**No. S247278**

# In the Supreme Court of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Appellant*,

v.

KENNETH HUMPHREY,

*Appellee.*

On Appeal from The Court of Appeal of the State of California,
First Appellate District, Division Two, Case No. A152056

## APPLICATION TO FILE AMICUS BRIEF AND BRIEF OF AMICI CURIAE CALIFORNIA ASSOCIATION OF PRETRIAL SERVICES, NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, PRETRIAL JUSTICE INSTITUTE, AND NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF APPELLEE

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**APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF**

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to Rule 8.200(c) of the California Rules of Court, the California Association of Pretrial Services ("CAPS"), the National Association of Pretrial Services Agencies ("NAPSA"), the Pretrial Justice Institute ("PJI"), and the National Association for Public Defense ("NAPD") respectfully request permission to file the joint amici curiae brief that is combined with this application. Each applicant is an organization that advocates for fair and effective administration of pretrial release and detention decisions. Amici desire to address scholarship and empirical evidence proving that pretrial detention need only be used in the most exceptional circumstances: situations in which the arrestee poses a serious threat of reoffending or absconding before the adjudication of pending charges.

The applicants respectfully submit a need exists for additional briefing regarding research demonstrating the harms of pretrial detention, revealing the extent to which alternatives to pretrial detention better serve state interests, and showing that pretrial detention imposed pursuant to secured-money bonds does not serve legitimate state interests. In the proposed brief combined with this application, applicants address the need for this Court to limit the use of pretrial detention to those situations in which the arrestee poses a significant risk of pretrial recidivism or failure to appear.

For the reasons stated in this application and further developed in the Interest of Amici Curiae and Issue Addressed by Amici Curiae portion of the proposed brief, the applicants respectfully request leave to file the amicus curiae

brief that is combined with this application.

The amici curiae brief was authored by J. Bradley Robertson, Kimberly M. Ingram, Candice L. Rucker, and Rachel A. Conry of Bradley Arant Boult Cummings LLP. No party, person, or entity made a monetary contribution to fund the preparation of this brief.

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## CERTIFICATE OF INTERESTED PARTIES

Under California Rule of Appellate Procedure 8.208, the California Association of Pretrial Services (CAPS) declares that it is a not-for-profit membership association that has no parent corporation and does not issue publicly held stock.

The National Association of Pretrial Services Agencies (NAPSA) declares that it is a not-for-profit membership association that has no parent corporation and does not issue publicly held stock.

The Pretrial Justice Institute (PJI) declares that it is a not-for-profit institute that has no parent corporation and does not issue publicly held stock.

The National Association for Public Defense (NAPD) declares that it is a not-for-profit membership association that has no parent corporation and does not issue publicly held stock.

The undersigned counsel certifies that the following entities may have an interest in the outcome of this case:

- Association of Pretrial Professionals of Florida, Affiliate of NAPSA
- BRADLEY ARANT BOULT CUMMINGS LLP, Counsel for Amici
- Colorado Association of Pretrial Services, Affiliate of NAPSA
- Connecticut Pretrial Services, Affiliate of NAPSA
- Ohio Association of Pretrial Services Agencies, Affiliate of NAPSA
- Pennsylvania Pretrial Services Association, Affiliate of NAPSA

- Shelby County Tennessee Pretrial Services, Affiliate of NAPSA
- South Carolina Association of Pretrial Intervention Programs, Affiliate of NAPSA
- Virginia Community Criminal Justice Association, Affiliate of NAPSA

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## INTEREST OF AMICI CURIAE

The California Association of Pretrial Services (CAPS) seeks to promote professional competence and responsibility in the field of pretrial services. Specifically, CAPS aims to encourage the continuation, expansion, and establishment of effective pretrial services in the State of California. To do so, CAPS sponsors educational and training programs for both pretrial services professionals and the public. As a result of its efforts, CAPS promotes research, development, and improvement of standards in the field of pretrial justice.

Founded in 1973, NAPSA is a not-for-profit membership association that maintains the Standards of Practice for the pretrial-services profession. NAPSA's mission is to promote pretrial justice and public safety through rational pretrial decision making and practices informed by evidence. NAPSA's membership consists of national and international pretrial practitioners, judges, attorneys, prosecutors, and criminal-justice researchers. Its board contains elected representatives from federal, state, and local pretrial services agencies. NAPSA has exclusively hosted the premier annual pretrial services training conference for the last 46 years.

NAPSA published its first set of Standards on Pretrial Release in 1978, which are revised on a continuing basis in light of changing practices, technology, case law, and program capabilities. Relevant here, NAPSA's current Standards on Pretrial Release advocate for limiting pretrial detention

to only cases in which (1) the defendant has been charged with a crime of violence or another dangerous crime, (2) the defendant has been charged with a serious offense while on release, probation, or parole for another serious offense, (3) there is a substantial risk that the defendant will fail to appear, or (4) there is a substantial risk that the defendant will obstruct justice or threaten, injure, or intimidate a witness or juror. NAPSA, *Standards on Pretrial Release*, Standard 2.9 (3rd ed. 2004) https://napsa.org/eweb/DynamicPage.aspx?Site=napsa&WebCode=standards.

PJI is a not-for-profit organization seeking to advance safe, fair, and effective pretrial justice. Its staff are among the nation's foremost pretrial-justice experts. PJI's Board includes representatives from the judiciary, law enforcement, prosecutors, victim advocates, pretrial services, county commissioners, and academia. Founded in 1977, PJI is supported by grants from the U.S. Department of Justice (DOJ) and private foundations. PJI is at the forefront of building stakeholder support for legal and evidence-based pretrial justice practices.

Over the past four decades, NAPSA and PJI have released dozens of publications, conducted hundreds of training sessions, and provided technical assistance to thousands of jurisdictions on enhancing pretrial justice.

The National Association for Public Defense (NAPD) is an association of more than 14,000 professionals who deliver the right to counsel throughout all states and territories in the United States. NAPD's members include attorneys, investigators, social workers, administrators, and other support staff responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are the defense advocates in jails, courtrooms, and communities. They are experts in both theoretical best practices and practical, day-to-day delivery of indigent-defense services. With respect to the constitutional right to bail, NAPD's members constitute the front-line defenders of the right to be released from custody pending trial, and they observe the collateral damage that occurs in the lives of defendants who remain incarcerated while they are presumed to be innocent. NAPD has an interest in preserving its clients' constitutional right to release pending trial and reforming the bail system in the United States.

## ISSUE ADDRESSED BY AMICI CURIAE

In accord with Supreme Court precedent, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). The amici offer this brief to outline scholarship and empirical evidence proving that pretrial detention need only be used in the most exceptional circumstances. The commonly used money-based bail system negatively impacts appearance rates and public safety. Thus, the amici seek to demonstrate the practical utility of unsecured bonds and other effective non-money alternatives, which limit or altogether curb the use of pretrial detention.

## SUMMARY OF THE ARGUMENT

The use of pretrial detention should be limited to situations in which the arrestee poses a serious threat of reoffending or absconding before the adjudication of pending charges. Absent such exceptional circumstances, the State runs the risk of unconstitutionally detaining arrestees who pose no real threat to themselves or the community, solely based on the fact that they are unwilling or unable to satisfy certain conditions of pretrial release.

Independent, appropriately controlled scholarship confirms that unsecured bonds and non-money alternatives successfully achieve the three goals of constitutional bail: (1) maximizing appearance at trial, (2) minimizing harm to the community from the small percentage of high-risk defendants who cannot be safely released, and (3) maximizing pretrial release of those not proven guilty. Pretrial release systems based on secured bonds perform no better than other systems with regard to appearance at trial and community safety. Critically, though, secured bonds delay or completely prevent the release of individuals who are bailable under the law, increasing pretrial costs and consequences for the innocent, the guilty, and the State. Other states have been able to effectively manage pretrial release and meet the three goals of constitutional bail by utilizing pretrial-supervision programs and evidence-based risk-screening tools that significantly limit or altogether eliminate the use of pretrial detention.

## ARGUMENT

### I. THE BAIL PROCESS IS INTENDED TO ACHIEVE THREE LEGITIMATE STATE INTERESTS—RETURN FOR TRIAL, PUBLIC SAFETY, AND PRETRIAL RELEASE.

The American system has long recognized legitimate state interests that impose pretrial burdens on people who have been accused—but not convicted—of a crime. These legitimate state interests resulted in the traditional concept of bail. But, because our constitution specifically forbids excessive bail, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. Under the constitutional view, "[t]he practice of admission to bail . . . is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty." *Stack v. Boyle*, 342 U.S. 1, 7-8 (1951) (Jackson, J., concurring).

The bail process is meant to effectuate pretrial release while ensuring later appearance and preserving public safety. *See id.* at 8. These three legitimate objectives also establish the relevant factors courts weigh when considering bail: the risk that (1) a defendant will fail to return or (2) will endanger the public before returning for trial, balanced against (3) the right to pretrial release. *See ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1132, 1143-44 (S.D. Tex. 2017). While these three state interests—return, safety, and release—were historically the focus of the bail process, the shift

to a profit-focused commercial bail system resulted in higher detention rates for pretrial defendants.

## II. EXCESSIVE AND ARBITRARY DELAYS IN PREVENTING PRETRIAL RELEASE CREATE SUBSTANTIAL NEGATIVE CONSEQUENCES FOR BOTH THE DEFENDANT AND THE STATE.

### A. DEFENDANTS ARE HARMED BY UNNECESSARY PRETRIAL DETENTION.

Pretrial detention deprives defendants of their liberty while they are still entitled to a presumption of innocence. *See Stack*, 342 U.S. at 3. This deprivation of liberty destabilizes defendants both socially and economically. *See* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1334, 1356-57 (2014). Pretrial detention also impairs a defendant's ability to prepare an effective defense, increasing the likelihood of conviction and post-trial imprisonment. *Id.* at 354.

#### 1. PRETRIAL DETENTION DEPRIVES DEFENDANTS OF THEIR LIBERTY WHILE THEY ARE STILL ENTITLED TO A PRESUMPTION OF INNOCENCE.

Prior to trial, defendants are entitled to a presumption of innocence, and pretrial detention impinges on liberty during this period of presumed innocence. *See Betterman v. Montana*, 136 S. Ct. 1609, 1613 (2016) ("Once charged, the suspect stands accused but is presumed innocent until conviction upon trial or guilty plea."); *Stack*, 342 U.S. at 3 ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."). Loss of liberty in the period

of pretrial detention is broad and severe. Pretrial detainees "are taken from their communities and physically barred from the outside world, restricted to limited visits by family members and attorneys. Their conversations are constantly monitored by guards and other inmates, their mail is searched, and they are subjected to frequent and invasive searches and pat-downs to ensure institutional security." Wiseman, *supra*, at 1353-54. "[D]espite speedy trial requirements, many defendants awaiting trial are detained for months," and "in some cases, the periods that defendants spend in jail awaiting trial is comparable to, or even greater than, their potential sentences[.]" *Id.* at 1354, 1356. A deprivation of liberty of this magnitude should only be imposed on pretrial defendants in exceptional circumstances.

### 2. PRETRIAL DETENTION DESTABILIZES DEFENDANTS ECONOMICALLY AND SOCIALLY.

Multi-day pretrial detention poses obvious threats to employment and family stability. *See* Wiseman, *supra*, at 1356-57 ("Many detainees lose their jobs even if jailed for a short time, and this deprivation can continue after the detainee's release. Without income, the defendant and his family may fall behind on payments and lose housing, transportation, and other basic necessities.") (internal footnotes omitted). Pretrial detainees "cannot work during the often considerable time that they spend in jail." *Id.* at 1346-47. This loss of income can have extensive impact in the life of a pretrial detainee. *See* Megan Comfort, *"A Twenty-Hour-a-Day Job": The Impact of*

*Frequent Low-Level Criminal Justice Involvement on Family Life,* Ann. Am. Acad. Pol. Soc. Sci. 665:1, p. 5 (2016). "Jail stays of several weeks are long enough to cause evictions for nonpayment of rent, suspensions of government entitlements such as food stamps and SSI, and the loss of possessions (cars towed, clothing thrown away in homeless shelters, belongings stolen from the street)." *Id.* This is particularly true for poorer defendants, who frequently live paycheck to paycheck, and for parents, who risk losing contact with and custody of their children when they are incarcerated awaiting trial. *See ODonnell*, 251 F. Supp. 3d at 1122, 1146.

The economic destabilization of a pretrial detainee may harm both the detainee's dependents and caregivers. A pretrial detainee's loss of income may leave his or her children and other dependents without economic support, requiring them to fend for themselves during the period of detention. *See* Wiseman, *supra*, at 1346-47. Family members who play caregiving or support roles in the life of a pretrial detainee may also bear some of the economic and social costs of stabilizing a defendant upon release from detention. *See* Comfort, *supra*, at 10. When pretrial detention destabilizes a defendant through loss of a job, a home, or social support network, the period of re-entry to free society may be difficult and require extensive financial and social support from family members. *See id.*

When pretrial detention is imposed because a defendant is unable to obtain bail money, the costs of secured bonds go beyond direct financial

payments. The money-based bail system "exacerbates and perpetuates poverty" and other sociological stigmas. *See ODonnell*, 251 F. Supp. 3d at 1122 (citation omitted). Predictably, defendants with secured bonds are detained significantly longer than those with unsecured bonds. *See* Michael R. Jones, PJI, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* 6 (2013), *available at* https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c57cebe-9456-f26b-4917-3d0f8b1f03ce&forceDialog=0. A Colorado study that examined the pretrial outcomes of nearly 2,000 defendants found that five days of pretrial incarceration passed before defendants with secured bonds achieved the same threshold of 80-percent release that defendants with unsecured bonds achieved on the first day. Jones, *supra*, at 15. This imposes a pretrial punishment on defendants who—though presumed innocent—are too poor to secure their freedom.

The impact of unnecessary pretrial detention greatly exceeds the value of the fines and bonds collected from low-risk defendants. In fact, this destabilization (often *caused* by the money-based bail system) contributes to an increase in risk for failure to appear and new criminal activity—the exact interests the bail system is intended to address. Christopher T. Lowenkamp, et al., Laura & John Arnold Found., *The Hidden Costs of Pretrial Detention* 3 (2013), *available at* http://www.arnoldfoundation.org/wp-

content/uploads/2014/02/LJAF_

Report_hidden-costs_FNL.pdf. Even a pretrial detention period as short as 48 hours may destabilize an arrestee economically and socially, making him or her "40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours." Lowenkamp, *supra*, at 3; *see also Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). Secured bonds thus add cost without benefit. The personal costs to defendants may persist past the conclusion of the case, even if the charges are dismissed.

### 3. UNNECESSARY PRETRIAL DETENTION INCREASES THE LIKELIHOOD OF A NEGATIVE TRIAL OUTCOME THROUGH CONVICTION AND IMPRISONMENT.

Pretrial detention inhibits a defendant's ability to prepare an adequate trial defense. *See Stack*, 342 U.S. at 3 The Supreme Court has addressed the negative effect of pretrial detention on preparation of a worthy defense: "[t]he traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id.*

"[R]esearch from both the Bureau of Justice Statistics and the New York City Criminal Justice Agency confirms studies conducted over the last 60 years demonstrating that, controlling for all other factors, defendants detained pretrial are convicted and plead guilty more often, and are sentenced

to prison and receive harsher sentences than those who are released." Timothy R. Schnacke, DOJ, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 23 (2014). The increased rate of convictions may stem from weakened defenses caused by limitations on a pretrial detainee's involvement in the preparation of his or her own defenses. *See* Marie VanNostrand, Gena Keebler, Lumosity, Inc., *Pretrial Risk Assessment in the Federal Court*, Fed. Probation, Vol. 73 No. 2, p. 3. Although pretrial detainees are offered less attractive plea bargains, detainees are incentivized to plead guilty, regardless of their actual guilt or innocence, because their pretrial detention awaiting trial may be comparable to, or even greater than, their potential sentences. *See* Arthur W. Pepin, *Evidence-Based Pretrial Release*, Conference of State Court Administrators, p. 5 (2013); Wiseman, *supra*, at 1356. Upon conviction or guilty plea, pretrial detainees are more likely than other defendants to be sentenced to terms of incarceration, and their terms of incarceration are often longer than those of other defendants. Pepin, *supra* at 5.

### B. THE STATE IS HARMED BY UNNECESSARY PRETRIAL DETENTION.

Unnecessary pretrial detention harms the State by increasing pretrial criminal activity, decreasing appearance of defendants at trial, and increasing the financial burden of the criminal justice system on taxpayers.

### 1. PRETRIAL DETENTION CORRELATES WITH HIGHER RATES OF PRETRIAL CRIMINAL ACTIVITY.

A study, conducted by the Laura and John Arnold Foundation, using historical pretrial data from Kentucky examined the impact of pretrial detention on both defendants and the public. Lowenkamp, *supra* at 3. "Kentucky currently uses a research-based and validated assessment tool (Kentucky Pretrial Risk Assessment [KPRA])" to assess the risk of pretrial failure" measured by failure to appear and new criminal activity. *Id.* at 8. These risk scores under the KPRA are categorized into three risk levels: low, medium, and high. *Id*.

The study found that "the longer low-risk defendants were detained, the more likely they were to have new criminal activity pretrial." *Id.* at 17. When compared with those released within a day, bailable low-risk defendants detained for as few as two to three days were 39 percent more likely to engage in criminal activity while awaiting trial. *Id.* Moderate-risk bailable defendants showed a smaller, but still significant, increase in reported pretrial criminal activity. *Id.* These results may follow from the loss of jobs, transportation, and even housing that can occur when pretrial detention prevents a defendant from showing up for work or meeting other commitments. *See* Wiseman, *supra*, at 1356-57. In sum, evidence correlates secured bail and pretrial detention with measurably poorer outcomes in the metrics that should be driving bail decisions.

### 2. PRETRIAL DETENTION CORRELATES WITH HIGHER FAILURE TO APPEAR RATES.

Even a short delay in release of bailable individuals correlates with a significant increase in failure to appear. *See* Lowenkamp, *supra*, at 17-18. After controlling for relevant factors including risk level, the researchers in the Kentucky study found statistically significant decreases in appearance rates for low-risk defendants and moderate-risk defendants related to delayed pretrial release. *Id.* at 4, 13. When compared with those released within a day, bailable low-risk defendants detained for as few as two to three days were 22 percent more likely to miss future proceedings. *Id.* at 15.

### 3. PRETRIAL DETENTION RESULTS IN HIGHER COSTS TO THE STATE.

Extended pretrial detention also increases financial costs to the State. *See generally* Criminal Justice Section, *State Policy Implementation Project*, ABA 2, *available at* http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_pretrialrelease.authcheckdam.pdf (last accessed Sept. 29, 2018) (comparing costs of pretrial detention with noncustodial supervision). While bail is designed to move bailable defendants out of expensive pretrial detention, defendants who cannot afford secured bail or otherwise satisfy certain bail conditions remain in custody, increasing costs to the State.

A recent study by the DOJ's Office of the Federal Detention Trustee quantified the State costs associated with pretrial detention. This study sorted

defendants into risk levels, utilizing five risk levels. It then analyzed the costs associated with pretrial detention and the Alternatives to Detention Program (ATD). ATD includes options such as computer monitoring, third-party custody, and mental health treatment.[1] The study found the average cost of pretrial *detention* for all five risk levels was between $18,768 and $19,912 per defendant based on an average daily cost of $67.27 and average pretrial detentions ranging from 279 to 296 days. In contrast, the average cost of the ATD program was $3,860 per defendant including the costs of supervising the pretrial defendant, the alternatives to detention, and fugitive recovery. Marie VanNostrand, DOJ, Office of the Fed. Detention Trustee, *Pretrial Risk Assessment in Federal Court* 34-36 (2009). On average, detention is between four and six times more expensive than the alternatives, even after factoring in costs related to recovering defendants who do not return on their own. *See id.*

America leads the world in pretrial detentions, detaining defendants pretrial at three times the world average. Schnacke, *supra*, at 3. Pretrial defendants "account for approximately 61% of jail populations nationally." *Id.* at 9. With such a large pretrial-detention population, the increased cost of

[1] NAPD does not take a position as to whether these or other pretrial detention alternatives are constitutional or valid in any particular case. Its members reserve the right to challenge the appropriateness of specific detention alternatives in individual cases. Nonetheless, NAPD does agree that, on a systemic level, there are less invasive, less burdensome, and more efficacious alternatives to imposing money bail on pretrial defendants.

detaining rather than releasing defendants awaiting trial has an enormous cumulative effect.

"[T]he Department of Justice estimates that keeping the pretrial population behind bars costs American taxpayers roughly 9 billion dollars per year." *Id.* at 15. Where pretrial detainees overcrowd jails, taxpayers face an even more costly scenario, "as new jail construction can easily reach $75,000 to $100,000 per inmate bed." *Id.* Reducing pretrial detention rates therefore significantly decreases the cost to the State by decreasing the number of expensive pretrial detainees.

## III. LEGITIMATE STATE INTERESTS ARE BETTER SERVED BY APPROACHES PROVEN SUCCESSFUL ELSEWHERE.

Although many courts still rely on a system of money bail for controlling pretrial release, legitimate state interests are better served by other approaches.

### A. PRETRIAL SUPERVISION HAS BEEN SHOWN TO BE EFFECTIVE WITH BAILABLE INDIVIDUALS IN ALL RISK LEVELS.

Community-based support is effective for managing low-risk and moderate-risk defendants without imposing financial conditions of release. While secured bonds delay or prevent release, they do not fundamentally alter the consequences of violating the conditions of release. New charges under either type of bond will result in revocation and detention. Whether bonds are secured or unsecured, defendants who fail to appear may be required to forfeit money. Jones, *supra*, at 10-11. The relevant question for a

judge, therefore, is what conditions on bail might improve the outcomes for defendants at what risk profiles.

A 2013 study drawing from historical data in two states identified statistically significant correlations between pretrial supervision—a common condition of release in which defendants meet and communicate regularly with a supervising officer—and improvements in court appearance rates of defendants released on bail. Christopher T. Lowenkamp & Marie VanNostrand, Laura & John Arnold Found., *Exploring the Impact of Supervision on Pretrial Outcomes* 10, 14-17 (2013). The study indicates that "the effect of pretrial supervision [on appearance rates] appears to matter even more as risk level increases," especially for moderate- and higher-risk defendants who were 38 percent and 33 percent less likely, respectively, to fail to appear when supervised during their release. *Id.* at 15.

### B. RISK ASSESSMENT TOOLS ARE AVAILABLE AND EFFECTIVE.

Risk-assessment tools are valuable for distinguishing low-risk defendants from higher-risk defendants so a judge may determine appropriate, individually tailored release conditions for each defendant.[2] Evidenced-based risk assessment has recently advanced dramatically such

[2] While NAPD agrees that risk-assessment tools can be effective, depending on how they are designed and applied to an individual defendant, it does not endorse any particular risk-assessment tool and has not taken a position on whether such tools are a constitutionally adequate remedy for flawed state-court bail systems. Accordingly, NAPD does not join this section of the brief.

that courts may now reliably assess risk and minimize conflict with the constitutional rights related to pretrial release. PJI, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* 4-5 (2015), *available at* https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=23a6016b-d4b3-cb63-f425-94f1ab78a912&forceDialog=0. Screening tools developed in multiple jurisdictions—including Virginia, Ohio, Kentucky, and Colorado—and validated through rigorous study have discredited prior assumptions about the factors that predict a defendant's risk to the community and risk of non-appearance in court. *Id.*; *see, e.g.*, PJI, *The Colorado Pretrial Assessment Tool (CPAT) Revised Report* 19-20 (2012).

### C. NATIONAL DATA SETS ALLOW RELIANCE, NONDISCRIMINATORY RISK ASSESSMENT WITH MINIMAL EXPENSE.

The data in this area is vast, and it provides state and local governments of any size with reliable tools for determining a defendant's risk level. One such tool, the Public Safety Assessment ("PSA"), provides a validated risk assessment based on "a database of over 1.5 million cases drawn from more than 300 U.S. jurisdictions." Laura & John Arnold Found., *PSA*, *available at* http://www.arnoldfoundation.org/initiative/criminal-justice/pretrial-justice/ (last accessed Sept. 28, 2018). The data-driven

process used to create the PSA identified nine administrative factors[3] based on current charges and criminal history that reliably predict risk of new crime, new violence, and failure to appear. *Id.* at 3-4. After accounting for those administrative factors, the authors determined that none of the interview-dependent factors—including "employment, drug use, and residence"—improved predictions. Laura & John Arnold Found., *Developing a National Model for Pretrial Risk Assessment* 4 (2013), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf.

As compared with unsubstantiated or discriminatory heuristics for estimating risk associated with pretrial release, the PSA is "more objective, far less expensive, and requires fewer resources to administer." *PSA, supra*. Courts using the PSA can make reliable predictions by focusing on criteria already available from charging documents and prior criminal records. Eliminating extraneous information, including race, gender, level of education, and socioeconomic status, the tool both reduces the need for

[3] The nine factors are: (1) Age at current arrest, (2) Current violent offense, (3) Pending charge at the time of the offense, (4) Prior misdemeanor conviction, (5) Prior felony conviction, (6) Prior violent conviction, (7) Prior failure to appear in the past two years, (8) Prior failure to appear older than two years, (9) Prior sentence to incarceration. Laura & John Arnold Found., *Public Safety Assessment: Risk Factors and Formula*, (2016) *available at* https://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf.

intensive and expensive pre-bail interviews and presents courts with a cleaner distillation of the factors relevant to legitimate state interests. *Id.*

In Yakima County, Washington, policymakers recently implemented an actuarial pretrial assessment tool—also called the Public Safety Assessment ("Yakima PSA")—to provide recommendations regarding supervised pretrial release. Claire M. B. Brooker, *Yakima County, Washington Pretrial Justice System Improvements: Pre- and Post-Implementation Analysis* (2017). At the first appearance, an arrestee was assigned a combined scaled score, determined by the defendant's charges, the local jurisdiction, and resources available for increasing the likelihood of pretrial success. *Id.* at 2. For defendants assigned a high likelihood of pretrial success, the algorithm recommends low-level supervised release. *Id*.

Following the implementation of the Yakima PSA, Yakima County observed a statistically significant increase in the number of arrestees released pretrial with no statistically significant difference in public safety and court appearance outcomes. *Id.* at 6. Use of the Yakima PSA also decreased the rate of pretrial detention for minority arrestees. *Id.* at 8. Before the Yakima PSA was implemented, there was a disparity in the pretrial release rates by race, with Caucasian arrestees being released at higher rates. *Id*. Following the implementation of the Yakima PSA, there was no significant difference in release rates among racial and ethnic groups. *Id*.

An empirical analysis of this pretrial assessment tool confirmed "that a jurisdiction can reduce pretrial detention and improve racial/ethnic equity by replacing high use of secured money bail with non-financial release conditions guided by actuarial-risk-based decision making, and do so with no harm to public safety or court appearance." *Id*. at 16.

### D. INDIVIDUAL STATES HAVE BEEN ABLE TO TAILOR RISK ASSESSMENT TO STATUTORY REQUIREMENTS.

Several states, including Virginia and Ohio, employ objective tools tailored to statutory criteria governing pretrial release. Virginia developed and validated a pretrial risk assessment instrument tailored to its statutory requirements. Marie VanNostrand & Kenneth J. Rose, *Pretrial Risk Assessment in Virginia* 1 (May 1, 2009). The Virginia validation study analyzed a year's worth of records from five representative counties and identified a set of statistically significant predictors of negative outcomes including failure to appear, new arrests, and criminal allegations prior to trial. *Id.* at 2.

Ohio followed a similar process in developing several tools for pretrial assessment and other risk inquiries related to recidivism. *See* Edward Latsessa, et al., *Creation and Validation of the Ohio Risk Assessment System Final Report* ii, 13 (2009). The Ohio initiative demonstrated the value of these assessment tools not only for managing pretrial release, but also for

addressing community supervision, institutional intake for convicted defendants, and community re-entry following incarceration.

State and local governments thus have abundant options for effectively and efficiently managing pretrial release without imposing a burden that adds cost to the accused and the State itself.

### E. PRETRIAL RISK ASSESSMENTS ARE MORE EFFECTIVE THAN BAIL SCHEDULES.

The rise of objective, evidence-based assessment tools is precisely why bail schedules should be rejected. Recognizing the importance of individual risk assessment, the ABA "flatly rejects the practice of setting amounts according to a fix bail schedule based on charge." Commentary to ABA Pretrial Release Standard 10-5.3(e), p. 113. Such schedules exclude consideration of factors that may be far more relevant than the charge. *Id.*

In addition, the use of such schedules inevitably leads to the detention of persons who pose little threat to public safety but are too poor to afford release while releasing others that pose a higher safety risk but can afford to post bond. For this reason and others, the International Association of Chiefs of Police adopted a resolution criticizing the use of bail schedules and calling for the use of pretrial risk assessments to increase public safety and reduce release of individuals that may pose a threat. International Association of Chiefs of Police, *supra*. In sum, evidence-based, objective pretrial risk

assessments are more effective than bail schedules at serving legitimate state interests.

## IV. EMPIRICAL DATA SHOWS THAT SECURED-MONEY BONDS DO NOT SERVE THE THREE LEGITIMATE STATE INTERESTS.

Money bail has its root in the Anglo-Saxon criminal justice system, which was mainly comprised of monetary penalties for criminal acts. Schnacke, *supra*, at 25. England and America eventually adopted a personal-surety system in which a reputable person would take responsibility for the accused and promise to pay the required financial condition if the defendant failed to return. *Id.*

A key component of the personal surety system was that the surety took on this responsibility without any initial remuneration or promise of future payment. *Id.* But as America grew and communities became larger, the personal-surety system gave way to one that allowed "impersonal" sureties to demand re-payment upon a defendant's default. *Id.* at 26. An "impersonal and wholly pecuniary," for-profit industry emerged, *see Leary v. United States*, 224 U.S. 567, 575 (1912), which requires bailable defendants to pay before being released. This shift resulted in an increase in detention of defendants who were traditionally eligible for bail. Schnacke, *supra*, at 26. Under a money-based bail system, arrestees who can afford to pay the costs associated with a secured bond are promptly released, while

poorer arrestees are forced to wait several hours or even days before even being evaluated for pretrial release

Secured-money bonds prejudicially prevent or delay release without reliably advancing the legitimate state interests that bail is intended to address:

- Secured-money bonds do not correlate with higher rates of appearance; and
- They do not improve public safety; but
- Secured financial bonds hinder pretrial release.

Secured bonds thus fail to meaningfully achieve any of the legitimate goals related to bail and succeed only in supporting the bail industry.

### A. SECURED-MONEY BONDS DO NOT CORRELATE WITH HIGHER RATES OF APPEARANCE FOR TRIAL.

Secured-money bonds do not increase appearance rates at trial and other proceedings. Rigorous studies from Colorado, Kentucky, Washington, and elsewhere support this conclusion and stand in stark contrast to the flawed studies promoted by the bail-bond industry.

### B. A FIRST-OF-ITS-KIND STUDY IN COLORADO FOUND UNSECURED BONDS OFFER THE SAME LIKELIHOOD OF COURT APPEARANCE AS SECURED BONDS.

In a first-of-its-kind study, researchers collected hundreds of case-processing and outcome variables on 1,970 defendants booked into ten Colorado county jails over a 16-month period and analyzed whether secured

bonds were associated with better pretrial outcomes than unsecured bonds. Jones, *supra*, 6-8. Over 80 percent of the state's population resides in the ten participating counties. *Id.* Each local jurisdiction collected data on a pre-determined, systematic random sampling to minimize bias in selecting defendants. *Id.* Defendants' pretrial risks were assessed and assigned to one of four risk categories. Nearly 70 percent scored in the lower two risk categories. *Id.* This study analyzes pretrial outcomes by risk level to ensure valid comparisons.

The study tracked defendants who received unsecured or secured bonds. *Id.* at 7. Unsecured bonds in Colorado are authorized by statute as "personal recognizance bonds" and do not require defendants to post any money with the court prior to pretrial release. If defendants fail to appear, the court can hold those defendants liable for the full amount of the bond. The Court can also require co-signors on unsecured bonds (like the personal sureties of former years). In contrast, secured bonds require money to be posted with the court on a defendant's behalf prior to pretrial release. *Id*.

The study showed that unsecured bonds offer the same likelihood of court appearance as secured bonds. Fully 97 percent of defendants who were assigned to the lowest risk level and given a personal-recognizance bond attended all future court appearances. *Id.* at 11. Only 93 percent of defendants in the same risk level with a secured bond attended all future court appearances. *Id.* Similarly, in the second risk category, 87 percent of

defendants with unsecured bonds attended all future court appearances. *Id.* Only 85 percent of defendants in the same risk category with a secured bond attended all future court appearances. *Id.* Thus, defendants released on unsecured bonds returned for trial *more* consistently than similar defendants with secured bonds.

### C. RECENT DATA FROM KENTUCKY AND WASHINGTON ALSO DEMONSTRATES THAT UNSECURED BONDS ARE AS EFFECTIVE AS SECURED BONDS IN ENSURING COURT APPEARANCE.

Research beyond Colorado also shows that secured bonds are not necessary to ensure future court appearances. Court appearance rates in Kentucky recently increased when Kentucky reformed its bail process. In 2011, Kentucky passed HB 463, which required the state pretrial-services division to use an empirically valid risk-assessment instrument to assess defendants' likelihood of returning for trial without threatening public safety. Low-risk defendants were released on their own recognizance unless the court made a finding that such a release was not appropriate. In the first two years after the law passed, the number of defendants released on unsecured bonds increased from 50 percent to 66 percent while the court appearance rate rose from 89 percent to 91 percent. Administrative Office of the Courts, Kentucky Court of Justice, *Pretrial Reform in Kentucky* 16-17 (2013), *available at* https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile

.ashx?DocumentFileKey=95c0fae5-fe2e-72e0-15a2-84ed28155d0a&forceDialog=0. Both the Kentucky and Colorado data sets demonstrate that secured bonds are statistically no better than unsecured bonds (and may actually be worse) at ensuring that defendants return to court as promised. The foundation of the money-bail system is statistically invalid.

### D. STUDIES THAT CLAIM SECURED BONDS ARE MORE EFFECTIVE DO NOT ADEQUATELY CONTROL FOR RISK.

Supporters of secured bail often tout studies—usually funded by the for-profit bail industry—that claim secured bonds are more effective than other types of bonds. *See* Kristin Bechtel, et al., PJI, *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research* 1, 6-15 (2012) (critiquing flawed studies commonly cited by the for-profit bonding industry). None of the industry-sponsored studies most often cited take the basic analytical step of controlling for risk levels in order to make comparisons between similar defendant populations. *See id.*

Consider, for example, a logically flawed 2004 article popular with the secured bond industry. *See* Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & Econ. 93 (2004). Helland and Tabarrok's article has been discredited for misusing data from the Bureau of Justice Statistics by alleging causation in ways that the Bureau itself has rejected. *See* Bechtel, *supra*, at 7–8. Industry advocates and others continue to cite this discredited article for

its conclusions without acknowledging that they cannot be inferred from the underlying data. *See, e.g.*, Helland & Tabarrok, *The Fugitive*, 47 J.L. & ECON. 93 (2004).

In contrast, the Colorado study sorted each defendant using a pretrial risk assessment. This made it possible to accurately compare the failure-to-appear rate of low-risk defendants with that of other low-risk defendants and make a valid comparison between two similarly situated populations. Ignoring the differences between high-risk, moderate-risk, and low-risk defendants makes it impossible to credibly evaluate the effectiveness of secured bonds. High-risk defendants—those who are least likely to return for trial and most likely to threaten public safety if released—are a small percentage of bailable defendants. Generally, statistics on bail outcomes for these defendants "should be interpreted with caution" because high-risk defendants are often only a small and statistically challenging portion of any study. *See, e.g.*, Jones, *supra*, at 10, tbl.3, n.*.

Because the industry studies fail to account for risk, the Bureau of Justice Statistics, the federal agency responsible for collecting the data used by the bail industry in these studies, has specifically warned that this data cannot be used to advocate for one type of pretrial release over another. The Bureau warned in a March 2010 that "the data are insufficient to explain causal associations between the patterns reported, such as the efficacy of one form of pretrial release over another." DOJ, Bureau of Justice Statistics, *Data*

*Advisory*, *supra*. The agency explained that in order to determine the most effective type of pretrial release, "it would be necessary to collect information relevant to the pretrial decision and factors associated with individual misconduct." *Id.* Unlike the typical study supporting the money-bail system, both the Colorado and Kentucky studies collected and analyzed such information, validating their conclusions.

### E. SECURED-MONEY BONDS DO NOT CORRELATE WITH LOWER RATES OF PRETRIAL CRIMINAL CONDUCT.

Secured-money bonds do not meaningfully affect the rate of new criminal activity committed by misdemeanor defendants. Secured-money bonds are not intended to and cannot deter criminal activity during the defendant's pretrial release because bond forfeiture is predicated on failing to appear in court, not on arrests. Defendants do not lose their money bond if they are arrested again. Indeed, the ABA recognizes that financial conditions on release are not appropriate tools for preventing pretrial criminal conduct. ABA Standards for Criminal Justice, *Pretrial Release* § 10-5.3 (3rd ed. 2007). Logic thus suggests that secured bonds are not more effective than other types of release conditions at preventing new pretrial criminal activity, except perhaps as a blunt tool for detaining defendants without regard to actual risk.

The Colorado study confirms this point. It shows no statistical difference between unsecured and secured bonds in preventing criminal

activity during the pretrial period. Jones, *supra*, at 10. Only seven percent of defendants in that study's lowest risk group who received an unsecured bond were rearrested for new pretrial crimes compared with ten percent of defendants with a secured bond—a consistent finding across all risk groups. *Id.*

The Kentucky case study likewise shows no positive correlation between secured bonds and public safety. After HB 463 passed, the public safety rate—a rate measuring how often defendants complete pretrial release without being charged with a new crime—actually improved slightly. *Pretrial Reform in Kentucky*, *supra*, at 17; *see* Kentucky Justice & Public Safety Cabinet, *Sourcebook of Criminal Justice Statistics*, tbl.5.9 (2012) (defining public safety rate), *available at* https://justice.ky.gov/Documents/Sourcebook/Sourcebook2012ChapterFive.pdf. In 2013, as part of the reform started by HB 463, the pretrial services program began using an improved pretrial risk assessment tool. Laura & John Arnold Found., *Results from the First Six Months of the Public Safety Assessment-Court in Kentucky* 3-5 (2014). A study conducted six months after the improved tool was introduced showed the pretrial release rate rose to 70 percent of all defendants and the rate of new criminal activity for defendants on pretrial release declined by 15 percent. *Id.* Thus, secured bonds are neither a necessary means of promoting public safety nor more effective at reducing incidents of new criminal activity.

### F. SECURED-MONEY BONDS EXCESSIVELY AND ARBITRARILY DELAY OR PREVENT RELEASE FOR INDIGENT DEFENDANTS, INCREASING COSTS FOR BOTH THE STATE AND BAILABLE DEFENDANTS.

Beyond simply failing to promote court appearance or protect public safety, secured-money bonds and fixed bail schedules directly undermine the primary purpose of bail by delaying or preventing the release of defendants—particularly the poor. Resource-blind bail schedules inevitably lead to the detention of people who would be low risk for release but are simply too poor to post the amount required by the schedule. Failing to release bailable defendants harms them and increases the financial cost to the State through higher pretrial detention rates. Unsecured bonds produce significantly higher release rates, do less harm to bailable defendants, and impose fewer costs on the State.

## CONCLUSION

A disinterested review of the relevant data shows that pretrial detention based on arbitrary metrics should never be used and that pretrial detention, more generally, should only be used in exceptional circumstances. Specifically, secured-money bail is ineffective and counter-productive at achieving the legitimate goals of maximizing release, maximizing court appearance, and minimizing public risk. The practice hinders release of bailable defendants and shows no statistically significant positive impact on any other valid metric. This Court should limit the use of pretrial detention to those situations in which the arrestee poses a significant risk of pretrial recidivism or failure to appear.

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## CERTIFICATE OF COMPLIANCE

I certify that pursuant to California Rules of Appellate Procedure 8.204(c)(1), this brief has been prepared in a proportionally spaced typeface, 13-point Times New Roman font, and contains 6,383 words, excluding the parts of the brief exempted by Rule 8.204(c)(3).

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