

1 KAMALA D. HARRIS, State Bar No. 146672
 Attorney General of California
 2 TAMAR PACTHER, State Bar No. 146083
 Supervising Deputy Attorney General
 3 JOSE A. ZELIDON-ZEPEDA, State Bar No. 227108
 Deputy Attorney General
 4 455 Golden Gate Avenue, Suite 11000
 San Francisco, CA 94102-7004
 5 Telephone: (415) 703-5781
 Fax: (415) 703-1234
 6 E-mail: Jose.ZelidonZepeda@doj.ca.gov
 Attorneys for Defendant Kamala Harris, Attorney
 7 General

8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE EASTERN DISTRICT OF CALIFORNIA
 10 SACRAMENTO DIVISION

<p>12 GARY WAYNE WELCHEN, 13 14 Plaintiff, 15 16 KAMALA HARRIS, Attorney General; et al., 17 18 Defendants.</p>	<p>2:16-cv-185-TLN-KJN DEFENDANT ATTORNEY GENERAL KAMALA HARRIS’ NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES Date: January 12, 2017 Time: 2:00 p.m. Dept: Courtroom 2, 15th Floor Judge: The Honorable Troy L. Nunley Trial Date: n/a Action Filed: January 29, 2016</p>
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1 TO PLAINTIFF GARY WAYNE WELCHEN AND HIS COUNSEL OF RECORD:

2 TAKE NOTICE THAT on January 12, 2017, at 2:00 p.m., or as soon as this motion may be
3 heard, in courtroom 2, 15th floor, in the United States District Court for the Eastern District of
4 California, Sacramento Division, 501 I Street, Sacramento, California, Defendant Kamala Harris,
5 Attorney General of California, will move to dismiss this action under Federal Rule of Civil
6 Procedure 12(b)(6) on the grounds that the allegations of the First Amended Complaint fail to
7 state a claim under the Due Process Clause. This motion is based on the complaint, the
8 documents attached to the complaint, the attached memorandum of points and authorities, and the
9 accompanying request for judicial notice.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **INTRODUCTION**

12 This case raises both a challenge to Sacramento County's bail system, and a challenge to
13 California's state bail law. It arises in the context of a nationwide debate about the ways in which
14 the justice system fails indigent individuals, by jailing persons who fail to pay set fines, penalties,
15 or bail without taking into account their ability to pay. Such practices have for good reason been
16 subject to intense scrutiny.

17 Although this case implicates weighty policy questions, the Attorney General only defends
18 the facial constitutionality of California's bail law. The Attorney General will not defend any
19 application of the bail law that does not take into consideration a person's ability to pay, or
20 alternative methods of ensuring a person's appearance at trial. Plaintiff's facial challenge to
21 California's bail laws fail, because as a matter of law these laws do not violate his due process
22 rights. Thus, the Court should dismiss this claim.

23 **FACTUAL BACKGROUND**

24 **A. Plaintiff's Allegations and Procedural History.**

25 Plaintiff was arrested on January 29, 2016, by Sacramento police officers and accused of
26 burglary. (ECF No. 31 ¶ 28.) He is an indigent resident of Sacramento, California. (*Id.* ¶¶ 28,
27 30.) After his arrest, he was taken to the Sacramento County Jail and informed by jail employees
28 that he would not be released unless he paid \$10,000 in bail. (*Id.* ¶ 29.) The same day, Plaintiff

1 initiated this purported class action against the Attorney General and the County of Sacramento,
2 alleging that enforcement of California Penal Code section 1269b (the Bail Law) and the
3 County's bail schedule, adopted pursuant to that law (Bail Schedule) discriminate on the basis of
4 wealth, and thus violate his due process and equal protection rights. (ECF No. 1.)

5 The amended complaint alleges that the bail set is mandated by the Bail Schedule based on
6 each arrestee's booking charges. (ECF No. 31 ¶ 37.) Plaintiff alleges that Sacramento County
7 has a "policy and practice" of "wealth-based detention." (*Id.* at 9 ¶ 48.) Plaintiff further alleges
8 that the Attorney General is liable for "requiring imposition of money bail irrespective of an
9 arrestee's ability to pay." (*Id.* at 10 ¶ 60.) Plaintiff seeks injunctive and declaratory relief,
10 damages, and attorneys' fees. (*Id.* at 21-22.)

11 **B. The Relevant Statutory Background for Bail Proceedings.**

12 The California Legislature enacted the Bail Law. Under this law, "Any person who has
13 been arrested for, or charged with an offense other than a capital offense may be released" on
14 bail. Cal. Pen. Code § 1270. The primary considerations in setting bail are "the protection of the
15 public, the seriousness of the offense charged, the previous criminal record of the defendant, and
16 the probability of his or her appearing at trial." *Id.* § 1275.

17 Under the Bail Law, a person arrested for a crime may be released on bail pending trial or
18 other resolution of the charges. Cal. Pen. Code § 1269b(a). If the arrestee appears before a judge,
19 the judge sets the bail amount; otherwise, bail is determined by the arrest warrant or by the
20 uniform county bail schedule. *Id.* § 1269b(b). The Bail Law requires the superior court in each
21 county to prepare the uniform bail schedule, taking into consideration "the seriousness of the
22 offense charged." *Id.* § 1269b(c) & (e). In assessing the seriousness of the offense, judges in the
23 superior courts must "assign an additional amount of required bail for each aggravating or
24 enhancing factor chargeable in the complaint." *Id.* § 1269b(e). The Bail Law also allows for
25 criminal defendants (other than those charged with serious felonies) to seek release on their own
26 recognizance under certain circumstances. *Id.* § 1269c ("[T]he defendant, either personally or
27 through his or her attorney, friend, or family member, also may make application to the
28 magistrate for release on bail lower than that provided in the schedule of bail or on his or her own

1 recognizance”); § 1270(a). Individuals charged with serious felonies and specified acts can also
2 seek bail that is lower than the county bail schedule. *Id.* § 1270.1. Individuals charged with a
3 misdemeanor are presumptively entitled to such release unless the court determines that this “will
4 compromise public safety or will not reasonably assure the appearance of the defendant as
5 required.” *Id.* § 1270(a). An individual detained in custody “prior to conviction for want of bail”
6 is entitled to “an automatic review of the order fixing the amount of the bail.” *Id.* § 1270.2.

7 **LEGAL STANDARD**

8 “A Rule 12(b)(6) motion tests the legal sufficiency of a claim.” *Navarro v. Block*, 250 F.3d
9 729, 732 (9th Cir. 2001). The Court can dismiss the Plaintiffs’ claims if “there is no cognizable
10 legal theory or an absence of sufficient facts alleged to support a cognizable legal theory.” *Id.*

11 **ARGUMENT**

12 **I. CALIFORNIA’S BAIL LAW DOES NOT, AS WRITTEN, VIOLATE SUBSTANTIVE DUE** 13 **PROCESS.**

14 Plaintiff’s amended complaint raises a substantive due process claim against California’s
15 bail law. (ECF No. 31 ¶¶ 4, 110.)

16 “As a general matter, the Court has always been reluctant to expand the concept of
17 substantive due process,” and thus the protections of this clause “have for the most part been
18 accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.”
19 *Albright v. Oliver*, 510 U.S. 266, 272 (1994). There is no indication that “matters relating to
20 marriage, family, procreation, and the right to bodily integrity” are at issue here. *Albright*, 510
21 U.S. at 272. The Ninth Circuit recently struck an Arizona law that categorically denied bail to an
22 entire class of individuals charged with non-capital offenses, namely undocumented immigrants.
23 *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc). But the bail system at issue
24 here does not categorically deny bail to any group of individuals; to the contrary, it allows any
25 individual (other than those charged with capital crimes or other serious offenses) to obtain bail.
26 The court agreed that Arizona had a compelling interest to ensure that those accused of serious
27 crimes be present for trial, but concluded that the law was not “carefully limited.” *Id.* at 782.
28 Unlike the law at issue in *Lopez-Valenzuela*, state law here presumptively allows bail for most

1 offenses (except serious ones), and contains a panoply of options for individuals to be released on
2 their own recognizance or to obtain lowered bail. Cal. Pen. Code § 1269b (c)-(e); § 1270(a);
3 *Galen v. Cty. Of Los Angeles*, 477 F.3d 652, 661 (9th Cir. 2007) (assessing California bail law in
4 light of challenge under Excessive Bail Clause).

5 Moreover, even assuming that a fundamental right is at issue and substantive due process
6 applies, Plaintiff has not established that the Bail Law imposes punishment. Instead, the
7 complaint alleges that “the effects of [the bail law] are excessive in relation to any legitimate
8 regulatory purpose,” and thus violates the substantive due process rights of individuals “by
9 keeping them in jail solely because they cannot afford to pay money bail.” (ECF No. 31 ¶ 111.)

10 The Supreme Court’s decision in *U.S. v. Salerno*, 481 U.S 739 (1987) undermines
11 Plaintiff’s challenge to the bail law. In that case, two criminal defendants raised a facial
12 challenge to the federal Bail Reform Act, claiming among other things that it violates their due
13 process rights. Initially, the Court rejected the argument that pretrial detention constitutes
14 impermissible punishment. *Id.* at 746. “As an initial matter, the mere fact that a person is
15 detained does not inexorably lead to the conclusion that the government has imposed
16 punishment.” *Id.* Absent any evidence that the statute was expressly intended to be punitive, the
17 Court looked at whether “an alternative purpose to which [the restriction] may rationally be
18 connected is assignable for it, and whether it appears excessive in relation” to the alternative
19 purpose. *Id.* at 747. Here, Plaintiff points to no evidence of punitive intent behind the Bail Law.
20 The statute does not speak to punishment, but instead attempts to allow a wide range of
21 individuals arrested for criminal violations to be released, and indeed creates a presumption for
22 release for all but the most serious offenses. Thus, as with the statute at issue in *Salerno*, the Bail
23 Law here “is regulatory in nature, and does not constitute punishment before trial in violation of
24 the Due Process Clause.” *Id.* at 748.

25 Plaintiff nevertheless argues that the Bail Law violates substantive due process because it
26 allegedly has effects “far in excess of any regulatory purpose for having [pretrial] detention.”
27 (ECF No. 31 ¶ 4; ¶ 111.) To the contrary, however, is the caselaw, which has upheld the use of
28 bail. The Constitution explicitly provides for bail, proscribing only *excessive* bail. U.S. Const.,

1 amend. VIII. “Like the ancient practice of securing the oaths of responsible persons to stand as
2 sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of
3 money subject to forfeiture serves as additional assurance of the presence of an accused.” *Stack*
4 *v. Boyle*, 342 U.S. 1, 4 (1951). Indeed, the Supreme Court has held that bail is excessive only
5 when it is “set at a figure higher than an amount reasonably calculated to fulfill this purpose.”
6 *Id.*; *Salerno*, 481 U.S. at 754 (“The only arguable substantive limitation of the Bail Clause is that
7 the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the
8 perceived evil.”). Thus, the relevant question is whether the bail amount set is unreasonable
9 relative to its purpose, which is to ensure the appearance of the accused at trial. In applying this
10 standard, the Ninth Circuit has rejected a claim that California bail procedures violate the
11 Excessive Bail Clause. *Galen v. Cty. of Los Angeles*, 477 F.3d 652, 661 (9th Cir. 2007). In line
12 with its earlier decision in *White*, the Ninth Circuit noted that “The plain meaning of ‘excessive
13 bail’ does not require that it be beyond one’s means, only that it be greater than necessary to
14 achieve the purposes for which bail is imposed.” *Id.* at 661. At least one other circuit court has
15 similarly rejected a challenge to bail schedules. *Fields v. Henry Cty.*, 701 F.3d 180, 183-84 (6th
16 Cir. 2012); *see also Kelly v. Springett*, 527 F.2d 1090, 1093 (9th Cir. 1975) (rejecting due process
17 claim by criminal defendant whose assets were seized and therefore could not afford bail, noting
18 that “an accused . . . has no absolute right to bail”).

19 Plaintiff cannot prevail under the proper formulation of his due process claim. The
20 Supreme Court has taken a deferential approach to state criminal laws when they are challenged
21 under the Due Process Clause. *Medina v. California*, 505 U.S. 437, 443 (1992) (noting that
22 “beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has
23 limited operation”) (internal citation omitted). “The Bill of Rights speaks in explicit terms to
24 many aspects of criminal procedure, and the expansion of those constitutional guarantees under
25 the open-ended rubric of the Due Process Clause invites undue interference with both considered
26 legislative judgments and the careful balance that the Constitution strikes between liberty and
27 order.” *Id.* Under this test, a state criminal law does not violate due process unless “it offends
28 some principle of justice so rooted in the traditions and conscience of our people as to be ranked

1 as fundamental.” *Id.* at 445 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). Thus, while
2 criminal trial of an incompetent individual violates due process, states do not violate due process
3 by putting the burden of proof on the criminal defendant to establish his lack of competency. *Id.*
4 at 453; *see also Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979) (“In evaluating the constitutionality
5 of conditions or restrictions of pretrial detention that implicate only the protection against
6 deprivation of liberty without due process of law, we think that the proper inquiry is whether
7 those conditions amount to punishment of the detainee.”).

8 Thus, Plaintiff’s claim fails under due process.

9 **II. UNDER CERTAIN CIRCUMSTANCES, A LOCAL BAIL PROCEDURE COULD**
10 **POTENTIALLY IMPLICATE DUE PROCESS CONCERNS.**

11 While the bail law does not facially violate equal protection or due process, the manner in
12 which it is implemented could potentially implicate due process concerns.¹ For example, the bail
13 law directs the various counties to set a bail schedule for different criminal charges. Cal. Pen.
14 Code § 1269b(c). Superior court judges, who are charged with preparing the bail schedule, must
15 “consider the seriousness of the offense charged,” as well as assess whether there are any
16 aggravating factors. *Id.* § 1269b(e). This is within the superior court’s discretion; the bail law
17 does not specify parameters for these bail amounts. *Id.*

18 If a county’s particular bail schedule set bail amounts that are prohibitively expensive, this
19 could potentially implicate the constitutional rights of the arrested individuals. *U.S. v. Gardner*,
20 523 F. Supp. 2d 1025, 1028 (N.D. Cal. 2007) (“Traditional challenges to bail typically involve
21 whether the amount of bail was set too high, resulting in detention, or the failure of a court to
22 admit a defendant to bail.”); *In re Underwood*, 9 Cal.3d 345, 349 (Cal. 1973) (noting, relying on
23 *Carlson v. Landon*, 342 U.S. 524 (1952), that “because the [Eighth] amendment does not grant
24 the Right to bail it can be construed to mean only that bail shall not be excessive in those cases in

25 ¹ The fact that Plaintiff cannot allege a cognizable facial challenge to the bail laws does
26 not mean that alternatives to monetary bail should not be considered by the Legislature. Since the
27 Legislature first adopted money bail, numerous alternatives have been instituted in other
28 jurisdictions, including the federal Bail Reform Act. *See* 18 U.S.C. § 3142. In light of these
alternatives, there are current legislative proposals to reform the bail laws. *See, e.g.,*
<http://www.latimes.com/politics/essential/> (last visited Dec. 8, 2016).

1 which it is proper”). Similarly, if a bail schedule singled out a disfavored group for negative
2 treatment, this would raise constitutional concerns. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772
3 (9th Cir. 2014)(en banc) (striking Arizona law that categorically denied bail to undocumented
4 immigrants without an individualized determination of flight risk). In short, bail should not be set
5 to achieve invalid interests or in an amount that is excessive in relation to the interests sought to
6 be protected. *Galen*, 477 F.3d at 659-60.

7
8 **CONCLUSION**

9 The Attorney General does not here defend the constitutionality of Sacramento’s
10 implementation of the state bail laws. However, the state bail laws themselves are facially
11 constitutional, and do not violate the Plaintiff’s rights. For the foregoing reasons, the Court
12 should dismiss Plaintiff’s facial challenge to California’s bail laws.

13 Dated: December 13, 2016

Respectfully Submitted,

14 KAMALA D. HARRIS
15 Attorney General of California
16 TAMAR PACHTER
Supervising Deputy Attorney General

17
18 /s/ Jose A. Zelidon-Zepeda
19 JOSE A. ZELIDON-ZEPEDA
20 Deputy Attorney General
Attorneys for Defendant Kamala Harris,
Attorney General

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