No. S247278

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re KENNETH HUMPHREY

ON HABEAS CORPUS.

APPEAL FROM FIRST APPELLATE DISTRICT, DIV. 2 (A152056)

APPEAL FROM SAN FRANCISCO COUNTY SUPERIOR COURT - MAIN (17007715)

HON. JOSEPH M. QUINN

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF FAITH LEADERS AND ORGANIZATIONS IN SUPPORT OF RESPONDENT

Emily Ludmir Aviad (Bar No. 251995)
eaviad@probonolaw.com
300 S. Grand Avenue, Suite 3400
Los Angeles, CA 90071
Telephone: (213) 687-5000
Facsimile: (213) 687-5600

Michael L. Pomeranz
(*pro hac vice pending)*
michael.pomeranz@probonolaw.com
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (212) 735-2000

Jonathan L. Marcus
(*pro hac vice pending*)
jonathan.marcus@probonolaw.com
Paul M. Kerlin
(*pro hac vice pending*)
paul.kerlin@probonolaw.com
Ryan J. Travers
(*pro hac vice pending*)
ryan.travers@probonolaw.com
1440 New York Avenue, N.W
Washington, D.C. 20005
Telephone: (202) 371-7000
Facsimile: (202) 393-5760

ATTORNEYS FOR *AMICI CURIAE*

AMICI CURIAE LISTED ON INSIDE COVER

AMICI CURIAE

Central Conference of American Rabbis
Friends Committee on Legislation of California
PICO California
Reverend Alan H. Jones
Reverend Gregory J. Boyle, S.J.
Rabbi Sharon Brous
Rabbi Aryeh Cohen
Reverend Zachary Hoover
Rabbi Jocee Hudson
Rabbi Jonathan Klein
Rabbi John Rosove
Reverend Dr. Rick Schlosser

TABLE OF CONTENTS

Page

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

Pursuant to California Rule of Court 8.520(f), the following faith leaders seek leave to appear as *amici curiae* in this matter: Central Conference of American Rabbis; Friends Committee on Legislation of California; PICO California; Reverend Gregory J. Boyle, S.J.; Rabbi Sharon Brous; Rabbi Aryeh Cohen; Reverend Zachary Hoover; Rabbi Jocee Hudson; Rabbi Jonathan Klein; Rabbi John Rosove; and Reverend Dr. Rick Schlosser (collectively, "*amici*").

Amici respectfully request leave to file the attached *amici curiae* brief in support of Respondent Kenneth Humphrey.

In accordance with California Rule of Court 8.250(f)(4), no party or counsel for any party, other than counsel for *amici*, has authored the proposed brief in whole or in part or funded the preparation of the brief. This brief is timely, as it is filed within 30 days after the last reply brief was filed. *See* Cal. R. Ct. 8.520(f)(2).

STATEMENT OF INTEREST

Amici are faith leaders who, notwithstanding their differences in theology, share the conviction that widespread pretrial detention of individuals exacts extraordinary costs on individuals, their families, and our communities. Such detention threatens the ethical standards of American

society and violates the moral obligations on which it is based. We write in the interest of helping the Court to gain a clearer and more complete understanding of the moral issues and human consequences implicated by the case at bar. No overarching characterization can adequately summarize our wide-ranging backgrounds. Information about each of the *amici* is provided below. For individual *amici*, the views expressed in the attached brief are their own and do not necessarily represent the views of the institutions with which they are associated.

Detainees in California jails and other facilities are ministered to, and rely on support from, local faith leaders and their institutions. As a result, faith leaders serving their communities possess unique, firsthand insight into the societal cost of pretrial detention in California. *Amici*'s proposed brief reflects broad experience and expertise in these issues, which *amici* submit will assist the Court in understanding the fundamental concerns that must be considered in any evaluation of pretrial detention. A brief description of the background and work of each of the *amici* follows.

Amicus **Central Conference of American Rabbis** ("CCAR") is the Reform Rabbinic leadership organization. The CCAR enriches and strengthens the Jewish community by fostering excellence in the Reform Rabbis who lead it, in whatever setting they serve, and through the resources and publications provided to the Jewish community. CCAR members lead

the Reform Movement on important spiritual, social, cultural, and human rights issues.

Amicus **Friends Committee on Legislation of California ("FCLCA")** is a nonpartisan, statewide public interest lobby founded by Quakers in 1952. The FCLCA's supporters include people of all backgrounds and beliefs. They advocate for California state laws that are just, compassionate and respectful of the inherent worth of every person. The FCLCA has lobbied for reform of California's criminal justice system; civil rights for the disenfranchised; single payer health care; farmworker protections; and protecting education and the social safety net.

Amicus **PICO California** supports grassroots organizing that enables people of faith to build power to reshape their lives and their communities. PICO California is comprised of 19 nonprofit organizations made up of 480 interfaith congregations, schools, and neighborhood institutions representing 450,000 families. Established in 1994, PICO California organizes in 73 cities, 35 school districts, and in more than 75 percent of the state's Senate and Assembly districts. It is the largest multi-racial faith-based community-organizing network in the state connecting and leveraging the power of the people to effect broad systemic change. Its network of organizations trains leaders and equips them with tools to fight racism and build a more equitable and just society.

Amicus Reverend **Alan H. Jones** is the Board President of the California Council of Churches and Senior Pastor at St. Mark's United Methodist Church in Sacramento. Previously, he served in pastoral capacities in the San Francisco Bay Area, Los Angeles, Sierra Leone and London with cross-cultural and cross-racial appointments. Pastor Alan has worked as a seminary teacher and an urban ministry director. He has an extensive history devoted to building interfaith connections and has provided leadership to numerous social justice activities and coalitions.

Amicus **Reverend Gregory J. Boyle, S.J.**, is the founder of Homeboy Industries in Los Angeles, the largest gang intervention, rehabilitation and re-entry program in the world. In 1986, he was appointed pastor of Dolores Mission Church in the Boyle Heights neighborhood of East Los Angeles. At Dolores Mission, Father Boyle founded Jobs for a Future, a community-organizing project that launched a social-enterprise business called Homeboy Bakery in the wake of the 1992 Los Angeles riots. In the ensuing years, Homeboy Bakery's success created the groundwork for additional social enterprise businesses, leading Jobs for a Future to become an independent nonprofit organization, Homeboy Industries.

Amicus **Rabbi Sharon Brous** is the senior and founding rabbi of IKAR. IKAR was started in 2004 with the goal of reinvigorating Jewish practice and inspiring people of faith to reclaim a moral and prophetic voice.

Today, it is widely credited with sparking a rethinking of religious life in a time of unprecedented disaffection and declining affiliation. Rabbi Brous is in the first cohort of Auburn Seminary's Senior Fellows program, which unites top faith leaders working on the frontlines for justice. Brous also sits on the faculty of the Shalom Hartman Institute-North America, and serves on the International Council of the New Israel Fund and the national steering committee for the Poor People's Campaign.

Amicus **Rabbi Aryeh Cohen, Ph.D.** is the part-time Rabbi-in-Residence for Bend the Arc in Southern California. Rabbi Cohen served as chair of the board of the Progressive Jewish Alliance (Bend the Arc's predecessor organization). He currently serves on the board of Clergy and Laity United for Economic Justice. Rabbi Cohen is Professor of Rabbinic Literature at the Ziegler School for Rabbinic Studies at the American Jewish University. His latest book is *Justice in the City: An Argument from the Sources of Rabbinic Judaism*.

Amicus **Reverend Zachary Hoover** is the Executive Director of LA Voice, a multi-racial, interfaith organization of 55 congregations across LA County. He is an ordained American Baptist Minister. Reverend Hoover serves as one of three peer-elected members of the Guiding Council for PICO National Network and is an appointed member of the LA County Probation Commission. Reverend Hoover has eleven years of organizing experience

with Inland Congregations United for Change in Coachella Valley and LA Voice.

Amicus **Rabbi Jocee Hudson** is an Associate Rabbi at Temple Israel of Hollywood ("TIOH"). Rabbi Hudson was ordained in 2007 at the Hebrew Union College – Jewish Institute of Religion ("HUC-JIR") in Los Angeles. She joined TIOH as Rabbi Educator-Religious School Director in 2009. Rabbi Hudson sits on the board of the National Association of Temple Educators. She is a contributor to the *Women of Reform Judaism's The Torah: A Women's Commentary*.

Amicus **Rabbi Jonathan Klein** has served as the Executive Director at Clergy and Laity United for Economic Justice ("CLUE") since 2009. Ordained at HUC-JIR in 1997, Rabbi Klein has served congregations in Flagstaff, Arizona and Rye, New York. Rabbi Klein organizes and mobilizes faith leaders to suspend their privilege in order to protect and celebrate the marginalized and disenfranchised of Southern California and beyond.

Amicus **Rabbi John Rosove** assumed his duties as Senior Rabbi of Temple Israel of Hollywood in November 1988. A native of Los Angeles, he earned Rabbinic Ordination from HUC-JIR, New York in 1979 and a Doctor of Divinity from HUC-JIR, Los Angeles in 2004. He regards social justice work and ethical practices as core Jewish religious values.

Amicus **The Reverend Dr. Rick Schlosser** is the Executive Director of the California Council of Churches, which seeks to be a prophetic witness to the Christian gospel on behalf of 52 denominations and judicatories throughout California, more than 5,500 congregations, with over 6.5 million church members. Dr. Schlosser has been involved in ecumenical and interfaith ministry for more than 35 years, including serving as president of the California Interfaith Coalition.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant *amici*'s application and accept the enclosed brief for filing and consideration.

DATED: October 9, 2018

By: /s/ Emily L. Aviad
Emily L. Aviad
Jonathan L. Marcus
Paul M. Kerlin
Ryan J. Travers
Michael L. Pomeranz
Attorneys for *AMICI CURIAE*

No. S247278

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re KENNETH HUMPHREY

ON HABEAS CORPUS.

APPEAL FROM FIRST APPELLATE DISTRICT, DIV. 2 (A152056)

APPEAL FROM SAN FRANCISCO COUNTY SUPERIOR COURT - MAIN (17007715)

HON. JOSEPH M. QUINN

AMICI CURIAE BRIEF OF FAITH LEADERS AND ORGANIZATIONS IN SUPPORT OF RESPONDENT

Emily Ludmir Aviad (Bar No. 251995)
eaviad@probonolaw.com
300 S. Grand Avenue, Suite 3400
Los Angeles, CA 90071
Telephone: (213) 687-5000
Facsimile: (213) 687-5600

Michael L. Pomeranz
(*pro hac vice pending)*
michael.pomeranz@probonolaw.com
Four Times Square
New York, New York 10036
Telephone: (212) 735-3000
Facsimile: (212) 735-2000

Jonathan L. Marcus
(*pro hac vice pending*)
jonathan.marcus@probonolaw.com
Paul M. Kerlin
(*pro hac vice pending*)
paul.kerlin@probonolaw.com
Ryan J. Travers
(*pro hac vice pending*)
ryan.travers@probonolaw.com
1440 New York Avenue, N.W
Washington, D.C. 20005
Telephone: (202) 371-7000
Facsimile: (202) 393-5760

ATTORNEYS FOR *AMICI CURIAE*

AMICI CURIAE LISTED ON INSIDE COVER

AMICI CURIAE

Central Conference of American Rabbis
Friends Committee on Legislation of California
PICO California
Reverend Alan H. Jones
Reverend Gregory J. Boyle, S.J.
Rabbi Sharon Brous
Rabbi Aryeh Cohen
Reverend Zachary Hoover
Rabbi Jocee Hudson
Rabbi Jonathan Klein
Rabbi John Rosove
Reverend Dr. Rick Schlosser

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

County of Ventura, *Adopted Budget Fiscal Year 2017-18* (2017), https://vcportal.ventura.org/auditor/docs/adopted-budgets/fy2017-2018/1.%20%20Full%20Reports/[1]%20Adopted%20Budget%202018,%20excluding%20Appendix%20C.pdf..... 24

David Feige & Robin Steinberg, *Replacing One Bad Bail System With Another*, N.Y. Times (Sept. 11, 2018), https://www.nytimes.com/2018/09/11/opinion/california-bail-law.html.11

Erwin Chemerinsky, *This Is Not the Way To Reform California's Bail System*, Sacramento Bee (Aug. 20, 2018, 12:00 PM), https://www.sacbee.com/opinion/op-ed/article217018990.html..... 11

François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 Am. J. Comp. L. 107 (2010) 15

Human Rights Watch, *"Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People* (2017), https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf 24

Human Rights Watch, *The Price of Freedom* (Dec. 2, 2010), https://www.hrw.org/report/2010/12/02/price-freedom/bail-and-pretrial-detention-low-income-nonfelony-defendants-new-york..... 13

John H. Langbein et al., *History of the Common Law* (2009) 3, 4

Justice Policy Institute, *System Overload: The Costs of Under-Resourcing Public Defense* (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf..... 19

Kristin Bechtel et al., Pretrial Justice Institute, *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research* (Nov. 2012) 9

Letter from Human Rights Watch to the Honorable Edmund G. Brown Jr. (Aug. 23, 2018), https://www.hrw.org/news/2018/08/24/human-rights-watch-urges-governor-brown-california-veto-senate-bill-10-california 11

Lisa Foster, Director, Office for Access to Justice, U.S. Department of Justice, Remarks at ABA's 11th Annual Summit on Public Defense (Feb. 6, 2016), https://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-aba-s-11th-annual-summit 18

Mac Taylor, California Legislative Analyst's Office, *2018-19 Budget: Governor's Criminal Justice Proposal* (Feb. 27, 2018), https://lao.ca.gov/reports/2018/3762/2018-19-crim-justice-proposals-022818.pdf (describing Department of Corrections and Rehabilitation budget) 23

Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (2016), http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/Distortion-of-Justice_Stevenson.pdf 20

NAACP Legal Defense & Education Fund, Inc., *Assembly Line Justice: Mississippi's Indigent Defense Crisis* (2003), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf 19, 20

Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017) 17, 21, 22

Press Release, ACLU N. California, *ACLU of California Changes Position to Oppose Bail Reform Legislation* (Aug. 20, 2018), https://www.aclunc.org/news/aclu-california-changes-position-oppose-bail-reform-legislation 11

Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice* (Oct. 2017) 7

Rabbi John Rosove, *Why Judaism Matters* (2017)..... 12, 15

Rabbi Suzanne Singer & Rabbi Zoë Klein Miles, *The Jewish Case for Ending Money Bail*, Jewish Journal (May 30, 2018), http://jewishjournal.com/opinion/234622/jewish-case-ending-money-bail/ 26

Rachel Davidson & Elena Weissman, *Why Ending Cash Bail is a Jewish Issue*, Forward (Jan. 8, 2018), https://forward.com/opinion/391661/why-ending-cash-bail-is-a-jewish-issue..... 2, 11, 14, 15

Ram Subramanian et al., Vera Inst. of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 40 (Feb. 2015)..... 21

Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344 (2014) 22

Sharon Dolovich, *Incarceration American Style*, 3 Harv. L. & Pol'y Rev. 237 (2009) 20

Sonya Tafoya et al., Public Policy Institute of California, *Pretrial Release in California* (May 2017), http://www.ppic.org/content/pubs/report/R_0517STR.pdf 9

Sonya Tafoya, Pub. Policy Inst. of Cal., *Pretrial Detention and Jail Capacity in California* (July 2015), http://www.ppic.org/content/pubs/report/R_715STR.pdf 18

Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics Special Report NCJ 214994, *Pretrial Release of Felony Defendants in State Courts: State Court Processing Statistics, 1990-2004*, (Nov. 2007), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf 17

UCLA School of Law Criminal Justice Reform Clinic, *The Devil in the Details: Bail Bond Contracts in California* (May 2017), https://static.prisonpolicy.org/scans/UCLA_Devil%20_in_the_Details.pdf 9, 17

INTRODUCTION

As imposed throughout the State of California, and further contemplated in these proceedings, widespread pretrial detention causes significant moral, human, and social harms to individuals, their families, and communities throughout the state. That this invasion of personal liberty can disadvantage both society and "the accused who cannot obtain his release" is not in dispute. *Barker v. Wingo*, 407 U.S. 514, 532 (1972). The harm that can be caused is manifold, and for detainees, "[i]t often means loss of a job; it disrupts family life; and it enforces idleness." *Id.* Put plainly, exposure to "the overcrowd[ed] and generally deplorable state" of local jails "has a destructive effect on human character." *Id.* at 520 (citation omitted). The Supreme Court of the United States made these observations nearly 50 years ago, and they are no less true today. *See, e.g.*, *Dews v. Superior Court*, 233 Cal. App. 4th 660, 664 (2014) (describing *Barker* as "seminal" and reiterating the *Barker* Court's observation that "lengthy pretrial incarceration contributes to overcrowding in local jails, is damaging to the 'human character,' and imposes costs in the form of maintenance expenses for inmates and lost wages" (citation omitted)).

Confronted with the threat of pretrial detention, those charged with crimes under the presumption of innocence often face "an impossible decision: maintain their innocence and await trial incarcerated indefinitely, or take a

plea deal and go home to their families and communities saddled with a criminal record." Rachel Davidson & Elena Weissman, *Why Ending Cash Bail is a Jewish Issue*, The Forward (Jan. 8, 2018), https://forward.com/opinion/391661/why-ending-cash-bail-is-a-jewish-issue/. "Imposing th[e] consequences [of imprisonment] on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent." *Barker*, 407 U.S. at 533. Moreover, widespread pretrial detention is in tension with historical traditions and fundamental constitutional principles. The practice leaves scars extending far past a detainee's time in jail and well beyond individual detainees—risking current and future employment, degrading the accuracy and reliability of guilty pleas, and incurring the financial cost of detaining defendants ultimately acquitted or never tried. These costs—moral, human, and societal—are unacceptable, and make clear that pretrial detention is, and should be, only an exception to the norm of liberty. *See United States v. Salerno*, 481 U.S. 739, 755 (1987).

As representatives of a cross-section of religions and communities, *amici* believe faith leaders provide an essential perspective on these critical issues. Views grounded in the belief that the moral imperatives that bind us all—that discrimination against the disadvantaged in our society induces spiritual decay, and that the unique suffering experienced in jail harms not

only the jailed and jailor, but their families and communities as well—must guide the judicial evaluation of any pretrial detention system for California.

ARGUMENT

I. WIDESPREAD PRE-TRIAL DETENTION CONTRAVENES HISTORICAL TRADITIONS, FUNDAMENTAL CONSTITUTIONAL PRINCIPLES AND JURISPRUDENCE

The Founders established systems of criminal procedures on the presumption of innocence and, what logically followed, the right to personal freedom pending trial. Their collective emphasis on pretrial liberty was a natural reaction to 16th and 17th century English practices in which, despite the 13th century assurance of Magna Carta that "no free man" would be "detained in prison . . . except . . . by the law of the land," "it was possible for an accused who had been committed to pretrial detention just after the summer assizes to spend as much as eight months in jail awaiting the next sitting of the court." John H. Langbein et al., *History of the Common Law* 595 (2009). The consequences of widespread pretrial detention were predictably tragic. For example, "during the period from 1558 to 1625 at least 1,291 prisoners died in pretrial detention in the jails of the Home Circuit (the five counties surrounding London)." *Id.* (citing J. S. Cockburn, "Introduction," *in Calendar of Assize Records: Home Circuit Indictments Elizabeth I and James I* 36, 38-39 (H.M.S.O. 1985)). Defendants were, due to their pretrial confinement, "dirty, underfed, and surely often ill." Langbein et

al., *supra*, at 605 (quoting J. M. Beattie, *Crime and the Courts in England*, *1660-1800* 350-51 (1986)). The attempts of detained defendants "to conduct a criminal defense" were "pathetic[ally] inep[t]." Langbein et al., *supra*, at 605. In fact, they "did not usually cross-examine vigorously or challenge the evidence presented against them." *Id.* (quoting Beattie, *Crime and the Courts in England*, *1660-1800* at 350-51).

Over centuries, English and then American societies committed themselves to pretrial liberty but struggled to honor that commitment. The cause to "avoid pretrial imprisonment" advanced slowly—one scholar characterized the struggle to implement the Magna Carta's promise that "'no freeman shall be arrested, or detained in prison . . . unless . . . by the law of the land'" as long but steady progress. Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 965-66, 971 (1965) (ellipses in original) (citation omitted).

The Supreme Court of the United States has explained that "[t]he statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment." *Hudson v. Parker*, 156 U.S. 277, 285 (1895). The Court further observed that the principle that the accused "should not be detained in custody prior to trial" "is for the interest of the public as well as the accused."

United States v. Barber, 140 U.S. 164, 167 (1891). That principle flows from the fundamental American presumption that the accused "are innocent of the crime charged." *Id.*

At the federal level, the first United States Congress promoted pretrial liberty "in two separate legislative packages: the excessive bail clause as one of the proposed amendments to the Constitution, and section 33 of the Judiciary Act extending an absolute right to bail in all noncapital federal criminal cases." Foote, *supra*, at 971. The first Congress proposed that the states adopt the Eighth Amendment to the United States Constitution, which prohibits excessive bail. *See* U.S. Const. amend. VIII; *see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 294 (1989) (O'Connor, J., concurring in part and dissenting in part) (explaining that the first Congress based the Eighth Amendment "on Article I, § 9, of the Virginia Declaration of Rights of 1776, which had in turn adopted verbatim the language of § 10 of the English Bill of Rights"). The Judiciary Act of 1789 provided an absolute right to bail in noncapital cases and bail at the discretion of the judge in capital cases. *See* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91.

In addition to drafting the excessive bail clause and section 33 of the Judiciary Act, the first Congress also proposed the Fifth Amendment, which states that "no person shall . . . be deprived of . . . liberty . . . without due

process of law . . . ." U.S. Const. amend. V. Pretrial liberty is rooted in that due process protection. Just as the Fifth Amendment protects liberty, so too does the Fourteenth Amendment, which includes a Due Process Clause, prohibiting "any State" from depriving a person of "liberty . . . without due process of law . . . ." U.S. Const. amend. XIV § 1. Both this Court and the Supreme Court have recognized that the Due Process Clause protects against the deprivation of liberty, including by pretrial detention. *People v. Olivas*, 17 Cal. 3d 236 (1976) ("[I]f we look to the specific guarantees of due process secured by the Fourteenth Amendment, we find they exist largely because of the great concern our system of justice exhibits for procedures which can result in deprivations of personal liberty."); *see also DeShaney v. Winnebago City Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) ("In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause . . . ."); *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) (the "liberty interest . . . [has] always . . . been thought to encompass freedom from bodily restraint"). Thus, under our constitutional system, it is axiomatic that pretrial liberty should be the norm, and detention prior to adjudication should occur only in narrowly confined circumstances.

Consistent with historical teachings and these fundamental constitutional principles, most states have accordingly protected a right to pretrial release. California is among them.

Indeed, generations of Californians have held fast to American traditions of limiting pretrial detention. "Pretrial release has been an element of California's legal framework from the earliest days of statehood." Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice* at 19 (October 2017) (footnotes omitted).

The California Constitutional Convention of 1849 accepted language from the Eighth Amendment to the United States Constitution prohibiting excessive bail. *See In re Underwood*, 9 Cal. 3d 345, 349-50 & n.6 (1973) (In Bank). To that prohibition, the Convention added an additional limit on pretrial detention, guaranteeing the right to bail except in certain capital cases. *Id.* This additional guarantee was added lest "[a]n innocent . . . be kept in prison and refused bail . . . ." *In re Underwood*, 9 Cal. 3d at 350 n.6. Under this initial constitutional provision, the California Constitution prohibited "the denial of bail solely because of petitioner's dangerous propensities." *In re Underwood*, 9 Cal. 3d at 351.

As early as 1862, this Court opined that, except in capital cases, "the admission to bail is a right which the accused can claim, and which no Judge

or Court can properly refuse," *People v. Tinder*, 19 Cal. 539, 542 (1862). In 1879, the Court observed that the only appropriate purpose of bail (and, by extension, of pretrial detention) is "to secure the personal appearance of the accused to answer the charge against him." *Ex parte Duncan*, 54 Cal. 75, 79 (1879). The law does not intend "to punish an accused person by imprisoning him in advance of his trial. Such inhumanity or injustice as inflicting punishment upon him before his guilt has been ascertained by legal means, is not to be imputed to the system of law under which we live . . . ." *Id.* (observing that "the extreme jealousy" with which American law "guards the personal liberty of the citizen from unwarrantable or unnecessary restraint" is embodied in the California Constitution).

Successive versions of the California Constitution as well as popular initiatives have reinforced the commitment to discouraging widespread pretrial detention for persons charged with a crime. As noted above, the California Constitution provided since statehood that a defendant "*shall be released* on bail by sufficient sureties." Cal. Const. art. I, § 12 (amended 1982 and 2008) (emphasis added). "This section was reenacted into the 1879 Constitution without debate." *In re Underwood*, 9 Cal. 3d at 350 n.6. The Constitution also authorizes a criminal court, in its "discretion," to "release" a defendant "on his or her own recognizance." Cal. Const. art. I, § 12. "The Constitution initially contained a single exception [to pretrial release], for

'capital offenses when the proof is evident or the presumption great.'" *In re White*, 21 Cal. App. 5th 18, 24 (2018) (citation omitted). "The electorate later adopted an initiative constitutional amendment that added two additional exceptions." *Id.*

Despite both the United States' and California's historical commitment to pretrial release, recent practice has bent away from liberty and toward aggressive pretrial detention. California authorities now routinely detain those merely accused, breaking from generations of common-law traditions. California relies heavily on pretrial detention, jailing 59 percent of individuals accused of crimes—exceeding by great margin the rate of 32 percent nationwide. UCLA Sch. of Law Criminal Justice Reform Clinic, *The Devil in the Details: Bail Bond Contracts in California* 2 (May 2017) (hereinafter, "*Devil in the Details*"), https://static.prisonpolicy.org/scans/UCLA_Devil%20_in_the_Details.pdf; *see* Sonya Tafoya et al., Pub. Policy Inst. of Cal., *Pretrial Release in California* 5 (May 2017), http://www.ppic.org/content/pubs/report/R_0517STR.pdf ("Pretrial detention . . . is common in California."). Defendants awaiting arraignment, trial, or sentencing account for two-thirds of California's jail population and nearly a quarter of California's population incarcerated in jails or prisons. *Id.* Worse still, the number of pretrial inmates in jail populations is spiraling "at a much faster pace than sentenced inmates, despite falling crime rates." Kristin Bechtel et

al., Pretrial Justice Inst., *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research* 1 (Nov. 2012).

In this case, the Court should interpret the Constitution to vindicate Californians' multi-century commitment to pretrial liberty. On August 28, 2018, Governor Jerry Brown signed into law the California Bail Act, 2018 Cal. Legis. Serv. Ch. 244 (S.B. No. 10) (West).[1] Although that Act eliminates cash bail, it would allow a pretrial detention system prone to the same harms caused by California's money bail system—subject to Constitutional constraints— pretrial detention would be available against defendants in a broad array of circumstances, including against defendants accused of specific misdemeanors,[2] defendants who have failed to appear for a court hearing within the last five years,[3] and defendants whose appearance "in Court" the court determines only pretrial detention will guarantee.[4]

For those, like *amici,* steeped in the pervasive damage that widespread pretrial detention imposes on individuals and the public, the new landscape

---

1 Alexei Koseff, *Jerry Brown Signs Bill Eliminating Money Bail in California*, Sacramento Bee, Aug. 28, 2018, https://www.sacbee.com/news/politics-government/capitol-alert/article217461380.html.

2 2018 Cal. Legis. Serv. Ch. 244 (S.B. No. 10), § 4 (West) (to be codified at Cal. Penal Code § 1320.10(e)(3)).

3 *Id.* (to be codified at Cal. Penal Code § 1320.10(e)(6)).

4 *Id.* (to be codified at Cal. Penal Code § 1320.20(e)(1)).

remains highly troubling.[5] A widespread pretrial detention apparatus is one still subject to routine infringement of individuals' rights, with this invasion of personal liberty commonly falling on the most disadvantaged among us.[6]

To accept widespread detention of presumed innocent men and women as routine is to reject continued progress toward a criminal justice system reflecting our collective commitment to liberty. Such a result contravenes the historical and constitutional commitment at both the federal and state levels to pretrial release. As other commentators have observed, in contending with a system that "was never intended as punishment," "[w]e have the opportunity to work towards systemic change [and] to truly practice the *mitzvah* [religious duty] of *Pidyon Shvuyim*—to free those unjustly incarcerated." Davidson & Weissman, *supra*. And for *amici*, it is a fundamental precept as faith leaders to advocate for the freedom of the

---

[5] *See* Erwin Chemerinsky, *This Is Not the Way To Reform California's Bail System*, Sacramento Bee (Aug. 20, 2018, 12:00 PM), https://www.sacbee.com/opinion/op-ed/article217018990.html; David Feige & Robin Steinberg, *Replacing One Bad Bail System With Another*, N.Y. Times (Sept. 11, 2018), https://www.nytimes.com/2018/09/11/opinion/california-bail-law.html.

[6] *See, e.g.*, Press Release, ACLU N. California, ACLU of California Changes Position to Oppose Bail Reform Legislation (Aug. 20, 2018), https://www.aclunc.org/news/aclu-california-changes-position-oppose-bail-reform-legislation; Letter from Human Rights Watch to the Hon. Edmund G. Brown Jr. (Aug. 23, 2018), https://www.hrw.org/news/2018/08/24/human-rights-watch-urges-governor-brown-california-veto-senate-bill-10-california.

innocent, and highlight the moral, human, and social costs inherent in widespread pretrial detention.

II. PRETRIAL DETENTION IMPOSES A GREAT MORAL COST

Widespread pretrial detention cannot fairly be evaluated without taking into account the moral consequences. *Amici* instead believe it critical to any consideration of this issue to include the moral context, a "sense of empathy, of humanity as a unified whole," Rabbi John Rosove, *Why Judaism Matters* 12 (2017), because *amici* "understand[ ] the world as interconnected, with a common breath, a common spark, linking the vast diversity of life." *id.* at 11. Biblical tradition speaks of man as created in the image of God. And the Bible says to love "your fellow as yourself," *Leviticus* 19:18, and "your God with all your heart and with all your soul and with all your might," *Deuteronomy* 6:5. *See* Rosove, *supra*, at 11. Reverence and honor for God and for other human beings thus are "two sides of the same coin." *Id.* Arising out of this moral understanding is an insistence on the fundamental dignity and rights of all people; a tenet inherent in the commitment to liberty integral to the criminal justice system.

From this commitment to an individual's fundamental dignity, the American legal tradition has limited pretrial detention to narrow circumstances. A defendant's right to pretrial liberty is "fundamental." *See, e.g.*, *Salerno*, 481 U.S. at 755. And, accordingly, pretrial liberty is the norm.

Id.; *see also Bandy v. United States*, 81 S. Ct. 197, 197 (1960) (Douglas, J.) ("The fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt.").[7] Even with "a risk that the accused will take flight," that outcome is allowed as an appropriate "calculated risk which the law takes as the price of our system of justice." *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., joined by Frankfurter, J., specially concurring). This jurisprudence has emerged in no small part from religious antecedents embracing a presumption of innocence and pretrial liberty. The Supreme Court of the United States has opined that "the Roman law was pervaded with the results of" the presumption, *Coffin v. United States*, 156 U.S. 432, 454 (1895), a legal tradition some scholars trace to Deuteronomy. *See id.*

Specific religious traditions speak to the moral costs of oppressive practices like pretrial detention. Although scripture guides that it is unjust to destroy the just in pursuit of punishing the wicked, *see Genesis* 18:22-33, many pretrial detainees, although presumed innocent, are detained in jail for as long as those found guilty are imprisoned.[8] And despite instruction that

---

[7] *See* Resp. Br. 19-23.

[8] *See* Human Rights Watch, *The Price of Freedom* (Dec. 2, 2010), https://www.hrw.org/report/2010/12/02/price-freedom/bail-and-pretrial-detention-low-income-nonfelony-defendants-new-york (examining pretrial

(cont'd)

"You shall not curse the deaf or put a stumbling block before the blind," *Leviticus* 19:14 (English Standard Version), "if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. 514, 533 (1972). Widespread pretrial detention thus imposes an immoral stumbling block, too often on those least able to overcome that obstacle or the costs it engenders, including wrongful convictions.

And this harmful practice recurs, even as the "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin*, 156 U.S. at 453 (distinguishing the presumption from the subject of reasonable doubt). Unsurprisingly, the sins attendant to pretrial detention are anathema to the religious values shared by *amici*. Widespread pretrial detention particularly threatens "one of the central tenets of our democracy—the presumption of innocence—as well as one of the central tenets of Judaism, the imperative of saving human life." Davidson & Weissman, *supra*. The Talmud understands *Pidyon Shvuyim*, freeing of captives, as a commandment "to free people unjustly held in custody by the

---

(cont'd from previous page)

detention and sentencing statistics for low income, nonfelony defendants in New York City).

authorities." *Id.* (citing *Bava Batra* 8b). "[T]he great Middle Ages jurist and philosopher Maimonides argued it takes precedence over other forms of aid to the poor." *Id.* (citing Maimonides, *Matanot Aniyim* 8:10-11). And 16th century Jewish legal code, the Shulchan Aruch, provides that "'Every moment that one delays in freeing captives, in cases where it is possible to expedite their freedom, is considered to be tantamount to murder.'" *Id.* (citing *Shulchan Aruch* (YD 252:3)).

The presumption of innocence, properly understood, is not only a rule of proof but, what follows logically from that rule, a "shield against premature punishment." François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 Am. J. Comp. L. 107, 107, 110 (2010). The presumption serves as "a safeguard of due process of law." *In re Winship*, 397 U.S. 358, 362 (1970). Widespread pretrial detention violates due process, sacrificing the foundational moral and ethical duties owed to each other. And, in doing so, it inflames "a virus that attacks the moral sense," resulting in a dehumanizing toll that "destroys empathy and sympathy. It shuts down the emotions that prevent us from doing harm." Rosove, *supra*, at 12 (quoting Rabbi Jonathan Sacks, *Not in God's Name:*

Confronting Religious Violence at 54 (2015)).[9] The resulting moral cost is great, and a challenge to the historical and moral commitments underpinning California's criminal justice system. As Moses declared: "And I charged your judges at that time, saying: 'Hear the causes between your brethren, and judge righteously between a man and his brother, and the stranger that is with him. . . . [Y]ou shall hear the small and the great alike; you shall not be afraid of the face of any person.'" Deuteronomy 1:16-17.

III. PRETRIAL DETENTION EXACTS SIGNIFICANT HUMAN COSTS

The sacrifice of an individual's fundamental right to pretrial liberty, *see*, *e.g.*, *Salerno*, 481 U.S. at 755, offends not simply moral standards—it exacts a concrete human cost. Widespread pretrial detention tears at the fabric of individuals' lives, subverting the right to liberty and the protection that right is designed to provide for detainees, their families, and communities.

Pretrial detention isolates detainees from family, interrupts their employment or education, and has a coarsening effect that can have

---

[9] The concept of "safety" in connection with pretrial detention should be construed consistent with moral considerations accompanying the jailing of those presumed innocent prior to any fact-finder's determination of guilt. Predicting human behavior is, of course, "fraught with danger of excesses and injustice," *Hairston v. United States*, 343 F.2d 313, 316-17 (D.C. Cir. 1965) (citation omitted), particularly in those communities in which individuals prompt concerns about "safety" because they are marginalized, accused, or feared by others in and outside their communities. For "safety" to truly be encouraged, authorities must respect constitutionally protected rights of individuals—even those accused of a crime—to liberty pending trial and conviction.

deleterious consequences for detainees, including increased rates of recidivism, following their release.[10] This isolation is especially troubling given that, ultimately, approximately 20 percent of pretrial detainees in the United States will have their case dismissed or will be acquitted.[11] Many more might be innocent. Yet the perverse incentives and dire conditions of pretrial detention often induce detainees to plead guilty regardless of their guilt or innocence.

A. Detainees Are Cut Off From Family, Work, and Education

Pretrial detention punishes the detained and their families, isolating loved ones from each other for charges that may ultimately be dropped or of which the individual will be acquitted. Even a defendant accused merely of a misdemeanor can face pretrial detention that extends for days, weeks, or even months. In that time, children will need to be cared for, jobs will be left unattended, schoolwork will be missed.

California jails are overcrowded, a problem that is only exacerbated by pretrial detention, with approximately 71 percent of the county jail

---

[10] *See, e.g.*, Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 713 (2017); *Devil in the Details*, *supra*, at 2.

[11] *See* Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics Special Report NCJ 214994, *Pretrial Release of Felony Defendants in State Courts: State Court Processing Statistics, 1990-2004*, at 7 (Nov. 2007), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf.

population awaiting trial.[12] The overcrowded jails can feature violence, lack of medical treatment, and other conditions so brutal they can kill, with more than 1,100 individuals dying while detained pretrial in California from 2005-2014.[13] Of those 1,110 deaths, a quarter were due to suicide and nearly 20 percent came from accidents.[14] These conditions, and the harms they cause, beset pretrial detainees regardless of their guilt or innocence.

The harm to detainees also extends outside of prison, reflected in a cascade of problems including separation from family, the immediate loss of employment, the loss of social services benefits, the disruption of education, and the potential loss of child custody.[15] The effect on employment is critical, with 37 percent of those held in jail making less than $10,000 annually.[16] For many detainees, the loss of even a few days of income can be the

---

[12] Allen Hopper et al., ACLU of Cal., *Public Safety Realignment: California at a Crossroads* 24 (Mar. 2012), https://www.aclusocal.org/sites/default/files/field_documents/99239204-Public-Safety-and-Realignment.pdf; *see also* Sonya Tafoya, Pub. Policy Inst. of Cal., *Pretrial Detention and Jail Capacity in California* (July 2015), http://www.ppic.org/content/pubs/report/R_715STR.pdf.

[13] *See* Cal. Dep't of Justice, Death in Custody, OpenJustice, https://openjustice.doj.ca.gov/death-in-custody/custody-stages (last visited Oct. 2, 2018).

[14] *Id.*

[15] *See* Lisa Foster, Director, Office for Access to Justice, U.S. Dept. of Justice, Remarks at ABA's 11th Annual Summit on Public Defense (Feb. 6, 2016), https://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-aba-s-11th-annual-summit.

[16] *See* Bernadette Rabuy & Daniel Kopf, Prison Policy Initiative, *Detaining the Poor* 3 (May 2016), https://www.prisonpolicy.org/reports/DetainingThePoor.pdf.

difference between paying rent and eviction, and will affect family members who rely on the detainee's income for support.[17] Detainees' income may be the primary or sole source of income for their family, and the loss of that income for days or weeks, coupled with the accrual of costs—including those collateral and falling on immediate family members attempting to navigate the criminal justice system—can cause families further struggles making ends meet.[18] This government-mandated absence also can mean detainees' evictions from their homes.[19] For instance, an NAACP survey of a group of 34 women detained in Mississippi found nearly half lost their homes and others lost their cars as a result of pretrial detention.[20] Detainees' children may be forced to be supported by other family members or be transferred to foster care—placing strains on the children, the nondetained family members, and social service budgets—all while the detainees wait in prison for minor

---

17 Justice Policy Inst., *System Overload: The Costs of Under-Resourcing Public Defense* 19 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf.

18 *Id.* at 18-19.

19 NAACP Legal Defense & Educ. Fund, Inc., *Assembly Line Justice: Mississippi's Indigent Defense Crisis* 20 (2003) (hereinafter "*Assembly Line Justice*"), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf.

20 *Id.*

crimes, of which they may not be guilty.[21] Likewise, in these circumstances elderly family members also may be left without caretakers.[22]

Pretrial detention places the already vulnerable in even more dire positions—a vicious, reinforcing cycle. The widespread imposition of this punishment damages detainees personally and professionally from the moment they enter jail, exposing them to potential physical and mental harm in detention, causing economic harm outside of jail, and making the most vulnerable even more desperate.

B. Pretrial Detention Induces Plea Bargains and Adversely Affects Case Outcomes

Pretrial detention also skews pretrial detainees' decision-making and adversely affects the outcomes of their cases. Most problematic, it can induce detainees to plead guilty, not because they are, in fact, guilty but because doing so may expedite their release from jail.[23] Despite being "innocent until proven guilty," detainees who do not enter guilty pleas can face prolonged detention if they instead contest the charges against them. As noted above,

---

[21] *See id.*; *see also* Sharon Dolovich, *Incarceration American Style*, 3 Harv. L. & Pol'y Rev. 237, 247 (2009).

[22] *Assembly Line Justice*, *supra* n.19, at 20 (finding that elderly family members of the surveyed detainees suffered financially).

[23] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 5, 7 (2016), http://home.ubalt.edu/id86mp66/PTJC/SymposiumReadings/Distortion-of-Justice_Stevenson.pdf; *see also* Hopper et al., *supra* note 22.

supra Part II.A, every day in detention taxes detainees' physical health, their social and psychological well being, and their families' finances. For detainees charged with lower-level crimes, whose pretrial detention actually can exceed a potential, actual sentence, pleading guilty to charges can open the door to relieving those hardships.[24] As a result, studies have shown that pretrial detainees charged with misdemeanors are 25 percent more likely to plead guilty than those released from detention.[25]

Furthermore, those detainees who choose not to plead guilty face worse outcomes than defendants who are released. It is axiomatic that the prosecution bears the burden of proving a defendant's guilt, but the reality for pretrial detainees is that they are required to prove their innocence to secure their release. The task of proving one's innocence is made all the more difficult by the detention itself.[26] Detention can hamper a defendant's "ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker*, 407 U.S. at 533. Confined to jail, pretrial detainees are forced to prepare their defense while in prison, away from family, friends, and legal counsel. Predictably, misdemeanor detainees are 43 percent more

---

[24] *See* Ram Subramanian et al., Vera Inst. of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 40 (Feb. 2015).

[25] *See* Heaton et al., *supra* note 10, at 747.

[26] *Cf. Stack*, 342 U.S. at 4 ("[The] traditional right to freedom before conviction permits the unhampered preparation of a defense . . . .").

likely to be sentenced to jail, and on average they receive jail sentences that are twice as long as defendants who were not subject to pretrial detention.[27]

C. Pretrial Detention Has Long-Term Consequences

The damage caused by pretrial detention extends forward, limiting opportunities for gainful employment for detainees in the months and years after their detention, and contributing to higher rates of recidivism. Pretrial detainees often have trouble finding employment for years after release.[28] For those fortunate enough to ultimately find employment, they will work fewer hours and make lower wages for as many as fifteen years after their release.[29]

Moreover, compared to alternatives like electronic monitoring, detention leads to a greater likelihood of recidivism.[30] This increased recidivism is found even among low-risk defendants detained for two to three days, who are 39 percent more likely to be arrested for new criminal activity during the remaining pretrial period and 17 percent more likely in the two-

---

27 *See* Heaton et al., *supra* note 10, at 717.

28 *See* Amanda Petteruti & Natassia Walsh, Justice Policy Inst., *Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies* 17 (Apr. 2008), http://www.justicepolicy.org/images/upload/08-04_rep_jailingcommunities_ac.pdf.

29 *See id.*

30 *See* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344, 1352-53 (2014).

year period following case conclusion.[31] Thus, even a brief detention can harm individuals in the months and years that follow.

Pretrial detention harms detainees from the moment they are jailed and lasts for years after they are released, even if they found not guilty. The practice isolates detainees from loved ones, imposing social burdens on them and their families, increases the likelihood of guilty pleas regardless of the detainees' actual guilt, and produces long-term consequences in the years following release, adversely impacting future employment opportunities.

IV. PRETRIAL DETENTION INFLICTS A SOCIAL COST ON TAXPAYERS AND COMMUNITIES

In addition to the moral costs imposed on society, and the human costs to detainees and their families, pretrial detention also results in significant social costs for taxpayers and the community. The current system, still permitting widespread pretrial incarceration, wastes taxpayer resources. In 2017, California spent nearly $12 billion imprisoning individuals, many of whom ultimately will never be convicted or sentenced for a crime.[32] Each day of custody costs an average of $114 per person, and even more in some

---

[31] *See* Christopher T. Lowenkamp et al., *The Hidden Costs of Pretrial Detention* 4, 11 (Nov. 2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report _hidden-costs_FNL.pdf.

[32] Mac Taylor, Cal. Legislative Analyst's Office, *The 2018-19 Budget: Governor's Criminal Justice Proposals* 4 fig. 2 (Feb. 27, 2018), https://lao.ca.gov/reports/2018/3762/2018-19-crim-justice-proposals-022818.pdf (describing Department of Corrections and Rehabilitation budget).

localities.[33] In six California counties examined by Human Rights Watch, California residents saw $37.5 million of their taxpayer dollars spent over the course of two years jailing people who were either never charged or had their charges dropped or dismissed.[34] In fact, resources have increasingly been lost at the county level following the passage of Assembly Bill 109, the Public Safety Realignment Act, which transferred responsibility of housing low-level offenders from the state to counties.[35] For example, San Bernardino County had a budget of $206 million for its Sheriff's Department's detention service in 2016, nearly four percent of the total budget of nearly $5.5 billion[36] while Ventura County had a budget of $110 million in 2017, approximately five percent of the total of $2.24 billion.[37]

---

[33] Californians for Safety & Justice & Crime & Justice Inst., *Pretrial Progress: A Survey of Pretrial Practices and Services in California* 5 (Aug. 2015), https://safeandjust.org/wp-content/uploads/PretrialSurveyBrief_8.26.15v2.pdf.

[34] Human Rights Watch, *"Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People* 3 (2017), https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf.

[35] Public Safety Realignment Act, 2011 Cal. Legis. Serv. Ch. 15 (A.B. 109) (West).

[36] San Bernardino County, *Adopted Budget 2016-2017*, at 1-2, 413 (2016) http://cms.sbcounty.gov/Portals/59/Content/2016-2017/2016-17-Adopted-Budget.pdf.

[37] County of Ventura, *Adopted Budget Fiscal Year 2017-18*, at 5, 134 (2017), https://vcportal.ventura.org/auditor/docs/adopted-budgets/fy2017-2018/1.%20%20Full%20Reports/[1]%20Adopted%20Budget%202018,%20excluding%20Appendix%20C.pdf.

It does not have to be this way. Santa Clara County implemented a "validated risk assessment tool" that saved the county between $31.3 and $40.2 million over six months by keeping 1,400 individuals out of jail prior to their guilt being adjudicated.[38] The pretrial release program costs the county between $15 and $25 per day, a drop of up to 93 percent compared to the $204 per day it costs to jail those same individuals.[39] This is money that can be spent on schools, vulnerable communities, or rehabilitation services to prevent recidivism and crime. Furthermore, the pretrial release did not lead to a low court appearance rate—often the justification for pretrial detention—as 95 percent of criminal defendants who were released on their own recognizance or on pretrial supervision between 2013 and 2016 made all court appearances.[40]

No matter the measure, it is clear that California's continued use of pretrial detention for extended periods without a sufficient justification is a highly inefficient use of taxpayer money. Moreover, the taxpayer expenditure does not end with the first incarceration, because those pretrial detainees are

---

[38] Bd. of Supervisors Mgmt. Audit Div., County of Santa Clara, *Management Audit of the Office of Pretrial Services* 10-11 (Feb. 2012), www.sccgov.org/sites/bos/Management%20Audit/Documents/PTSFinalReport.pdf.

[39] Bail & Release Work Grp., County of Santa Clara, *Final Consensus Report on Optimal Pretrial Justice* 34-35 (2016), https://www.sccgov.org/sites/ceo/Documents/final-consensus-report-on-optimal-pretrial-justice.pdf.

[40] *Id.* at 46.

more likely to commit future crimes than those who are not detained.[41] As a result, beyond harming the individual detainees, the current system demands taxpayer money that could be far better spent supporting the community, particularly those most impoverished.

CONCLUSION

In light of the historical traditions, constitutional principles, and moral guidance supporting the presumption of innocence and favoring liberty, the continued widespread use of pretrial detention—with all its attendant moral, human and social costs—comes at far too great a price. As other faith leaders have noted: "[i]f we truly believe that all people are created b'tzelem Elohim, in God's image, and that all people are thus entitled to respect and dignity, then we must act now . . . ." Rabbi Suzanne Singer & Rabbi Zoë Klein Miles, *The Jewish Case for Ending Money Bail*, Jewish Journal (May 30, 2018), http://jewishjournal.com/opinion/234622/jewish-case-ending-money-bail/. For the reasons set forth above, *amici* respectfully request that the Court do so and hold in favor of the Respondent Kenneth Humphrey.

[41] *See* Lowenkamp et al., *supra* n.31, at 4, 11.

DATED: October 9, 2018

By: /s/ Emily L. Aviad

Emily L. Aviad
Jonathan L. Marcus
Paul M. Kerlin
Ryan J. Travers
Michael L. Pomeranz
Attorneys for *AMICI CURIAE*

CERTIFICATE OF WORD COUNT

I, the undersigned, certify that the application consists of 1,372 words and the brief consists of 5,837 words exclusive of those portions of the brief specified in California Rule of Court 8.204(c)(3), relying on the word count of the Microsoft Word computer program used to prepare the application and brief.

DATED: October 9, 2018

By: /s/ Emily L. Aviad

Emily L. Aviad
Jonathan L. Marcus
Paul M. Kerlin
Ryan J. Travers
Michael L. Pomeranz
Attorneys for *AMICI CURIAE*

PROOF OF SERVICE

In re KENNETH HUMPHREY **Case No: S247278**

I am employed in the County of Los Angeles, State of California, am over the age of 18 and not a party to the within action; my business address is 300 South Grand Avenue, Suite 3400, Los Angeles, California 90071

On **October 9, 2018**, I caused to be served the following document(s) described as:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF FAITH LEADERS AND ORGANIZATIONS IN SUPPORT OF RESPONDENT; AMICI CURIAE BRIEF OF FAITH LEADERS AND ORGANIZATIONS IN SUPPORT OF RESPONDENT; PROOF OF SERVICE

on the interested parties in this action by transmitting the above-mentioned document on the interested parties in this action:

The Honorable Tani Cantil-Sakauye, Chief Justice, and Honorable Associate Justices Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797	**California Supreme Court** (1Copy via Federal Express)
First District Court of Appeal 350 McAllister Street San Francisco CA, 94102	**California Court of Appeal** (1 Copy via Truefiling Electronic Service Notification and Federal Express)
Hon. Brendan Conroy Hon. Joseph M. Quinn Superior Court of California 850 Bryant Street, Room 101 San Francisco, CA 94103	**Trial Court** (1 Copy via Federal Express)

George Gascon Sharon Woo Wade K. Chow Allison G. Macbeth Office San Francisco District Attorney 850 Bryant Street, Room 322 San Francisco, CA 94103	**Attorneys for Petitioner** (1 Copy via Truefiling Electronic Service Notification)
Jeff Adachi San Francisco Public Defender Matt Gonzalez Chief Attorney Christopher F. Gauger Anita Nabha Chesa Boudin Deputy Public Defenders 555 Seventh Street San Francisco, CA 94103 Alec Karakatsanis Katherine C. Hubbard Civil Rights Corps 910 17th Street N.W., Suite 200 Washington, D.C. 20006 Seth P. Waxman Daniel S. Volchok Wilmer Cutler Pickering Hale and Dorr LLP 1875 Pennsylvania Avenue N.W. Washington, D.C. 20006 Thomas G. Sprankling Wilmer Cutler Pickering Hale and Dorr LLP 950 Page Mill Road Palo Alto, CA 94304	**Attorneys for Respondent** (1 Copy via Truefiling Electronic Service Notification)

☒ **(BY ELECTRONIC SERVICE)** I caused the above-entitled document to be served through File and Serve Xpress addressed to all parties appearing on the One Legal electronic service list for the above-entitled case.

☒ **(BY FEDERAL EXPRESS)** I am readily familiar with the firm's practice for the daily collection and processing of correspondence for deliveries with the Federal Express delivery service and the fact that the correspondence would be deposited with Federal Express that same day in the ordinary course of business; on this date, the above-referenced document was placed for deposit at Los Angeles, California and placed for collection and delivery following ordinary business practices.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **October 9, 2018** at Los Angeles, California.

Brigitte. S. Travaglini
Type or Print Name

Signature