Phil Telfeyan (CA Bar No. 258270)
Attorney, Equal Justice Under Law
400 7th Street NW, Suite 602
Washington, D.C. 20004
(202) 505-2058
ptelfeyan@equaljusticeunderlaw.org
Attorney for Plaintiffs Riana Buffin and Crystal Patterson

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

RIANA BUFFIN and CRYSTAL PATTERSON, on behalf of themselves and others similarly situated, Plaintiffs, v. VICKI HENNESSY in her official capacity as the San Francisco Sheriff, *et al.*, Defendants.	15-CV-4959 (YGR) PLAINTIFFS' REPLY TO CBAA'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT Hearing: December 12, 2017, 2:00pm The Honorable Yvonne Gonzalez Rogers

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I. Introduction

Wealth-based discrimination is impermissible in the criminal justice system, and justice outcomes based on wealth-status are not narrowly tailored to any government interest. Nothing in Defendant's wealth-based release system ensures that those who languish in jail longer are more dangerous or a greater flight risk than others — only that they are poorer. While Defendant's money bail system is transparently not narrowly tailored to court appearance or public safety, this legal conclusion is bolstered by the many jurisdictions, scholars, and policymakers that illustrate that non-monetary release can be as effective at meeting the government's goals while being less restrictive. No genuine disputes exist as to whether Defendant's system deprives liberty based on wealth-status; because viable and less restrictive alternatives exist to achieve Defendant's interests, summary judgment is appropriate.

II. Evidentiary Response[1]

In the interests of justice, this Court should have all relevant information when deciding an issue that affects the constitutional rights of thousands of presumed-innocent arrestees in San Francisco. Accordingly, both parties have introduced articles and empirical studies, and Plaintiffs seek to equip this Court with a complete and accurate record. All of Plaintiffs' exhibits are properly considered by this Court because:

- The Bail Industry does not substantively dispute the authenticity of the scholarly articles offered by Plaintiffs, but rather wants them procedurally authenticated. This dispute has been cured, and the Bail Industry has suffered no prejudice. *See* Ex. 1.

- Nearly all empirical articles offered by Plaintiffs are excepted from the hearsay rule because they have been established as reliable by expert witnesses. FRE 803(18).

- All empirical studies and articles offered by Plaintiffs are also excepted from the hearsay rule because they have "circumstantial guarantees of trustworthiness" — they

[1] Plaintiffs take exception to the Bail Industry's accusations that Plaintiffs "knowingly" attempt to "mislead" this Court. Plaintiffs believe the facts — fully and accurately presented — support their claims. Plaintiffs have not knowingly misled this Court and would not do so under any circumstances.

are published by experts and respected academics, supported by rigorous analysis. Fed. R. Evid. 807. The other elements of Rule 807 are met, including that the articles "will serve the purposes of [the Rules] and justice" by ensuring that this Court has the most complete and accurate context in which to render its opinion. Fed. R. Evid. 807.

- Plaintiffs' Separate Statement did not include facts for the narrow tailoring analysis because narrow tailoring is a question of law. *See infra* Section III.B.i. In any event, none of the Bail Industry's additional facts create a triable issue on this point. *See* Ex. 2, Demonstrative Aid.

- Because Plaintiffs' burden is only to show that effective, less restrictive alternatives to money bail exist, *see infra* Section III.B., scholarly research offered by Plaintiffs regarding effective pretrial alternatives is highly relevant and does not confuse the issues or prejudice the Bail Industry. Fed. R. Evid. 401–403.

- Not counting the signature block, page 25 of Plaintiffs' opening motion contains 28 lines of text — the maximum allowed under the local rule.

III. Summary Judgment is Appropriate as a Matter of Law and Because No Genuine Disputes of Material Fact Exist

Plaintiffs have extensively briefed the applicability of strict scrutiny to this case, which they reincorporate by reference here. ECF Doc. 136 at § III.B.; ECF Doc. 153 at §§ II.A.–B. The Bail Industry has not cited a single case that exempts pre-arraignment restrictions from the well-settled principle that restrictions on pretrial liberty merit strict scrutiny. It has not cited one case that strips personal liberty of its fundamental quality.[2] And it has pointed to no source that analyzes discrimination affecting a fundamental right under a deferential rational basis standard.

Where arrestees who are indigent remain jailed due to "inability to post bail," the "interest at issue [] is 'fundamental': freedom from imprisonment . . . [t]hat is beyond dispute." *Hernandez v. Sessions*, 872 F.3d 976, 993 (9th Cir. 2017) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). The Ninth Circuit has dispelled "any doubt" that pretrial detention cases necessitate heightened scrutiny. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014).

[2] The Bail Industry cites *Demore v. Kim*, 538 U.S. 510 (2013), but *Demore* is limited to a specific context not relevant here: "[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Id.* at 528.

The Bail Industry's claim that heightened scrutiny ignores necessary "practical compromise[s]" between individual rights and law enforcement found in cases like *Gerstein* and *McLaughlin* is irrelevant; *Gerstein* and *McLaughlin* address the government's imperative need to determine probable cause in the context of Fourth Amendment reasonableness, and the holdings in those cases are explicitly "limit[ed] . . . to the precise requirement of the Fourth Amendment." *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975). They have no applicability to wealth-based detention in the criminal justice system under the Fourteenth Amendment. Instead, "[d]etention of an indigent for inability to post money bail is impermissible if the individual's appearance at trial could reasonably be assured by [an] alternate form[] of release." *Hernandez*, 872 F.3d at 990 (citing *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc)). Defendant's money bail scheme fails the Ninth Circuit's requirement that the government rely on reasonable alternate forms of release and fails strict scrutiny.

Plaintiffs' motion for summary judgment should be granted because (A) the alleged factual disputes raised by the Bail Industry are neither genuine nor material, and (B) no genuine dispute exists as to whether Defendant's discriminatory system is narrowly tailored to a compelling government interest.

A. The Bail Industry's Asserted Disputes Are Neither Genuine Nor Material

The Bail Industry opposes Plaintiffs' factual claims with conclusory and semantic allegations of dispute, but "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (emphasis in original) (citations omitted). The Bail Industry cannot avoid summary judgment because (i) their asserted disputes are unsupported and not genuine, and (ii) their asserted disputes are immaterial.

i. The Bail Industry's Asserted Disputes Are Not Genuine Because They are Unsupported and Based on Semantics

The Bail Industry asserts discrepancies where none exist. To genuinely dispute facts, the Bail Industry may not rely upon conclusory allegations or pleading unsupported by factual data; it must "designate 'specific facts showing there is a genuine issue for trial.'" *Celotex v. Catrett*, 477 U.S. 317, 324 (1986); *see also Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) (holding a dispute is "genuine" only if the non-moving party provides a sufficient evidentiary basis). It is the Bail Industry's burden to provide "significant probative evidence tending to support" its allegations of genuine dispute. *Bias v. Moynihan*, 508 F.3d 1212, 1218 (9th Cir. 2007) (internal quotations omitted). The Bail Industry fails to demonstrate genuine disputes with specific facts; its conclusory allegations "do not alone establish the existence of a genuine issue of material fact . . . rather, they are sham issues which should not subject the [Plaintiffs] to the burden of trial." *Radobenko v. Automated Equip. Corp,* 520 F.2d 540, 544 (9th Cir. 1975).

The disputes raised by the Bail Industry are not genuine because they are unsupported by the record. For example, the Bail Industry disputes that an individual with enough money to post bail will be "immediately" released, but does not offer any particularized evidence to make this dispute genuine. No trial is needed to confirm what the Sheriff admits: it is "undoubtedly true" that "an individual with access to adequate funds can pay bail and be released immediately." ECF Doc. 149 at 1. Furthermore, the record shows that individuals who pay bail during intake can be released as soon as booking is finished, and that an individual who paid tens of thousands in cash was released in under an hour. ECF 136-15, Hatton Decl., ¶ 9.

The Bail Industry disputes that money provides a faster opportunity for pretrial release than non-monetary methods, but offers no evidence in support of this claim. ECF Doc. 143 at 12. Yet in 2016, 39 individuals who were able to afford bail or a bail bond were released from

custody in three hours or less; not a single arrestee was released through the OR Project within the same time frame. *See* ECF 136-15, Hatton Decl., ¶ 10. Indeed, the Sheriff herself concedes that "individuals who are able to pay the amount on the bail schedule . . . can obtain release more quickly than those who obtain release through [non-monetary methods]." ECF Doc. 149 at 1. The Bail Industry's conclusory, unsupported statements of disagreement do not create a triable dispute and cannot preclude summary judgment.

Many of the Bail Industry's disputes are semantic, but if a disagreement "appears to be based on semantics . . . [i]t does not create a genuine dispute." *Bowerman v. Field Asset Services*, 242 F. Supp. 3d 910, 917 n.2 (N.D. Cal. 2017). For instance, the Bail Industry disagrees that "access to money" or "lack of wealth" affects the amount of time an arrestee will spend in custody, not because it can cite any specific facts to support this "dispute," but simply because it prefers a different phrasing. ECF Doc. 143 at 4–5 ("[R]elease is a factor of . . . payment of the applicable bail amount or posting of a bail bond for the applicable bail amount."). Different semantic presentations of the same fact do not create a genuine dispute. The material fact underlying the parties' characterizations is substantively identical: payment — or inability to make a payment — determines one's ability to obtain immediate release. No genuine dispute exists on this point; "indeed, it appears more likely that the parties do not dispute the fact itself, but simply prefer to characterize the same fact differently." *Kerrigan v. Lowe's Home Centers*, 15-CV-88, 2015 WL 12669869, at *3 (C.D. Cal Sept. 15, 2015). Similarly, there is no genuine dispute that "those who can afford bail are released faster" simply because, in the Bail Industry's view, the meaning of the word "afford" is vague. It is undisputed that Defendant gives arrestees the opportunity to purchase pretrial freedom and that not all arrestees are able to do so. The Bail Industry's view that the word "afford" is vague does not constitute a genuine, triable dispute.

ii. The Bail Industry's Asserted Disputes Are Immaterial

The Bail Industry disputes minor issues and differences in characterization that are immaterial, as "only disputes over facts that might affect the outcome of the suit" are material to the summary judgment calculus. *Anderson*, 477 U.S. at 248. The Bail Industry's characterizations are immaterial to the resolution of this case.

For instance, the Bail Industry disputes that there is no guaranteed timeframe for the OR Project to complete its workups, but the parties stipulated to the truth of this fact. ECF Doc. 136-1 at ¶ 26 ("There is no guaranteed timeline for when the OR Workup will be completed . . . ."). Regardless, whether the OR Project has a "formal" timeframe to complete workups is immaterial as it will not affect the outcome of this case; more important is the fact that "individuals who are able to pay the amount on the bail schedule (whether in cash or by means of a surety bond) can obtain release more quickly than those who obtain release through a pre-arraignment application to a magistrate facilitated by the OR Project." ECF Doc. 149 at 1. Similarly, the Bail Industry disputes that, on an average day, the jail is filled with San Francisco's poorest residents. Even if this fact were genuinely and demonstrably disputed, it is not of material consequence to the case — while the jail's demographics help to illustrate discrimination in San Francisco, the outcome of this case will not turn on the ZIP codes of the jail detainees. Finally, the Bail Industry disputes that Ms. Buffin was "informed" she would have to pay bail or remain detained, because instead, Ms. Buffin received her bail amount on her booking card. Even if the word "informed" does not capture information conveyed in writing, this fact is hardly material. Whether Ms. Buffin was informed of her bail amount in verbal or written form, she was required to stay in jail absent payment, and a trial is not needed to determine this fact.

All other alleged disputes raised by the Bail Industry are unsupported, not genuine, merely semantic, immaterial, or legal claims rather than factual. *See* Ex. 2, Demonstrative Aid.

B. Factual Disputes — Real or Imagined — Are Irrelevant to the Legal Question of Whether Money Bail Is Not Narrowly Tailored to Government Interests

Where the government burdens a fundamental right, "if a less restrictive means is available for the Government to achieve its goals, the Government must use it." *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 815 (2000). Defendant's wealth-based system is not narrowly tailored to achieve government interests and summary judgment is appropriate because (i) the least restrictive means test is a standard of law unrelated to factual disputes, (ii) scholarly research of other jurisdictions' success with non-monetary pretrial release proves Defendant's system is not narrowly tailored, and (iii) the Bail Industry has failed to show that available less restrictive alternatives are necessarily ineffective.

i. The Least Restrictive Means Test Is a Standard of Law, Not Fact

The Bail Industry incorrectly argues that this Court cannot decide whether money bail constitutes the least restrictive means for achieving Defendant's interests; but that question is for the Court. Where government burdens a fundamental right, whether its policies constitute the least restrictive means for achieving compelling interests is a question of law, not fact. *See, e.g.*, *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004) ("In considering this question, a court assumes that certain [fundamental rights] can be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal."); *see also Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 948–949 (9th Cir. 1997) (relying on empirical studies to determine that, as a matter of law, the city's curfew for minors was not the least restrictive alternative). Plaintiffs do not "have a burden to introduce, or offer to introduce, evidence that their proposed alternatives are more effective." *Ashcroft*, 542 U.S. at 669. No facts are needed to conclude that money bail is not narrowly tailored.

Burdening the fundamental right to liberty is "unacceptable if less restrictive alternatives

would be *at least as effective*" as money bail at achieving the government's purposes. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) (emphasis added). Plaintiffs need only show that "a number of plausible, less restrictive alternatives" are available to Defendant. *Ashcroft*, 542 U.S. at 666. Plaintiffs do not need to prove that non-discriminatory pretrial measures would work *better* than money bail — although ample research suggests that they do — Plaintiffs need only show non-monetary alternatives are available to achieve the government's interests in a manner that is less restrictive on impoverished individuals' liberty.

ii. Scholarly Research of Other Jurisdictions' Success with Non-Discriminatory Release Methods Prove Defendant's System is Not Narrowly Tailored

A detention scheme based on money (rather than risk) can be expected to detain people who are poor and release people who are rich while bearing no connection to compelling government interests of court appearance or public safety. It is therefore no surprise that wealth-based systems lead to unnecessary detention of those too poor to afford bail and do nothing to contribute to court appearance and public safety; in fact, they are counterproductive to the government's goals. *See* ECF Doc. 136, Sections III.B.i, III.C (showing that money bail systems decrease court appearance rates and decrease public safety). The counter-productivity of money bail is confirmed by scholarly research about other jurisdictions' non-monetary release methods.

Comparisons to other jurisdictions using less liberty-restrictive alternatives to money bail are relevant to the least-restrictive alternative determination, as the Ninth Circuit has "found comparisons between institutions analytically useful when considering whether the government is employing the least restrictive means." *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005). Furthermore, the Ninth Circuit has found it unacceptable that "the government would refuse to consider alternatives to monetary bonds that would also serve the same interest the bond requirement purportedly advances. This is especially true in light of the empirically

demonstrated effectiveness of such conditions at meeting the government's interest in ensuring future appearances." *Hernandez*, 872 F.3d at 991. Scholarly research shows that numerous jurisdictions successfully use non-monetary alternatives to money bail resulting in high rates of court appearance; these alternatives are available to Defendant and are less restrictive on an individuals' right to be free from arbitrary government detention.

Non-monetary release produces objectively high rates of court appearance. Santa Clara County locally validated a pretrial risk assessment tool in 2013, and it uses a pretrial services agency that interviews defendants while they are booked to facilitate prompt release on own recognizance or supervised own recognizance. ECF 136-20, Herceg Aff., ¶¶ 10–16. Santa Clara County's average appearance rate for individuals released on non-monetary conditions is over 95%. *Id.* at ¶ 17; *see also California Pretrial Reform: The Next Step in Realignment*, at p. 5 (2017).[3] Kentucky has outlawed for-profit bonding; by using risk assessment, court reminders, and community-based monitoring, 90% of released defendants appear to *every single* scheduled court appearance throughout the course of their criminal adjudication. *California Pretrial Reform*, pp. 5–6. By rejecting wealth-based liberty deprivation, Kentucky saved an estimated $102.9 million in incarceration costs through its statewide pretrial services program. *Id.* at p. 7.

Non-monetary, unsecured bonds are just as effective as money bail. In 2010, Jefferson County, Colorado assessed reform measures increasing reliance on unsecured bonds. Brooker et al., *The Jefferson County Bail Project*, Pretrial Justice Institute, 1 (2014).[4] The study found that judges who used unsecured bonds with conditions "achieve[d] the same public safety rate [and] court appearance rate" as judges using secured bonds. *Id.* at 12. The Study did not find any public safety or court appearance benefits associated with money bail. *Id.* A larger study of ten

[3] http://cjpp.law.harvard.edu/assets/CA-Pretrial-Reform-The-Next-Step-in-Realignment-FINAL.pdf
[4] https://www.pretrial.org/download/pji-reports/Jefferson%20County%20Bail%20Project-%20Impact%20Study%20-%20PJI%202014.pdf

Colorado counties found "higher bond amounts are not associated with better court appearance outcomes" and that "unsecured bonds offer the same probability of fugitive-return as do secured (including surety-only) bonds." Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, pp. 14, 16 (2013).[5]

Non-monetary release methods have no negative impact on public safety or court appearance. In 2015, Lucas County, Ohio, implemented pretrial risk assessment and robust own-recognizance measures; within the first year, the percentage of defendants regaining liberty (without paying for it) increased by 14%, while pretrial arrests decreased by 10% and failures to appear decreased by 12%. Press Release, *New Data: Pretrial Risk Assessment Tool Works to Reduce Crime, Increase Court Appearance* (Aug. 8, 2016).[6] In 2016, Yakima County, Washington, implemented a pretrial risk assessment tool and established a pretrial services agency; a 2017 study found a "substantial increase was observed in the number of people released pretrial" and this less restrictive system was achieved "without a negative impact on public safety and court appearance." Brooker, *Yakima County, Washington Pretrial Justice System Improvements*, p. 16 (2017). In fact, most of the negative outcomes experienced in Yakima County resulted from failure to eradicate money bail completely, as the county's pretrial system "continue[d] to allow the highest risk/charge profile defendants to be released on a secured money bond" and "continue[d] to detain defendants legally eligible for release because of their inability to pay a secured money bond." *Id.* at p. 17.

Washington, D.C. — which has a similar population to San Francisco and has eliminated money bail — demonstrates an effective and less restrictive alternative to money bail.

[5]http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf

[6]http://www.arnoldfoundation.org/new-data-pretrial-risk-assessment-tool-works-reduce-crime-increase-court-appearances/

Washington releases between 85% and 88% of all defendants; over 91% of released defendants never miss a *single* court date, and 98% remain arrest-free for violent crimes during their pretrial release period. *See* ECF 136-19, Morrison Aff., ¶ 12; *see also* U.S. Dept. of Justice, *Fundamentals of Bail*, pp. 25–26 (2014).[7]

Although the Bail Industry insists on data from San Francisco, a San Francisco-specific study is not necessary to determine whether Defendant's money bail system is narrowly tailored. Plaintiffs do not need to prove that *every* form of non-monetary pretrial release would be successful in San Francisco, or that the quantifiable results achieved in non-monetary jurisdictions would be identically reproduced in San Francisco. They need only provide this Court with information sufficient to determine "whether the challenged regulation is the least restrictive means among available, effective alternatives." *Ashcroft*, 542 U.S. at 666. The experiences of other jurisdictions — some that have eliminated money bail completely, and some that have operated successful non-monetary programs for many years — show that numerous effective alternatives exist to achieve interests without producing untenable wealth-based detention in the process. Money bail is not the least restrictive means for achieving what numerous other jurisdictions have achieved non-monetarily.

Scholarly research about other jurisdictions is ample illustration that money bail is not the least restrictive or most narrowly tailored way for Defendant to achieve its goals. Plaintiffs do not ask this Court to find — nor is it their burden to prove — some specific court appearance rate generally achieved through non-monetary systems or exactly what appearance rate will hold in San Francisco. The critical point — supported by scholars and academics who have studied the issue and jurisdictions who have implemented reform — is that a less restrictive method is available to Defendant.

[7] http://www.pretrial.org/download/research/Fundamentals%20of%20Bail%20-%20NIC%202014.pdf

iii. The Bail Industry Has Not Met its Burden Because It Has Failed to Show Available Alternatives to Money Bail Are Ineffective

The Bail Industry must show that all plausible alternatives to wealth-based detention are ineffective for achieving Defendant's interests; "it is not enough" for the Bail Industry to show that money bail "has some effect," as "[a]ny restriction on [liberty] could be justified under that analysis." *Ashcroft*, 542 U.S. at 666. Instead the Bail Industry has a "heavy burden . . . to explain why a less restrictive [alternative] would not be as effective." *Reno*, 521 U.S. at 879.

The Bail Industry has failed to meet this burden in two ways: (a) it alleges that non-monetary alternatives are ineffective based only on unreliable evidence and uncited claims; and (b) it fails to demonstrate why Defendant cannot utilize less-restrictive alternatives used in jurisdictions with the same compelling interests.

a. The Bail Industry's Evidence Against Non-Monetary Release is Unreliable and Unsupported

The Bail Industry cites to Bureau of Justice Statistics ("BJS") data to support its claim that no available alternative can achieve court appearance as well as money bail — but that data is unequivocally regarded as unreliable and misleading. In 2007, the BJS State Court Processing Statistics (SCPS) Project published data from forty counties nationwide measuring, among other things, relative court appearance outcomes between jurisdictions using money-secured and unsecured release. Bechtel, et al., *Dispelling the Myths*, p. 3 (2012).[8] However, SCPS aggregated data for all "unsecured release" jurisdictions without recording whether those jurisdictions used pretrial conditions or effective pretrial programs — in other words, it is impossible to know if these jurisdictions used risk assessments, employed pretrial services agencies, and subjected released defendants to pretrial conditions, or if they simply released defendants indiscriminately with no supervision or subsequent contact. *Id.* at p. 5.

[8] https://www.pretrial.org/download/pji-reports/Dispelling%20the%20Myths%20(November%202012).pdf

The private bail industry relied heavily on SCPS data, leading BJS to issue a "Data Advisory" in 2010 — the only time in BJS's history Counsel is aware of it having done so — warning that "SCPS cannot distinguish defendants released under conditions that involve intensive pretrial monitoring from defendants released under less stringent pretrial conditions. Any evaluative statement about the effectiveness of a particular program in preventing pretrial misconduct based on SCPS is misleading." U.S. Dept. of Justice, Bureau of Justice Statistics, *Data Advisory*, p.1 (2010).[9] Nonetheless, the Bail Industry supports its claims that non-monetary release is ineffective based solely on this data. *Compare* ECF Doc. 143, pp. 16–17; ECF Doc. 144-8 (Bartlett Report); ECF Doc. 144-9 (BJS Report); ECF Doc. 144-11 ("The Fugitive"); ECF Doc 143-1, Additional Fact 20 *with* Bechtel, et al., *Dispelling the Myths*, pp. 6–10 (2012). By relying on discredited data, the Bail Industry has failed to prove that non-monetary release is less effective than wealth-based detention.

Other than SCPS data the BJS has specifically cautioned against as "misleading," the only support the Bail Industry provides is uncited testimony of Dennis Bartlett that provides no factual basis. The Bail Industry compares San Francisco's failure-to-appear ("FTA") rates against the unrelated and supported claim that "surety bail agents return approximately 97% to 98% of their skips, with a failure to appear rate close to 3–4%." ECF Doc. 143, p. 16. But the only support for this claim is the testimony of Mr. Bartlett, who *cites no source whatsoever* for his claim. ECF Doc. 144-8, ¶ 11. Even if Mr. Bartlett's claim were true, the comparison is meaningless, as the successful return of fugitives has nothing to do with court appearance rates. A return rate of 97% to 98% is consistent with a very high FTA rate: a single "skip" could conceivably fail to appear dozens of times before returning. Accordingly, the Bail Industry's claim that privatized bail results in FTA rates of 3–4% is both irrelevant and without basis.

[9] https://www.bjs.gov/content/pub/pdf/scpsdl_da.pdf

b. The Bail Industry Has Failed to Demonstrate Why Defendant Cannot Use Less-Restrictive Alternatives

The Bail Industry has failed to explain why the less restrictive alternatives used successfully by other jurisdictions could not achieve Defendant's interests; often, "the failure of [an opposing party] to explain why another [jurisdiction] with the same compelling interests was able to accommodate the same [liberty interests] may constitute a failure to establish that the defendant was using the least restrictive means." *Warsoldier*, 418 F.3d at 1000. The Bail Industry offers speculative and unsupported reasons why a non-monetary system would be impractical — for instance, it cites the cost of pretrial services in other jurisdictions while omitting costs offset by keeping fewer defendants in jail — but fails to show why Defendant cannot achieve what numerous other jurisdictions have done without financial ruin.

The Bail Industry's other attempts to discredit non-monetary alternatives are flawed. For instance, the Bail Industry's claim that unsecured bonds in Colorado are "failing" has been directly contradicted by a district court judge working in Colorado's system. *See* Ex. 3, Letter from Judge Margie L. Enquist in Response to Colorado District Attorney, ¶¶ 12–16 (stating "money and commercial sureties were never eliminated from the system to begin with," and that "secured bonds did not increase 'accountability' as measured by court appearance" in Colorado). The Bail Industry, recognizing itself that San Francisco "only recently began using the PSA," also points to preliminary data to claim that the PSA tool has resulted in a 28% failure to appear rate during an initial six month period. *See* ECF Doc 143, pp. 19, 22. But this misstates the data, which show that 28% of active pretrial cases "were terminated [from the pretrial services program] for failure to appear." ECF Doc. 144-6, SHF0000852. This does not mean that the *overall* failure to appear rate was 28%. Instead, it means that 28% of released defendants failed to appear *at least one time* during their pretrial supervision; these individuals could conceivably

have attended nearly all scheduled court appearances other than the one that triggered termination. Preliminary data can be unreliable, and the same PSA tool used in San Francisco has been shown to decrease pretrial arrests by 10% and decrease failures to appear by 12% in other jurisdictions using the tool for a longer period of time. *See* "Press Release," *supra* at 10.

Plaintiffs do not have to show that San Francisco's PSA tool is more effective than money bail; only that effective, less restrictive alternatives are available. By contrast, even if the Bail Industry could point to a jurisdiction that did not have success with non-monetary pretrial release — which it has yet to do without using discredited data — its burden would not be satisfied. Plaintiffs need not prove (and are not arguing) that all non-monetary systems will maximize court appearance, and the existence of one non-monetary system with poor court appearance rates does not mean that all non-monetary systems are always ineffective. The Bail Industry has failed to show why less restrictive alternatives effectively used in other jurisdictions cannot address Defendant's interests. Because the Bail Industry has "failed to show, in the face of [Plaintiffs'] evidence, why its [] system is so different" from the jurisdictions that achieve safety and court appearance without wealth discrimination, it has failed to show that Defendant's system is narrowly tailored. *See Holt v. Hobbs,* 135 S.Ct. 853, 865 (2015).

IV. Conclusion

For the reasons articulated above, Plaintiffs respectfully request that this Court grant their motion for summary judgment.

Respectfully submitted,

/s/ Phil Telfeyan
Phil Telfeyan (California Bar No. 258270)
Attorney, Equal Justice Under Law
400 7th Street NW, Suite 602
Washington, D.C. 20004
(202) 505-2058
ptelfeyan@equaljusticeunderlaw.org

Certificate of Service

I certify that on November 21, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all attorneys-of-record in this case.

/s/ Phil Telfeyan
Attorney for Plaintiffs

Phil Telfeyan (CA Bar No. 258270)
Attorney, Equal Justice Under Law
400 7th Street NW, Suite 602
Washington, D.C. 20004
(202) 505-2058
ptelfeyan@equaljusticeunderlaw.org
Attorney for Plaintiffs Riana Buffin and Crystal Patterson

THE UNITED STATES DISTRICT COURT
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RIANA BUFFIN and CRYSTAL PATTERSON, on behalf of themselves and others similarly situated, Plaintiffs, v. VICKI HENNESSY in her official capacity as the San Francisco Sheriff, *et al.*, Defendants.	15-CV-4959 (YGR) DECLARATION OF MARISSA HATTON IN SUPPORT OF PLAINTIFFS' REPLY TO OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT Hearing: December 12, 2017, 2pm Department: Courtroom 1, Fourth Floor Judge: The Honorable Yvonne Gonzalez Rogers

I, Marissa Hatton, declare as follows:

1. I am a Law Fellow with Equal Justice Under Law, counsel for Plaintiffs Riana Buffin and Crystal Patterson in this action. I am over the age of 18 and competent to make this declaration. This declaration is submitted in support of Plaintiffs' Motion for Summary Judgment (ECF Doc. 136), Plaintiffs' Motion to Exclude Opinion Testimony of Dennis Bartlett (ECF Doc. 137), Plaintiffs' Motion to Exclude Opinion Testimony of John Rorabaugh (ECF Doc. 138), Plaintiffs' Motion to Exclude Opinion Testimony of Quentin Kopp (ECF Doc. 139), Plaintiffs' Opposition to CBAA's Motion for Summary Judgment (ECF Doc. 153), Plaintiffs' Opposition to CBAA's Motion to Exclude Testimony of Judge Truman Morrison (ECF Doc.

154), Plaintiffs' concurrently filed reply brief in support of Plaintiffs' Motion for Summary Judgment responding to the Bail Industry, Plaintiffs' concurrently filed reply brief in support of Plaintiffs' Motion for Summary Judgment responding to the Sheriff, and Plaintiffs' concurrently filed reply brief to Exclude Opinion Testimony of Dennis Bartlett. I have personal knowledge of the facts contained in this declaration, and if called upon, I could and would competently and truthfully testify as follows:

I. ECF Doc. 136, Plaintiffs' Motion for Summary Judgment

2. On October 31, 2017, I compiled exhibits for Plaintiffs' Motion for Summary Judgment, ECF Doc. 136.

3. Attached thereto is **Exhibit 1,** a true and correct copy of the parties' Joint Stipulation of Facts.

4. Attached thereto is **Exhibit 2**, a true and correct copy of a document produced by the Sheriff in discovery as SHF000014.

5. Attached thereto is **Exhibit 3**, a true and correct copy of an Excel spreadsheet in PDF form produced by the Sheriff in discovery as SHF000235.

6. Attached thereto is **Exhibit 4**, a true and correct copy of a document produced by the Sheriff in discovery as SHF000023.

7. Attached thereto is **Exhibit 5**, a true and correct copy of a document produced by the Sheriff in discovery as SHF000064.

8. Attached thereto is **Exhibit 6**, a true and correct copy of a document produced by the Sheriff in discovery as SHF000053–SHF000077.

9. Attached thereto is **Exhibit 7**, a true and correct copy of the declaration of Plaintiff Riana Buffin, in the form that was introduced as Exhibit 1 to Plaintiffs' Third Amended

Complaint.

10. Attached thereto is **Exhibit 8**, a true and correct copy of a document produced by the Sheriff in discovery as SHF000892.

11. Attached thereto is **Exhibit 9**, a true and correct copy of a document produced by the Sheriff in discovery as SHF000899.

12. Attached thereto is **Exhibit 10**, a true and correct copy of a document produced by the Sheriff in discovery as SHF000891.

13. Attached thereto is **Exhibit 11,** a true and correct copy of the declaration of Chesa Boudin, in the form that was introduced as Exhibit 3 to Plaintiffs' Third Amended Complaint.

14. Attached thereto is **Exhibit 12**, a true and correct copy of the declaration of Plaintiff Crystal Patterson, in the form that was introduced as Exhibit 2 to Plaintiffs' Third Amended Complaint.

15. Attached thereto is **Exhibit 13,** a true and correct copy of Plaintiff Crystal Patterson's Surety Bail Bond Contract, dated October 28, 2015, in the form that was introduced as Exhibit 1 to Plaintiffs' Class Certification Reply dated November 20, 2015.

16. Attached thereto is **Exhibit 14**, a true and correct copy of the United States Department of Justice's Statement of Interest, filed in *Varden v. City of Clanton*, Case No. 2:15-cv-34-MHT-WC, on February 13, 2015. I located this document in Equal Justice Under Law's internal digital files containing true and correct copies of all public documents filed in our organization's previous litigation.

17. Attached thereto is **Exhibit 15**, a true and correct copy of my own declaration, signed on October 31, 2017.

18. Attached thereto is **Exhibit 16**, a true and correct copy of an Excel spreadsheet in

PDF form produced by the Sheriff in discovery as SHF000236.

19. Attached thereto is **Exhibit 17**, a true and correct copy of a document produced by the Sheriff in discovery as SHF000886.

20. Attached thereto is **Exhibit 18**, a true and correct copy of the sworn affidavit of Plaintiffs' unchallenged expert, Michael Jones. I have personal knowledge that this affidavit was provided to our office by Dr. Jones.

21. Attached thereto is **Exhibit 19**, a true and correct copy of the sworn affidavit of Judge Truman Morrison, in the form that was introduced as Exhibit 6 to Plaintiffs' Third Amended Complaint.

22. Attached thereto is **Exhibit 20**, a true and correct copy of the sworn affidavit of Gerry Herceg, in the form that was introduced as Exhibit 8 to Plaintiffs' Third Amended Complaint.

23. Attached thereto is **Exhibit 21,** a true and correct copy of the sworn affidavit of Allison McCovey, in the form that was introduced as Exhibit 4 to Plaintiffs' Third Amended Complaint.

24. Attached thereto is **Exhibit 22**, a true and correct copy of a document produced by the Sheriff in discovery as SHF000100.

25. Attached thereto is **Exhibit 23,** a true and correct copy of the declaration of Ross Mirkarimi, in the form that was introduced as Exhibit 7 to Plaintiffs' Third Amended Complaint.

26. Attached thereto is **Exhibit 24,** a true and correct copy of the declaration of Jeff Adachi, in the form that was introduced as Exhibit 9 to Plaintiffs' Third Amended Complaint.

27. Attached thereto is **Exhibit 25,** a true and correct copy of Plaintiffs' Supporting Separate Document.

II. ECF Doc. 137, Plaintiffs' Motion to Exclude Testimony of Dennis Bartlett

28. On October 31, 2017, I compiled exhibits for Plaintiffs' Motion to Exclude Testimony of Dennis Bartlett, ECF Doc. 137.

29. Attached thereto is **Exhibit 1,** a true and correct copy of the declaration of Tal H. Klement, in the form that was introduced as Exhibit 1 to Plaintiffs' Opposition to the Bail Industry's Motion to Intervene.

III. ECF Doc. 138, Plaintiffs' Motion to Exclude Testimony of John Rorabaugh

30. On October 31, 2017, I compiled exhibits for Plaintiffs' Motion to Exclude Testimony of John Rorabaugh, ECF Doc. 138.

31. Attached thereto is **Exhibit 1,** a true and correct copy of the declaration of Tal H. Klement, in the form that was introduced as Exhibit 1 to Plaintiffs' Opposition to the Bail Industry's Motion to Intervene.

IV. ECF Doc. 153, Plaintiffs' Opposition to CBAA's Motion for Summary Judgment

32. On November 14, 2017, I compiled exhibits for Plaintiffs' Opposition to CBAA's Motion for Summary Judgment, ECF Doc. 153.

33. Attached thereto is **Exhibit 1**, a true and correct copy of the sworn affidavit of Judge Truman Morrison, in the form that was introduced as Exhibit 6 to Plaintiffs' Third Amended Complaint.

34. Attached thereto is **Exhibit 2**, a true and correct copy of the sworn affidavit of Gerry Herceg, in the form that was introduced as Exhibit 8 to Plaintiffs' Third Amended Complaint.

35. Attached thereto is **Exhibit 3,** a true and correct copy of the Harvard Law School Criminal Justice Policy Program's report: *California Pretrial Reform: The Next Step in*

Realignment (Oct. 2017). I located this document on November 14, 2017, by navigating to the website of the Criminal Justice Policy Program at Harvard Law School (http://cjpp.law.harvard.edu). The URL is http://cjpp.law.harvard.edu/assets/CA-Pretrial-Reform-The-Next-Step-in-Realignment.pdf.

36. Attached thereto is **Exhibit 4,** a true and correct copy of *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (2013), by Michael R. Jones for the Pretrial Justice Institute. I located this document on the Pretrial Justice Institute's website (http://www.pretrial.org) on November 14, 2017. The URL is http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf.

37. Attached thereto is **Exhibit 5,** a true and correct copy of *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (2015), by Timothy R. Schnacke for the U.S. Department of Justice's National Institute of Corrections. I located this document on November 14, 2017, by navigating to the website of the U.S. Department of Justice's National Institute of Corrections (http://nicic.gov). The URL is http://www.pretrial.org/download/research/Fundamentals%20of%20Bail%20-%20NIC%202014.pdf.

38. Attached thereto is **Exhibit 6,** a true and correct copy of *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (2013), by Christopher T. Lowenkamp et al. for the Arnold Foundation. I located this document on the website for the Arnold Foundation (http://arnoldfoundation.org) on November 14, 2017. The URL is http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf.

39. Attached thereto is **Exhibit 7,** a true and correct copy of the declaration of Jeff Adachi, in the form that was introduced as Exhibit 9 to Plaintiffs' Third Amended Complaint.

40. Attached thereto is **Exhibit 8**, a true and correct copy of an Excel spreadsheet in PDF form produced by the Sheriff in discovery as SHF000235.

41. Attached thereto is **Exhibit 9**, a true and correct copy of my own declaration, signed on October 31, 2017.

42. Attached thereto is **Exhibit 10,** a true and correct copy of Plaintiffs' Responsive Separate Statement.

V. ECF Doc. 154, Plaintiffs' Opposition to CBAA's Motion to Exclude Testimony of Judge Truman Morrison

43. On November 14, 2017, I compiled exhibits for Plaintiffs' Opposition to CBAA's Motion to Exclude Testimony of Judge Truman Morrison, ECF Doc. 154.

44. Attached thereto is **Exhibit 1**, a true and correct copy of the sworn affidavit of Judge Truman Morrison, in the form that was introduced as Exhibit 6 to Plaintiffs' Third Amended Complaint.

45. Attached thereto is **Exhibit 2**, a true and correct copy of the sworn affidavit of Plaintiffs' unchallenged expert, Michael Jones, in the form that was introduced as Exhibit 18 to Plaintiffs' Motion for Summary Judgment. I have personal knowledge that this affidavit was provided to our office by Dr. Jones.

VI. Plaintiffs' Reply in Support of Summary Judgment (responding to the CBAA)

46. On November 21, 2017, I compiled exhibits for Plaintiffs' Reply to CBAA's Opposition to Motion for Summary Judgment.

47. Attached thereto is **Exhibit 3,** a true and correct copy of a Letter from Judge

Margie L. Enquist in Response to the Colorado District Attorney.

VII. Plaintiffs' Reply in Support of Summary Judgment (responding to the Sheriff)

48. On November 21, 2017, I compiled exhibits for Plaintiffs' Reply to the Sheriff's Response to Motion for Summary Judgment.

49. Attached thereto is **Exhibit 1,** a true and correct copy of the Brief for Current and Former District and State's Attorneys et al. as *Amici Curiae* in *O'Donnell v. Harris Cty*., 4:16-cv-01414 (S.D. Tex. Aug. 8, 2017). I located this document on the website for the Center for Legal and Evidence-Based Practices (http://clebp.org) and clicking on "Harris County" on November 21, 2017. The URL is http://clebp.org/images/Prosecutors_Amicus.pdf.

50. Attached thereto is **Exhibit 2,** a true and correct copy of the Brief for Law Enforcement and Corrections Officers as *Amici Curiae* in *O'Donnell v. Harris Cty*., 4:16-cv-01414 (S.D. Tex. Aug. 7, 2017). I located this document on the website for the Center for Legal and Evidence-Based Practices (http://clebp.org) and clicking on "Harris County" on November 21, 2017. The URL is http://clebp.org/images/Police_and_Sheriffs_Amicus.pdf.

51. Attached thereto is **Exhibit 3,** a true and correct copy of the Brief of Conference of Chief Justices as *Amicus Curiae* in *O'Donnell v. Harris Cty*., 4:16-cv-01414 (S.D. Tex. Aug. 8, 2017). I located this document on the website for the Center for Legal and Evidence-Based Practices (http://clebp.org) and clicking on "Harris County" on November 21, 2017. The URL is http://clebp.org/images/Conference_of_Chief_Justices.pdf.

VIII. Plaintiffs' Reply to Exclude Opinion Testimony of Dennis Bartlett

52. On November 21, 2017, I compiled exhibits for Plaintiffs' Reply in Support of Their Motion to Exclude Testimony of Dennis Bartlett.

53. Attached thereto is **Exhibit 1,** a true and correct copy of *Data Advisory: State*

Court Processing Statistics Data Limitiations, by Thomas Cohen and Tracey Kyckelhahn for the U.S. Department of Justice (2010). I located this document on the website for the U.S. Department of Justice's Bureau of Justice Statistics (http://bjs.gov) on November 21, 2017. The URL is https://www.bjs.gov/content/pub/pdf/scpsdl_da.pdf.

54. Attached thereto is **Exhibit 2,** a true and correct copy of *Dispelling the Myths: What Policy Makers Need to Know about Pretrial Research*, by Kristin Bechtel et al. I located this document on the Pretrial Justice Institute's website (http://www.pretrial.org) on November 21, 2017. The URL is https://www.pretrial.org/download/pji-reports/Dispelling%20the%20Myths%20(November%202012).pdf.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 21st day of November, 2017.

Marissa Hatton

Phil Telfeyan (CA Bar No. 258270)
Attorney, Equal Justice Under Law
400 7th Street NW, Suite 602
Washington, D.C. 20004
(202) 505-2058
ptelfeyan@equaljusticeunderlaw.org
Attorney for Plaintiffs Riana Buffin and Crystal Patterson

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

RIANA BUFFIN and CRYSTAL PATTERSON, on behalf of themselves and others similarly situated, Plaintiffs, v. VICKI HENNESSY in her official capacity as the San Francisco Sheriff, *et al.*, Defendants.	15-CV-4959 (YGR) DEMONSTRATIVE AID ILLUSTRATING UNDISPUTED FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT Hearing: December 12, 2017, 2pm Honorable Yvonne Gonzalez Rogers

Plaintiffs respectfully submit the following demonstrative aid to highlight that there are no genuine disputes of material fact that could preclude summary judgment in this case. In each instance where the Bail Industry claims a fact is in dispute, either (a) the cited evidence is not *genuine* or *competent* to support a dispute, (b) the facts asserted by the Bail Industry do not establish a *material* dispute of fact, or (c) the Bail Industry does not dispute a fact but a *semantic* phrasing or *legal* conclusion. In total, there are no genuine disputes of material fact.

Because the Bail Industry did not submit its asserted facts with its opening motion, Plaintiffs have not yet had the opportunity to respond to the Bail Industry's alleged facts. This demonstrative aid includes Plaintiffs' responses to the Bail Industry's asserted facts.

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
Issue 1 (Money bail constitutes wealth discrim-ination.)	Fact 1: San Francisco uses a uniform countywide bail schedule to determine bail amounts for arrestees, and the schedule does not include provisions for adjustment based on inability to pay. Stipulated Facts ¶¶ 2, 29, 30, 31 SHF00002 – SHF000036	Undisputed to the extent that San Francisco uses a uniform countrywide schedule of bail ("Bail Schedule") to determine bail amounts for arrestees (Stipulated Fact ("SF") 2), and to the extent that the Bail Schedule does not reference Cal. Penal Code §§ 1269c, 1270.1, or the OR Project. Disputed as vague with respect to the phrase "provisions for adjustment based on inability to pay," and to the extent that SHF000024-SHF000036 is a copy of the Bail Schedule effective as of July 1, 2016, which was superseded by the Bail Schedule approved June 2017, with effective date July 1, 2017, as set forth on the website of the Superior Court of California, County of San Francisco. Declaration of Krista L. Baughman In Opposition to Motion for Summary Judgment ("Baughman Decl."), Exh. 1 (Bail Schedule is subject to judicial notice pursuant to FRE 201(b)(2)).	No genuine dispute, only a semantic dispute. The Bail Industry's assertion that *the wording* Plaintiffs used in its description of the bail schedule is "vague" does not create a genuine dispute. There is no substantive dispute that the Bail Schedule does not accommodate inability to pay. The Bail Industry has helpfully attached the current Bail Schedule (neither party asserts that there is any material difference between the 2016 and 2017 bail schedules that would impact the issues in this case).
Issue 1	Fact 2: The Sheriff enforces the bail schedule by detaining those who do not pay	Disputed to the extent incomplete: as accurately stated in SF 2: "The Sheriff enforces state laws	No dispute. Plaintiffs and the Bail Industry agree that the Sheriff enforces the bail schedule and pertinent state

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
	the amount on the bail schedule. Stipulated Facts ¶ 2	that require the use of a uniform countywide schedule of bail and the detention of individuals who do not pay the amount on the bail schedule, *in the absence of some other legal authorization for that persons' release.*" SF 2 (emphasis added). Otherwise undisputed.	laws by detaining those who do not pay their bail amount. The Bail Industry's quote of the full stipulation does not create a dispute — Plaintiffs acknowledge that they provided a partial citation.
Issue 1	Fact 3: Bail-eligible arrestees with access to money are able to secure freedom at the time of their choosing by paying bail. Stipulated Facts ¶¶ 32, 35	Disputed. An arrestee's "access to money" does not result in their "freedom"; rather, release is a factor of payment of the applicable bail amount or the posting of a bail bond for the applicable bail amount, by an arrestee who is not subject to one or more holds (no-release charges). SF 32, 34. Further disputed as to "at the time of their choosing." Even arrestees who post a bail bond for the applicable bail amount are detained for some period of time while their release is processed, and this is not at the discretion of the arrestee. *See* Baughman Decl., Exh. 2 (Patterson testimony), p. 33 line 20 – p. 34, line 13 (establishing that Patterson first spoke to a bail agent "a few hours" after she had been in jail);	No genuine dispute, only a semantic dispute. The Bail Industry cannot and does not dispute that arrestees with ready cash in the amount of their full bail can achieve release in less than one hour. SHF000235 (showing release in under an hour for multiple arrestees, including the time it took to complete booking, and one instance where an arrestee paid $21,000 in cash for release). That those who "can pay are released at the time of their choosing" is Defendant's characterization. ECF Doc. 101, Sheriff's Answer, p. 1 ("Those who can pay are released at the time of their choosing, regardless of any threat they may pose to public safety and regardless of any flight risk."). Furthermore, the Bail Industry's unsupported implication about Crystal

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
		SF 12 (Patterson was not released until after 29 hours of detention).	Patterson's time in jail is immaterial. That an indigent arrestee like Crystal Patterson could not immediately gather the cash needed to purchase her release does not draw into dispute that those with ready access to cash, like a person with $21,000 at the time of arrest, can secure release in less than an hour from booking.
Issue 1	Fact 4: Individuals who cannot post bail immediately must remain imprisoned while they try to make bail, wait for the O.R. project, or apply to a magistrate. Stipulated Facts ¶¶ 2, 36, 38	Disputed to the extent it mischaracterizes the cited Stipulated Facts (2, 36, 38), which do not speak to "immediate" posting of bail, and do not mention the O.R. Project or application to a magistrate judge. Undisputed to the extent that the Sheriff's Department will detain individuals who do not pay the amount on the bail schedule, in the absence of some other legal authorization for that person's release, including release on own recognizance pursuant to an application made pursuant to Penal Code §1269c or with the assistance of the OR Project. SF 2, 20-27, 39.	No genuine dispute, only a semantic dispute. Stipulated Fact 36 says that those who are not released after booking are put in a holding cell. Under common English usage, any delay in release means it is not "immediate." Arrestees who post bail can be released in less than an hour. SHF000235 (showing four individuals able to pay either $21,000 in cash, or pay a down payment on a bond ranging between $39,000 and $50,000, were released in under an hour — effectively immediately after booking was finished). All others waited at least four hours for non-monetary processes. SHF000235.
Issue 1	Fact 5: As a result of their lack of wealth, poorer arrestees who are bail-eligible will	Disputed. An individual's purported "lack of wealth" does not proximately or necessarily	No genuine dispute, only a semantic dispute. People who are poor will remain longer in jail collecting

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
	spend more time incarcerated than wealthier arrestees. Stipulated Facts ¶ 32, 36, 38, 40 SHF000235	cause more time spent incarcerated as compared with wealthier arrestees. For example, some arrestees who self-identify as indigent choose not to post a bail bond (*see* Baughman Decl., Exh. 3 (Buffin testimony), p. 57, line 14 – p. 58, line 12), and thus their time incarcerated results from a personal decision. Other arrestees who self-identify as indigent and who post a bail bond are nonetheless detained longer than arrestees who seek non-monetary release through the OR Project. *Compare* SF 12 (establishing Patterson's 29 hour detention despite posting a bond), *with* SHF000235 (Dkt. 136-3, p. 143) (establishing that some arrestees are released through the OR Project as soon as within 4 hours of arrest).	money they do not have, whereas those with their full bail amount can purchase release in less than one hour. SHF000235. Regarding the Bail Industry's assertions: Riana Buffin is an indisputably indigent person, with an hourly wage of $10.25. The implication that she "decided" or "chose" not to pay her $30,000 bail amount — money that she did not have — is (at best) speculation and thus cannot be the basis for a disputed fact. It would have taken time to gather money she did not have from relatives who likely also did not have it. ECF No. 136-7 at ¶ 4 (providing facts regarding Ms Patterson's family's disabilities and demonstrating she was the family's breadwinner). The Bail Industry's implication that Ms. Patterson spent 29 hours in jail awaiting processing (rather than spending time to collect money) is inaccurate and without support in the record — and therefore cannot be a basis for a disputed fact. In any event, it does not undercut that those not wealthy enough to pay their full bail amount must wait in jail

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
			while they try to gather money or wait for non-monetary processes.
Issue 1	Fact 6: In 2016, of the 398 people released from custody in three hours or less, not a single one was processed through the O.R. Project; yet 39 individuals posted bond or cash bond and were released within three hours. SHF000235	Undisputed that SHF000235 (Dkt. 136-3) contains data that reflects this conclusion. Disputed to the extent that SHF000235 was produced by the Sheriff subject to certain objections and limitations, and included only that data that existed in the Sheriff's databases and does not reflect a review of individual criminal or jail records. Baughman Decl., Exh. 4.	No genuine dispute. The fact that the Bail Industry objects to evidence the Defendant produced in discovery does not create an issue of material fact. The Bail Industry does not cite to any competent evidence to draw this fact into dispute.
Issue 1	Fact 7: In 2016, 1,112 individuals bailed out of jail in ten hours or less; only 10 individuals were released through the OR Project during within the same timeframe. SHF000235	Disputed. The data contained in SHF000235 (Dkt. 136-3) indicates that 13 individuals were released through the OR Project in ten hours or less. Further, SHF000235 was produced by the Sheriff subject to certain objections and limitations, and included only that data that existed in the Sheriff's databases and does not reflect a review of individual criminal or jail records. Baughman Decl., Exh. 4. Undisputed to the extent that SHF000235 contains data that reflects that 1,112 individuals were bailed out of jail within ten hours.	No material dispute. Plaintiffs confirm that in 2016, 1,112 individuals bailed out of jail in ten hours or less; only 13 individuals were released through the OR Project during within the same timeframe; zero individuals were released on application to a magistrate at any time within 48 hours. SHF000235 The Bail Industry does not cite any other competent evidence that could draw dispute to this fact.

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
Issue 1	Fact 8: On an average day, the largest percentages of the jail population (not including sentenced defendants) are comprised of residents of some of San Francisco's poorest neighborhoods, or individuals identifying as homeless. SHF000064	Disputed. The evidence cited (SHF000064, Dkt. 136-5) does not address the entire "jail population" on an average day, but rather, a subset comprised of the 602 people in custody on August 23, 2016, who were not subject to certain conditions set forth at SHF00060, and of these 602 people, some were eligible for pre-arraignment release and some were not. *See* Dkt. 136-3 (SHF000053-000077); Baughman Decl., Exh. 5 (Riker testimony), p. 134-137). Further disputed to the extent that no evidence is cited by Plaintiff in support of the assertion that the Zipcodes of Residence listed in SHF000064 are "some of San Francisco's poorest neighborhoods."	No material dispute. Plaintiffs agree with the Bail Industry that some of the 602 people in custody on August 23, 2016 (the "snapshot" provided by the Sheriff) were eligible for release and others were not. Census data confirms that ZIP code 94102 is San Francisco's poorest ZIP code and is the most highly represented ZIP code of the jail population on the date in question. Sandy Allen & Ena Li, *A Look At Bay Area Poverty*, United Way Bay Area (2016); SHF000064. The Bail Industry does not cite any competent evidence to draw this fact into dispute. The Bail Industry also does not dispute that 11.5% (70/602) of detained individuals (who were not subject to holds or revocations) were homeless. SHF000064.
Issue 1	Fact 9: For individuals ineligible for non-monetary release under state law but still eligible for release under the bail schedule, monetary payment is the only way to secure pre-arraignment freedom; those who do not post bail will remain jailed until	Disputed to the extent that, for the category of arrestee that Plaintiffs appear to be referring to (i.e. individuals charged with certain offenses that make them ineligible to apply pre-arraignment for OR release or a reduction in bail, but who remain eligible for release under the bail schedule), such	No genuine dispute, only semantic confusion. The Bail Industry's commentary does nothing to dispute the original wording of Plaintiffs' assertion, which assumed no legal impediment to monetary release. Thus, it remains as stated: For individuals ineligible

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
	arraignment. Stipulated Facts ¶ 40 Cal. Penal Code §§ 1269b, 1269c, 1270.1	arrestees will not "secure pre-arraignment freedom" if there is some other legal impediment to their release, regardless of a monetary payment. SF 40. Otherwise undisputed.	for non-monetary release under state law *but still eligible for release under the bail schedule*, monetary payment is the only way to secure pre-arraignment freedom; those who do not post bail will remain jailed until arraignment.
Issue 2 (Defendants' money bail system infringes a fundamental right)	Fact 1: In situations where bail is offered and no other legal impediment exists, posting bail results in release from custody. Stipulated Facts ¶ 32	Undisputed.	No dispute.
Issue 2	Fact 2: The Sheriff enforces the bail schedule by detaining those who do not pay the amount on the bail schedule. Stipulated Facts ¶ 2	Disputed. The Bail Schedule does not speak to detention. The Sheriff enforces state laws that require the detention of individuals who do not pay the amount on the Bail Schedule, in the absence of some other legal authorization for that person's release. The Sheriff will not detain those for whom another legal authorization for release exists, regardless of failure to pay monetary bail. SF 2.	No genuine dispute, only a semantic dispute. The parties agree in substance that, absent some other legal authorization for release, the Sheriff detains those who do not pay the required amount on the bail schedule.
Issue 2	Fact 3: For an individual who would otherwise be released upon posting bail, failure to pay bail results in some period of detention. Stipulated Facts ¶¶ 2,	Undisputed.	No dispute.

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
	36		
Issue 2	Fact 4: Whether, and how quickly, a defendant posts bail has a direct consequence on their pretrial freedom. Stipulated Facts ¶¶ 2, 32, 36, 40 SHF000014 SHF000235	Disputed to the extent that it is unclear what is meant by "direct consequence on their pretrial freedom." Undisputed to the extent that whether, and how quickly, a defendant posts bail has some bearing on whether, and how quickly, the defendant may obtain release from custody. Similarly, whether, and how quickly, a defendant applies pre-arraignment to a magistrate for OR release or a reduction in bail has some bearing on whether, and how quickly, the defendant may obtain release from custody. Penal Code §1269c.	No genuine dispute, only a semantic dispute. "Direct consequence on their pretrial freedom" refers to how long a person is detained. Plaintiffs note that, out of 8,929 arrestees released within 48 hours in 2016, *not a single individual* achieved release through application to a magistrate, suggesting that this process is either not available, not honored, or not used in San Francisco. SHF000235.
Issue 2	Fact 5: Inability to post bail (for non-citation release, bail-eligible arrestees) results invariably and immediately in some period of detention. Stipulated Facts ¶¶ 2, 32, 36, 38, 40	Disputed. Under state law, "inability to post bail" is not the cause of detention; rather, the cause of detention for non-citation release, bail-eligible arrestees, absent other legal impediment for their release, is failure to either post the scheduled bail amount, post a revised amount pursuant to an application under Penal Code §1269c, or obtain OR release pursuant to Penal Code §1269c. Penal Code §§ 1269b, 1269c; SF 40.	No genuine dispute, only a semantic dispute. The Parties agree in substance that those who do not post bail remain detained unless and until some non-monetary process authorizes their release. SF 36, 38–40. The Bail Industry is redefining subsets of "inability to post bail" into (i) inability to post the scheduled amount, (ii) inability to post a revised amount, or (iii) OR release. Adding more words does not affect the agreed premise that if an arrestee cannot post bail at the first chance, he or she is going to

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
			be detained longer.
Issue 2	Fact 6: Arrestees forced to seek release through magistrate application or the OR Project will spend longer behind bars than those who can, and do, post bail immediately. Stipulated Facts ¶¶ 23, 26 SHF000235	Disputed. Arrestees are not "forced to seek release through magistrate application or the OR Project," which are optional procedures. Penal Code §1269c. Plaintiffs' cited evidence does not support the proposition that arrestees who seek release through magistrate application or the OR Project will necessarily be detained longer than those who post bail. For example, SHF000235 (Dkt. 136-3) contains data reflecting release of arrestees through the OR Project within as little as 4 hours, and release of arrestees through posting bail in as great as 48 hours. Dkt. 136-3. Baughman Decl., Exh. 9 (BJS report), pp. 5, 13 (indicating financial releases took longer than non-financial releases in counties where data was gathered, which include San Francisco County).	No genuine dispute. The fact that *some* people post bail slower than the non-monetary release achieved by others does nothing to negate the fact that those who immediately post bail can achieve release in less than one hour. SHF000235. The earliest release under non-monetary processes is four hours. *Id.* The fact that, during the first ten hours of custody, 1,112 individuals achieved monetary release while only 13 achieved non-monetary release suffices to demonstrate that the posting of money bail can result in much faster release than slower, non-guaranteed non-monetary processes.
Issue 3 (San Francisco's money bail scheme is not narrowly tailored to a	Fact 7: Defendants accused of the most serious and dangerous offenses are ineligible for release through non-monetary methods, but are able to secure	Disputed. To the extent that "serious and dangerous offenses" refers to offenses listed under Penal Code §1270.1, the proposed fact is inaccurate because such	No genuine dispute. The Bail Industry only claims a "dispute" by referencing post-arraignment release and capital offenses, neither of which is at issue in this lawsuit. For the *pre-*

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
compelling government interest)	immediate release by posting bail pursuant to the bail schedule, regardless of whether they have undergone a public safety assessment. Stipulated Facts ¶ 40	individuals are eligible for release through non-monetary methods, after a hearing held in open court. Penal Code §1270.1(a), (c). To the extent that "serious and dangerous offenses" refer to a capital offense, the proposed fact is inaccurate because individuals accused of a capital offense are not able to secure release by posting bail pursuant to the bail schedule. Penal Code §1270; SF 33.	*arraignment period* at issue in this case, the Bail Industry agrees in substance that those arrested for offenses under Penal Code §1270.1 are ineligible for non-monetary release but can obtain release by paying their money bail amount. It is undisputed that individuals who are ineligible for non-monetary pre-arraignment release under Penal Code §1270.1 also avoid any public safety assessment if they purchase their freedom before the OR Project does its workup.
Issue 3	Fact 8: For individuals freed on bail, the sole condition that triggers forfeiture of their money is a failure to appear, and not additional criminal activity. Cal. Penal Code § 1305(a)(1)	Disputed to the extent misleading. While the premise asserted is undisputed, it is also true that a defendant's money bond can be revoked if the defendant commits new crimes while released on bail. *People v. National Automobile and Casualty Insurance Co.,* 98 Cal.App.4th 277, 285 (2002) (discussing difference between revocation and forfeiture, and noting that "A court may order bail status revoked for any number of reasons," including "new information regarding his flight risk, commission of new	No genuine dispute; the bail industry is improperly presenting a legal argument as a disputed fact. The Bail Industry agrees (as it must) in substance that, under California law, the only criterion for forfeiture of money that has been posted as bond is failure to appear, not criminal activity. The cases cited by the Bail Industry discuss when someone's *status* of release on bail can be revoked, not when their posted monetary payment is forfeited. The cases disingenuously cited by the Bail Industry demonstrate this: "Revocation of bail and forfeiture have distinct legal meanings. Forfeiture of bail

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
		crimes, additional crimes charged, or the like.") *People v. Stuyvesant Ins. Co.*, 261 Cal.App. 2d. 773 (2012) (court issued ex parte revocation of bail of a defendant after defendant shot three persons outside a tavern).	can only occur in one circumstance — when a defendant fails to appear at a scheduled court appearance." *People v. National Automobile and Casualty Insurance Co.*, 98 Cal.App.4th 277, 285 (2002) (internal quotations omitted).
Issue 3		Additional Fact 18: OR Workups are generally submitted to and ruled upon by the duty judge the same working day the OR Project receives the fingerprint records, which in turn is within 24 hours of arrest. SF ¶26. Baughman Decl. Exh. 7 (SFPDP testimony), p. 52, lines 2-14.	Not material. This additional fact does nothing to contradict the more important fact: non-monetary processes are slower and nonguaranteed. Whereas someone with immediate access to their full bail amount can obtain release in less than an hour, the OR Project will take much longer and is not guaranteed. SHF000235. Furthermore, that OR Workups are "generally" submitted the same working day as fingerprints are received does nothing to disprove that arrestees waiting for release through the OR Project wait many hours, and may have to wait several days for release.
Issue 3		Additional Fact 19: During the first 6 months of the Public Safety Assessment ("PSA")'s implementation in San Francisco County, 28% of defendants released using the PSA assessment had failed to appear.	Not material. First, the cited statistic does not establish a failure to appear rate. 28% of individuals were terminated from Pretrial Services for a failure to appear: they may have missed 1 out of 50 court appearances each, while 72% of individuals

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		Baughman Decl., Exh. 6 (*see* SHF0000852). Baughman Decl., Exh. 5 (Sheriff testimony), pp. 105-106.	may have had perfect attendance of 160 out of 160 court appearances each (for example). Under such an example, the overall FTA rate would be 28/12,920 or 0.2%. More importantly, the legal standard of whether money bail is narrowly tailored does not require Plaintiffs to show that *every* non-monetary system has stellar FTA rates, including the Arnold PSA, but just that there is a less restrictive system with FTA rates as good as the more restrictive alternative.
Issue 3		Additional Fact 20: surety bail agents return approximately 97% to 98% of their skips, with a failure to appear rate of 3-4%. Baughman Decl., Exh. 8 (Bartlett Decl.), ¶11	No competent evidence supports this fact, and it is immaterial. Paragraph 11 of Mr. Bartlett's declaration provides no citation for his claim that private bail companies "return approximately 97% to 98% of their skips." There is simply no reason for this court to accept this uncited assertion as true. Furthermore, returning 97–98% of skips says nothing about overall FTA rate. That assertion suggests that 2–3% *never return to court* and that the 97–98% had at least one FTA (i.e., the FTA that made them a "skip"). So all this information is telling us is that: (a) 97–98% of the referenced

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
			individuals had at least one FTA, and (b) 2–3% were never returned to court. Such facts are consistent with a very high FTA rate. To compare this to additional fact 19, 28% of individuals on non-monetary release during a six-month span had one FTA. Paragraph 11 of Bartlett's declaration not only lacks any citation, but it is also consistent with the possibility that 75% of those released through private bail companies have at least one FTA. Bartlett's uncited claim says nothing about how many individuals have at least one FTA.
Issue 3		Additional Fact 21: financial release is more effective than own recognizance release or release on unsecured bond at ensuring the appearance of a defendant. Baughman Decl., Exh. 8 (Bartlett report), ¶12. Baughman Decl., Exh. 9 (BJS report), p. 1. Baughman Decl., Exh. 11 ("The Fugitive"), p. 26. *See also* Additional Facts 19-20.	This legal conclusion is contradicted by all of the analysis in Plaintiffs' briefing thus far. ECF Doc. 136, §§ III(B)(i)(c)(1) and III(C); ECF Doc. 153, § II(A)(ii). This claim is also not supported by competent evidence. The BJS specifically issued a "data advisory" explaining that the reports (both the BJS Report and "The Fugitive") on which Mr. Bartlett relies cannot be cited for the claim he makes. Bechtel, et al.,

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			Dispelling the Myths, p. 7 (2012)[1] It did so for good reason: the data included statistics for jurisdictions with no pretrial supervision, meaning that the FTA data is skewed and unreliable. Cohen & Kyckelhahn, *Data Advisory: State Court Processing Statistics Data Limitiations*, U.S. Dept. of Justice (2010).[2]
Issue 3		Additional Fact 22: Conditions of release such as drug testing, alcohol monitoring, curfews, home detention, and electronic monitoring, result in some infringement on an individual's privacy interests. Dkt. 133-4 (Kopp Report), ¶¶27-29. *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2005). *Dolan v. City of Tigard*, 512 U.S. 374 (1994).	Not material and not a fact but rather a legal assertion based on a legal argument. Whatever the privacy concerns of certain conditions of release, they do not approach the liberty infringement of detention. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that [the Due Process] Clause protects."). Detention has long been considered "the paradigmatic affirmative disability or restraint." *Smith v. Doe*, 538 U.S. 84, 86 (2003).
Issue 3		Additional Fact 23: The Public Safety Assessment has not been shown to be an effective tool to predict a San Francisco County	Not material. Strict scrutiny analysis does not require that a specific alternative be proven and demonstrated, only that a reasonable

[1] https://www.pretrial.org/download/pji-reports/Dispelling%20the%20Myths%20(November%202012).pdf
[2] https://www.bjs.gov/content/pub/pdf/scpsdl_da.pdf

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
		defendant's risk of failure to appear in court or of committing a new crime during the pretrial release period. Baughman Decl., Exh. 12 (Jones testimony), pp. 57-71; 84; 146-147; 155; 165; 197; 199-120. Baughman Decl., Exh. 5 (Sheriff testimony), pp. 56-59. Baughman Decl. Exh. 8 (Bartlett report), ¶30. Baughman Decl., Exh. 10 ("State of the Science of Pretrial Risk Assessment"), pp. 26-29.	alternative *exist* that is less restrictive than the challenged conduct. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004). Courts have stricken down practices a not narrowly tailored without proven and demonstrated empirical statistics about the alternative. *See, e.g.*, *U.S. v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 824 (2000) (finding restriction on speech not narrowly tailored where plausible but untested alternatives existed, and that "[a] court should not assume a plausible, less restrictive alternative would be ineffective").
Unspecified		Additional Fact 24: accurate conclusions regarding the effectiveness of risk assessment tools as a whole cannot be drawn from the existing data. Baughman Decl., Exh. 8 (Bartlett report), ¶30. Baughman Decl., Exh. 12 (Jones testimony), pp. 146-147; 155. Baughman Decl., Exh. 10 ("State of the Science of Pretrial Risk Assessment"), pp. 26-29.	Not material for the same reasons as in response to additional fact 23.
Unspecified		Additional Fact 25: The Washington, D.C. system of pretrial release and	Not material for the same reasons as in response to additional fact 23.

Issue No.	Plaintiffs' Undisputed Material Facts and Supporting Evidence	CBAA's Response and Supporting Evidence	Resulting Undisputed Facts
		detention would not be effective or practicable in San Francisco County. Baughman Decl., Exh. 8 (Bartlett report), ¶¶ 35-36. Dkt. 133-4 (Kopp report), ¶¶17-22. Dkt. 135-1 (Morrison deposition testimony), pp. 64-64.	
Unspecified		Additional Fact 26: The New Jersey system of pretrial release and detention would not be effective or practicable in San Francisco County. Dkt. 133-4 (Kopp report), ¶¶ 18-19.	Not material for the same reasons as in response to additional fact 23.
Unspecified		Additional Fact 27: public safety is more likely to be ensured by the use of financial release than by the elimination of financial release. Baughman Decl., Exh. 8 (Bartlett report), ¶12. Baughman Decl., Exh. 9 (BJS report), p. 10. Dkt. 92-4 (listing methods of supervision of arrestees determined eligible for OR release). Baughman Decl., Exh. 13 (Jones testimony), p. 186.	This assertion is not a fact but a legal conclusion that is contradicted by all of the analysis in Plaintiffs' briefing thus far. ECF Doc. 136, §§ III(B)(i)(c)(1) and III(C); ECF Doc. 153, § II(A)(ii).

District Court
FIRST JUDICIAL DISTRICT
100 JEFFERSON COUNTY PARKWAY
GOLDEN, COLORADO 80401-6002

MARGIE L ENQUIST
JUDGE

1. My name is Margie Enquist, and I am a District Court Judge in Colorado's First Judicial District, comprised of Jefferson and Gilpin Counties. I received my law degree from the University of Minnesota Law School, graduating *magna cum laude.* Before being appointed to the bench in 2004, I served as Deputy District Attorney for the First Judicial District, handling felony cases, with an emphasis on crimes against children.

2. I have provided training to law enforcement academies and continuing legal education seminars to attorneys in Colorado. I have occasionally been asked to speak outside of Colorado (to other judges and policy makers), primarily on issues surrounding pretrial release and detention as well as research on the impact of those decisions. I co-authored a paper on the topic of release and detention in Jefferson County for the Attorney General's National Symposium on Pretrial Justice in 2011.

3. As a Colorado judge, I am bound by a judicial code of conduct that limits my ability to provide testimony. Accordingly, I will not be commenting on the merits of this particular case. Instead, I will only respond to a letter dated December 22, 2016, titled "Proposed Amendment by Standing Committee on Practice and Procedure Regarding Rules of Criminal Procedure on Pretrial Release." To be clear, I do not speak for the Colorado Judicial Branch or any other judges in my district.

4. As an initial matter, you should be aware that three signatories of the above-mentioned letter were not in their present positions during the years-long process research and implementation of a project that we named the "Jefferson County Bail Project." From what I recall, none of them were present during the many meetings during which we compromised to reach consensus, they did not participate in or contribute to the research, they did not help with the various documents produced during the process, and, in my opinion, that impairs their ability to fairly evaluate the success or failure of either the Jefferson County Bail Project, or a sub-study titled the "Bail Impact Study."

5. Jefferson County began discussions concerning the effectiveness of our pretrial release and detention practices in 2008 and 2009. Those discussions culminated in our local Criminal Justice Coordinating Committee (CJCC), comprised of all the criminal justice stakeholder groups and chaired by our then-Chief Judge Brooke Jackson, voting to further explore the issues. In 2009, after a lengthy period of study, the County's Criminal Justice Planning Unit (staff to the CJCC) produced a series of recommendations for making changes to our then-existing pretrial processes.

6. Based on those recommendations, judges in the First Judicial District chose to engage with the rest of the County in discussions surrounding what we called the Jefferson County Bail Project, which involved a collaborative process of reworking our first advisement bail settings and examining all aspects of the pretrial process. I was asked to serve as one of two Judge Representatives during that process. The overall project was a complicated but collaborative process of change involving representation from multiple stakeholders from the entire criminal justice system.

7. One component of this long process was a study titled the Bail Impact Study, which was a fourteen-week pilot project designed to measure the impact of many of the proposed recommendations for change. The Bail Impact Study (BIS) was designed merely to provide local data, specifically concerning outcomes from the various changes made to local practices during the fourteen weeks.

8. The Bail Project was much broader, and included meetings, papers, the creation of new pretrial supervision practices and responses to violations, and numerous policy level discussions over various proposals (such as having all defendants appear before a judge prior to bond settings, and having defense attorneys at bail hearings, at least in felony cases). The differences between the BIS and the overall Bail Project have been documented and published in 2014 in two separate papers found here: https://www.pretrial.org/download/pji-reports/Jefferson%20County%20Bail%20Project-%20Impact%20Study%20-%20PJI%202014.pdf (impact study); and here: http://www.pretrial.org/download/pji-reports/Jefferson%20County%20Bail%20Project-%20Lessons%20Learned%20-%20PJI%202014.pdf.

9. The CJCC (including the Sheriff and County Commissioner on the committee) voted nearly unanimously (the one vote cast against was by the District Attorney) to attempt to fully implement the studied and recommended changes.

10. In my opinion, and as someone who was present throughout the Jefferson County Bail Project, that Project had an overall positive impact. It led to the elimination of the County's arbitrary monetary bail schedule (which was arguably unconstitutional because it was based solely on charged offense and not ability to pay or risk to the community), to having public defenders at first advisements, to having Saturday advisements, and overall to fostering a more thoughtful and educated process of bail settings in our District. The data collected by the planners showed that judges could release more people on unsecured bonds and still retain the same court appearance and public safety rates, a finding that has helped countless jurisdictions in America struggling to find solutions to pretrial issues.

11. The Bail Project also led the statewide Colorado Commission on Criminal and Juvenile Justice to examine bail practices, and to discuss alternatives to the traditional money bail system. I was a Co-Chair of the Subcommittee tasked with leading those discussions, which ultimately led to revisions to our state laws changing the definition of bail, and encouraging the use of unsecured bonds, an actuarial pretrial risk assessment, and pretrial services supervision where available.

12. The letter of December 22, 2016, states that "the county shifted toward an unsecured bond system," but that now "the use of financial bail, including the use of commercial sureties, has been re-introduced into the system." In fact, despite the findings of the BIS, the county never completely "shifted" to an unsecured bond system, and money and commercial sureties were never eliminated from the system to begin with (even during the BIS). Then, as now, judges have been able to use their discretion (within constitutional limits) to set types and amounts of bond, under Colorado state law.

13. The letter of December 22, 2016, also states that "the program did not work as intended," citing budget issues. In fact, while budget concerns (related to an anticipated need for more jail space) led to initial discussions over pretrial changes, to me, as a person asked to represent the judges during this project, budget issues ultimately became secondary to issues of fairness and effectiveness in the administration of justice. Moreover, as stated, some judges then and today choose secured bonds despite the empirical evidence. Accordingly, any claims concerning the current budget cannot be easily attributed to changes in bond types made during the pilot project. And surety bonds have not solved the problem.

14. The letter of December 22, 2016, further states that "the program did not work as intended," citing accountability issues. In fact, the BIS study, cited above, demonstrated that secured bonds did not increase "accountability," as measured by court appearance despite the fact that failure to appear is the only basis for bond forfeiture in Colorado. Secured bonds are also not correlated with improved public safety rates in Colorado because those bonds are not forfeit in the event of a new offense. Secured bonds are effective in increasing public safety and court appearance when they result in detention, but I am unaware of any research showing that the use of secured bonds decreases recidivism, increases public safety, or decreases failures to appear after release.

15. Overall, the Bail Project worked as intended as a necessary first step in the iterative process toward more just and effective bail practices in Jefferson County. In sum, the Jefferson County Bail Project provided an overall benefit in that it educated Jefferson County judges and stakeholders about bail setting, helped the County in making significant changes to pretrial practices, and informed state lawmakers when changing Colorado's bail laws. Moreover, the BIS portion of the Project was highly successful in showing that judges could release more persons pretrial while keeping the same court appearance and public safety rates. To the extent that the implementation of the recommendations was not successful, the reasons therefor extend far beyond the scope of the statements in the letter of December 22, 2016.

I swear under penalty of perjury that the foregoing is true and correct to the best of my ability.

March 6, 2017

Signed & Sworn before me this 6th day of March 2017 in Jefferson County, CO

Judy A. Cross

JUDY A. CROSS
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20004034328
My Commission Expires 11-20-2020