bail bond is encompassed within the ordinary meaning of the bail by sufficient sureties clause because that language does not distinguish between types of surety. This Court has treated surety and bail bond interchangeably:

> "[T]he bail bond is a contract between the surety and the government whereby the surety acts as a guarantor of the defendant's appearance in court under the risk of forfeiture of the bond." (*People* v. *American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 657; citing *People* v. *Ranger Ins. Co.* (1994) 31 Cal.App.4th 13, 22, internal quotation marks omitted.)

The commercial bail bond system evolved because it became difficult to find personal sureties as modern society developed. California courts have held that bail by sufficient sureties encompasses release by a bail bond:

> "[e]xcept in capital cases, a criminal defendant has the right to be released on bail by sufficient sureties . . . . [citing Cal. Const., art. I, §28, subd. (f)(3)] One method for such release is a bail bond." (*People* v. *The North River Ins. Co.* (2017) 18 Cal.App.5th 863, 871, internal quotation marks omitted; also see *People* v. *Financial Casualty & Surety, Inc.* (2017) 10 Cal.App.5th 369, 377.)

Bail by sufficient sureties has meaning. The California constitution does not say that criminal defendants have a right to bail by pretrial preventative detention or by risk assessment algorithm, it says they have a right to bail by sufficient sureties.

Therefore, as a matter of case law, plain language, history, tradition and understanding at the time of the ratification of the California Constitution, the bail by sufficient sureties clause requires defendants be allowed the option to utilize a commercial bail bond to secure release form pretrial detention, unless an exception to the right to bail applies.

B. Pretrial Detention Will Exacerbate Overcrowding in California's Jails and Increase Criminal Justice Costs.

Petitioner argues that harmonizing the bail provisions of the California Constitution will allow courts to safely move away from monetary bail to a system of pretrial preventative detention:

> "Existing provisions of our Constitution, specifically sections 12 and 28, subdivision (f)(3) as harmonized, provide Californians with the means to move safely away from monetary bail. Pretrial preventative detention under both sections serves not only the compelling government interests of protecting safety and ensuring that a defendant appears in court, but does so in a narrowly limited manner, under the confines of due process." (PRBM, supra, at p. 10.)

Not only will pretrial preventative detention violate defendants' constitutional right to bail by sufficient sureties (as discussed above), it is impractical and will exacerbate jail overcrowding leading to unsupervised emergency releases that will be counterproductive to public safety.

Pretrial preventative detention has the potential to be abused for political reasons. If private monetary bail is eliminated as an option, the government will have complete control over who gets released from custody before trial. Trial judges, who must stand for reelection, will be susceptible to public pressure to detain defendants in high profile cases even when preventative detention is unwarranted. The recall of Santa Clara County Judge Aaron Persky is a recent example of this type of public pressure. Judge Persky was recalled because voters felt his sentencing of Brock Turner was too lenient, even though he followed the law and the probation department's recommendation. The clear message to judges is that it is safer to keep defendants in custody and hand out tough sentences. After all, no judge has been recalled for being tough on crime.

Monetary bail is the most common form of pretrial release with an average of 205,000 bail bonds executed per year in California. (Pretrial Detention Reform, Recommendations to the Chief Justice (Oct. 2017) p. 36.) Sometimes more than one bail bond is posted for the same defendant, but the number of defendants who can afford to bail out of custody and

choose to do so is considerable. If this option is taken away, many of these defendants will be preventatively detained in jail and California jails will quickly become overcrowded.

Thirty-nine jail facilities in 19 counties are operating under court-ordered population caps where the sheriff, not the court, is required to make emergency capacity releases when the jail exceeds its mandated population threshold. (Pretrial Detention Reform, Recommendations to the Chief Justice (Oct. 2017) p. 26.) These emergency releases are usually unsupervised and nearly half, 45 percent, fail to appear in court. (Cohen, Thomas H. & Reaves, Brian A., State Court Processing Statistics, 1990–2004: *Pretrial Release of Felony Defendants in State Courts* (USDOJ, Bureau of Justice Statistics, Nov. 2007), p. 8, available at: www.bjs.gov/content/pub/pdf/prfdsc.pdf.) Emergency releases also frustrate the rule of law because courts remand defendants into custody for good reason, only to see them released by the sheriff due to overcrowding.

Failures to appear have many costs for Californians:

> "Defendants who fail to appear impose significant costs on others. Direct costs include the costs of rearranging and rescheduling court dates, the wasted time of judges, lawyers, and other court personnel, and the costs necessary to find and apprehend or rearrest fugitives. Other costs include the additional crimes that are committed by fugitives. In 1996, for example, 16 percent of released defendants were rearrested before their initial case came to trial. [Footnote Omitted.] We can be sure that the percentage of felony defendants who commit additional crimes is considerably higher than their rearrest rate. We might also expect that the felony defendants

> who fail to appear are the ones most likely to commit additional crimes. Indirect costs include the increased crime that results when high failure-to-appear (FTA) and fugitive rates reduce expected punishments. [Footnote Omitted.]" (Helland, E., & Tabarrok, A. (2004). *The fugitive: Evidence on public versus private law enforcement from bail jumping*, The Journal of Law and Economics 47 (1), 93-122, p. 94, available at: https://mason.gmu.edu/~atabarro/PublicvsPrivate.pdf.)

Therefore, despite the intentions of petitioner, replacing monetary bail with pretrial preventative detention will harm public safety by increasing failures to appear in court. Justice for victims will be frustrated if defendants do not appear for trial. By the time the absconding defendant is caught and brought to court, evidence may be lost or spoiled, witnesses may no longer be available and memories may have faded. This will result in the frustration of justice and the probable dismissal of the case. Thereby allowing defendants back into our communities where they can victimize others.

C. Monetary Bail Protects Victim and Public Safety.

The Court of Appeal incorrectly stated that:

> "Money bail, however, has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes." (*In Re Humphrey* (2018) 19 Cal.App.5th 1006, 1029.)

Petitioner and respondent compounded this error by making the same argument in their briefs. (Petitioner's Opening Brief on the Merits (POBM), p. 23-24; RBM, p. 28.)

It is true that monetary bail cannot be forfeited if the defendant commits a new crime while released on bail. The bail bond can only be forfeited when the defendant fails to appear at a scheduled court appearance without sufficient excuse. (Pen. Code §1305 subd. (a)(1).) However, monetary bail does have a rational relationship to protecting public and victim safety because forfeiture is not the court's sole remedy. A defendant committing a new offense while released on monetary bail, may have his or her bail revoked, resulting in remand into custody and loss of the premium fee. Bail revocation and bail forfeiture are distinct legal concepts. (*People* v *National Auto. & Cas. Ins. Co.* (2002) 98 Cal.App.4th 277, 282–287.) The premium fee is usually 10% of the bail amount and is not refundable when bail is revoked. There is a direct mathematical nexus between the amount of bail and the premium fee charged. Higher bail results in more deterrence because more premium fee will be lost upon bail revocation for committing additional crimes. Furthermore, defendants committing new felonies while on bail for a felony offense are subject to a two-year sentence enhancement if they are convicted of both felony offenses. (Pen. Code §12022.1.) Therefore, bail does protect public and victim safety because defendants released on bail are deterred from committing additional crimes.

D. Monetary Bail Does Not Violate Equal Protection.

California's monetary bail system does not violate Equal Protection so long as defendants are given a hearing within 48 hours of arrest that

addresses their ability to pay monetary bail. (*ODonnell* v. *Harris County Texas, et al.* (5th Cir. 2018) 882 F.3d 528, 543.) Presumably, non-monetary alternatives would be considered at the hearing. Furthermore, the federal system permits a court to delay a bail hearing by three days after an arrestee's first appearance (plus intervening weekends or holidays) upon the government's motion. (18 U.S.C. §3142(f).) The 11th Circuit in *Walker* recently held that the City of Calhoun's bail system, which uses a bail schedule, survived an Equal Protection challenge:

> "Walker and other indigents suffer no absolute deprivation of the benefit they seek, namely pretrial release. Rather, they must merely wait some appropriate amount of time to receive the same benefit as the more affluent. Indeed, after such delay, they arguably receive preferential treatment, in at least one respect, by being released on recognizance without having to provide any security. Such scheme does not trigger heightened scrutiny under the Supreme Court's equal protection jurisprudence." (*Walker* v. *City of Calhoun* (11th Cir. August 22, 2018) No. 4:15-cv-00170-HLM at p. 27, __ F.3d __, internal quotation marks omitted.)

Justice O'Scannalin, from the 9th Circuit, sitting by designation and writing for the majority in *Walker*, pointed out the absurdity of treating wealth as a suspect class under Equal Protection analysis:

> "If Walker were correct that wealth should be treated like race, sex, or religion, and that every policy that affects people differently based on ability to pay must be justified under heightened scrutiny, the courts would be flooded with litigation. Innumerable government programs—heretofore considered entirely benign—would be in grave constitutional danger. If the Postal Service wanted to continue to deny express service to those unwilling or unable to pay a fee, it would have to justify that decision under the same standard it

> would have to meet to justify providing express service only to white patrons. The University of Georgia would be unable to condition matriculation on ability to pay tuition unless it could meet the same constitutional standard that would allow it to deny admission to Catholics. In Walker's preferred constitutional world, taxes that are independent of income, such as property taxes or sales taxes, would be the target of perpetual litigation. All that is to say, we do not believe that Bearden or Rainwater announced such radical results with so little fanfare, and we therefore reject Walker's equal protection theory. The district court was wrong to apply heightened scrutiny under the Equal Protection Clause." (*Walker* v. *City of Calhoun, supra,* at p. 27-28.)

While the *Humphrey* court did not define "ability to pay" or how a court should evaluate indigency, courts should not rely on an affidavit-based process for determining indigency. As the *Walker* court noted:

> "It may reasonably prefer that a judge have the opportunity to probe arrestees' claims of indigency in open court, where the importance of honesty may more clearly be impressed on the arrestee than would be the case in filling out an affidavit in the jailhouse. In more complex cases, a judicial hearing would allow the court iteratively to examine with the arrestee, his counsel, and the government what conditions of release are reasonable and within the arrestee's means, thereby tailoring case-specific conditions of release that balance the individual's pretrial liberty interest with the government's interest in assuring his subsequent appearance." (*Walker* v. *City of Calhoun, supra,* at p. 42.)

A hearing would also allow the court to inquire as to whether any third parties are willing to post monetary bail for defendant. Since a surety is a third party, the right to bail by sufficient sureties requires the indigency inquiry to go beyond the assets of the defendant and look at what sureties are willing to post defendant's bail. The defendant may be indigent, but his

friends, family or a commercial surety may have sufficent means to post his bail.

In sum, California's monetary bail system is constitutional if it is reformed to provide an individualized bail hearing for indigent defendants within 48 hours of arrest that considers their ability to pay monetary bail and non-monetary alternatives. The bail schedule allows those that can afford to post bail to get released quickly which frees up jail bed space and saves the county money, while those who are unable to afford bail will be granted a hearing within 48 hours to have their bail reviewed.

E. Monetary Bail Does Not Violate Due Process.

The *Walker* Court explained that due process and equal protection principles converge in the Court's analysis of cases where defendants are treated differently by wealth. The fairness of relations between the defendant and the State are generally analyzed the under the Due Process Clause. (*Walker* v. *City of Calhoun, supra*, at p. 22, citing *Bearden* v. *Georgia* (1983) 461 U.S. 660, 665). However, indigent defendants do not have a fundamental substantive due process right to be free from any form of wealth-based detention. (*ODonnell* v. *Harris County Texas, et al., supra,* at p. 546.)

Monetary bail does not violate Due Process if an in-custody defendant's bail is reviewed by a judge within 48 hours of arrest. The hearing must consider defendants ability to pay, provide notice, an opportunity to be

heard and to submit evidence, and a reasoned decision by an impartial decision-maker. (*ODonnell* v. *Harris County Texas, et al., supra,* at p. 546.)

In sum, California's monetary bail system is constitutional if it is reformed to provide an individualized bail hearing for indigent defendants within 48 hours of arrest that considers their ability to pay monetary bail and non-monetary alternatives, provides notice, an opportunity to be heard and to submit evidence, and a reasoned decision by an impartial decision-maker. The bail schedule allows those that can afford to post bail to get released quickly which frees up jail bed space and saves the county money, while those who are unable to afford bail will be granted a hearing within 48 hours to have their bail reviewed.

F. Risk Assessment Algorithms Will Not Achieve the Purposes of Bail More Fairly and Effectively.

Pretrial release systems that do not include monetary bail usually rely on risk assessment algorithms. Proponents of these algorithms claim they can divine the intentions of defendants and determine the risk that a defendant will fail to appear in court or commit a new offense while on pretrial release. In reality, there is very little evidence on the effectiveness of these tools:

> "The empirical research evaluating whether outcomes are improved by incorporating algorithmic risk assessment into the decision-making framework is beyond thin; it is close to

> non-existent. [Footnote Omitted.] Many of the "facts" that are cited about the impacts of risk assessment come from sources that range from detail-light non-academic reports put out by the agencies who designed the risk tool to nothing more than a single slide in a Power Point presentation. [Footnote Omitted.] Somehow, criminal justice risk assessment has gained the near-universal reputation of being an evidence-based practice despite the fact that there is virtually no research showing that it has been effective." (Stevenson, Megan T., *Assessing Risk Assessment in Action* (June 14, 2018). Minnesota Law Review, Vol. 103, forthcoming, available at: SSRN: https://ssrn.com/abstract=3016088.)

A commonly cited study from 2016 shows that risk assessments are biased against black defendants. In 2016, PROPUBLICA studied more than 10,000 criminal defendants in Broward County, Florida, who had been subjected to analysis by a risk assessment tool and subsequently released. The study compared their predicted recidivism rates with their actual rate over a two-year period. PROPUBLICA found that black defendants were far more likely than white defendants to be incorrectly judged to be at a higher risk of recidivism, while white defendants were more likely than black defendants to be incorrectly flagged as low risk. (Larson, Jeff, et al., *How We Analyzed the COMPAS Recidivism Algorithm*, PROPUBLICA (May 23, 2016), Available at: https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm.)

By contrast, competition in the monetary bail market reduces judicial discrimination in the setting of bail by lowering bail costs for African American and Hispanic defendants. (Ayres, Ian & Waldfogel, Joel,

A Market Test for Discrimination in Bail Setting, (1994) 46 Stan. L. Rev. 987, 994, available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2526&context=fss_papers.)

In 2014, Former U.S. Attorney General Eric Holder criticized risk assessments in his remarks to the National Association of Criminal Defense Lawyers:

> "Here in Pennsylvania and elsewhere, legislators have introduced the concept of risk assessments that seek to assign a probability to an individual's likelihood of committing future crimes and, based on those risk assessments, make sentencing determinations. Although these measures were crafted with the best of intentions, I am concerned that they may inadvertently undermine our efforts to ensure individualized and equal justice." (Holder, Eric, Att'y Gen., U.S. Dep't of Justice, *Address at the National Association of Criminal Defense Lawyers 57th Annual Meeting and 13th State Criminal Justice Network Conference* (Aug. 1, 2014), available at: https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th, internal quotation marks omitted.)

Attorney General Holder's criticism dovetails with the *Humphrey* court's criticism of the utility of San Francisco's PSA (Public Safety Assessment) recommendation:

> "The one-page form risk assessment report submitted to the court by the pretrial services agency, which does not indicate a representative of the agency ever met with petitioner, provides no individualized explanation of its opaque risk assessment of petitioner and no information regarding the availability and potential for use of an unsecured bond, which imposes no costs on the defendant who appears in court, or supervised release programs involving features like required

> daily or periodic check-ins with the pretrial services agency, drug testing, home detention, electronic monitoring, [Footnote Omitted.] or other less restrictive release options." (*In Re Humphrey, supra,* 19 Cal.App.5th at p. 1020-1021.)

Furthermore, risk assessment tools are often not properly validated. One report found more than 30 states have never run a validation process on the algorithms used within their state, suggesting that most of the time these programs are used without proper calibration. (Williams, Nikki, *Sentence by Numbers: The Scary Truth Behind Risk Assessment Algorithms*, (May 7, 2018), Center for Digital Ethics & Policy, available at: http://www.digitalethics.org/essays/sentence-numbers-scary-truth-behind-risk-assessment-algorithms.) Presumably, validation would have to be done in all 58 California counties so that the risk assessment tool was calibrated to the local population. This raises the possibility that some counties would fail to validate the tool, as the 30 states failed to do above.

In the pretrial context, where defendants are presumed innocent, risk assessment algorithms work outside the transparency Due Process requires. Courts and litigants often don't know how risk assessment tools work because their source code is usually proprietary and considered a trade secret of their vendor. The inputs may be known, but precisely how this data is weighed and calculated to produce a risk score is secret. How can a defendant effectively challenge a bad score under a proprietary risk assessment algorithm?

On the other hand, monetary bail setting is transparent. It is usually based on publicly available bail schedules and can be reviewed in bail hearings conducted in open court. Bail hearings are generally informal and may be done orally without written points and authorities. (California Judges Benchguide 55: *Bail and Own-Recognizance Release* (CJER rev. 2013) §55.13.) Furthermore, prior to arraignment a defendant or his friends or family may apply for release on lower bail or own recognizance. (Pen. Code §1269c.) However, the defendant must have been arrested without a warrant for a bailable felony offense that is not a serious or violent felony or a misdemeanor offense of violating a domestic violence restraining order. (California Judges Benchguide 55, supra, at §55.15.)

In sum, risk assessments are unproven, opaque tools that conceal discriminatory detentions with a false veneer of objective, algorithmic analysis.

G. This Case is Not Mooted by Enactment of SB 10.

On August 28, 2018, Governor Brown signed Senate Bill 10 into law. This law is unconstitutional because it attempts to eliminate the right to bail by sufficient sureties which is guaranteed by article I sections 12 and 28(f)(3) of the California Constitution. By contrast, when the right to monetary bail was eliminated and replaced with a system of preventive detention in New Jersey, that jurisdiction first amended its constitution to

eliminate the right to bail by sufficient sureties.[1] The right to bail by sufficient sureties is more fully discussed above, in section A of this brief.

Cases can be mooted by enactment of new legislation. (*Sagaser* v. *McCarthy* (1986) 176 Cal.App.3d 288, 299.) However, an exception applies if the new legislation is unconstitutional:

> "Because we hold that AB 2251 is constitutional and valid legislation, and because the validity of AB 2251 is the only issue before us, we must dismiss the appeal as moot." (*Sagaser, supra,* 176 Cal.App.3d at 299, emphasis added.)

Furthermore, SB 10 will not go into effect until October 1, 2019 and SB 10 may be repealed by referendum no. 18-0009 which has been filed with the Attorney General. On September 10, 2018, the Attorney General issued title and summary for referendum no. 18-0009 allowing signature

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[1] In 2014 New Jersey voters passed Public Question No. 1 which amended the New Jersey Constitution by eliminating bail by sufficient sureties from article I, section 11 and amending that clause as follows: "No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be ~~bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great~~ *eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process. It shall be lawful for the Legislature to establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision.*" [Standard text is unchanged, ~~strikeout text~~ is deleted and *italicized text* is added.] (New Jersey, Public Question No. 1 (2014), Available at: https://ballotpedia.org/New_Jersey_Pretrial_Detention_Amendment,_Public_Question_No._1_(2014).)

gathering to commence. (California Attorney General, *Referendum To Overturn A 2018 Law That Replaced Money Bail System With A System Based On Public Safety Risk*, Available at: https://oag.ca.gov/system/files/initiatives/pdfs/Title%20and%20Summary%20%2818-0009%29_0.pdf.) Proponents will need to gather 365,880 valid voter signatures by November 26, 2018 to earn a place on the ballot. If this referendum qualifies, SB 10 will be stayed until the November, 2020 election. (Cal. Const., art. II, §9.) If history is a guide, this referendum is likely to qualify for the ballot and pass. Between 1912 and 2016, 56.18% of referenda qualified for the ballot and 58% of the referenda that qualified for the ballot were successful in repealing a law. (California Secretary of State, *Summary of Referenda Data*, available at: https://elections.cdn.sos.ca.gov/ballot-measures/pdf/referenda-data.pdf.)

Therefore, this case is not moot because the current bail system will remain in effect at least until October 1, 2019 and longer if the referendum qualifies for the ballot. If the referendum passes, SB 10 will never take effect. Furthermore, even if SB 10 goes into effect on October 1, 2019, holding this case moot will waste judicial resources because another litigant could bring a case challenging SB 10 prior to October 1, 2019.

Prior to passage of SB 10, Governor Brown and the California Legislature knew the *Humphrey* case was pending before the California Supreme Court, a co-equal branch of government. They also knew that

Humphrey dealt with bail reform, the same subject matter as SB 10. Instead of waiting for the outcome of this litigation, Governor Brown and the California Legislature rashly passed and enacted SB 10. Therefore, SB 10 should be struck down as unconstitutional to the extent it abridges the right to bail by sufficient sureties.

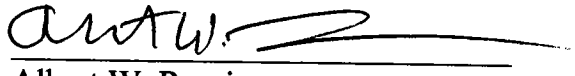
CONCLUSION

For the reasons set forth above, amicus respectfully requests that the Court determine that California's constitution guarantees defendants the right to monetary bail, unless an exception applies and that the monetary bail system is constitutional if it is reformed to provide an individualized bail hearing for indigent defendants within 48 hours of arrest that considers their ability to pay monetary bail and non-monetary alternatives, provides notice, an opportunity to be heard and to submit evidence for a reasoned decision by an impartial decision-maker. The bail schedule allows those that can afford to post bail to get released quickly which frees up jail bed space and saves the county money, while those who are unable to afford bail will be granted a hearing within 48 hours to have their bail reviewed.

We further request that SB 10 be struck down as unconstitutional to the extent that it conflicts with the right to bail by sufficient sureties.

Dated: October 4, 2018

Respectfully submitted,



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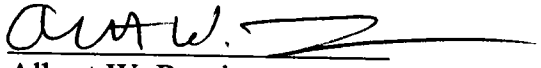
CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using the Times New Roman font in a size no smaller than 13-points. According to the Word Count feature in Microsoft Word for Windows software, this brief contains 7,188 words.

I declare under penalty of perjury under the laws of the State of California that this Certificate of Compliance is true and correct and that this declaration was executed in Fresno, California on October 4, 2018.



Albert W. Ramirez
Declarant

DECLARATION OF SERVICE

I, Albert W. Ramirez, state:

I, the undersigned, declare that I am, and was at the time of service of the papers herein referred to, over the age of 18 years and not a party to the within action or proceeding; that my business address is 1230 M Street, Fresno CA 93721, which is located in the county in which the within-mentioned mailing occurred. I am familiar with the practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Such correspondence will be deposited with the United States Postal Service on the same day in the ordinary course of business with postage fully prepaid.

On October 4, 2018, I mailed from Fresno, California the following document(s):

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE GOLDEN STATE BAIL AGENTS ASSOCIATION IN SUPPORT OF NEITHER PARTY

by placing a true copy in a separate envelope for each addressee named below, with the name and address of the person served shown on the envelope as follows:

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