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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

RIANA BUFFIN and CRYSTAL PATTERSON, on behalf of themselves and other similarly situated,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO, *et al.*

Defendants.

Case No. 4:15-cv-04959-YGR

REPLY IN SUPPORT OF FOURTH MOTION OF CALIFORNIA BAIL AGENTS ASSOCIATION TO INTERVENE AS DEFENDANT

Date: February 7, 2017
Time: 2:00 p.m.
Place: Courtroom 1, Fourth Floor
Judge: Hon. Yvonne Gonzalez Rogers

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I. INTRODUCTION

Plaintiffs' Opposition to CBAA's Fourth Motion to Intervene ("Motion") reflects a fundamental misunderstanding of the requirements for intervention under Federal Rule of Civil Procedure 24, misapprehends San Francisco's bail scheme, and mischaracterizes Plaintiffs' attack on that statutory scheme. Plaintiffs' argument that the California Bail Law is "wealth-based" is unavailing, in light of the comprehensive statutory scheme for setting bail schedules in California, which requires that the judges of the county consider (among other things) the nature of the offense when setting the presumptive amount of bail – a criterion that Plaintiffs admit in their opposition is proper. Plaintiffs are seeking a judicial declaration that California's Bail Laws are unconstitutionally excessive, and as such, Plaintiffs cannot sidestep uniform Eighth Amendment jurisprudence, which upholds bail even when it is set at an amount that the defendant cannot pay.

As discussed in the Motion and below, CBAA has amply met the burdens for both intervention of right and permissive intervention under Rule 24. As the sole remaining Defendant, San Francisco's Sheriff, has now refused to defend California's Bail Law (*see* Dkt. 101), Plaintiffs correctly have abandoned any argument that CBAA's interests are being represented in *any* way, much less "adequately," as required by Rule 24. Realizing the weakness of their arguments in opposition, Plaintiffs resort to a misleading suggestion that CBAA must meet the heightened burden of demonstrating Article III standing prior to intervention. This is, simply put, not the law, and Plaintiffs' construction of the applicable legal standards is apparent from the very case law they cite in their Opposition.

Plaintiffs request a declaration that the laws which underpin and legitimize the bail bond industry by expressly validating surety bail bond contracts, are unconstitutional as applied to thousands of individuals who have currently existing contracts with CBAA's members, including Plaintiff Patterson herself. *See* Third Amended Complaint, Dkt. 71 ("TAC"). ¶¶55, 66; Doc. 25, 25-1. Given the facts and the relevant, binding case law in the Ninth Circuit, Plaintiffs' argument that CBAA and/or its members have no legally protectable interest and "cannot be aggrieved by any adverse ruling" in this case, is patently false. For the reasons discussed in the Motion and below,

CBAA respectfully requests that the Court grant its Motion and permit its intervention as a defendant in this case.

II. PLAINTIFFS' OBJECTIONS TO INTERVENTION ARE UNFOUNDED

A. Plaintiffs' Claims Are Premised on a Challenge to the Eighth Amendment

Plaintiffs argue that their claims do not challenge the Eighth Amendment, and insist that they "are *not* arguing that all money bail has to be eliminated," but rather that "money bail cannot be used to detain people who cannot afford it." Dkt. 112 ("Opposition"), p. 5. Setting aside the fact that this position directly contradicts Plaintiffs' counsel's many public representations (and therefore admissions) on this topic,[1] it is inaccurate as a matter of law.

As discussed in CBAA's Proposed Rule 12 Motion to Dismiss the TAC (Dkt. 110-4), uniform Supreme Court jurisprudence establishes that "bail" and "money bail" are the same thing under the Eighth Amendment, and that the Eighth Amendment proscription against "excessive" bail necessarily contemplates the quantum of bail. For instance, in *U.S. v. Salerno*, 481 U.S. 739 (1997), the district court ordered the defendants held without bail, and the defendants presented an Eighth Amendment challenge to the Bail Reform Act of 1984. The Supreme Court made clear that the Eighth Amendment did not mandate a right to bail, but was only concerned with the *amount* of bail if and when bail was warranted. *Id.*, at 739 ("…when the Government has admitted that its only interest is in preventing flight, bail must be set by a court *at a sum* designed to ensure that goal, and no more.") (emphasis added); *see also, Galen v. County of Los Angeles*, 477 F.3d 652, 660 (9th Cir. 2007) ("[t]he state may not set bail to achieve invalid interests . . . nor *in an amount* that is excessive in relation to the valid interests it seeks to achieve.") (internal citations omitted) (emphasis added). Indeed, the only case cited by Plaintiffs in purported support of their argument that "bail" is not limited to money bail is *Stack v. Boyle*, 342 U.S. 1 (1951), but that case also addresses the *quantum* of bail, and therefore contemplates solely monetary conditions of relief. *Id.* at 6 (stating in dictum that "[b]ail *set at a figure* higher than *an amount* reasonably calculated [to ensure defendant's

[1] *See, e.g.*, EJUL's website announcing goal of "Ending the American Money Bail System," http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/.

presence at trial] is 'excessive' under the Eighth Amendment") (emphasis added).

Eighth Amendment jurisprudence also repeatedly upholds bail even when it is set at an amount that the defendant cannot pay. *See, e.g., White v. Wilson,* 399 F.3d 596, 598 (9th Cir. 1968) ("[t]he mere fact that petitioner may not have been able to pay the bail does not make it excessive."); *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987) ("[t]he test for excessiveness is not whether defendant is financially capable of posting bond ....," *quoting U.S. States v. Beaman*, 631 F.2d 85, 86 (6th Cir. 1980)); *U.S. v. Wright*, 483 F.2d 1068, 1070 (4th Cir. 1973) (stating the defendant's "impecunious financial status" is not "the governing criterion to test the excessiveness of bail"); *U.S. v. McConnell*, 842 F.2d 105,107 (5th Cir. 1998) ("[a] bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement.").

Even were Plaintiffs' constitutional arguments concerning the Eighth Amendment accurate (they are not), this is irrelevant to a Rule 24 intervenor analysis, as Plaintiffs' requested relief – an injunction against the use of surety bail to detain indigent arrestees – would still materially affect the legally protectable interest of CBAA and its members in the enforceability of the contracts held with those very indigent individuals. As such, regardless of the Eighth Amendment analysis, CBAA is a proper intervenor.

B. Plaintiffs Misunderstand How San Francisco's Bail Schedule is Determined

Plaintiffs cite "the Washington, D.C. and federal systems" as alleged examples of constitutional pretrial detention/release systems because "release and detention decisions are based on dangerousness rather than monetary conditions…" Dkt. 112, p. 7. What Plaintiffs fail to admit – and where CBAA's expertise could offer helpful guidance to the Court – is that California's bail-setting scheme is not wealth-based, but rather considers the same types of criteria as the federal system. Specifically, California's statutory bail scheme, including the San Francisco bail schedule under attack here, is required to take into consideration the seriousness of the offense charged. *See* Cal. Penal Code § 1269b(e) ("[i]n adopting a uniform countywide schedule of bail for all bailable felony offenses the judges shall consider the seriousness of the offense charged."). The federal system similarly requires judges to consider the nature of the charged offense in setting bail. *See e.g.*,

18 U.S.C. § 3142(g)(1) (requiring court to consider "[t]he nature and circumstances of the offense charged, including whether the offense is a crime of violence …."). And the federal system of release or detention of a defendant pending trial is not violated if the defendant, although granted bail, remains in custody because he cannot pay it. *See, e.g., U.S. v. Fidler*, 419 F.3d 1026, 1028 (9th Cir. 2005) (no violation of 18 U.S.C.A. §3142 where a defendant is granted pretrial bail, but is unable to comply with a financial condition, resulting in his detention)[2]; *Lee v. Evans,* 41 F.3d 1513 (9th Cir. 1994) ("[a] bail setting is not excessive within the meaning of the Eighth Amendment merely because the defendant cannot pay it.").

Indeed, Plaintiffs point to nothing that indicates that the California bail scheme is wealth-based; *i.e.*, that the bail schedule set by the San Francisco Superior Court judges is dependent on the financial status of the offender. Rather, Plaintiffs simply note the noncontroversial fact that poor people have a more difficult time affording things than wealthy people. That is not a constitutional violation under the federal system that Plaintiffs tout; nor can it be a violation of California's comprehensive bail scheme under attack. *See, e.g., Fidler, supra,* 419 F.3d. at 1028; *McConnell, supra,* 842 F.2d at 107; *White v. Wilson, supra,* 399 F.2d at 598.

C. CBAA Is Entitled to Intervene as a Matter of Right under Rule 24(a)

Plaintiffs argue that intervention "will only confuse the issues and delay these proceedings." Dkt. 112, p.4. In reality, no delay will arise from intervention, which follows immediately on the heels of the Answer filed by the sole remaining defendant. Further, issues will only be "confused" to the extent that they will be litigated, in the first place – without CBAA's intervention, *no defense* to Plaintiffs' fundamental constitutional challenges will be asserted. *See* Dkt. 101. CBAA's participation in this lawsuit is therefore critical, and is authorized under both subsections of Rule 24.

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[2] The *Fidler* court further held that where the detention "is not based solely on the defendant's inability to meet the financial condition, but rather on the court's determination that the amount of the bond is necessary to reasonably assure the defendant's attendance at trial or the safety of the community…under those circumstances, the defendant's detention is 'not because he cannot raise the money, but because without the money, the risk of flight or danger to others is too great.'" *Id.* at 1029, *citing U.S. States v. Jessup,* 757 F.2d 378, 389 (1st Cir. 1985).

1. CBAA's Motion Is Timely.

Plaintiffs do not contest the timeliness of CBAA's Motion. *See* Dkt. 112. In light of the Answer filed by the Sheriff, and the Proposed Answer and Proposed Rule 12 Motion submitted by CBAA, this Court now "understands…the defenses [Sheriff] and CBAA intend to raise," and thus intervention can be sufficiently addressed at this time. Dkt. 55, p.10.

2. CBAA Has Significantly Protectable Interests in the Litigation

Plaintiffs' suggestion that CBAA should not be allowed to intervene "because the [bail bond] industry does not have a legally protected interest in its continued existence" (Dkt. 112, p.10), belies a fundamental misunderstanding of the "protectable interest" standard under a Rule 24 intervenor analysis. In fact, the Ninth Circuit has "rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest," and "agree[s] with the D.C. Circuit that the ' 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (internal citations omitted); *citing Neusse v. Camp,* 385 F.2d 694, 700 (D.C. Cir. 1967) *see also Blake v. Pallan,* 554 F.2d 947, 952 (9th Cir. 1977). Indeed, "[**t]he 'interest test' is basically a threshold one, rather than the determinative criterion for intervention, because the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task of limiting extension of the right to intervene."** *Fresno, supra,* at 438 (emphasis added); *see also Smuck v. Hobson*, 408 F.2d 175, 179 (D.C.Cir. 1969) (Bazelon, J.); *Johnston v. San Francisco Unified School District,* 500 F.2d 349, 352-53 (9th Cir. 1974) ("the first requirement of Rule 24(a)(2), that of an 'interest' in the transaction, may be a less useful point of departure than the second and third requirements"). This is in line with the well-established four-part test for intervention in the 9th Circuit, which "is to be construed liberally in favor of applicants for intervention and guided by practical considerations rather than technical distinctions." *Cemex, Inc. v. County of Los Angeles*, 92 Fed. Appx. 457 (9th Cir. 2004); *see also Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001) ("Berg").

A proposed intervenor meets its burden on prong two of an intervention analysis if "the interest [asserted] is protectable under some law, and [] there is a relationship between the legally protected interest and the claims at issue." *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011). "The interest test is not a bright-line rule…[a]n applicant seeking to intervene need not show that 'the interest he asserts is one that is protected by statute under which litigation is brought.' It is enough that the interest is protectable under any statute." *U.S. v. Alisal Water Corp*, 370 F.3d 915 (9th Cir. 2004), *citing Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993); *see also Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349 (9th Cir. 1974) (noting that "for purposes of Rule 24(a)(2), all students and parents…have an interest in a sound educational system and in the operation of that system in accordance with the law."); *Perry v. Schwarzenegger*, No. C 09-2292 VRW, 2009 U.S. Dist. LEXIS 55594 (N. D. Cal. June 30, 2009) (holding under Rule 24 that "(2) as official proponents [of California's Proposition 8], [proposed intervenors] have a significant protectible [sic] interest in defending Prop 8's constitutionality," and "(3) their interest in upholding Prop 8 is directly affected by this lawsuit"). Further, a non-speculative economic interest may be sufficient to support a right of intervention. *U.S. v. Alisal Water Corp.*, *supra*, 370 F.3d at 919; *see also Arakaki v. Cayetano*, 324 F.3d 1078, 1088 (9th Cir. 2003) (Native Hawaiians had a sufficiently related interest to intervene in a lawsuit by taxpayers challenging the provision of benefits by the State of Hawaii and its subdivisions to Hawaiians).

CBAA and its members have a non-speculative, economic interest in the continued viability of their industry, and in the enforcement of their currently existing bail bond contracts, which are provided for by the Eighth Amendment and Penal Code §1269b. There is a direct relationship between those interests and Plaintiffs' requested relief – namely, a declaration that these laws are unconstitutional. As such, the threshold test of Rule 24(a)(2) clearly is met.

a. CBAA's Interest in the Bail Industry's Continued Viability

While Plaintiffs claim in this Court that they "have made no claims against the bail bond industry" (Dkt. 112, p. 4), they are simultaneously making public statements outside the courtroom

that winning this case would render CBAA's entire industry, on a nationwide level, "obsolete."[3] CBAA submits that judicially-mandated obsolescence qualifies as injury-in-fact. *See, e.g., Brooks v. Flagg Bros.*, 63 F.R.D. 409, 415 (S.D.N.Y. 1974) ("where specific segments of an industry would be vitally affected by a declaration that the statute which governs their business conduct is unconstitutional, there is little reason to exclude them from participation"); *see also* 7C Wright, Miller & Kane, Fed. Prac. & Proc. Civ. § 1908.1 (3d ed. 2010) ("in cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention"); *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994); *New York Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N. Y.*, 516 F.2d 350, 352 (2d Cir. 1975). Plaintiffs do not meaningfully distinguish these authorities, but merely note that they deal with intervention "by regulated parties in challenges to regulations that directly regulate the economic interests at issue." Dkt. 112, p. 12. Plaintiffs offer no explanation for why the rationale stated in these cases should not apply to this case, as CBAA is an association composed entirely of parties regulated by the California Penal Code and the Insurance Code, and Plaintiffs pose a challenge to the law that regulates CBAA's and its members' economic interests.[4]

In arguing that the bail bond industry "does not have a legally protected interest in its continued existence" (Dkt. 112, p. 8), Plaintiffs cite three wholly inapposite cases, none of which concern California law, address the "legally protected interest" standard under Rule 24(a)(2), or support the assertion made by Plaintiffs. *See, e.g., Johnson Bonding Co., Inc. v. 23 Com. of Ky.*, 420 F.Supp 331, 355 (E.D. Ky. 1976) (interpreting a Kentucky statute from 1976); *Stephens v.*

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[3] *See* www.washingtonpost.com/national/cash-bail-system-under-attack-asunconstitutional/2015/12/26/e70de61c-ac06-11e5-9b92-dea7cd4b1a4d_story.html, discussing statements by EJUL counsel, Paul Telfeyan (last visited January 17, 2017).

[4] As set forth in the Motion, CBAA seeks to intervene both on its own behalf, and on behalf of its members, which is proper under the circumstances. *See* Dkt. 110, pp.12-14; *Berg, supra*, 268 F.2d at 822 n.3.

Bonding Ass'n of 23 *Kentucky*, 538 S.W.2d 580 (Ky. 1976) (evaluating constitutionality of a 1976 provision of a House Bill for bail reform); *Schilb v. Kuebel*, 404 U.S. 357 (1971) (finding no denial of due process or equal protection by an Illinois bail reform statute, where no indication that the statute actually favored the affluent). Plaintiffs also mischaracterize *U.S. v. Alisal Water Corp.*, which did not "reject[] intervention based on future potential profits," but rather, held that "an allegedly impaired ability to collect judgments arising from past claims does not, on its own, support a right to intervention," noting that "[t]o hold otherwise would create an open invitation for virtually any creditor of a defendant to intervene in a lawsuit where damages might be awarded." *Id.*, at 920. Clearly, an ability to collect judgments is not the interest being asserted by CBAA. Rather, CBAA's and its members' interest – the ability to provide surety bail bonds, including to indigent defendants – is protected under California law and the 8th Amendment, and there is a direct relationship between that interest and Plaintiffs' requested declaratory relief to do away with surety bail bonds for indigent defendants. CBAA and its members indisputably have a protectable interest in this litigation.

b. CBAA's Interest in Current Bail Bond Contracts

CBAA has an independent and alternative legally protectable interest in this lawsuit – namely, the enforceability of the thousands of *currently existing* contracts held by its members. Indeed, one such contract exists between named Plaintiff Crystal Patterson, and Bail Hotline Bail Bonds, which is a member of CBAA. *See* Dkt. 25-1 (Surety Bail Bonds Agreement); Dkt. 110-1 (Mitchell Decl.), ¶13. Plaintiffs admit that this contract is still in effect. *See* Dkt. 25 ("the $1,500 [Patterson] paid the bail bond company will not be returned, and she will be responsible for the remainder plus interest of her $15,000 bond"); Dkt. 71 (TAC), ¶28 ("Ms. Patterson is still indebted to a private bail bond company for the balance of her $15,000 debt, plus interest."). The Surety Bail Bonds Agreement is currently a valid and enforceable legal contract pursuant to Penal Code §1269b and the Eighth Amendment, but would be rendered illegal and unenforceable, should the Court grant Plaintiffs' requested relief – a declaration that the laws authorizing this (and an

unspecified number of other) bail bond agreements are unconstitutional. "[A] contract whose object is a violation of law is itself against the policy of the law (Civ. Code, §§ 1441, 1667, 1668), and renders the bargain unenforceable." *Baccouche v. Blankenship*, 154 Cal. App. 4th 1551, 1558 (2007). Plaintiffs do not, and cannot, dispute this fundamental principle of contract law. Granting Plaintiffs' requested relief will result in the deprivation of CBAA and its members of their economic interests. Of course, if CBAA's members' industry collapses, CBAA's own viability as an association will cease.

Plaintiffs cite Supreme Court cases "regarding the lack of a protected right to future profits" (Dkt. 112, p. 11), but none of these cases are on point. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972) does not address the standards for intervention; moreover, that case held that a university professor's "abstract concern in being rehired" was not a property interest sufficient to require due process, in the absence of any state statute or university rule or policy that secured the professor's interest in reemployment or that created any legitimate claim thereto. By contrast, there is a state statute expressly authorizing CBAA's members to act as surety bail bondsmen and entitling CBAA's members to enjoy the benefits of their contracts with arrestees. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940) similarly does not involve or address an intervention motion, and is inapplicable. Plaintiffs cite *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001) for the proposition that an intervenor's economic interest is not cognizable for intervention where the intervenor has "no existing legal right, contract, or permits relating to future sales…" Dkt. 112, pp. 11-12. But *Berg* expressly recognizes that "[c]ontract rights are traditionally protectable interests," and in this case, CBAA's members have existing contracts with indigent arrestees, including Plaintiff. *Berg, supra,* at 820, *referencing Hook v. State of Arizona*, 972 F.2d 1012, 1015 (9th Cir. 1992) (holding that intended third-party beneficiaries of an agreement have rights to enforce the contract that grants them beneficiary status).

Plaintiffs also take the position that should the Court grant their requested relief and declare unconstitutional the laws authorizing the bail industry's contracts, the existing bail bond contracts "will not be affected" unless and until the indigents who are parties to those contracts individually bring "a different state law challenge" to the enforceability of the contract. Dkt. 112, p. 12. Plaintiffs argue that CBAA should not be allowed to intervene because "[s]uch challenges might involve hundreds of plaintiffs." *Id.* at 12. Plaintiffs' position is at odds with the underlying purpose of Rule 24(a)'s "interest test," which serves as a "practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *County of Fresno, supra,* 622 F.2d at 438, *quoting Nuesse v. Camp, supra,* 385 F.2d at 700. The fact that "hundreds of plaintiffs" may file duplicative lawsuits challenging their surety bail bond contracts following a judgment in this case ruling on the constitutionality of the Bail Law, does not weigh against intervention – in fact, it weighs *in favor* of allowing CBAA to intervene as a party now, so that this Court's decisions concerning Plaintiffs' challenges to the Eighth Amendment and Penal Code §1269b will be binding on the CBAA and will thereby prevent the need for further litigation on this topic.

Having no valid opposition to the legally protectable interests shown by CBAA, Plaintiffs cite to non-binding case law to suggest, misleadingly, that Article III standing must be shown in an intervention motion. Dkt. 112, p. 12. This is, simply put, not the law in the Ninth Circuit. Plaintiffs cite *Southwest Center for Biological Diversity v. Berg,* 268 F.3d 810 (9th Cir. 2001) for the proposition that the "standing requirement is at least implicitly addressed by our requirement that the applicant must assert an interest relating to the property or transaction which is the subject of the action." Dkt. 112, p. 13, *citing Berg,* 268 F.3d at FN 3. The *Berg* court, in turn, cited *Portland Audubon Soc. v. Hodel,* 866 F.2d 302 (9th Cir. 1989), in which the Ninth Circuit followed in the Supreme Court's footsteps by declining the parties' request to require a would-be intervenor to satisfy Article III's standing requirements. *See Portland Audubon, supra,* 866 F.2d at n.1, *abrogated on other grounds by Wilderness Society, supra,* 630 F.3d 1173; *citing Diamond v.*

Charles, 476 U.S. 54, 68-69 & n. 21 (1986). *Portland Audubon* further noted that "we [the Ninth Circuit] in the past have resolved intervention questions without making reference to standing doctrine," and "**decline[d] to incorporate independent standing inquiry into our circuit's intervention test.**" *Portland Audubon, supra,* 866 F.2d at n.1 (emphasis added), *citing Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-29 (9th Cir. 1983). This remains the precedent today. *See, e.g. Wilderness Society, supra,* 630 F.3d 1173 (discussing intervention requirements; no mention of Article III standing).

Hollingsworth v. Perry, 133 S. Ct. 2652 (2013), another case cited by Plaintiffs concerning Article III standing, patently does *not* hold that Rule 24 intervention requires Article III standing, and narrowly held that proponents of California's Proposition 8, who had been *allowed to intervene* on behalf of defendants at the trial court level, lacked Article III standing to *appeal* the District Court's order where the original defendants (state officials) had chosen not to. *Id.* at 2661. This case does not weigh against intervention – in fact, *Hollingsworth* strongly **supports** CBAA's intervention motion, as that case also involved named defendants (California's state and local officials responsible for enforcing California's marriage laws) who "refused to defend the law, although they ha[d] continued to enforce it throughout th[e] litigation." *Hollingsworth, supra,* at 2660. In its order granting intervention at the trial court level, this Court stated as follows: "[s]ignificantly, with respect to the last factor [adequacy of representation], although the responsibilities of the Attorney General of California contemplate that he shall enforce the state's laws in accordance with constitutional limitations...Attorney General Brown has informed the court that he believes Prop 8 is unconstitutional." *Perry v. Schwarzenegger*, No. C 09-2292 VRW, 2009 U.S. Dist. LEXIS 55594 (N. D. Cal. June 30, 2009). The Sheriff in this case has similarly refusal to defend California's Bail Law, and therefore CBAA should be permitted to intervene as

its sole proponent. Plaintiffs' standing argument fails,[5] and CBAA has clearly shown a legally protectable interest in the litigation.

3. CBAA's Interests Will Be Impaired If Intervention Is Denied

As discussed in the Motion and above, CBAA's and all of its members' interests not only "may," but *will necessarily be* impaired as "a practical matter" if Plaintiffs' requested relief – a declaration that the laws that validate surety bail bond contracts with indigent arrestees are unconstitutional – is granted. As Plaintiffs do not address this element separately, no further discussion is required here.

4. CBAA's Interests Are Not Now Being Adequately Represented

In light of the Sheriff's position that she will not defend California's Bail Law, Plaintiffs have correctly withdrawn any argument that CBAA's interests are being represented *in any way* in this lawsuit – much less that the Sheriff will "undoubtedly make all of the intervenor's arguments." *County of Fresno, supra,* 622 F.2d at 438-39. This factor weighs strongly in favor of CBAA's intervention. *See Perry v. Schwarzenegger, supra,* No. C 09-2292 VRW, 2009 U.S. Dist. LEXIS 55594 (N. D. Cal. June 30, 2009) (finding "significant[]" the fact that the existing defendants found the challenged law unconstitutional).

D. Alternatively, Permissive Intervention Should Be Granted under Rule 24(b)

In the alternative, CBAA requests permission to intervene under Rule 24(b), which provides that "[o]n timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact." F.R.C.P. 24(b)(1)(B).

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[5] Even if Article III standing *were* required, it is met here. As discussed above, should the Court find that surety bail is unconstitutional as applied to Plaintiffs, CBAA's members will be deprived of the right to enforce surety bail contracts with Plaintiff Patterson and thousands of other indigent arrestees; moreover, as a party to the lawsuit, the Court could order CBAA not to enforce its contracts. As such, there is a live case or controversy (which was not the case in *Hollingsworth,* in which no relief could be ordered against the intervening party, proponents of Proposition 8).

CBAA's defense and Proposed Counterclaim involves the identical facts and issues as Plaintiffs' claim – namely, the constitutionality of California's Bail Law. This Motion is timely and will not delay proceedings, as intervention was sought shortly after the Sheriff's Answer was filed. Nor is there any basis for Plaintiffs' claim that intervention will confuse the issues – CBAA does not introduce "a host of complicated and irrelevant issues" (Dkt. 112, p. 16) by noting that should the Court grant Plaintiffs' requested relief, CBAA's contracts would be rendered unconstitutional and thus invalid. Nor does CBAA seek to litigate the so-called "issue" of "whether…the private bail bond industry is actually effective," other than within the context of a discussion of how the remedies that are *already afforded* to indigent arrestees under the Bail Law, meet constitutional requirements. Dkt. 112, p.13. Further, that Plaintiffs and Defendant have allegedly "already shown good cooperation" (Dkt. 112, p. 17), does not weigh against intervention, as evident by the lack of any case law cited by Plaintiffs in support of this argument. Indeed, CBAA submits that it is precisely the excessive "cooperation" between these parties, pursuant to which the Sheriff appears to be accepting Plaintiffs' progressive legal and social agenda without a fight, that further supports intervention by CBAA, an organization which is able and willing to mount a vigorous defense of California's Bail Law.[6]

The issues CBAA seeks to raise and defend are directly relevant to this action, and achieving clarity concerning the enforceability of the bail bonds contracts of CBAA's members will promote judicial efficiency by preventing duplicative litigation over this question. Given the important Constitutional issues at stake, and in light of the utter lack of any defense of California's Bail Law by an existing party, the Court should permit CBAA to intervene.

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[6] Nor do Plaintiffs provide any competent, admissible support for their melodramatic assertion that a "potential class of thousands who have been harmed by private bail industry contracts" will come flocking to join this litigation if CBAA is permitted to intervene. Dkt. 112, p.16, *citing* Dkt. 112-1, Klement Decl. at ¶33. Further, Plaintiffs have already styled this case as a class action. Moreover, as discussed above, CBAA's addition as a party will in fact *prevent* the need for indigent arrestees to intervene, because in that case a Court ruling could apply to and bind CBAA, and prohibit it from enforcing its contracts with those individuals.

E. CBAA Has Amply Met the Pleading Standard

Plaintiffs argued in prior briefings that an Answer is sufficient to meet Rule 24(c)'s requirements, and that an Answer will "make clear" the question of whether "a proposed intervenor cannot answer the complaint or has no relevant information to bear on the claims…" Dkt. 104, p. 8. With its Motion, CBAA has submitted not only a Proposed Rule 12(b)(6) Motion to Dismiss the TAC, but also a Proposed Answer that specifically responds to each of Plaintiffs' 105 factual allegations, and adds substantial information addressing facts and issues that go to the heart of this lawsuit. *See* Dkt. 110-3, *e.g.* ¶¶37-38 (concerning Plaintiff Patterson's existing surety bond contract with CBAA member, Bail Hotline Bail Bonds); ¶43 (correcting Plaintiffs' inaccurate allegations regarding the length of time required to obtain release through the O.R. Project); ¶¶44-46, 48, 50, 52, 64 (correcting Plaintiffs' mischaracterization of the options available to arrestees, and the process and timeline for obtaining bail); 79 (discussing Plaintiffs' inaccurate allegations concerning the operation of pretrial supervision programs and non-monetary tools).[7] CBAA's pleadings make clear that it intends to mount a substantive defense of California's Bail Laws, based on constitutional principles. Plaintiffs' argument otherwise is disingenuous, in light of CBAA's ample submissions.

F. *Amicus* Participation Will Fail to Afford CBAA the Relief to Which it is Entitled

Plaintiffs argue that intervention should be denied in favor of *amicus* participation, due to the "complexity" purportedly invited by intervention. Dkt. 112, p. 17. No complexity exists in reality – this case is in its infancy, and CBAA's involvement would not threaten its timely progression, the unfolding of discovery, or any alleged rapport that the existing parties may have established with one another. Should CBAA be relegated to *amicus* participation, it will have "no control over the litigation and no right to institute any proceedings in it" (*NGV Gaming, Ltd. v. Upstream Point Molate, LLC,* 355 F.Supp.2d 1061, 1068 (N.D.Cal. 2005)) – despite the fact that the Sheriff will not be defending against Plaintiffs' claims. Additionally, as *amicus,* CBAA will

[7] While Plaintiffs bemoan that CBAA's Answer contains statements of lack of knowledge, the same is true of the Sheriff's Answer (and indeed, of most Answer filed in most lawsuits). *See, e.g.*, Dkt. 101 (Sheriff's Answer), ¶¶ 1, 9-10, 28-32; 34-38; 51-52; 71, 74-79; 95-99.

not be bound to any judgment of this Court, which will create judicial waste to the extent that individuals who are parties to surety bail bonds contracts with CBAA's members will file individual lawsuits concerning the enforceability of those contracts. *See id.* at 1068 (*amicus* participation in case does not bind it to any judgment of court, and is not sufficient to trigger *res judicata* effect).

CBAA conclusively has shown its entitlement to intervene, both of right and permissively, pursuant to Rule 24, and requests the opportunity to do so at this time. However, if the Court believes *amicus* participation is more appropriate, CBAA would welcome the opportunity to provide input on these important issues through that mechanism.

G. Objections to Plaintiffs' Evidence

Pursuant to this Court's Civil Local Rule 7-3(c), CBAA objects to the Klement Declaration submitted by Plaintiffs at Dkt. 112-1, on the grounds that it contains assertions that lack foundation (Fed. R. Evid. 901)(*see, e.g.*, ¶¶8-10, 29); lack personal knowledge (Fed. R. Evid. 602) (*see, e.g.*, ¶¶4, 6-10, 12-20, 22-26, 29, 32); consist of inadmissible hearsay (Fed. R. Evid. 802) (*see, e.g.*, ¶¶ 3, 30); and are irrelevant to the issues raised in the Motion (Fed. R. Evid. 401) (*see, e.g.*, ¶¶21, 27, 31). Plaintiffs request that this Court strike the declaration on these grounds.

III. CONCLUSION

CBAA respectfully requests that the Court permit it to intervene as a party to defend California's Bail Law, which will otherwise be given no voice in this important proceeding.[8]

Respectfully submitted,

Date: January 17, 2017

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[8] Plaintiffs do not contest, and therefore concede, that should the Court deny the Motion to Intervene, such denial should be without prejudice.