SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PHILLIP URQUIDI, DANIEL MARTINEZ, SUSANA PEREZ, TERILYN GOLDSON, GERARDO CAMPOS, ARTHUR LOPEZ, CLERGY AND LAITY UNITED FOR ECONOMIC JUSTICE ("CLUE"), REVEREND JENNIFER GUTIERREZ, REVEREND GARY WILLIAMS, and RABBI ARYEH COHEN, individually,

Plaintiffs,

v.

CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, SHERIFF ROBERT LUNA, LOS ANGELES POLICE DEPARTMENT, and CHIEF MICHEL R. MOORE, AND ATTORNEY GENERAL ROB BONTA,

Defendants.

Case No.: 22STCP04044

MEMORANDUM DECISION AND ORDER ON MOTION FOR PRELIMINARY INJUNCTION

Spring Street Courthouse, Dept. 7

INTRODUCTION

The American people, seeking to secure the blessings of liberty, established a national constitution premised on the dual aspirations of equal justice under law (the words to this day chiseled into the main beam atop the United States Supreme Court building) and due process of law. So too did the people of California in establishing their

state constitution. So revered are these principles that we employ the 18th-century convention of initial capitalization to heighten emphasis: Equal Protection, Due Process, and Constitution.

Words in a Constitution mean little without a society's ardent commitment to them. In California, we require elected and appointed public officials — governors, legislators, attorneys general, mayors, city council members, county council members, district attorneys, sheriffs, police officers and judges — to take a solemn oath to support and defend the Constitutions of the United States and of the State of California. From time to time, people sue their public officials demanding the oaths be honored, as do plaintiffs here.

How are judges empowered to require or prohibit actions by the other separate and co-equal branches of government? Under the doctrine of separation of powers,[1] each branch must exercise self-restraint, prudence, and respect for the constitutional boundaries of the other two branches. Yet at the end of the day, and no matter how unwelcome the obligation imposed upon the judicial branch, "[i]t is emphatically the province and duty of the judicial department to say what the law is." (*Marbury v. Madison* (1803) 5 U.S. 137, 177.) And, "[t]he judicial function is to declare the law and define the rights of the parties under it." (*Marin Water & Power Co. v. Railroad Com. Of Calif.* (1916) 171 Cal. 706, 711-712.)

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[1] "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.)

The plaintiffs are six of tens of thousands of people who are lawfully arrested each year in Los Angeles County by police officials without a warrant and then held in jail for a period of time before a judge determines whether and under what conditions the arrestee may be released pending further judicial proceedings. The current pre-arraignment arrestee release system in Los Angeles County utilizes uniform, countywide money bail schedules — one schedule for misdemeanors and another schedule for felonies — that assign dollar amounts of money bail based on the offense charged. Thus, arrestees with sufficient wealth (or whose families and friends can acquire the funds) to post the scheduled bail amount promptly go free. Arrestees without enough money (or without family and friends who can provide the required bail amount) stay in jail at least until they are brought before a judge for a bail-determination hearing. This "wealth-based detention system," plaintiffs say, is unconstitutional under the Due Process and Equal Protection clauses in both the United States and California Constitutions, and they say it needs to stop now.

The plaintiffs, on their own behalf and on behalf of a putative class of similarly situated persons, seek a court order — an injunction — to prohibit the Los Angeles County Sheriff's Department ("LASD") and the City of Los Angeles Police Department ("LAPD"), both of which operate jails, from enforcing the money bail schedules as the ***sole*** means of determining whether arrestees are or are not released before they are brought before a judge. Arrestees may be detained in custody for reasons other than their inability to pay the scheduled money bail such as if the offenses for which they are arrested make them ineligible for bail (for example, capital and specified serious and violent offenses),

or they concurrently have an unresolved "open" criminal case or if they are the subject of an arrest warrant. Such persons are not within plaintiffs' putative class.

The duration of the custody period in question for the putative class members—from arrest to first appearance before a judge — is between one and five days.[2] The named plaintiffs here, all of whom spent five days in jail because they could not afford to post the scheduled money bail, assert that such detentions work severe and even cruel hardships on presumptively innocent, impoverished people. These hardships are not visited upon more fortunate arrestees who, although charged with the same crime and otherwise indistinguishable from their poorer counterparts, can "make bail" and be freed within hours. Pretrial detention of presumptively innocent people based upon their poverty is neither intended nor permitted to operate as a form of punishment, but that is, plaintiffs say, what is actually happening every day.

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[2] California Penal Code section 825 provides that the arrestee shall be brought before the judge "without unnecessary delay" and in any event within 48 hours after arrest, excluding Sundays and holidays.

Plaintiffs have provided evidence that delays not infrequently occur beyond the time specified by statute. See, e.g., Declaration of Tiana S. Baheri in Support of Plaintiff-Petitioners' Ex Parte Application for a Temporary Restraining Order (Nov. 14, 2022) ("Baheri Decl."), Exh. C. (Dugdale, "*Nearly 40% of LASD Jail Buses Are Out of Service, And Some Incarcerated People Are Missing Court Dates*" (Aug. 19, 2022) LAist <https://laist.com/news/criminal-justice/nearly-40-of-lasd-jail-buses-are-out-of-service-and-some-incarcerated-people-are-missing-court-dates> (as of Nov. 12, 2022)).

Declaration of Micah Clark Moody in Support of Plaintiff-Petitioners' Ex Parte Application for a Temporary Restraining Order (Nov. 14, 2022). Based on a response to a public-records request, for the time period covered, "more people were arraigned five days after arrest (1,242) than one day after arrest (986)" and that "the time between arrest and arraignment for people in custody is most often two days (12,333) followed by four days (6,060) followed by three days (3,514)."

Plaintiffs ultimately seek a permanent injunction — something to be considered at the end of the case. But now, at the beginning of the case, and the subject of the present motion before the court, plaintiffs seek a *preliminary* injunction ("PI"). The distinction, preliminary vs. permanent, is important.

It is clear defendants do not dispute plaintiffs' principal factual and legal points. Indeed, the evidence shows that many public officials in California — the former and present Governors and the Legislature,[3] the Judicial Council of California ("JCC"),[4] the

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[3] See discussion below concerning the passage and signing into law of S.B.10. See also, McCrum, *California Bail Reform: Where Are We Now?* (May 9, 2022) Georgetown Journal on Poverty Law & Policy <http://www.law.georgetown.edu/poverty-journal/blog/california-bail-reform-where-are-we-now/>. "When Governor Jerry Brown signed Senate Bill 10 (S.B. 10), which sought to end cash bail and other monetary conditions of pretrial release, it seemed that meaningful criminal justice reform was on the way in the most populous state. Then-Lieutenant Governor Gavin Newsom lauded Governor Brown's action saying, '[a] person's checking account balance should never determine how they are treated under law...Cash bail criminalizes poverty, and with Governor Brown's signature today, California has opened the door to pursue and perfect a just pretrial system."

[4] Baheri Decl., Exh. D (Judicial Council of California, Pretrial Pilot Program: Report to the Legislature (July 2022).)

The JCC explained that the report fulfills the Legislature's mandate which allocated $75 million to the JCC to fund the implementation, operation, and evaluation of programs related to pretrial decision-making in at least 10 trial courts. The goals, as set by the Legislature, were to increase the safe and efficient pre-arraignment and pretrial release of individuals booked into jail; implement monitoring practices with the least restrictive interventions necessary to enhance public safety and return to court; expand the use and validation of pretrial risk assessment tools that make their factors, weights, and studies available; and assess any disparate impact or vias that may result from the implementation of these programs.

former Chief Justice of the California Supreme Court,[5] the California Supreme Court (in a groundbreaking decision in 2021),[6] and the County of Los Angeles via its Probation Department[7] and Board of Supervisors[8] [9] — have had profound doubts about the wisdom,

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[5] On March 9, 2016, during her State of the Judiciary address to the California Legislature, Chief Justice Cantil-Sakauye said, "[w]e need more pretrial release programs to balance safety against the need to post bail. We must not penalize the poor for being poor." (Ottone & Scott-Hayward, *Pretrial Detention and the Decision to Impose Bail in California* (2018) Criminology, Criminal Justice, Law & Society, Vol. 19, Issue 2, 24-43, at 38.)

[6] See discussion below of the *Humphrey* decision.

[7] Baheri Decl., Exh. F (Los Angeles County Probation Department Annual Report: Transforming Lives for a New Tomorrow (2021)) explains that the Pretrial Services Bureau "provides crucial information to public entities such as law enforcement, the courts, and Probation Department, concerning community safety and the client's court appearance. The Bureau utilizes a risk instrument tool to measure pretrial conduct and court appearance reliability to assess client's risk, if released."

[8] Baheri Decl., Exh. B (Report Back on Data Collection to Support Pretrial Reform in Los Angeles County (Item No. 3, Agenda of Aug. 4, 2020) from County of Los Angeles Chief Executive Officer Feisa A. Davenport to Supervisors Hilda Solis, Holly Mitchell, Sheila Kuehl, Janice Hahn and Kathyrn Barger).

The report was developed by the County's Chief Information Officer in collaboration with a working group that included representatives from the Departments of Alternate Public Defender, County Counsel, District Attorney, Health Services/Correctional Health Services and Office of Diversion and Reentry, Mental Health, Probation, Public Defender, Sheriff, Information Systems Advisory Board, as well as the Los Angeles Superior Court, County Prosecutors Association, County Bar Association, the Bail Project, Center for Court Innovation, Dignity and Power Now, Frontline Wellness Network, JFA Institute, Project 180, and Vera Institute for Justice.

[9] Baheri Decl., Exh. J (County of Los Angeles Chief Executive Office, Sheriff's Department Budget Fact Sheet (updated Apr. 21, 2022)) explains, "If public safety is at risk, the Board of Supervisors has shown its readiness to move immediately to find funding to address public concerns" and "[t]he Sheriff is responsible for determining which public safety programs best serve County residents and which should be eliminated. As an elected official, the Sheriff has broad authority to fund programs within his Department as he sees fit."

fairness, and constitutionality of the pretrial money bail system that operates to detain arrestees in jail solely because they are too impoverished to pay money bail.

The defendants have stated in open court that plaintiffs have already demonstrated "some likelihood of success on the merits" of their claims. The court interprets this to mean the defendants recognize that plaintiffs will likely be able to demonstrate at trial both a constitutional injury and the existence of "irreparable harm" in the absence of injunctive relief. Less clear to the court is whether the defendants truly oppose the plaintiff's requested form of PI and, if so, why.

A court considering a PI *must* consider the broader public interest. During this extended PI hearing, the court implored the parties to produce evidence on critical questions of public interest: does secured money bail in fact reduce the incidence of (1) arrestees committing new criminal activity ("NCA") and (2) arrestees failing to appear ("FTA") at future court appearances? Bluntly put: would plaintiffs' requested PI thus increase crime and FTAs, compared to the current secured money bail regime?[10]

The plaintiffs have produced a vast amount of evidence, via four well-qualified expert witnesses and more than a dozen academic studies, that decisively shows the answer to these questions is "no." Their evidence has demonstrated that it is highly likely

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[10] A point of vocabulary: The bail schedules are a form of "secured money bail." "Unsecured money bail" means the arrestee does not have pay any money up front upon release but may be required to pay a specified amount if he or she later fails to appear for court proceedings. "Release on non-financial conditions" means financial incentives and potential penalties are not conditions of release but other conditions, such as pretrial supervision, electronic monitoring, promises to appear, and drug testing, may be imposed.

that the opposite is true: secured money bail regimes are associated with *increased* crime and *increased* FTAs as compared with unsecured bail or release on non-financial conditions. What's more, the evidence demonstrates that secured money bail, as now utilized in Los Angeles County, is itself "criminogenic" — that is, secured money bail *causes* more crime than would be the case were the money bail schedules no longer enforced. Plaintiffs have made a strong showing that secured money bail, including the bail schedules at issue here, are not reasonably designed, much less narrowly tailored, to achieve the governmental interests at stake — namely, reduction in arrestees' NCA and FTAs.

The defendants have offered no evidence, via departmental or third-party witnesses, departmental data, expert testimony, academic studies, or otherwise, to controvert *any* of plaintiffs' evidence. This is not for want of opportunity. The court has invited the Mayor of Los Angeles, the Sheriff of Los Angeles County ("the Sheriff"), the LAPD Chief of Police ("the Chief"), and any of the County Board of Supervisors and Los Angeles City Council to come into court and be heard. Perhaps these public officials, despite their concession of the constitutional injury, nonetheless support the current secured money bail system. Perhaps they believe an injunction prohibiting enforcement of the money bail schedules is not in the public interest. Perhaps the Sheriff and the Chief have evidence, opinion or otherwise, that the money bail system actually does reduce NCA and FTAs among arrestees. Perhaps these public officials, given their expertise in criminology and public administration, have better ideas for the content of a PI than that proposed by plaintiffs.

But all have declined to testify at this hearing.

This is not to say that defendants do not have a clear position. They do: it is that the judges of the Los Angeles County Superior Court created the money bail schedules under the authority of the California Legislature, and that the Sheriff and the Chief are obligated by law to enforce them. The defendants categorically insist that it is up to the Los Angeles Superior Court judges to solve this problem — or, at a minimum, to be an integral part of the solution. (The Los Angeles Superior Court is not a party to this lawsuit.) Plaintiffs equally categorically disagree. This lawsuit seeks, they say, to enjoin the *enforcers* from enforcing unconstitutional as-applied cash bail schedules. The *enforcers* are Sheriff and the Chief, and plaintiffs claim to seek no relief from the *creators* of the cash bail schedules, namely the California Legislature and the Los Angeles Superior Court.[11]

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Thus, plaintiffs seek this court's PI now. The decision facing the court today — whether to enter a PI against the enforcement of the money bail schedules — is controversial. Indeed, for many in the community, the use of secured money bail is a

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[11] Lawsuits seeking to enjoin the *enforcers* and not the *creators* of an unconstitutional law are not unusual. To cite a famous example, in 1970, Jane Roe filed a lawsuit against Henry Wade, the district attorney of Dallas County, Texas, from enforcing what she considered an unconstitutionally restrictive Texas state law regulation of abortion. Others include *In Re Taylor* (2015) 60 Cal.4th 1019, which affirmed a lower court's injunction prohibiting the Department of Corrections and Rehabilitation from enforcing statutory residency restrictions for certain classes of parolees and *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 212 (injunction against enforcement of county public assistance program violating recipients' constitutional privacy rights.)

Rorschach test. Those opposed to its continued use see an unconstitutional injustice that imposes harsh if not devasting consequences on thousands of impoverished, often mentally ill and otherwise vulnerable members of the community simply because they are poor. Those in favor of its continued use see a bulwark against turning loose on the community dangerous individuals with a propensity to commit more crime and not to appear for their court dates. Both sides can point to sensational anecdotes[12] in the media or otherwise to support their points of view.

The court need not rely on anecdotal evidence, however. Now before the court is the testimony of four well-qualified experts together with a broad collection of the relevant, peer-reviewed academic studies and reports analyzing data sets of hundreds of thousands of cases in multiple jurisdictions in California and the United States. These studies utilize multiple regression analyses to control for dozens of other socioeconomic and demographic variables and employ conventional academic statistical conventions to account for and reduce chance findings. As a body of evidence, they are coherent and

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[12] Anecdotes are a limited-utility source of information as illustrated by the City-elicited testimony concerning an arrestee, a Mr. Bircan. The City wished to show "an example" of a person released on zero bail who then allegedly shortly thereafter reoffended. As a result of the new (second) offense, secured money bail was required for any further pretrial release. Mr. Bircan then paid the money bail, was released, and allegedly committed a third offense. The anecdote of his case illuminates nothing about the inefficacy of unsecured bail or the efficacy of secured money bail in deterring NCA, although it raises the possibility that an individualized pretrial-release risk-assessment may have been more protective of the public interest.

consistent in their conclusions, and provide a robust evidentiary record upon which the court may proceed to a decision.

OVERVIEW

A. The Parties

In November 2022, plaintiffs Phillip Urquidi, Daniel Martinez, Susana Perez, Terilyn Goldson, Gerardo Campos, and Arthur Lopez ("Arrestee Plaintiffs") were arrested without warrants in Los Angeles County. The allege they could not afford to post their scheduled bail and for that reason, they each remained jailed for at least five days. None of them were brought before a judge for a bail determination. As described below, they claim to have suffered a variety of serious injuries and indignities during their prolonged detention in jail. It is the Arrestee Plaintiffs who seek the PI.

The other plaintiffs are an organization, Clergy and Laity for Economic Justice ("CLUE"), and three individuals who are officers or board members of CLUE and community religious leaders. These four plaintiffs ("Taxpayer Plaintiffs") seek a permanent injunction against the expenditure of taxpayer funds to administer the money-bail detention system. They do not seek a PI and therefore are not participating in the present motion.

The defendants are (1) the City of Los Angeles which operates and manages the LAPD ("City"); (2) the County of Los Angeles ("County"); (3) the LASD, which operates the County's jails; (4) Sheriff Robert Luna, the Sheriff of Los Angeles County; (5) Chief

Michel Moore, the Chief of the LAPD; and (6) California Attorney General Rob Bonta ("the AG").[13]

B. The Interval in the Criminal Pretrial Process Involved in This Case

As noted, persons taken into custody following a warrantless arrest are brought before a judge in Los Angeles County usually between one and five days following arrest for an individualized determination of the person's conditions for release, if any, whether by bail or release on his or her own recognizance ("OR"). This normally occurs at the arrestee's arraignment, the first hearing at which the arrestee appears in court with counsel, is advised of the charges and rights, and enters a plea.

This case does not involve the *judicial* determination of the conditions of release on bail. This case solely involves the interval of time between arrest and the time when the arrestee is first brought before a judge.[14]

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[13] As of the date of this Order, the AG has not yet appeared. The County and City defendants demurred to the plaintiffs' operative complaint on the ground that the State of California is an indispensable party — an entity without whose participation in the case the case may not lawfully proceed. Among their arguments is that the Sheriff and the judges of the Los Angeles Superior Court are state, not county, actors.

Again, plaintiffs disclaim seeking any relief as against the Los Angeles Superior Court or its judges, contending that they seek only to enjoin the enforcers of the money bail schedule, namely the City and the County and its officials. The court agreed that the State of California should be joined as a party because the Sheriff is subordinate to the California Attorney General and so the State's views as to the public interest of any permanent injunction could be considered. In response to the court's order requiring the participation of the State of California, plaintiffs sued the AG.

[14] The parties appear to disagree as to the endpoint of the relevant interval. Plaintiffs insist that it runs until the arrestee, with the benefit and presence of counsel, has a "*Humphrey* hearing" before a judge. The defendants appear to contend that the interval

C. Bail In California and Los Angeles County: The Constitution, the Penal Code, the California Rules of Court and the Los Angeles County Superior Court Local Rules—An Overview

The term "bail" has several distinct meanings. "Admission to bail" is the court order that discharges a defendant or arrestee from actual custody "upon bail." (Pen. Code, § 1268.) Thus "bail" also refers to a bond, cash deposit or other "sufficient sureties." Traditionally, the setting of bail was to designed to insure the appearance of the arrestee at future court appearances but the California Constitution and Penal Code currently specify that the safety of the public and of crime victims are permissible — indeed, the primary — considerations in determining bail. (Cal. Const., art. I, § 28; Pen. Code, § 1275.)

The California Constitution provides that a person must be released on bail by sufficient sureties except in specified cases. (Cal. Const., art. I, § 12.) The exceptions are (a) capital crimes (i.e., crimes punishable by death) when the facts are evident or the presumption great; (b) felony offenses involving acts of violence or sexual assault on another person, when the facts are evident or the presumption great and clear and convincing evidence shows that there is a substantial likelihood that the person's release

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ends for those arrestees who participate in a "bail deviation" request and/or a PREP proceeding (discussed below), both of which involve a "Duty Magistrate's" evaluation and potential modification of an arrestee's money bail amount pre-arraignment. Neither the PREP nor bail deviation processes involve a face-to-face hearing before a judge or the arrestee having the benefit of counsel.

would result in great bodily harm to others; and (c) felony offenses when the facts are evident or the presumption great and clear and convincing evidence shows that the person has threatened another with great bodily harm and that there is a substantial likelihood the person would carry out the threat if released. Persons charged with noncapital offenses may be released OR, i.e., without money bail but with a promise to appear and other conditions. (Cal. Const., art. I, § 12; Pen. Code, §§ 1270, 1318 et seq.)

To effect release on bail, the California Legislature specified that the Superior Court judges sitting in each California county create and adopt, on a yearly basis, bail schedules for all felony and misdemeanor criminal offenses for which bail may be posted. (Pen. Code, § 1269b.) The Los Angeles Superior Court duly promulgates the bail schedules pursuant to the Superior Court of Los Angeles County, Local Rules, rule 8.3, which provides that the Presiding Judge appoint a Bail Committee within the Criminal Division; the Bail Committee prepare and annually revise a Uniform Countywide Misdemeanor/Infraction Bail Schedule and a Uniform Countywide Felony Bail Schedule; and that the Bail Committee submit the schedules to the Superior Court's Executive Committee for approval. The Los Angeles Superior Court's 2022 bail schedules are attached to plaintiffs' operative second amended complaint and are in evidence.[15]

Under this statutory scheme, the Sheriff and the Chief have no role in setting or issuing the bail schedules, and the jailors' role in retaining or releasing arrestees from pre-arraignment custody is entirely driven by statute, leaving no room for discretion. (See,

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[15] Baheri Decl., Exh. A.

Pen. Code, § 1268 [admission to bail is based on court order]; § 1269b, subd. (a) [Sheriff can accept bail only in the amount shown on the arrest warrant, bail schedule, or court order]; § 4004 [person committed to jail must be confined there until "legally discharged"].)[16]

The Judicial Council of California ("JCC"), the policymaking body of the California courts, also establishes bail schedules. The JCC has promulgated uniform secured money bail and penalty schedules for certain offenses involving boating, fish and game, forestry, public utilities, parks and recreation, and business licensing. (Cal. Rules of Court, rule 4.102.) Notably, at the outset of the COVID-19 emergency in April 2020, the JCC promulgated an emergency, state-wide bail schedule which, broadly, set bail at $0 for misdemeanors and low-level felonies.[17] The purpose was to reduce jail crowding in the face of the pandemic. The JCC rescinded this order in June 2020. Thereafter, many counties, including Los Angeles, maintained in place their own "zero cash bail" (a misnomer in that not all bail was set at $0) regimes in response to the pandemic. The parties here refer to the Los Angeles County "zero bail" schedules as the Emergency Bail

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[16] However, for misdemeanor offenses (except for violation of domestic violence protective orders and other offenses involving threats of harm), Penal Code section 853.6 gives law enforcement discretion to "cite and release" arrestees without taking them into custody. By signing the citation, the arrestee promises to appear in court at a specified time and place. In addition, those arrested for lower-level felonies may be "cited out" from facilities operating under court orders relating to jail overcrowding.

[17] Plaintiffs' P.I. Exh. 4.

Schedules ("EBS").[18] The Los Angeles Superior Court rescinded its EBS effective June 30, 2022, whereupon secured money bail schedules again became operative.

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"Bail reform," nationally and in California, has been a topic of public and academic interest for decades.[19] Following her State of the Judiciary Address in 2016 (see fn. 5, *infra*), the Chief Justice of the California Supreme Court established the Pretrial Detention Reform Workgroup to evaluate the current bail system and to make recommendations for improvement. Among her guiding principles for the workgroup was that "[p]retrial custody should not occur solely because a defendant cannot afford bail." (Pretrial Detention Reform Workgroup, Pretrial Detention Reform: Recommendations to the Chief Justice (2017) Executive Summary, p. 1.) The Workgroup found that "California's current pretrial release and detention system unnecessarily compromises victim and public safety because it bases a person's liberty on financial resources rather than the likelihood of future criminal behavior and exacerbates socioeconomic disparities and racial bias." (*Id.* at p. 57.)

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[18] Plaintiffs' P.I. Exhs. 2-3. Plaintiffs seek to incorporate elements of "the most recent Emergency Bail Schedule for Los Angeles County" into their proposed P.I. The court understands that to be the "Third Los Angeles County Emergency Bail Schedule Modification Effective October 20, 2020," filed as Plaintiffs' P.I. Exh. 3.

[19] Many histories and analyses of bail and bail reform are published in the academic presses. See, e.g., Adam Peterson, *The Future of Bail in California: Analyzing SB10 Through the Prism of Past Reforms* (2019) 53 Loy. LA. L. Rev. 263, 269-280; Jorgensen and Smith, *The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States* (2021) Faculty Research Working Paper Series, Harvard Kennedy School.

The Legislature responded in 2017 with S.B. 10, the California Money Bail Reform Act. (Sen. Bill No. 10 (2017-2018 Reg. Sess.) (hereafter, "S.B.10").) Governor Brown signed a revised version of S.B.10 into law on August 28, 2018, to become effective October 1, 2019. In broad summary, the law would have ended cash bail in California and replaced it with a risk-assessment model for pretrial detention. Arrestees would have been placed in high, medium, and low risk categories. Arrestees who posed a low risk of FTA and to public safety would have been released, while arrestees in the high-risk category would have been kept in jail. Local court rules would have dictated the process for medium-risk arrestees.

Thereafter, California Proposition 25, the Replace Cash Bail with Risk Assessment Referendum, was placed before the voters on November 3, 2020. The measure was defeated, effectively repealing S.B.10.

D. Other Recent Legal Challenges to Cash Bail and Wealth-Based Detention Policies in California

This case is one of several that have recently examined the role and constitutionality of money bail schedules and wealth-based pretrial detention policies in California. But this case is the first in California to consider, on the merits, the issuance of a PI against the enforcement of money bail schedules during the pre-arraignment period.

1. *Humphrey*

The California Supreme Court recently examined the constitutional framework for wealth-based bail determinations *by judges*. It granted review of a Court of Appeal

decision "to address the constitutionality of money bail as currently used in California as well as the proper role of public and victim safety in making bail determinations." (*In re Humphrey* (2021) 11 Cal.5th 135, 147 (*Humphrey*).) The *Humphrey* court made the following holdings and observations:[20]

> "The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional. Other conditions of release — such as electronic monitoring, regular check-ins with a pretrial case manager, community housing or shelter, and drug and alcohol treatment — can in many cases protect public and victim safety as well as assure the arrestee's appearance at trial. ... [W]here a financial condition is nonetheless necessary, the court must consider the arrestee's ability to pay the stated amount of bail — and may not effectively detain the arrestee 'solely because' the arrestee 'lacked the resources' to post bail." (*Id.* at p. 143.)
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> "In unusual circumstances, the need to protect community safety may conflict with the arrestee's fundamental right to pretrial liberty — a right that also generally protects an arrestee from being subject to a monetary condition of release the arrestee can't satisfy — to such an extent that no option other than refusing pretrial release can reasonably vindicate the state's compelling interests. In order to detain an arrestee under those circumstances, a court must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements." (*Id.* at p. 143.) In these narrow circumstances, detention does not depend on the

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[20] As summarized by Witkin, California Criminal Law (4th ed. 2023) section 98. Citations are to *Humphrey*; citations to other sections in the treatise are omitted.

arrestee's financial condition, but rather "on the insufficiency of less restrictive conditions to vindicate compelling government interests: the safety of the victim and the public more generally or the integrity of the criminal proceedings. Allowing the government to detain an arrestee without such procedural protections would violate state and federal principles of equal protection and due process. (*Ibid.*)

A court that does not consider an arrestee's ability to pay "cannot know whether requiring money bail in a particular amount is likely to operate as the functional equivalent of a pretrial detention order." Detaining an arrestee in these circumstances accords insufficient respect to the arrestee's crucial equal protection rights against wealth-based detention and substantive due process rights to pretrial liberty. (*Id.* at p. 151.) Thus, "pretrial detention is subject to state and federal constitutional restraints" and "is impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests." (*Ibid.*)

When making a bail determination, a trial court must undertake an individualized consideration of the relevant factors, including (1) the protection of the public and the victim, (2) the seriousness of the charged offense, (3) the arrestee's previous criminal record and history of compliance with court orders, and (4) the likelihood that the arrestee will appear at future court proceedings. (*Id.* at p. 152.) The court must also assume the truth of the criminal charges. (*Id.* at p. 153.)

The California Constitution bars pretrial detention based on concerns for public or victim safety, or based on an arrestee's risk of flight, unless the court finds, based on clear and convincing evidence, that no other

conditions of release can reasonably protect public and victim safety or reasonably assure the arrestee's appearance in court. (*Id.* at p. 153.)

"[W]here the arrestee poses little or no risk of flight or harm to others, the court may offer OR release with appropriate conditions. ... Where the record reflects the risk of flight or a risk to public or victim safety, the court should consider whether nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial. If the court concludes that money bail is reasonably necessary, then the court must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and — unless there is a valid basis for detention — set bail at a level the arrestee can reasonably afford. And if a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect those interests." (*Id.* at p. 154.)

Even where a bail determination complies with these prerequisites, the court must still consider whether the deprivation of liberty caused by pretrial detention is consistent with state statutory and constitutional law addressing bail. (*Id.* at p. 155.) This question is not resolved here. (*Ibid.*) Because this case does not involve an order denying bail, the question whether Cal. Const., Art. I, § 12 , and Cal. Const., Art. I, § 28(f)(3) addressing the denial of bail, can or should be reconciled, including whether these provisions authorize or prohibit pretrial detention of noncapital arrestees outside of the circumstances specified in Cal. Const., Art. I, § 12(b) and Cal. Const., Art. I, § 12(c), is left for another day. (*Humphrey,* at p. 155, fn. 7.)

Although due process does not categorically prohibit pretrial detention, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." (*Id.* at p. 155 [quoting *United States v. Salerno* (1987) 481 U.S. 739].) The court's procedure for an order that results in pretrial detention must ensure that, when necessary, the arrestee is detained "in a fair manner." The court must set forth the reasons for its decision on the record and include them in the court's minutes. (*Id.* at p. 155.) Thus, "striking the proper balance between the government's interests and an individual's pretrial right to liberty requires a reasoned inquiry, careful consideration of the individual arrestee's circumstances, and fair procedures." (*Id.* at p. 156.) However, "this is not a case that requires us to lay out comprehensive descriptions of every procedure by which bail determinations must be made. We leave such details to future cases." (*Ibid.*)

2. *Buffin*

In late 2015, Riana Buffin and others sued the Sheriff of San Francisco County and others in federal court, challenging the Sheriff's use of San Francisco's Felony and Misdemeanor Bail Schedule as a basis to release or detain arrestees before arraignment. (*Buffin v. City and County of San Francisco* (N.D. Cal. 2019) 2019 WL 1017537 (*Buffin*).) Because no defendant was willing to defend the constitutionality of Penal Code section 1269b, the trial court permitted the California Bail Agents Association ("CBAA") to intervene to serve as a "zealous advocate."

The trial court ruled that plaintiffs' Due Process and Equal Protection claims required the court to apply a "strict scrutiny" level of review, stating the relevant inquiry

as: "whether the Sheriff, through use of the bail schedule, has significantly deprived plaintiffs of their fundamental right to liberty and, if so, whether, under the strict scrutiny standard of review, the Sheriff's use of the bail schedule is the least restrictive alternative for achieving the government's compelling interests."[21]

The court also certified the following class: "all pre-arraignment arrestees (i) who are, or will be, in the custody of the San Francisco Sheriff; (ii) whose bail amount is determined by the Felony and Misdemeanor Bail Schedule as established by the Superior Court of California, County of San Francisco; (iii) whose terms of pretrial release have not received an individualized determination by a judicial officer; and (iv) who remain in custody for any amount of time because they cannot afford to pay their set bail amount."

Plaintiffs then brought a motion for summary judgment. The court found, given the consequences of extended pre-arraignment detention, that plaintiffs demonstrated the Sheriff, through use of the bail schedule, had significantly deprived them of their fundamental right to liberty by sole reason of their indigence. The court further found that plaintiffs had made at least a *prima facie* showing that their proposed alternative to the bail schedules — an individualized inquiry into the risk an arrestee poses to public safety and of FTA — was consistent with the government's goals of enhancing public safety and ensuring court appearances, and did not perpetuate the deprivation of an arrestee's liberty.

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[21] The *Buffin* court denied without prejudice plaintiffs' motion for a PI, citing procedural, not substantive, reasons.

Accordingly, the burden then shifted to "the government" — actually, the intervenor CBAA —to show that plaintiffs' proposed alternative would be less effective or more restrictive than the bail schedule. The court found CBAA's evidence and argument unavailing. It noted that unlike the plaintiffs' proposed individualized-inquiry process, the bail schedule was arbitrary in that it set amounts without regard to any objective measurement and thus had no relation to the government's interests in enhancing public safety and ensuring court appearances. The court described the bail schedule as providing a "get out of jail card" for anyone with sufficient means to afford it.

The *Buffin* court granted plaintiffs' motion for summary judgment and advised it would, following briefing, enter a permanent injunction. Later, "based upon the real parties-in-interest's request and considerations of federalism, the court allowed the parties time to resolve the action with a global comprehensive solution." The parties thereafter agreed upon a "heavily-negotiated Stipulated Final Judgment Remedying Constitutional Violations" that prohibited the use of the bail schedule, set forth detailed modifications of the procedures for pretrial release as a plausible alternative to the bail schedule, and established a monitoring period of 18 months.

3. *Welchen*

In 2016, Gary Welchen sued the County of Sacramento, the Sheriff of Sacramento County, and the California Attorney General in federal court, asserting that as a homeless and indigent resident of Sacramento arrested on suspicion of second-degree burglary, he could not afford the $10,000 set out on the County's bail schedule in order to be released from custody. He therefore remained jailed for six days. (*Welchen v. County of*

Sacramento (E.D. Cal. 2022) __F. Supp.3d__ [2022 WL 4387794] app. pending (*Welchen*).) He asserted that Penal Code section 1269b and the County's bail schedule adopted pursuant thereto violated his Due Process and Equal Protection rights under the 14th Amendment to the U.S. Constitution. In September 2022, the trial court granted summary judgment in Welchen's favor.

The *Welchen* court, too, found that the applicable standard of review was strict scrutiny, given the fundamental right to pretrial liberty under the 14th Amendment. The court found that plaintiff's six day detention significantly deprived him of his fundamental right to pretrial liberty solely due to his indigence. The court then turned to the question whether the bail schedule satisfies substantive due process, i.e., whether it was narrowly tailored to serve a compelling state interest. The court found that it was not.

The court found that the bail schedule was both overinclusive because it confined people, many of who may not pose any risk, simply because they could not afford to post the amount assigned by the bail schedule, and underinclusive because it allowed other people who posed a greater risk to go free simply because they could afford to pay a higher bail amount. Likewise, the court found the bail schedule was both overinclusive and underinclusive as pertains to the compelling state interest in ensuring arrestees' appearances in court because there was no individualized determination of an arrestee's nonappearance risk.

Next, the court turned to whether there existed less restrictive alternatives to the bail schedule. Noting the State of California's own support of a computerized risk assessment process under S.B.10, and the less restrictive alternatives adopted by

multiple other jurisdictions, the court found that plaintiff carried his burden to prove there existed an alternative that was plausible, less restrictive, and at least as effective at serving the government's compelling interests. The court concluded that the use of the money bail schedule in Sacramento County was unconstitutional.

The *Welchen* court has not yet not ruled on any form of injunction.

SUMMARY OF PERTINENT EVIDENCE

A. The Arrestee Plaintiffs[22]

Phillip Urquidi, age 25, was arrested by the LAPD on November 9, 2022, on a charge of vandalism causing damage of $400 or more in violation of Penal Code section 594, subdivision (b)(1). At the time, he lived in his pickup truck with his girlfriend and worked at a temporary staffing agency every day for about $500 per week. He was taken into custody and held at the LAPD Devonshire station and later the LAPD Van Nuys station on $20,000 bail per the extant bail schedules. During his detention, he lost access to his prescription medication and his girlfriend, whom he supports, was alone in the truck without money for gas. He would have paid the money bail to be released but lacked sufficient financial resources to do so. He was ultimately released OR after being in custody for five days following his arrest.

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[22] These facts are drawn from the declarations of each arrestee plaintiff, filed November 14, 2022, as supplemented by the declaration of Salil H. Dudani of March 26, 2023.

Plaintiff Daniel Martinez, age 39, was arrested by the LAPD on November 10, 2022, on a charge of receiving stolen property in violation of Penal Code section 496. At the time he was homeless, had no financial assets, and was living with friends. He was taken into custody and held at the LAPD Foothill station and later the Van Nuys jail on $20,000 bail per the extant bail schedules. He would have paid the money bail to be released but lacked sufficient financial resources to do so. While in custody, he missed an interview for a full-time construction job that would have paid $17 per hour. His bail was ultimately increased above the scheduled amount. He was in custody for five days following his arrest.

Plaintiff Susan Perez, age 48, was arrested by the LAPD for vandalism in violation of Penal code section 594, subdivision (b)(1). At the time, she was homeless and living in a van which she shared with her boyfriend, relying on him and public assistance for financial support. She was taken into custody and held at the LAPD Van Nuys jail on $20,000 bail per the extent bail schedules. She would have posted bail to be released, but neither she nor her family members could afford to pay the bail or a bail bondsman. She was ultimately released OR after spending five days in custody.

Plaintiff Terilyn Goldson, age 37, was arrested by the LAPD on November 9, 2022, on suspicion of reckless evading in violation of Vehicle Code section 2800.2. She is a high school graduate and has worked as a paralegal. At the time of her arrest, she relied on food stamps and had been homeless since June 2022, residing in a tent community until she moved into a shelter after being assaulted. She was taken into custody and held on $75,000 bail per the extent bail schedules, which she would have paid but could not

afford to. While in custody she missed a scheduled parental visitation with her children. She was ultimately released when the DA declined to charge prior to arraignment. She was in custody for five days following her arrest.

Plaintiff Gerald Campos, age 26, was arrested by the LAPD on November 9, 2022, on a charge of attempted robbery under Penal Code section 211. At the time, he had not had a stable place to live since middle school and relied on friends who allowed him to sleep in their cars and use their bathrooms for personal hygiene. He worked construction when he could find the work. He was taken into custody and held at the LAPD Van Nuys jail on $70,000 bail per the extant bail schedule, an amount he would have paid to be released if he could have afforded it. His bail ultimately was reduced to $26,000. He was in custody for five days following his arrest.

Plaintiff Arthur Lopez, age 58, was arrested by the LAPD on November 9, 2022, on a charge of criminal threats under Penal Code section 422, subdivision (a). At the time, he had been working as a security guard, living paycheck to paycheck. He lived in his car on which he owed his mechanic $600 and was concerned that if he lost his job while detained, he might lose his car as well. His bail was set at $50,000 per the extant bail schedules. He would have paid the money bail to be released but lacked sufficient financial resources to do so. He was ultimately released on informal diversion. He was in custody for five days following his arrest.

B. Tamara Kase

Ms. Kase, age 52, testified on behalf of plaintiffs. She explained that she was arrested by the LAPD on November 28, 2022 (she did not specify the charge), and was

held in custody on $30,000 bail at West Hollywood and Lynwood LAPD jail facilities for a period of 40-48 hours. She described the conditions as cold, dark, dirty, unsanitary, and dismal. She could not secure warm clothing and was very uncomfortably cold. While in custody, she was transported to Cedar-Sinai for some hours for evaluation or treatment of pre-existing medical conditions (details not disclosed.) During her detention, a police officer wrenched her shoulder, causing her pain that persists to present. She was never advised about the PREP program or any bail deviation option. She had virtually no money and could not pay the bail to be released, although she would have paid had she had the funds. Later, she said, "a group" paid her bail and she was released.

C. Christine S. Scott-Hayward, Ph.D.

Dr. Scott-Hayward provided a declaration and, at the court's request, in-court testimony. She is a tenured Associate Professor and Director of the School of Criminology, Criminal Justice, and Emergency Management at California State University, Long Beach, and holds a master's degree in Social Sciences from the University of Chicago and a Ph.D. in Law and Society from New York University. (Declaration of Christine S. Scott-Hayward (Nov. 12, 2022) ("Scott-Hayward Decl.") ¶¶ 1-3.) She obtained her law degree in Ireland and has been a licensed attorney in New York. She has more than 20 years of experience conducting social science research on criminal justice and criminal procedure topics.[23]

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[23] Dr. Scott-Hayward's CV is referenced in her declaration as Exhibit A and was placed before the court in Plaintiffs' February 8, 2023 Notice of Errata.

Dr. Scott-Hayward's research interests have focused on pretrial justice and sentencing. She has conducted two empirical studies, both subsequently published in peer-reviewed publications. The first, co-authored with a student, "Pretrial detention and the decision to impose bail in Southern California," examined the imposition of bail in state courts in Southern California. It is published in Ottone & Scott-Hayward, Criminology, Criminal Justice, Law and Society (2018). The second, "Reducing the federal prison population: The role of pretrial community supervision" was a qualitative analysis of federal sentencing hearings in the Central District of California. It was published in the *Federal Sentencing Reporter*, a peer-reviewed journal, in 2022. She has also published two books in the field of bail and pretrial justice: she is the co-author of a peer-reviewed book, Scott-Hayward and Fradella, Punishing Poverty: How Bail and Pretrial Detention Fuel Inequalities in the Criminal Justice System (U. of Cal. Press 2019), and the lead editor, with two co-editors, of Scott-Hayward et al., Handbook on Pretrial Justice (Routledge 2022). She has also written four refereed articles and a book chapter on bail and pretrial justice.

Following a review of materials for this case and a thorough literature search, and her review of academic and government studies and reports concerning money bail and pretrial detention (Exhibit B to her declaration),[24] Dr. Scott-Hayward formed and offered the following opinions among others:

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[24] The full title of studies referred to in this section are found in this Exhibit B attached to plaintiffs' February 8, 2023 Notice of Errata.

1. Secured money bail results in higher rates of pretrial detention.

"[T]he vast majority of those [arrestees] who were detained had money bail set in their case, likely could not afford to pay it, and thus remained in pretrial detention for the duration of the case process." (Scott-Hayward Decl., ¶ 14.) "[J]urisdictions that have eliminated or substantially restricted the use of money bail have seen reductions in pretrial detention." (*Id.* at ¶ 16.) Examples include New Jersey, with an 8.7% reduction following 2017 bail reform legislation, largely replacing money bail with OR or pretrial monitoring, and Harris County, Texas, with a 13% increase in the share of misdemeanor defendants released within 24 hours following an injunction that required release of most individuals who signed an affidavit saying that they were unable to pay the required bail amount. (*Ibid.*)

2. Pretrial detention for time periods of more than 24 hours negatively affects detained individuals' criminal case outcomes in that, compared to otherwise similarly situated populations, they are more likely to plead guilty, to be convicted, and to receive a sentence of incarceration, and less likely to receive charge reductions. (Scott-Hayward Decl., ¶ 17.)

3. Pretrial detention for time periods of more than 24 hours negatively affects detained individuals and the community.

In terms of health consequences, the detained population experienced higher rates of mental illness, substance abuse, and physical and chronic conditions as compared with the general population but a lesser likelihood of receiving adequate treatment. The detained population also experienced higher rates of death (citing a study that found the

suicide rate among people awaiting trial in jail is 7.5 times higher than the general population) and financial wellbeing. (Scott-Hayward Decl., ¶¶ 28-37.)

With respect to the question of community safety, "[a] growing body of research finds that, controlling for other relevant demographic and case-related factors, people who are detained pending trial are more likely to be charged with new offenses than released defendants." (Scott-Hayward Decl., ¶ 38.) Examples, drawn from peer-reviewed studies include Harris County, Texas where researchers Heaton[25] et. al (2017) found that detentions for at least seven days increased the share of defendants charged with new felonies by 32.2% 18 months post-hearing and future misdemeanors by 9.7%; Kentucky, where Lowenkamp and colleagues (2013) found that defendants of all risk levels who were detained for the entire pretrial period were 1.3 times more likely to be arrested for new criminal activity, both 12- and 24-months post-disposition, compared to defendants who were released; and Dobbie and colleagues (2018), examining data from Philadelphia and Miami-Dade counties, who found that after case disposition, defendants who were released within three days of arrest were significantly less likely to be charged with a new offense than defendants who remained detained. (Scott-Hayward Decl., ¶ 38.)

4. Pretrial detention for time periods of at least 24 hours adversely affects the likelihood that a person will remain law-abiding during the pretrial period but has no

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[25] The author is Paul Heaton, Ph.D. whom the parties jointly suggested that the court appoint its expert under Evidence Code section 730. The court did so.

consistent effect on the likelihood that an individual will FTA. (Scott-Hayward Decl., ¶ 39.)

5. There is no empirical evidence that secured money bail is more effective than unsecured money bail or non-monetary conditions at assuring public safety and law-abiding behavior.

"With respect to public safety, it is my opinion that money bail does not protect public safety and, surprisingly, seems to be criminogenic, meaning that it may actually lead to more crime." (Scott-Hayward Decl., ¶ 42.) Studies by Jones (2013) concerning 1,900 defendants in 10 Colorado counties; Monaghan and colleagues (2022) concerning arrestees in New Orleans in 2019 and controlling for demographic factors and offense information; and Ouss and Stevenson (2022), studying the impact of No-Cash-Bail policy in Philadelphia, all support the proposition that "there is *no* evidence that money bail keeps the public safer during the pretrial period." (Scott-Hayward Decl., ¶ 42, emphasis in original.)

6. Most empirical evidence shows that secured money bail is no more effective than unsecured money bail or non-monetary conditions of release at assuring court appearances.

"There is simply no evidence to support the idea that a defendant needs a monetary incentive to show up at court." (Scott-Hayward Decl., ¶ 44.) Most studies find no difference in appearance rates based on type of pretrial release. Examples include two Colorado studies by Jones (2013) and Brooker and colleagues (2013); Barno and colleagues (2020), a study of supervised release in Orange County, California that found

individuals were significantly less likely to fail to appear than those released on cash bail; Fox & Koppel (2019), a study that analyzed data from the New York Criminal Justice Agency and reported a slight increase in appearance rates for defendants released OR; Ouss & Stevenson (2022), which found no increases in FTAs in Philadelphia following the inception of the No-Cash-Bail policy; and Grant (2020), which found the rate of court appearances remained consistently high — 89.9% and 90% in 2018 and 2019, respectively — after the "virtual elimination" of money bail in New Jersey. (Scott-Hayward Decl., ¶ 47.)

In court testimony, Dr. Scott-Hayward testified that in her literature review, she could find no study or article that supported the proposition that money bail reduced NCA or FTAs. To the contrary, the literature shows that unsecured bail or release on non-financial conditions produce better outcomes on NCA and FTAs than secured money bail.

She also testified about actuarial risk assessment tools now available and widely used to predict an arrestee's potential for NCA and FTA. She testified about "the Public Safety Assessment" ("PSA"), a prediction tool used in 39 U.S. jurisdictions, which evaluates risk based on factors including the arrestee's age, whether the current offense is violent, whether there is a pending charge at the time of arrest, whether there is a prior misdemeanor and/or felony conviction, whether there is a prior conviction for a violent crime, whether the arrestee has an FTA in the preceding 24 and 240 months, and whether the arrestee has previously been sentenced to incarceration.[26]

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[26] Scott-Hayward, et al., Handbook on Pretrial Justice (Routledge 2022) p. 307.

When asked a hypothetical question, Dr. Scott-Hayward opined that in terms of rates of NCA and FTAs, the public interest would be enhanced by the use of the PSA only as opposed to the continued use of the money bail schedules in Los Angeles County. She offered a similar opinion concerning a choice between, on the one hand, the money bail schedule and, on the other hand, the EBS that had set $0 bail for most misdemeanors and non-violent felonies. Again, she opined that the public interest would be enhanced by use of the EBS, using NCA and FTA as metrics, in the place of the current money bail schedules.

D. Meredith Gallen

Meredith Gallen has worked for the Los Angeles County Public Defender's Office since 2017 assigned to both felony and misdemeanor courtrooms at the Foltz Criminal Justice Center in downtown Los Angeles, and the Compton and Metropolitan courthouses. (Declaration of Meredith Gallen (Nov. 11, 2022) ¶¶ 3-4.) She has represented hundreds if not thousands of defendants at arraignment. Her declaration provides, "I have repeatedly witnessed the ways in which bail determination at the time of arraignment can drastically impact the course of a case." (*Id.* at ¶ 5.) Among the points made by attorney Gallen is this: "When cash bail is set at arraignment in a case, many clients who had hoped to fight their charges decide to enter a change of plea from "[not] guilty" to "no contest" and accept offers that will allow them to e released from custody on the date of arraignment. In so doing, they abandon the pursuit of viable defenses and their constitutional rights because ongoing incarceration is too great a risk to their well-being." (*Id.* at ¶ 13.)

E. Garrett Miller

Garrett Miller has worked for the Los Angeles County Public Defender's Office since 2013 with assignments in felony and misdemeanor courtrooms in the Central District in Los Angeles County, Compton and Los Padrinos Juvenile. (Declaration of Garett Miller (Nov. 13, 2022) ¶¶ 2-3.) Attorney Miller states, "Fighting a case while in custody presents innumerable challenges for any defendant, including exposure to violence, lack of sufficient food and nutrition, lack of appropriate medical care, lack of appropriate dental care, lack of ability to maintain proper hygiene, loss of employment and inability to care and support family, and inability to assist with preparing their defense." (*Id.* at ¶ 5.)

F. Michael R. Jones, Ph.D.

Dr. Jones testified at the hearing. He received his Ph.D. in clinical psychology from the University of Missouri-Columbia. For several decades, Dr. Jones has been engaged in research and project management in pretrial justice policies and practices, with a particular research interest in the "front end" of the justice system. He is currently the President of Pinnacle Justice Consulting which provides training and assistance for states, municipalities, and various national and state stakeholder organizations to understand and implement legal and research-based criminal justice policies and practices.[27] From 2010 to 2017, he was associated with the Pretrial Justice Institute, last

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[27] Dr. Jones, described as a "national expert on effective pretrial process, bail, and risk assessment," was a presenter to the Pretrial Detention Reform Workgroup. (See fn. 20, *infra*.)

serving as it Director of Implementation, a role in which he assisted dozens of state and local jurisdictions in understanding and implementing empirically based pretrial policies and practices. He has also worked as a technical resource provider for the National Institute of Corrections since 2004, and previously worked for nine years as a criminal justice planner and manager in Jefferson County, Colorado.

Dr. Jones has published numerous articles in peer-reviewed and other journals concerning pretrial matters in the criminal justice system. Among them is Jones, M.R., *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (2013) Pretrial Justice Institute, a study that examined the influence of unsecured bonds (personal recognizance bonds with a financial condition)[28] and of secured bonds (surety and cash bonds) on three pretrial outcomes — (1) public safety, (2) court appearance, and (3) jail-bed use — using data from 1,900 defendants from 10 Colorado counties. The study, Dr. Jones wrote, provides strong evidence that, when posted, unsecured bonds achieve the same public safety and court appearance results as do secured bonds, findings that held true for all risk levels of offender. The study also demonstrated that unsecured bonds achieve these public safety and court-appearance outcomes while using substantially (and statistically significantly) fewer jail resources.[29]

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[28] These bonds require arrestees to promise to appear for all court dates but set a financial penalty that is payable if the person fails to appear. No upfront monetary security is required.

[29] Dr. Jones's CV was received in evidence by the parties' stipulation. (Stipulation and Order Regarding Expert Curricula Vitae (May 8, 2023) 2.)

Dr. Jones has continued to study the academic and professional literature on the topic of the efficacy of money bail and alternatives to money bail with respect to the goals of public safety, court appearances, and jail utilization. He has consulted with multiple jurisdictions in Colorado and elsewhere — including Kern County, California, and Miami, Florida — as they implement risk-based, as opposed to money-based, pretrial release regimes.

Dr. Jones testified that to achieve governmental goals there are well-recognized, effective alternatives to money bail, including unsecured money bail and adjunct measures such as electronic court date reminders (email or telephone), supervised release, and OR release. He noted the following sample of jurisdictions have now reduced or eliminated money bail: New York City; New Jersey; Broward County, Florida; Pennington County, South Dakota; Lucas County, Ohio; Washington, D.C.; Miami-Dade County; Florida; Philadelphia, Pennsylvania; Cook County, Illinois; Harris County, Texas; and Denver, Colorado.

Dr. Jones cited in a PowerPoint presentation nine published studies that analyzed the efficacy of secured money bail compared to alternatives. All nine studies found no relationship in efficacy, as measured by rearrests, on (1) public safety or (2) on FTAs, despite (3) an increase in pretrial release from local jails. The studies, as he referred to them, are: M. Jones (2013) (discussed above); Brooker et al. (2014) (Jefferson County, Colorado); Brooker (2017) (Yakima County, Washington); Ouss and Stevenson (2020) (Philadelphia, PA); Fox and Koppel (2019, 2021) (New York City); Grant (2019-2022)

(New Jersey); Redcross (2019) (Mecklenberg County, North Carolina); Garett et al. (2022) (Harris County, Texas) and Heaton (2022) (Harris County, Texas.)

Dr. Jones analyzed the in-court testimony of Dr. Scott-Hayward and agreed with her opinions and conclusions, including the conclusion that money bail is itself criminogenic and counterproductive to the governmental goals of reduced NCA and FTAs.

G. Paul Heaton, Ph.D.

Dr. Heaton testified at the hearing. He is a professor at the University of Pennsylvania Carey Law School, the Academic Director of the Quattrone Center for the Fair Administration of Justice. As noted above, at the parties' joint suggestion, the court appointed Dr. Heaton as its expert pursuant to Evidence Code section 730. Dr. Heaton is also an Adjunct Economist for the RAND Corporation, having earlier served as a Senior Economist and Director at the RAND Institute for Civil Justice. He obtained his Ph.D. in Economics from the University of Chicago in 2007. He is the author of dozens of peer-reviewed articles and reports on the topics of criminal justice/drug policy, civil justice/insurance, military manpower, education, information technology, and political economy. One of his research interests is the effects of bail reform, and he has been the lead researcher in the "epicenter" of bail reform, Harris County, Texas.

Also as noted above, he is the lead author of Heaton, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017), a study that used detailed data on hundreds of thousands of misdemeanor cases resolved in Harris County, Texas — the third largest county in the U.S. — to measure the effects of

pretrial detention on case outcomes and future crime. The study found that detained defendants are 25% more likely than similarly situated releasees to plead guilty "for no reason relevant to guilt" (*Id.*, p. 771); are 43% more likely to be sentenced to jail; receive jail sentences that are more than twice as long on average. (*Id.*, p.717.) The study also found that those detainees are more likely to commit future crimes which suggests that detention may have a criminogenic effect. "The results provide compelling evidence that pretrial detention causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, and the likelihood of future arrest for new crimes." (*Id.*, p. 715.) These differences persisted even after fully controlling for the initial bail amount, offense, demographic information, and criminal history characteristics.

Dr. Heaton concluded a follow-up research paper in August 2022, *The Effects of Misdemeanor Bail Reform*, published by the Quattrone Center for the Fair Administration of Justice. The study analyzed data from 517,000 cases from 2015-2022 acquired via an MOU with the Harris County Commissioners and drawn from the police, the sheriff, county pretrial services, and the courts. It was designed to test a collection of a priori predictions, drawn from the existing body of "high quality research"[30] (including Dr. Heaton's 2017

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[30] Gupta, et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization* (2016) 45 J. Legal Stud. 471 (in Pittsburgh and Philadelphia, imposing cash bail increased conviction rates by 12% and increased future crime by 9%).

Leslie & Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments* (2017) 60 J. L. Econ. 529 (In New York, pretrial detention increased conviction rate by 20% for misdemeanors and doubles average incarceration length).

study) on increased pretrial release rates resulting from bail reform efforts in Harris County from 2017 onward, including from a federal court injunction (*ODonnell v. Harris County* (5th Cir. 2018) 892 F.3d 147 (*ODonnell*)). One of Dr. Heaton's pre-study predictions was that increased rates of pre-trial release would "not increase, and possibly reduce, future contacts with the criminal justice system." (*Id.*, p.4.) His subsequent finding in the study, based on the new data, as to that prediction was: "expanding pretrial release under the *ODonnell* injunction did not fuel a spike in crime, as some have claimed." (*Id.*, p.42.)

He directed his conclusion to the "concern of critics of liberalizing pretrial release [that] released individuals might commit additional crimes in the community either during or after their period of pretrial release. Under this view, pretrial detention is necessary to incapacitate dangerous people, and expanding release will lead to more crime." Noting that measuring the impact of pretrial release on recidivism is difficult because it requires the comparison of two pools of arrestees that differ in their exposure to pretrial reform but

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Stevenson, Distortion of Justice: *How the Inability to Pay Bail Affects Case Outcomes* (2018) 34 J. L. Econ. & Org. 511 (In Philadelphia, pretrial detention increased conviction rate by 13%, sentence length by 42%, and court fees by 41%).

Dobbie, et al., *The Effects of Pretrial Detention Conviction, Future Crime, and Employment: Evidence from Randomly Selected Judges* (2018) 108 Am. Econ. Rev. 201 (In Philadelphia and Miami-Dade, pretrial detention increased guilty plea rate by 32%, did not reduce future offending, and decreased employment rates by 20%).

Didwania, *The Immediate Consequences of Federal Pretrial Detention* (2020) 22 Am. L.& Econ. Rev 24 (In the federal system, pretrial release reduced sentence length).

are otherwise similar in their latent propensity to commit future crimes, Dr. Heaton noted that prior analyses of Harris County bail reform data had failed to ensure equivalence across differing pools of defendants. "When we make a more careful effort to ensure we are contrasting similarly situated pools of defendants," he concluded, "we obtain unambiguous results that clearly show that the increase in release rates under the injunction was not associated with an increase in future crime." (*Id.*, p. 42.)

Dr. Heaton's initial expert qualification in this case pertained to the analysis of crime statistics. Earlier in this proceeding, the court sought evidence of rates of NCA and FTA during the EBS ("zero dollar bail") regime compared to the period after the EBS was rescinded. Sergeant John Jansen testified on behalf of the Sheriff's Department, explaining the Department's data systems. Sgt. Jansen testified that by and large, the Department did not have the capacity to secure those data from extant data systems. Later, Lieutenant Christopher Chase, a 26-year LAPD officer with expertise in the Department's COMSTAT database, testified to a compilation of data, the acquisition of which he had supervised, that compared reported crime during the EBS and non-EBS periods. He disclaimed any expertise in statistical analysis. Admitted as City's PI Exhibit 1, his data show that during the EBS period, some types of reported crime increased, although most types of reported crime decreased.

Dr. Heaton testified that these raw data were uninformative and should not form the basis for the court's decision concerning the PI. He explained these data are subject to multiple variables, none of which were accounted for. Dr. Heaton explained, for example, that decreased mental health services in the community during the pandemic

might have raised reports of crime, whereas lockdowns in society might have reduced reports of crime. Also, the statistics do not appear to include unreported crime that occurred in the jail itself among detained arrestees. And there is no differentiation between crime committed by persons released on zero bail and crime committed by others in the community.

Based on the robust research in the literature and his own work, Dr. Heaton opined that the PI sought by plaintiffs in this case would not increase NCA or FTAs and, compared to the current secured money bail schedules, would be in the public interest.

H. Insha Rahman

Ms. Rahman testified for plaintiffs. An attorney licensed in New York, she has long been affiliated with the Vera Institute of Justice as an educator and advocate for bail and pretrial reform, among other initiatives. She has consulted with governmental organizations in multiple states, including California, on bail reform and pretrial-release regimes. She previously worked as a criminal defense lawyer in New York state. She is knowledgeable about and follows closely the academic research concerning downstream outcomes from various types of secured and unsecured pretrial-release regimes.

Much of Ms. Rahman's opinion testimony was consistent with that of Dr. Scott-Hayward, Dr. Jones, and Dr. Heaton with respect to the "counterproductive" (her word) outcomes that result from secured-money bail as opposed to unsecured bail or non-financial conditions of release. She, too, testified that she is aware of no study showing any population-based aggregate adverse outcome in terms of NCA and FTAs associated

with bail reform measures substituting non-financial conditions or unsecured bail for secured money bail systems.

Ms. Rahman also testified about the use of actuarial risk assessment tools in pretrial-release decision-making, focusing on the PSA, which she commented was the most widely used tool. In her opinion, she did not recommend the use of a risk-assessment tool under the circumstances of this case, where the duration of detention at-issue is from arrest to first presentation to a judge. She did recommend the Los Angeles Superior Court reduce the duration, if possible given court resources, citing to New York state where bail-detention hearings are held twice every calendar day, including weekends and holidays.

I. Beau Topar

Sheriff's Department Deputy Beau Topar testified to his 16 years of work at the Inmate Reception Center ("IRC"), the primary intake and release facility for the Los Angeles County jail system, and his 10 years of experience working in the Records and Identification Bureau. He provided overview testimony concerning the booking process at the IRC, including the application of the bail schedules. He also testified concerning the "repeat offender" provision in the County's third EBS Modification, effective October 2020. That provision reads, "While released on $0 bail, bail for subsequent offense/s during the state of emergency as declared by the Los Angeles County Board of Supervisors and the Department of Public Health, shall be set pursuant to the applicable non-emergency 2020 Infractions & Misdemeanor Bail Schedule, and 2020 Felony Bail Schedule. This exception does not apply to those whose subsequent separate offense

occurs after the original offense is resolved." Deputy Topar testified that as a practical matter, booking officers had no ability in real time to determine whether the exception applied.

He testified that on account of overcrowding condition at the Central Jail, offenders with bail less than $50,000 are customarily cited and released.

J. Eboni Bryant

LAPD Principal Detention Officer Eboni Bryant testified concerning the City's planning for the implementation of S.B.10. In essence, she testified that she knew of some preliminary steps the LAPD had taken in conjunction with other agencies, but she could supply no details. She also testified that she was knowledgeable about the LAPD Jail Division, Metropolitan Jail Section before, during, and after the EBS period. She had formed the impression that repeat offenders had cycled through the jail during the EBS period, but she had no data to support her impression.

K. David Grkinich

In its initial Opposition to plaintiffs' motion for this PI, the County defendants proffered the declaration of David Grkinich, a Bureau Chief of the County's Probation Department. (Declaration of David Grkinich in Support of County Defendants' Opposition (Jan. 18, 2023) ("Grkinich Decl.") ¶ 3.) At paragraph 8 of his declaration, Mr. Grkinich stated, "I strongly believe that any order prohibiting the use of the Bail Schedules would be very detrimental to the operation of the criminal justice system in Los Angeles County. Basically, without the availability of and use of the Bail Schedules, many inmates who would ordinarily be released on bail shortly after their arrests (pre-arraignment) would be

forced to remain in custody until they could appear before a judge to have their bail set." The court asked Mr. Grkinich to appear live to testify further concerning these statements. He did not appear, and the County defendants agreed to strike the quoted language from his declaration. (Order Regarding Declaration of David Grkinich (May 10, 2023) 2.)

L. American Bar Association Policy Statements

The parties stipulated that the court could consider certain policy pronouncements of the American Bar Association ("ABA") concerning secured money bail. (Plaintiffs' Notice of Lodging of American Bar Association Materials (May 9, 2023).) The policies are set out, among other places, in the Brief of ABA as Amicus Curiae in Support of Plaintiff-Appellants, filed in *Daves v. Dallas County, Texas* (5th Cir., April 12, 2021, No. 18-11368) 2021 WL 1566334. (Plaintiffs' Notice of Lodging of American Bar Association Materials (May 9, 2023), Attachment 1 (hereafter, "ABA Brief").) The *Daves* case was a class action by persons who were charged with misdemeanor and felony crimes in Dallas County, Texas, and who had been allegedly unconstitutionally incarcerated pretrial solely because they were financially unable to post required bail. Bail decisions, plaintiffs asserted, were made via an offense-based schedule promulgated by district and county court law judges.

In its brief, the ABA explained that it has for many years published *ABA Standards for Criminal Justice* which provide a comprehensive set of principles articulating the ABA's recommendations for fair and effective criminal justice systems. Among them are the Criminal Justice Standards for Pretrial Release which, the ABA says, memorialize the ABA's exhaustive study of systems of pretrial release and detention that balance the

rights of criminally accused persons with the need to ensure the accused's reappearance in court and to protect the community. The ABA further explained that its work this in area reflect three "bedrock principles." (ABA Brief, p. 3.) First, money bail should not be used as de facto pretrial detention based merely on ability to pay. Second, money bail should be a last-resort remedy imposed only if non-monetary conditions are unable to secure the accused's return to court. Third, money bail conditions, when imposed, should always take into account the accused's ability to pay. (*Ibid.*) The ABA concluded, "The record in this case shows that Dallas County's money bail system runs contrary to the ABA's experience and well-supported policies and violates essential constitutional rights. It also represents grievously flawed public policy." (*Id.* at p. 4.)

M. PREP and Bail Deviation

The defendants introduced evidence of two pre-arraignment programs that operate in the jails: Pretrial Risk Evaluation Program ("PREP") and "bail deviation." The PREP program operates using funds allocated by the JCC to implement a pilot program to expand and expedite pretrial release. Under PREP, according to Mr. Grkinich, all new eligible arrestees throughout Los Angeles County are automatically evaluated for pre-arraignment release by a "Duty Magistrate" approximately four hours after booking. The Duty Magistrates, he says, are available for this review 24 hours per day, seven days per week. The court heard no evidence whether the PREP evaluation considered the

arrestee's ability to pay the scheduled money bail.[31] Plaintiffs' uncontroverted evidence is that over a one-year period in Los Angeles, 4,061 out of 66,704 eligible persons (approximately 6.1%) were released under PREP.[32]

The bail deviation program is operated by the County's Probation Department, Mr. Grkinich further explained in his declaration. Arrestees are advised by prominent signage in the jails of the program's availability. The program operates both to reduce or eliminate bail, as sought by an arrestee, or to increase bail above the scheduled amount, as sought by law enforcement personnel. Mr. Grkinich explained that if an arrestee is eligible for bail deviation, the Department's Pretrial Services assesses the arrestee's suitability for such deviation by using a risk-assessment tool. Then, based on the information provided by Pretrial Services, a judicial officer can then reduce an arrestee's bail amount, release the arrestee OR, or otherwise act on the bail adjustment. (Grkinich Decl., ¶ 15.) The arrestee is not present for the Probation Department's presentation of information to the Duty Magistrate. The court received no evidence whether the bail deviation program considered an arrestee's ability to pay the scheduled money bail. The plaintiffs' uncontroverted evidence is that in 2021, of 35,656 applicants to the bail deviation, 31,021

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[31] The County's counsel advised the court that the criteria used by PREP are known to and within the custody of the Los Angeles Superior Court which declined to provide that information upon request to the County.

[32] Baheri Decl., Exh. C (Judicial Council of California, Pretrial Pilot Program: Report to the Legislature (July 2022) p. 16, fn. 20).

(87%) were deemed ineligible for consideration, 2,222 (6%) were released; and 2/403 (7%) were rejected after consideration.[33]

PRELIMINARY INJUNCTIONS

The genesis of this proceeding is plaintiffs' November 14, 2022, ex parte application for, among other things, an order to show cause why the Court should not issue a PI (1) enjoining defendants from detaining any individuals who cannot afford to pay cash bail as a condition of pre-arraignment release, and (2) enjoining the use of taxpayer dollars to fund the enforcement of the bail schedule and the expenditure of forfeited bail funds collected pursuant to the unlawful bail schedule. Plaintiffs have since filed two amended versions of their proposed PI, the operative version having been lodged on April 24, 2023.

The operative paragraphs of the proposed PI are paragraphs 8 through 11.

Paragraph 8 would enjoin the defendants from applying the "2023"[34] Bail Schedules before arraignment or any other bail schedule "that requires or has as its effect that the existence of duration of the pre-arraignment detention is determined by an arrestee's ability to pay, prior to arraignment (at which an adversarial hearing described in [*Humphrey*] is held.)"

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[33] Baheri Decl., Exh. F, p. 13.

[34] The court believes the current bail schedules are denominated "2022."

Paragraph 9 would hold in abeyance the terms of paragraph 8 for 60 days to permit the parties to develop concrete, enforceable and administrable plans and procedures. It also sets forth time lines for submission of such plans and procedures.

Paragraph 10 would, during the abeyance period of paragraph 9, enjoin defendants from "detaining any individual who would have been released without paying money bail under the most recent Emergency Bail Schedule for Los Angeles County prior to arraignment (at which an adversarial hearing described in [*Humphrey*] is held.)"

Paragraph 11 would order defendants to comply with the PI "irrespective of any actual or perceived conflict" with Penal Code sections 849, 853.6, or 4004, or Penal Code Part 2, Title 10, Chapter 1.[35]

# # #

The purpose of a PI s to preserve the status quo pending adjudication of the action on the merits. (*White v. Davis* (2003) 30 Cal.4th 528, 554 (*White*); *Jamison v. Department of Transp.* (2016) 4 Cal.App.5th 356, 361 (*Jamison*).) A judge may issue a PI to prevent future harm as well. (*Russell v. Douvan* (2003) 112 Cal.App.4th 399, 402-403.) The general rule is that a judge should avoid issuing a PI that does not maintain the status quo of the litigation until a trial on the merits. (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1472 (*O'Connell*).) This is because such an injunction disrupts the

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[35] Paragraph 11 is surplusage. The plaintiffs are making an as-applied constitutional challenge to the enforcement of a statutory scheme resulting, they assert, in an unconstitutional infringement of their Due Process and Equal Protection rights. An injunction directed to that statutory scheme operates notwithstanding "any actual or perceived conflict" with the statutory scheme.

status quo and may make it impossible to return to the status quo if the defendant ultimately prevails in the litigation. But a judge may issue a PI that mandates an affirmative act that changes the status quo in an extreme case where the right to injunctive relief is clearly established. (*Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.* (2016) 6 Cal.App.5th 1178, 1183-1184.)

A PI may be granted "at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor." (Code Civ. Proc., § 527, subd. (a).) A court decides whether to exercise its discretion and issue a preliminary injunction by weighing two factors: (1) the likelihood that the party seeking the injunction will ultimately prevail on the merits of her claim, and (2) "the relative interim harm to the parties from issuance or non-issuance of the injunction," including the effect of interim relief on the status quo of the litigation. (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678; *O'Connell, supra,* 141 Cal.App.4th at p. 1472.) The factors are interrelated — the greater the plaintiff's showing on one, the less she must show on the other — but no injunction shall issue unless she shows "some possibility" of ultimately prevailing on the merits. (*Butt* at p. 678.) Moreover, "it is well-established that when injunctive relief is sought, consider of public policy is not only permissible but mandatory." (*O'Connell,* at p. 1471.)

"An injunction cannot ... prevent the execution of a public statute by officers of the law for the public benefit." (Code Civ. Proc., § 526, subd. (b)(4).) This rule has judicial exceptions, including "where the statute is unconstitutional and there is a showing of irreparable injury." (*Jamison, supra,* 4 Cal.App.5th at pp. 363-364; *O'Connell, supra,* 141

Cal.App.4th at p. 1481.) Specifically, if a plaintiff "seeks to enjoin public officers and agencies in the performance of their duties," the court must consider the public interest and "principles of comity and separation of powers"; the proposed injunction must be the "least disruptive remedy" and "tailored to the harm at issue"; and the plaintiff must show its interim injury will be not only irreparable — a requirement for any preliminary injunction — but also "significant." (*O'Connell,* at pp. 1464, 1471, 1476; *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471.) The "ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm [that] an erroneous interim decision may cause." (*White, supra,* 30 Cal.4th at p. 554.)

Injunctions may be prohibitory or mandatory in nature and, often, the distinction is subtle because prohibitory injunctions may have incidental mandatory aspects and a mandatory injunction may be prohibitory in form. (*Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1041-1042.) The distinction has appellate consequences. An injunction must be sufficiently specific to provide a person of ordinary intelligence with fair notice of the conduct that is to be prohibited or mandated. (*People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 316.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Defendants County of Los Angeles, Los Angeles County Sheriff's Department, Sheriff Robert Luna, City of Los Angeles, Los Angeles Police Department and Chief Michel Moore ("these Defendants") currently apply and enforce the Los Angeles County Superior Court 2022 Felony Bail Schedule and the 2022 Bail Schedule for

Infractions and Misdemeanors ("the bail schedules") as a condition of release for persons arrested without a warrant in these Defendants' respective jurisdictions.

2. The plaintiffs' putative class members, as defined by paragraph 127 of Second Amended Complaint, are persons who are or will be detained pursuant to the bail schedules solely because they cannot afford to pay the secured money bail set by the bail schedules. The putative class does not include persons who are or will be detained for reasons other than their inability to pay the secured money bail set by the bail schedules.

3. These Defendants' enforcement of the bail schedules implicates the putative plaintiff class's fundamental right to liberty under the Due Process clauses of the U.S. and California Constitutions — freedom from imprisonment being at the core of the liberty interest. Any infringement on the right to liberty requires a strict-scrutiny analysis and can be justified only if it both furthers and is narrowly tailored to serve a compelling government purpose. Even then, such infringement is permissible only if it is the least restrictive alternative available. (*Lopez-Valenzuela v. Arpaio* (9th Cir. 2014) 770 F.3d 772, 777, 781; *Humphrey, supra,* 11 Cal.5th at pp. 151-152.)

4. The putative plaintiff class members are likely to succeed on the merits of their lawsuit in that they are likely to show their pre-arraignment detention under the bail schedules deprives the putative plaintiff class of their fundamental right to, and interest

in, pretrial liberty in violation of the Due Process clauses of the U.S. and California Constitutions.[36]

5. These Defendants do not assert, and have offered no evidence, that their enforcement of the bail schedules furthers compelling government purposes in reducing or eliminating new criminal activity among arrestees awaiting their first appearances before a judge for the purpose of setting bail. Nor that such enforcement furthers the compelling government goal of arrestees appearing for their scheduled future court appearances. But even if these Defendants did so assert, the putative plaintiff class members would be likely to succeed on the merits of their lawsuit in that they are likely to show that these Defendants' enforcing the bail schedules do not further those purposes, nor that such enforcement is narrowly tailored to do so, and that there exist effective, less restrictive alternatives to further and to achieve those purposes. The putative plaintiff class members are likely to succeed on the merits of their lawsuit in that they are likely to show that the PREP and bail deviation programs do not address, cure, or mitigate the constitutional injury presented by these Defendants' enforcement of the bail schedules.

6. The putative plaintiff class members are likely to succeed on the merits of their lawsuit in that they are likely to show that the putative class faces irreparable harms in the absence of injunctive relief.

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[36] Having found a likely constitutional injury under the Due Process clauses of the state and federal constitutions, the court does not now decide the likelihood of plaintiffs' success on their claims under the Equal Protection clauses.

7. The putative plaintiff class has clearly shown that the constitutional harm to the putative class is extreme. It is pervasive in that each year it likely affects tens of thousands of impoverished persons detained solely because they are poor. Such harm warrants the court's entering a PI even though the PI changes the status quo. The likely harm to the putative plaintiff class in the absence of preliminary injunctive relief substantially outweighs any harm these Defendants would face from the issuance of a preliminary injunction.

8. The issuance of a PI is in the public interest in that the uncontroverted evidence shows the PI will reduce the incidence of new criminal activity and failures to appear for future court proceedings among members of the plaintiffs' putative class, and decrease overcrowding at these Defendants' jail facilities. The remediation of a constitutional injury is itself also in the public interest.

9. The PI the court orders today is prohibitory in nature in that, at base, it prohibits these Defendants from future enforcement of the bail schedules in their customary manner.

10. The putative plaintiff class is composed of indigent people and, for that reason, the court will not require a bond or undertaking upon issuance of a PI. No defendant seeks such a bond or undertaking.

CONCLUSION

The plaintiffs have shown that these Defendants' conduct in enforcing the secured money bail schedules against poor people who are detained in jail solely for the reason of their poverty is a clear, pervasive, and serious constitutional violation. The parties

estimate they will be ready for a trial on the merits in about 12 months. Between now and then, tens of thousands of persons will be arrested by the LASD and LAPD and jailed under the extant bail schedules solely because they are too poor to pay the scheduled money bail. Others, arrested for the identical offense and otherwise indistinguishable from the arrestees in the putative plaintiffs' class, will be promptly released because they can raise the funds to pay the secured money bail. Fidelity to the United States and California Constitutions cannot abide the delay of a year in remediating at least some of this constitutional harm now. Indeed, on this substantial record, it would be an abuse of the court's discretion *not* to enter a PI.

Plaintiffs have proposed terms for a PI; defendants have not. As noted above, the key elements of plaintiffs' proposed PI are: (1) an injunction against enforcement of the extant money bail against members of the putative plaintiff class; (2) a 60 day "abeyance period" during which the injunction would not be operative to permit the parties to meet and to propose "Plans and Procedures" for a different pretrial detention regime relative to the plaintiffs' putative class; and (3) an injunction, during the abeyance period, compelling these Defendants to utilize and to enforce the "zero bail" Third Los Angeles County EBS Modification Effective October 20, 2020 (Plaintiffs' P.I. Exh. 3).

The court is reluctant to adopt plaintiffs' proposed terms for two reasons. First, the court questions why such an abeyance period is required for the parties to develop constitutionally sound, effective, concrete, administrable, and enforceable plans and procedures for pre-arraignment release of arrestees. These issues have been on the forefront of criminal justice in California and Los Angeles County for years and this case

on file for six months. Dozens of other jurisdictions have such plans in place. What has prevented these parties from developing such plans and procedures by now and what will be different in 60 days?

Yet all parties seek such an abeyance period. The court, out of respect for the separation of powers doctrine, will agree. Moreover, it is more than evident to the court that these Defendants — with billion-dollar annual budgets, hundreds of highly trained personnel, decades if not centuries of accumulated criminal science experience, and possessing full knowledge of the complexities of operating jail facilities in our huge county — are far better suited to design an effective pre-trial detention program than is a Superior Court judge.

The second reservation relates to the imposition of the EBS. It was not designed as a constitutionally sound and effective pre-arraignment release regime of the type that the experts in this case have helped to develop and implement in dozens of jurisdictions. It was promulgated as a public health measure in the face of a sweeping pandemic with the goal of quickly reducing overcrowded jail conditions. The court also has concerns that the Sheriff's Department, per Deputy Topar, at least during the EBS period, was impaired in determining arrestees who would fall under the "repeat offender" provision of the EBS.

On the other hand, these Defendants have experience with the EBS, and it is specific and administrable. There is good reason to think that its implementation now as temporary measure during the abeyance period will remediate substantially, although not perfectly, the constitutional violations that would otherwise occur. The court should not

make the perfect the enemy of the good, especially recognizing that the court may modify the terms of the PI at any time for good cause shown.

PRELIMINARY INJUNCTION

1. These Defendants are hereby enjoined from applying or enforcing, prior to arraignment, the Los Angeles Superior Court's 2022 Felony Bail Schedule and 2022 Bail Schedule for Infractions and Misdemeanors, or any form of secured money bail schedule that requires or has as its effect that the existence and duration of pre-arraignment detention is determined by an arrestee's ability to pay money bail. This injunction does not apply to arrestees who are arrested for a capital offense or who are otherwise ineligible for admission to bail under California law, arrested for an offense enumerated under Penal Code section 1270.1(a), who have an open, unresolved criminal case, or are the subject of an arrest warrant.

2. Paragraph 1 shall be held in abeyance until July 17, 2023, at 12:01 a.m., to permit the parties in consultation with one another to develop constitutionally sound, effective, concrete, administrable, and enforceable plans and procedures ("Plans and Procedures") for pre-arraignment release of arrestees. The Plans and Procedures shall address, at least, matters of public safety and enhancement of the likelihood of arrestees' appearances at future court proceedings. The parties shall specify their agreed-upon Plans and Procedures in a joint report filed not later than 4:00 p.m. on July 5, 2023. To the extent there is not complete agreement, the parties shall each specify in the joint report their or its Plans and Procedures, together with an explanation of the reasons and bases therefor.

The court will hold a hearing on July 10, 2023, at 9:00 a.m. to determine the feasibility and advisability of the implementation of the Plans and Procedures. Unless excused by the court upon ex-parte application in advance of the hearing, the Sheriff and the Chief are ordered to appear and to be prepared to offer testimony relative to the Plans and Procedures.

3. In the meantime, so long as the provisions of paragraph 1 are held in abeyance, these Defendants are enjoined from detaining any person prior to arraignment who would have been released without paying money bail under the Third Los Angeles County Emergency Bail Schedule Modification Effective October 20, 2020 (Plaintiffs' P.I. Ex. 3), attached hereto as Exhibit 1. The "Repeat Offenders" provision of Exhibit 1 is modified for the purposes of this PI as follows: "While release on $0 bail, bail for subsequent offense/s during the abeyance period under paragraph 2 of this Preliminary Injunction shall be set pursuant to the applicable bail schedules promulgated by the Los Angeles Superior Court. This exception does not apply to those persons whose subsequent separate offense occurs after the original offense is resolved."

The provisions of this paragraph 3 shall become effective May 24, 2023, at 12:01 a.m.

It is so ordered.

Dated: May 16, 2023

LAWRENCE P. RIFF
JUDGE OF THE SUPERIOR COURT

EXHIBIT 1

THIRD LOS ANGELES COUNTY EMERGENCY BAIL SCHEDULE MODIFICATION EFFECTIVE [OCTOBER 20, 2020 at 5 p.m.]

PURPOSE & APPLICATION

This modified Los Angeles County Bail Schedule will take effect *October 20, 2020 at 5 p.m.* and remain in effect until further notice. This Los Angeles County Emergency Bail Schedule is in response to the COVID-19 pandemic and deemed a temporary modification to both the 2020 Infractions & Misdemeanors Bail Schedule and the 2020 Felony Bail Schedule.

GENERAL PRINCIPLES OF BAIL ARE STILL APPLICABLE

A court's consideration of the amount of bail in an individual case is governed by mandatory factors identified in the California Constitution: "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." (Cal. Const., art. 1, § 28, subd. (f)(3).) Furthermore, the Penal Code states: "In setting bail, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration. In setting bail, a judge or magistrate may consider factors such as the information included in a report prepared in accordance with Section 1318.1." (Pen. Code, § 1275, subd. (a)(1).)

GENERAL RULE

As a rule, the bail for all infraction, misdemeanor, and felony offenses will be set at $0, with the exception of the offenses listed below:

MISDEMEANOR EXCEPTIONS

Bail for the offenses listed below shall be set within the discretion of the bench officer utilizing the 2020 Infractions & Misdemeanors Bail Schedule as a guide, and in consideration of the facts of the case, the risk to public safety, as well as consideration of the COVID-19 emergency goal of reducing the jail population.

1. Penal Code § 149, Officer Unnecessarily Assaulting or Beating any Person;
2. Penal Code § 166(c)(1), Contempt of Court (Violation of a Stay-Away Order or Protective Order);
3. Penal Code §§ 191.5, 192 & 192.5, Misdemeanor Manslaughter;
4. Penal Code § 243(b), Battery on a Peace Officer;

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
ADMITTED IN EVIDENCE
CASE NO: 22STCP04344
PLTF / PET / DEF / RESP / JOINT / CRT
EXH NO: PJ3
DATE: 4/19/23
Sherri R. Carter, Executive Officer/Clerk
BY: L. Megyeran DEPUTY
LACIV 021 (Rev. 07-13)
LASC Approved

P.J. Ex 3

5. Penal Code §243(e)(1), Battery on an Intimate Partner (spouse, cohabitant, child's parent, former spouse, fiancé, fiancée, current/prior dating or engagement relationship);

6. Penal Code § 273.5(a), Domestic Violence;

7. Penal Code §273.6, Violation of a Court Order, if the detained person made threats to kill or harm, has engaged in violence against, or has gone to the residence or workplace of, the protected party;

8. Penal Code § 409, Riot, Rout, or Unlawful Assembly; Remaining Present After Warning to Disperse;

9. Penal Code § 409.5, Authority of Peace Officers to Close Disaster Area; Exclusion from Command Post Area; Unauthorized Entry;

10. Penal Code § 416, Assembly for Purpose of Disturbing the Peace or Committing Unlawful Act; Refusal to Disperse; Exception (Media);

11. Penal Code § 417, Exhibiting a Firearm;

12. Penal Code § 463, Looting During a State of Emergency;

13. Penal Code § 646.9, Stalking;

14. Penal Code § 25400, Carrying Concealed Firearm;

15. Penal Code §§ 29805, 29815, 29820, 29825, Firearm Possession by a Restricted Person (specified conviction offense; in violation of a probation condition; specified offense committed by a juvenile; TRO, injunction, protective order);

16. Vehicle Code §§ 23152 & 23153, Driving Under the Influence;

17. Health & Safety Code §120280, Refusal to Comply with Isolation Order;

18. Health & Safety Code § 120290, Intentional Transmission of an Infectious or Communicable Disease;

19. Repeat Offenders as set forth below.*

FELONY EXCEPTIONS

Bail for the offenses listed below shall be set within the discretion of the bench officer utilizing the 2020 Felony Bail Schedule as a guide, and in consideration of the facts of the case, the risk to public safety, as well as consideration of the COVID-19 emergency goal of reducing the jail population.

1. Penal Code § 667.5(c), Any Violent Felony;
2. Penal Code §1192.7(c), Any Serious Felony;
3. Penal Code § 69, Obstructing or Resisting Executive Officer in Performance of Duties;
4. Penal Code § 136.1, Witness Intimidation, when punishment is imposed under Penal Code §136.1(c) (accompanied by force or by an express or implied threat of force or violence, in further of a conspiracy, with a prior conviction of this section, or, when committed for pecuniary gain);
5. Penal Code § 149, Officer Unnecessarily Assaulting or Beating any Person;
6. Penal Code § 166(c)(1), Violation of a Criminal Protective Order;
7. Penal Code § 186.11, Any Theft with a Loss Greater than $100,000;
8. Penal Code § 236.1, Human Trafficking;
9. Penal Code § 237, False Imprisonment of Elder/Dependent Person;
10. Penal Code § 243(d), Battery with Serious Bodily Injury;
11. Penal Code § 243.4, Sexual Battery;
12. Penal Code § 245(a)(4), Assault by Means of Force Likely to Produce Great Bodily Injury;
13. Penal Code § 262, Spousal Rape;
14. Penal Code § 266h, Pimping;
15. Penal Code § 266i, Pandering;
16. Penal Code § 273a(a), Child Abuse;
17. Penal Code § 273.5(a), Domestic Violence;

18. Penal Code § 278, Child Stealing;

19. Registerable Offenses listed in Penal Code § 290(c) (Note that a violation of Penal Code § 290 itself would be eligible for $0 bail);

20. Penal Code § 368, Elder Abuse;

21. Penal Code § 422, Criminal Threats;

22. Penal Code § 463, Looting;

23. Penal Code § 594(b)(1), Vandalism;

24. Penal Code § 646.9, Stalking;

25. Penal Code § 4502, Possession of Deadly Weapon by Prison Inmate;

26. Penal Code §§ 4530/4532, Escape or Attempt by Prison Inmate with or without Force or Violence;

27. Penal Code § 25400, Carrying Concealed Firearm;

28. Penal Code §§ 29800, 29805, 29815, 29820, 29825, Firearm Possession by a Restricted Person (felon; specified conviction offense; in violation of a probation condition; specified offense committed by a juvenile; TRO, injunction, protective order);

29. Penal Code § 31360, Possession of Body Armor by a Restricted Person (Violent Felon);

30. Vehicle Code § 2800.2, Driving in Willful or Wanton Disregard for Safety of Persons or Property while Fleeing Pursuing Police Officer (Evading);

31. Vehicle Code §§ 23152 & 23153, Driving Under the Influence;

32. Repeat Offenders as set forth below.*

***REPEAT OFFENDERS**

While released on $0 bail, bail for subsequent separate offense/s during the state of emergency as declared by the Los Angeles County Board of Supervisors and the Department of Public Health, shall be set pursuant to the applicable non-emergency 2020 Infractions & Misdemeanors Bail Schedule, and 2020 Felony Bail Schedule. This exception does not apply to those whose subsequent separate offense occurs after the original offense is resolved.

ABILITY TO DENY BAIL

Nothing in the Los Angeles County Emergency Bail Schedule restricts the ability of the court to deny bail as authorized by Article I, §12, or § 28(f)(3) of the California Constitution.

BAIL FOR VIOLATIONS OF POST-CONVICTION SUPERVISION

Under the Los Angeles County Emergency Bail Schedule, bail for violations of misdemeanor probation, whether the arrest is with or without a bench warrant, may be set at $0, unless the charges include at least one of the misdemeanor exceptions set forth above. If a misdemeanor exception applies, bail may be set pursuant to the non-emergency 2020 Infractions & Misdemeanors Bail Schedule.

Bail for all violations of felony probation, parole, post-release community supervision, or mandatory supervision may be set in accord with this Los Angeles County Emergency Bail Schedule ($0), unless either the charges of conviction or any new criminal charge or arrest is for a felony exception (see above), in which case bail may be set as the greater of the bail associated with the charges of conviction or the bail associated with any new criminal charge or arrest, when the alleged violation of supervision involves new alleged criminal conduct. Nothing in this Emergency Bail Schedule shall affect the hold that can be placed by a supervising agency pursuant to Penal Code §§ 3056, 3455. Felony exceptions are subject to bail set at the amount(s) listed in the court's non-emergency 2020 Felony Bail Schedule and may include enhancements.

BAIL FOR ARREST WARRANTS

Bail for arrest warrants should be set utilizing the 2020 Felony Bail Schedule and/or the 2020 Infractions & Misdemeanors Bail Schedule as appropriate.