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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

GARY WAYNE WELCHEN, Plaintiff, **v.** **KATHLEEN A. KENEALY, Acting Attorney General; et al.,** Defendants.	2:16-cv-185-TLN-DB **DEFENDANT ACTING ATTORNEY GENERAL KATHLEEN A. KENEALY'S REPLY SUPPORTING MOTION TO DISMISS FIRST AMENDED COMPLAINT**[1] 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

Plaintiff's opposition to the Attorney General's motion to dismiss, based on a series of hypothetical scenarios, does not and cannot show that the complaint adequately alleges either a substantive due process violation, or that the Bail Law fails in all its applications. Accordingly, the motion to dismiss the Attorney General should be granted because as a matter of law Plaintiff cannot adequately allege a facial substantive due process challenge.[2]

[1] Attorney General Kamala D. Harris resigned from office on January 3, 2017. By operation of law, Acting Attorney General Kathleen A. Kenealy is automatically substituted. Fed. R. Civ. P. 25(d).

[2] Plaintiff mistakes the Attorney General's position in this case, contending that she "concedes that Sacramento County's implementation of money bail may be unconstitutional." (continued…)

ARGUMENT

I. THE BAIL LAW PASSES MUSTER UNDER *U.S. V. SALERNO*.

"[T]he Government may permissibly detain a person suspected of committing a crime prior to a formal adjudication of guilt." *Bell v. Wolfish*, 441 U.S. 520, 534 (1979). It is undisputed that the government "has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, or that confinement of such persons pending trial is a legitimate means of furthering that interest." *Id.* Similarly, the government's "interest in preventing crime by arrestees is both legitimate and compelling." *U.S. v. Salerno*, 481 U.S. 739, 749 (1987). Thus, pretrial detention violates an individual's rights only if it constitutes impermissible punishment or is otherwise excessive in relation to its purpose. *Id.* at 747. Because Plaintiff does not allege that the Bail Law imposes impermissible punishment (*see generally* ECF No. 38; ECF No. 31 at 11-14), the only question is whether he can adequately allege that the Bail Law is excessive relative to its purpose. As a matter of law, he cannot.

In *Salerno*, the Court rejected a challenge to the federal Bail Reform Act, holding that the statute "carefully limited the circumstances under which detention may be sought to the most serious crimes," entitled the arrestee to a "prompt detention hearing," and the conditions of confinement "appear to reflect the regulatory purpose" that the government sought to achieve. 481 U.S. at 747. That standard is here met.

Plaintiff fails to show that the Bail Law is like the one rejected in *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc). In that case, the Ninth Circuit struck an Arizona law that, on its face, categorically denied bail to undocumented immigrants. The court agreed that Arizona had a compelling interest to ensure that those accused of serious crimes be present for trial, but concluded that the law was not "carefully limited." *Id.* at 782. Instead, the Arizona law created an irrebuttable presumption that all undocumented immigrants posed a flight risk, and thus was not narrowly focused under *Salerno*. *Id.* Ultimately, "to survive heightened scrutiny

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(ECF No. 38 at 1.) However, the Attorney General has taken no position on the as-applied challenge, which is alleged against Sacramento County. Accordingly, the Attorney General here defends only the facial constitutionality of state law.

any such categorical rule, requiring pretrial detention in all cases without an individualized determination of flight risk or dangerousness, would have to be carefully limited," and the chosen classification "would have to serve as a convincing proxy for unmanageable flight risk or dangerousness." *Id.* at 786.

By contrast, the Bail Law does not categorically deny bail to any individual or group of individuals, and is not excessive relative to its purposes. Instead, it allows a wide range of individuals arrested for criminal violations to be released pending trial, creating a presumption *in favor of release* for all but the most serious offenses— all arrestees "charged with an offense other than a capital offense may be released on bail." Cal. Pen. Code § 1270. Other provisions of the Bail Law dictate that bail should be based on the seriousness of the offense charged, thus demonstrating the Bail Law's focus on public safety, that is, ensuring an arrestee's appearance for trial. *Id.* § 1269b(c) & (e) (providing that in adopting bail schedule, local judges "shall consider the seriousness of the offense charged"). In assessing the seriousness of the offense, judges in the superior courts must "assign an additional amount of required bail for each aggravating or enhancing factor chargeable in the complaint." *Id.* § 1269b(e). The Bail Law also allows most criminal defendants to seek release on their own recognizance under certain circumstances. *Id.* § 1269c; § 1270(a). Individuals charged with a misdemeanor are presumptively entitled to release unless the court makes specific findings to the contrary. *Id.* § 1270(a). And an arrestee detained because he cannot make bail is entitled to automatic review within five days of the order setting the bail amount. *Id.* § 1270.2.

California's Bail Law has previously been upheld by the Ninth Circuit. In *Galen v. County of Los Angeles*, the court assessed an as-applied challenge under the Excessive Bail Clause to the Bail Law at issue here. 477 F.3d 659 (9th Cir. 2007). Following *Salerno*, the Ninth Circuit ascertained whether bail was set "to achieve invalid interests," and whether it was "excessive in relation to the valid interests" that bail sought to achieve. *Id.* (citing *Salerno*, 481 U.S. at 754). The Ninth Circuit rejected the challenge to the Bail Law, concluding that the law was not excessive in light of the purpose for which it was imposed, or otherwise excessive. *Id.* at 661. *Galen* disposes of Plaintiff's claims here.

Plaintiff's opposition does not discuss, much less attempt to distinguish *Galen*. (ECF No. 38.) Instead, Plaintiff proffers alternative methods for ensuring that arrestees will appear for trial. (ECF No. 38 at 7-12.) These are policy preferences that can and should be addressed to the Legislature; they do not raise constitutional concerns. As shown in *Salerno*, the proper inquiry is whether the Bail Law serves a legitimate government interest, and is excessive relative to that purpose. 481 U.S. at 747.

Plaintiff also faults the Bail Law because it is allegedly not "individualized or based on specific evidence of flight risk." (ECF No. 38 at 6.) But Plaintiff cites no case imposing such an individualized determination requirement on a state bail scheme. Instead, Plaintiff focusses on the fact that the federal Bail Reform Act at issue in *Salerno* was upheld based in part on the fact that it contained an individualized determination requirement. (*Id.* at 6.) But *Salerno* did not hold that the provisions of the federal Bail Reform Act are constitutionally mandated of every jurisdiction. 481 U.S. at 752; *cf. Gerstein v. Pugh*, 420 U.S. 103, 123 (in assessing Fourth Amendment challenge to state criminal procedures, noting that "[t]here is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole."). And, as noted above, the Ninth Circuit has upheld the Bail Law though it does not require an individualized assessment of flight risk, and applies across the board to most offenses. *Galen*, 447 F.3d at 661.

Plaintiff argues at length that prejudice against people who are poor, or the perception that the "poor are necessarily an unmanageable flight risk," is improper. (ECF No. 38 at 6.) But the Bail Law reflects no such prejudice or assumption, and distinguishes among arrestees based solely on the crime charged. That is, the Bail Law presumptively denies bail to individuals charged with a capital offense. Cal. Pen. Code § 1270. All other individuals are entitled to bail, and the various counties are directed to prepare uniform bail schedules tying the bail amounts to the seriousness of the offense charged. *Id.* § 1269b(c) & (e). Unlike the Arizona law struck in *Lopez-Valenzuela*, which on its face singled out undocumented immigrants as ineligible for bail, the law at issue here makes all individuals eligible for bail (unless they are arrested for a capital offense).

Plaintiff also contends that the Bail Law does not tackle a problem of an unmanageable flight risk or public safety "because a person's wealth-status is not determinative of her likelihood of appearing for trial or threatening public safety." (ECF No. 38 at 6.) But this misses the point—the Bail Law does not make distinctions based on an arrestee's financial status; in fact, it does not consider wealth at all. *Cf. Valeria v. Davis*, 307 F.3d 1036, 1039 (9th Cir. 2002) (statute that did not mention racial minorities generally or a particular racial minority does not violate equal protection).

Thus, Plaintiff cannot as a matter of law allege a substantive due process challenge to the Bail Law.

II. UNDER HIS FACIAL CHALLENGE, PLAINTIFF HAS NOT ESTABLISHED THATTHE BAIL LAW IS UNCONSTITUTIONAL IN ALL ITS APPLICATIONS.

The facial challenge also fails because as a matter of law, Plaintiff cannot demonstrate that the Bail Law is unconstitutional in each and every application.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. When a party raises a facial challenge to a statute, he must show that the law is unconstitutional in *all* its applications. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008); *Lopez-Valenzuela*, 770 F.3d at 780. Thus, a facial challenge "must fail where the statute has a 'plainly legitimate sweep.'" *Id.* (citation omitted).

As the Supreme Court held in *Salerno*, that the federal Bail Reform Act "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.* at 745. To sustain a challenged statute's provisions, a court "need only find them 'adequate to authorize the pretrial detention of at least some persons charged with crimes,'" regardless of whether they might be insufficient in some particular circumstances. *Id.* at 751. Thus, if the Bail Law at issue here could be applied constitutionally—that is, if the court can find that a law requiring a bail schedule tied to the seriousness of an offense can be applied in a way that was lawful—Plaintiff's challenge must fail. *U.S. v. Stephens*, 594 F.3d 1033, 1038 (8th Cir.

2010). In *Stephens*, for example, a criminal defendant raised a facial challenge to a federal law that created an irrebuttable presumption requiring curfew and electronic monitoring for individuals charged with child pornography. *Id.* The court rejected the challenge, noting that such a presumption "would be appropriate in any case in which a judicial officer conducting a detention hearing would, in fact, find curfew and electronic monitoring to be warranted." *Id.*

Plaintiff makes no attempt to show that the Bail Law is unconstitutional *in all its applications*, instead focusing at length on hypothetical scenarios that purportedly show the Bail Law's limitations. (ECF No. 38 at 5-6.) For example, Plaintiff posits that "California's money bail laws allow release for someone who is rich, dangerous, and a flight risk while detaining someone who is poor, safe, and likely to appear in court." (*Id.* at 5.) Initially, an individual subject to the Bail Law has by definition committed acts giving probable cause for an arrest for committing a criminal offense, and thus can hardly be deemed presumptively "safe." More to the point from a legal perspective, the extreme examples Plaintiff posits do not show that the Bail Law is unconstitutional in *all its applications*. *See Wash. State Grange*, 552 U.S. at 449. In determining whether a law is facially invalid, courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 450.

On a facial challenge, Plaintiff must establish that the law he challenges cannot be applied in a constitutional manner. A bail law tying bail amounts to the seriousness of the offense can be properly enforced in a situation where an arrestee is charged with any number of serious offenses and for whom only bail will ensure his appearance at trial and protect the public. In fact, as explained above, the Ninth Circuit has upheld the Bail Law in an as-applied context in *Galen*. This demonstrates that the Bail Law can be applied constitutionally in some cases. *Cf. Lopez-Valenzuela*, 770 F.3d at 789 (noting that facial invalidation is proper if, given the nature of the claim and defense, any other plaintiff raising the same challenge would also win); *Stephens*, 594 F.3d at 1038 (rejecting facial challenge given that other courts had found the challenged restrictions appropriate in particular situations). Accordingly, Plaintiff's claim fails.[3]

[3] Plaintiff's reliance on *Bearden v. Georgia*, 461 U.S. 660, 667 (1983), *Tate v. Short*, 401 U.S. 395 (1971), and *Williams v. Illinois*, 399 U.S. 235 (1970), is misplaced, because bail is not (continued…)

CONCLUSION

For the foregoing reasons, the Court should dismiss the claims against the Attorney General.[4]

Dated: January 5, 2017

Respectfully submitted,

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set based on ability to pay, but based on the crime charged.

[4] Plaintiff contends that because the Attorney General moved to dismiss the facial claims, his "as applied" challenge is unopposed. (ECF No. 38 at 2.) But the sole allegation against the Attorney General is that she allegedly requires the imposition of a bail schedule under California law, and supervises the county sheriffs. (ECF 31 at 5-6 ¶¶ 23-26.) If, as explained above, the Bail Law is constitutional, Plaintiff is not entitled to any relief against the Attorney General. Notably, Plaintiff does not argue that the Attorney General played any role in his pretrial detention. (*Id.* at 6-7 ¶¶ 27-33.)