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**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' RESPONSE IN OPPOSITION TO CALIFORNIA BAIL AGENTS ASSOCIATION'S MOTION TO INTERVENE (ECF Doc. 110)

Hearing: February 7, 2pm
Department: Courtroom 1, Fourth Floor
Judge: The Honorable Yvonne Gonzalez Rogers

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE CALIFORNIA BAIL AGENTS ASSOCIATION'S MOTION TO INTERVENE (ECF Doc. 110)

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1 **I. Introduction**

2 This case challenges San Francisco's use of money bail to detain people who are too poor
3 to purchase their freedom. Plaintiffs have made no claims against the bail bond industry, the bail
4 bond industry is not alleged to have caused any injury, and no relief is sought from the bail bond
5 industry. There is no legal or factual basis for a private lobbying association that represents the
6 bail bond industry to intervene in this lawsuit, and its intervention would only confuse the issues,
7 vastly increase the scope of this litigation, and delay these proceedings.

8 The relevant interests of the bail bond industry and the efficient process of this litigation
9 can both be preserved without intervention if the bail bond industry submits *amicus* briefs when
10 appropriate. Intervention as a party — especially by a party whose sole motive is financial —
11 risks complicating every stage of these proceedings, from settlement negotiations to discovery
12 requests to motions practice. This Court could also consider appointment of alternate counsel to
13 defend the bail laws on constitutional grounds without delving into the financial and social
14 consequences of private money bail.

15 The bail industry's threatened course of action — filing a separate lawsuit seeking a
16 declaration of the constitutionality of money bail — only underscores the industry's lack of any
17 legally protectable interest. The industry's threatened suit seeks an advisory opinion,
18 underscoring the confusion and complication the bail industry would bring to this case.

19 This case is not about private bail bond companies. It is not about getting rid of all uses
20 of money bail. The sole question before this Court is whether San Francisco's wealth-based
21 detention scheme is consistent with the Equal Protection and Due Process guarantees of the
22 Fourteenth Amendment. This question is fully resolvable without the bail industry's
23 intervention, and it is best answered without the confusion and delay that would accompany such

intervention. For all of the reasons discussed below, Plaintiffs respectfully request that the bail bond association's motion to intervene be denied.

II. The Bail Bond Association Misstates Plaintiffs' Claims and Injects Red Herrings

The bail bond association (A) misstates the nature of Plaintiffs' legal claims, because Plaintiffs are not arguing that all money bail has to be eliminated, only that money bail cannot be used to detain people who are too poor to afford it, and (B) injects distracting arguments, such as their false claim that the Eighth Amendment contemplates a private bail bond industry and their belief that constitutional claims should be resolved by legislatures rather than courts.

A. Plaintiffs Are Not Arguing that All Money Bail Has to Be Eliminated

The only claims Plaintiffs raise in this litigation are that, under the Due Process and Equal Protection Clauses, no person should spend even one day in jail solely based on her wealth-status — and that San Francisco's money bail scheme operates in direct violation of this principle. Plaintiffs are *not* arguing that all money bail has to be eliminated. Plaintiffs do not seek any relief regarding the bail bond industry and certainly have not proposed an injunction against the use of bail bonds. Instead, Plaintiffs are arguing that money bail cannot be used to detain people who cannot afford it.

Nothing in Plaintiffs' claims prevents San Francisco from employing a model similar to the federal system, where detention is based on dangerousness rather than wealth-status. Indeed, California law authorizes preventative detention based on potential danger to the community. Cal. Const. Art. I, § 12(b)–(c). Such a system would allow for money bail to be used as genuine collateral for those wealthy enough to afford it, but not as currently used by San Francisco as *de facto* detention of people based solely on their wealth-status. The bail bond association's claim that Plaintiffs seek to eliminate money bail is therefore untrue.

1
2
B. The Bail Industry's False Premises and Irrelevant Arguments Distract from the Issues in this Case

3 The bail industry's argument that the Eighth Amendment envisions private bail bond
4 companies is not supported by the text of the Constitution. *See* U.S. CONST. amend. VIII
5 (making no reference to the existence of or need for a private bail bond industry). Indeed, the
6 United States is one of only two countries in the world (along with the Philippines) that allows
7 private bail bond companies. *See* Adam Liptak, *"Illegal Globally, Bail for Profit Remains in*
8 *U.S."*, Jan. 29, 2008 (*available at* http://www.nytimes.com/2008/01/29/us/29bail.html). The bail
9 industry's self-serving belief that pretrial justice cannot function without a private bail industry is
10 disproven by virtually every other country around the world, the federal system, and Washington
11 D.C.'s pretrial justice system. Nothing in the Constitution requires, envisions, or even
12 contemplates the existence of a private bail bond industry. For precisely this reason, Kentucky,
13 Illinois, Oregon, and Wisconsin have outlawed private bail bond companies. *See id.*

14 Plaintiffs' claims do not implicate the Eighth Amendment because the Eighth
15 Amendment does not require the use of a wealth-based detention scheme, and it does not require
16 money bail to be the sole basis of determining release or detention. In fact, the Eighth
17 Amendment does not require the use of money bail at all; it only prohibits the setting of
18 excessive bail conditions.

19 "Bail" under the Eighth Amendment is not limited to money bail; it encompasses any
20 conditions of release, and conditions of release can be entirely non-monetary. The concept of
21 bail has been equated with release since the founding of this country, and the Supreme Court has
22 recognized that the right to bail means a right to release. *See* United States Department of
23 Justice, National Institute of Corrections, *Fundamentals of Bail* (2014), p. 43, available at
24 http://static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf

1 (“[T]he notion that bailability should lead to release was foundational in early American law.);
2 *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (defining the right to “be admitted to bail” as the “traditional
3 right to freedom before conviction”); *id.* at 7–8 (Jackson, J., concurring) (“The practice of
4 admission to bail . . . is to enable [arrestees] to stay out of jail until a trial has found them
5 guilty.”). Under the Eighth Amendment, the concept of “money bail” is never mentioned, and it
6 is erroneous to equate “bail” as used in the Eighth Amendment with “money bail” as used by San
7 Francisco. If the Eighth Amendment somehow required the use of money bail, both the
8 Washington, D.C. and federal systems — systems in which release and detention decisions are
9 based on dangerousness rather than monetary conditions — would be inconsistent with the
10 Eighth Amendment. Plaintiffs are only challenging a system that ties pretrial freedom to wealth-
11 status, and this argument is neither foreclosed by nor inconsistent with the Eighth Amendment.
12 Furthermore, the bail industry’s repeated insistence that Plaintiffs’ claims be resolved by
13 the legislature rather than this Court fundamentally misunderstands the constitutional protections
14 at stake. It is not up to voters or legislators to override constitutional protections; if a state
15 statutory scheme violates the federal Constitution, it simply does not matter how much voters or
16 the legislature support the unconstitutional statute. The bail industry’s request that this case be
17 resolved by the legislature is incompatible with this Court’s function in determining the
18 constitutionality of legislative enactments.

19 **III. Intervention Is Not Legally Justified and Would Cause Confusion of the Issues and**
20 **Delay in these Proceedings**

21 The bail bond association’s motion to intervene should be denied because (A) the
22 association is not entitled to intervene as of right and (B) the association has not met the
23 requirements for permissive intervention. The requested intervention will only confuse the
24 issues and delay these proceedings.

A. The Bail Bond Association Is Not Entitled to Intervene as of Right

The bail bond association is not entitled to intervene as of right because the association lacks a legally protectable interest. Intervention as of right requires a legally protectable interest related to the claims in the case, and the bail bond association has no such interest. *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (holding that intervention as of right requires "a relationship between the legally protected interest and the claims at issue"). The actions of the Sheriff in implementing San Francisco's wealth-based detention scheme are wholly independent from any actions of the bail industry. The bail bond association is not a proper defendant in this lawsuit because (i) its interest in future profits from San Francisco's bail scheme is not legally protected, (ii) its lack of standing reveals why it has no legally protectable interest, and (iii) its current contracts will not be affected by any ruling in this case.

i. The Bail Bond Association's Interest in Future Profits from San Francisco's Bail Scheme is Not Legally Protected

The bail bond association takes the factual position that its business model depends on government policies and that it would become obsolete if the government changed its policies, but these assertions do not establish a legally protected interest. The bail bond association essentially claims a legal right to future profits incident to San Francisco's wealth-based pretrial detention scheme. As the case law makes clear, this interest is not legally protected.

Courts have rejected bail bond associations' claims of a legal right to future profits because the industry does not have a legally protected interest in its continued existence. For example, after Kentucky statutorily abolished its commercial bail bond system in 1976, the Kentucky bail bond association argued that the law constituted taking of their property (i.e., their future profits and continued existence) without due process. *See Stephens v. Bonding Ass'n of Kentucky*, 538 S.W.2d 580 (Ky. 1976). The Kentucky Supreme Court unanimously dismissed

1 the bail bond association's complaint and held that no taking had occurred, writing:

2 The bail bonding business by compensated surety is not "an ancient honorable
3 and necessary calling," but one whose evils have been tolerated because of deep-
4 rooted antipathy against the confinement of persons entitled to a presumption of
5 innocence pending trial. Bail bonding by compensated surety has never enjoyed a
6 favorable status but exists because no better system has been provided. It does
7 not have protection as an integral part of the judicial process that will require this
8 court to invalidate a new system designed . . . to remedy the evils of the existing
9 system and at the same time provide adequate guarantee of pretrial release.

10 *Id.* at 583. Recognizing that the private bail industry is neither legally guaranteed nor "an
11 integral part of the judicial process," but simply an industry "whose evils have been tolerated,"
12 the Kentucky Supreme Court summarily dismissed the bail industry's claims. In so ruling, the
13 court showed no sympathy to the bail bond industry's interest in its continued existence, stating
14 "[t]he professional bondsman is an anachronism in the criminal process. Critical analysis of his
15 role indicates that he serves no major purpose that could not better be served by public offices at
16 less cost in economic and human terms." *Id.* at 582 (quoting American Bar Association Project
17 on Minimum Standards for Criminal Justice, Pretrial Release pp. 61–64). As in Kentucky, bail
18 agents in California enjoy no legally protected right to operate and could be replaced at any time
19 by a better system of pretrial release.

20 Federal district courts were no more receptive to the Kentucky bail agents' objections to
21 the law, agreeing that the bail industry had no legally protectable interest. The bail industry had
22 again argued, in the Eastern District of Kentucky, that abolition of the bail industry violated its
23 Due Process rights — a claim that was again swiftly dismissed. *Johnson Bonding Co., Inc. v.*
24 *Com. of Ky.*, 420 F.Supp 331, 355 (E.D. Ky. 1976) ("[T]he unsoundness of [the bail industry]'s
25 claim that the Act deprives it of property without due process of law 'so clearly results from the
26 previous decisions of this court as to foreclose the subject.'"). Indeed, the bail industry cites no
27 case holding that bail agents have a legally protected interest in future profits of bail contracts.

1 The Supreme Court has likewise approvingly discussed a policy that brought about the
2 end of the private bail bond industry in Illinois. In *Schilb v. Kuebel*, 404 U.S. 357 (1971), the
3 Court reviewed an Illinois law that permitted criminal defendants to deposit 10% of their bail
4 amount with the government (rather than a private company) — a law that effectively wiped out
5 Illinois's private bail bond industry. The Court, discussing the change in the law, wrote:

> 6 Prior to 1964, the professional bail bondsman system, with all its abuses, was in
> 7 full and odorous bloom in Illinois. Under that system the bail bondsman
> 8 customarily collected the maximum fee . . . permitted by statute . . . and retained
> 9 the entire amount even though the accused fully satisfied the conditions of the
> 10 bond. . . . The results were that a heavy and irretrievable burden fell upon the
> 11 accused, to the excellent profit of the bondsman, and that professional bondsmen,
> 12 and not the courts, exercised significant control over the actual workings of the
> 13 bail system."

14 *Id.* at 359–60. Recognizing the "odorous bloom" of "all [of the bail industry's] abuses," the
15 Supreme Court referred to the bail bond industry's grip on the system as an "offensive situation"
16 and approved of a law that had a stated purpose of ending the private bail bond industry in
17 Illinois. *Id.* at 360. Like Illinois and Kentucky, San Francisco could end the use of private bail
18 bond companies, and the bail bond industry would not have a legally protected interest in its
19 continued existence.

20 Other states' abolition of private bail companies provides a clear example of why the bail
21 bond association in this case does not have a legally protected interest in the outcome of this
22 litigation. Bail bond agents have no right to insist that the government continue to operate a bail
23 scheme that enables it to profit off of people who cannot afford bail. The bail bond industry is
24 not an integral part of the pretrial justice system — it is a profit-motivated industry that has
25 found a way to make money off of states' unconstitutional bail schemes. By its nature, the bail
26 bond industry operates at the mercy of various government actors. If San Francisco *voluntarily*
27 stopped using money bail, the private bail industry could have no claim against the government

1 agencies for doing so. Similarly, the San Francisco Superior Court judges could decide, next
2 time they vote on the bail schedule, to drastically reduce bail amounts such that very few people
3 ever needed to go through bail agents to purchase their release. The bail bond association would
4 have no claim against the judges for affecting its members' interest in future profits because it
5 has no legally protected right to these profits.

6 The lessons from states that have abolished private bail bonds are consistent with the
7 Supreme Court's longstanding precedent regarding the lack of a protected right to future profits.
8 *See, e.g.*, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972) (university
9 professor's "abstract concern in being rehired" was not a property interest sufficient to require
10 due process). In *Roth*, the Supreme Court explained that to have a property interest in
11 something, "a person clearly must have more than an abstract need or desire for it. He must have
12 more than a unilateral expectation of it. He must, instead, have a legitimate claim of *entitlement*
13 to it." *Id.* at 557 (emphasis added). The Court has also held that there is no right to future
14 contracts with the government. *See Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940)
15 (finding no right to contract with the government because "it is by now clear that neither damage
16 nor loss of income in consequence of the action of Government, which is not an invasion of
17 recognized legal rights, is in itself a source of legal rights in the absence of constitutional
18 legislation recognizing it as such."). The bail bond industry does not have a legally protectable
19 interest because, as *Perkins* holds, loss of income in consequence of a government action is not
20 an invasion of a legally recognized right.

21 Consistent with all of this case law, the Ninth Circuit has made clear that a speculative
22 economic interest alone is insufficient to support intervention. *Sw. Ctr. for Biological Diversity*
23 *v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001) (explaining that where proposed intervenors have no

1 existing legal right, contract, or permits relating to future sales, their economic interest is "based
2 upon a bare expectation" and is therefore not cognizable for intervention). *See also United*
3 *States v. Alisal Water Corp.*, 370 F.3d 915, 920–21 (9th Cir. 2004) (rejecting intervention based
4 on future potential profits). Although the bail industry has existing contracts (which are not
5 threatened by this lawsuit), they do not have a legal right or contract that entitles them to conduct
6 business in the future. Lacking any right to future sales, under *Berg*, the bail bond association
7 lacks a legally protectable interest.

8 Precedent does not support intervention based on the bail industry's claimed economic
9 interest in the outcome of this constitutional challenge. None of the cases cited by the bail bond
10 association allows intervention in such circumstances; instead, the bail industry's cases deal only
11 with intervention by regulated parties in challenges to regulations that directly regulate the
12 economic interests at issue. *See, e.g.*, *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994)
13 (permitting intervention of timber companies where plaintiffs sought a direct injunction against
14 logging); *Brooks v. Flagg Bros.*, 63 F.R.D. 409, 415 (S.D.N.Y. 1974) (permitting intervention
15 where intervenor's governing statute was directly challenged). Plaintiffs are not challenging
16 regulations that directly limit, bind, or affect the bail industry; the industry's future economic
17 interest in this case is far more attenuated.

18 19 **ii. The Bail Bond Association's Lack of a Legally Protectable Interest Is Revealed by Its Lack of Standing**

20 That the bail bond association has no legally protectable interest is made clear by the fact
21 that it would not have standing to challenge or defend San Francisco's bail scheme. Several
22 circuit courts have recognized that intervenors must show standing. *See, e.g.*, *Planned*
23 *Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Ehlmann,* 137 F.3d 573, 576–77 (8th Cir.
24 1998) (requiring independent intervenor standing); *Building & Const. Trades Dep't v. Reich,* 40

1 F.3d 1275, 1282 (D.C. Cir. 1994) (same). *See also Southwest Ctr. for Biological Diversity v.*
2 *Berg*, 268 F.3d 810, 821 n.3 (9th Cir. 2001) (acknowledging that the "standing requirement is at
3 least implicitly addressed by our requirement that the applicant must assert an interest relating to
4 the property or transaction which is the subject of the action").

5 The bail bond association lacks a legally protectable interest because there is no live case
6 or controversy with the bail industry, and thus this Court lacks jurisdiction over any alleged
7 dispute between Plaintiffs and the bail industry. With no allegations in the complaint that the
8 bail industry has caused any injury to Plaintiffs, there is no adverseness between Plaintiffs and
9 the bail industry. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) ("For there to be
10 such a case or controversy, it is not enough that the party invoking the power of the court have a
11 keen interest in the issue."). And of course, with no relief sought against the bail industry, there
12 is no redressable dispute between Plaintiffs and the bail industry. *Id.* at 2662 (holding that,
13 where Plaintiffs received complete relief from government defendants, they "no longer had any
14 injury to redress" against the intervenors). Lacking both adverseness and redressability, there is
15 no case or controversy between Plaintiffs and the bail industry. In short, there are simply no
16 justiciable issues between Plaintiffs and the bail industry, and the fact that the bail industry may
17 have strong and sincere feelings about the legal issues in this case does not create a live case or
18 controversy with them. *Id.* at 2663 ("No matter how deeply committed petitioners may be to
19 upholding Proposition 8 or how zealous [their] advocacy, that is not a particularized interest
20 sufficient to create a case or controversy under Article III.") (alteration in original) (internal
21 quotation marks and citations omitted); *id.* ("Article III standing is not to be placed in the hands
22 of concerned bystanders, who will use it simply as a vehicle for the vindication of value
23 interests.") (internal quotation marks omitted). The lack of any justiciable case or controversy

1 proves the lack of any legally protectable interest.

2 The fact that the industry lacks standing is dispositive of their lack of a legally
3 protectable interest. For example, if Plaintiffs win their claims against Defendant, even if the
4 bail industry were improperly admitted as an intervenor, the bail industry would not have
5 standing to appeal because no relief could be ordered against the industry. *Id.* at 2662 (finding
6 that non-state official intervenors lacked standing to appeal in a lawsuit challenging the
7 constitutionality of a state law because "the District Court had not ordered them to do or refrain
8 from doing anything"). Complete relief must be given from the current Defendant, so if this
9 Court rules in Plaintiffs' favor, the bail bond association would lack standing to appeal. The bail
10 bond association cannot be aggrieved by any adverse ruling because no ruling would require the
11 bail industry to do (or not do) anything. Thus, the bail industry's lack of standing and lack of a
12 legally protected interest regarding the claims in this case flow from the same source: there is no
13 adverseness or redressability between Plaintiffs and the bail industry.

14 The bail industry's suggestion that it file a separate lawsuit seeking an advisory opinion
15 about the constitutionality of money bail further underscores the industry's lack of a legally
16 protectable interest. Federal courts could not exercise jurisdiction to issue such an advisory
17 opinion. *See, e.g.*, *Deveraux v. City of Chicago*, 14 F.3d 328, 331 (7th Cir. 1994) ("[B]ecause
18 nothing in the declaratory judgment plaintiffs seek would . . . alter the legal relationship of the
19 parties, we conclude that the district court properly dismissed plaintiffs' action for failure to
20 allege a case or controversy). Lacking the basic ingredients for jurisdiction, including
21 adverseness and redressability, the bail industry lacks a legally protectable interest.

22 **iii. Bail Agents' Presently Existing Contracts Will Not Be Affected by the**
23 **Outcome of this Litigation**

24 No current bail bond contracts are being challenged by this lawsuit, and there is no basis

1 for the bail bond association's assertion that this lawsuit will result in existing surety bail
2 contracts being voided as illegal and unenforceable. It does not follow from a declaration that
3 San Francisco's bail scheme is unconstitutional that bail bond agents' existing contracts are
4 necessarily voided. The enforceability of private bail contracts — under unconscionability or
5 any other doctrine — is a question of state law involving different elements than the Fourteenth
6 Amendment rights in this case (including, for example, the intent and knowledge of the parties at
7 the time the contract was made). Because Plaintiffs' Fourteenth Amendment claims do not
8 address the elements of a state law contract dispute, this Court's resolution of the constitutional
9 issues in this case cannot have preclusive or binding effect on any hypothetical state court
10 contract lawsuit. And with different plaintiffs and different defendants, this Court's ruling can
11 have no *res judicata* or estoppel effects. In short, the validity of existing contracts is not at issue
12 here, and there is therefore no present threat to the association's economic interest in its
13 members' bail bond contracts.

14 The validity of existing contracts might be a question for a different state law challenge,
15 but that challenge is not raised in this case. As the San Francisco Public Defenders Office has
16 seen, numerous potential challenges could be made against bail industry practices, including
17 unconscionability, coercion, arbitrariness, abuse, destruction of property, and many others.
18 Exhibit 1, Klement Decl. at 1–5. Such challenges might involve hundreds of plaintiffs. *Id.* at ¶
19 33. These challenges are not raised by this lawsuit, and allowing the private bail industry to
20 intervene in this suit would open the floodgates to potentially hundreds of plaintiffs intervening
21 as well. After all, if this case is made to be about the validity of existing or future bail contracts
22 — a result that Plaintiffs do not seek — both those who benefit from bail contracts (i.e., the bail
23 industry) and those who have been harmed by bail contracts (i.e., hundreds of indigent criminal

1 defendants) would have an interest in the outcome. The introduction of these issues into this
2 litigation would needlessly complicate and delay this case. As it currently stands, no claims that
3 Plaintiffs make and no relief that Plaintiffs seek could possibly have any impact on the bail
4 industry's currently existing contracts and therefore the bail bond association has no legally
5 protectable interest in this lawsuit.

6 **B. This Court Should Not Grant the Industry Permissive Intervention**

7 Although this Court has broad discretion to allow permissive intervention, the integrity
8 and efficiency of these proceedings is better served by denying permissive intervention because
9 intervention will confuse the issues and delay these proceedings.

10 If the bail bond association is permitted to intervene in this lawsuit, it will undoubtedly
11 add a host of complicated and irrelevant issues that need not be part of this litigation. If issues
12 such as whether current bail bond contracts are enforceable and whether the private bail bond
13 industry is actually effective are permitted to become part of this litigation, then undoubtedly
14 other parties who have an interest in such questions would seek to intervene as well. *See* Exhibit
15 1, Klement Decl. at ¶ 33 (describing potential class of thousands who have been harmed by
16 private bail industry contracts). Indigent defendants who have been directly harmed by the bail
17 bond industry's unfair contracts and predatory tactics would have just as much right as the bail
18 bond industry to litigate these tangential issues. Permitting the bail bond association to intervene
19 in this lawsuit may open the floodgates of people who would like to bring claims against bail
20 agents.

21 The extent to which the private bail industry preys on impoverished residents of San
22 Francisco is an important social issue, but it need not take over the critical constitutional issues
23 raised in this case. Intervention by the bail bond association and others will only serve to

1 confuse the claims at hand by inviting a host of complex issues into this case, which have
2 nothing to do with the constitutionality of San Francisco's bail scheme. The efficiency of this
3 litigation is better served by limiting the issues to the constitutional and legal questions raised in
4 Plaintiffs' complaint, without venturing further afield into abuses by the private bail industry.

5 In addition to the inclusion of distracting and confusing issues, intervention would have
6 the necessary impact of delaying these proceedings. The bail association's future involvement
7 would derail the efficient pattern developed between the parties. Plaintiffs and Defendant have
8 already shown good cooperation regarding briefing schedules, deadlines, case management, and
9 other matters. Moreover, the bail bond association's intervention is not supported by any party.
10 The inclusion of an intervenor not friendly to any of the parties inserts yet another party into
11 every single question, from discovery matters to scheduling issues to motions practice to
12 settlement and beyond. Especially because the bail industry lacks standing or any live case or
13 controversy with Plaintiffs, the prospect for delay caused by their intervention is unnecessary.

14 **IV. *Amicus* Participation Is the Proper Vehicle for Any Additional Legal Arguments the**
15 **Bail Bond Association Wishes to Make**

16 To the extent the bail industry wishes to present its legal arguments, *amicus* participation
17 is the more appropriate means of doing so. *Amicus* participation is preferable because it would
18 allow this Court the discretion to control the timing, frequency, and scope of industry
19 participation, ensure a smoother discovery process, allow settlement between the existing parties,
20 and capture all of the interests the bail industry could reasonably have.

21 The intervention of a private party adds complexity that *amicus* participation would not.
22 Whereas a party-intervenor would be involved in all discovery matters, attempts at settlement,
23 and other management of the case, an *amicus* brief is the perfect vehicle for legal argumentation.
24 The bail industry's only apparent interest is to advocate for the use of money bail (and the

1 private bail bond industry). To the minimal extent such advocacy is needed in this case, the
2 briefing already submitted (and any additional briefing required) covers the bail industry's
3 interest. An entity facing no allegations and no claims for relief should not be an intervenor-
4 party; an entity requesting to make legal arguments can submit an *amicus* brief, leaving this
5 Court in control of when such briefing is useful or required.

6 Indeed, this Court can invite an *amicus* filing from any appropriate party to satisfy this
7 Court's needs. Many district courts in this Circuit have, when appropriate, allowed *amicus* briefs
8 to be submitted. *See, e.g.*, *Safari Club Int'l v. Harris*, No. 2:14-CV-01856-GEB-AC, 2015 WL
9 1255491, at *1 (E.D. Cal. Jan. 14, 2015); *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*,
10 355 F. Supp. 2d 1061, 1068 (N.D. Cal. 2005); *Cmty. Ass'n for Restoration of Env't (CARE) v.*
11 *DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999). *Amicus* participation is
12 vested in this Court's discretion, thereby allowing this Court to determine in each instance
13 whether *amicus* participation serves the needs of this Court and the needs of justice. *Hoptowit v.*
14 *Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) ("The district court has broad discretion to appoint
15 *amici curiae*."); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999) ("A court
16 may grant leave to appear as an *amicus* if the information offered is timely and useful.").

17 *Amicus* briefing allows for greater flexibility to meet the needs of this Court. If, for
18 example, this Court finds that an *amicus* is overburdening the litigation with too many filings,
19 this Court can restrict filings accordingly. If this Court finds that an *amicus* seeks to file on
20 matters that are simply irrelevant from the issues before the Court, this Court can exercise its
21 discretion to limit filings only to those matters where *amicus* briefing is shown to be beneficial.

22 Perhaps the most important benefit to *amicus* participation (as opposed to intervention as
23 a party) is that *amicus* participation allows a smooth discovery process between the existing

1 parties without introducing additional entities, additional issues, and additional costs. Having a
2 third-party involved in discovery — especially one without standing before the Court and
3 without any live controversy with any of the other parties — risks costly delays, requests, and
4 disputes that might otherwise be avoided.

5 Additionally, as noted earlier, because full relief can be given from government
6 defendants, any prospects for settlement are more likely between Plaintiffs and Defendant than
7 with the bail industry as an additional defendant. Mutual resolution between the parties in
8 controversy is always the most expedient and efficient method for achieving a just result, and the
9 intervention of a third-party that lacks claims or relief could disrupt a possible settlement.

10 **V. The Industry's Proposed Filings Do Not Justify Intervention**

11 The bail bond association's proposed pleading is telling: the association has no direct
12 knowledge of the allegations made in the complaint. Its proposed answer is filled with numerous
13 statements of lack of knowledge. This result is unsurprising; Plaintiffs' allegations are directed
14 at government practices and policies that only government entities are in a position to address.
15 The bail bond association has far less information about San Francisco's bail procedures than
16 does the Sheriff.

17 Not only does the bail bond industry lack any special expertise relevant to this case, but
18 the industry's self-promoting assertions about the value of bail bond companies are belied by the
19 experience of jurisdictions without private bail, *see, e.g.*, ECF Doc. 71-6 (noting high court
20 appearance and community safety rates in Washington, D.C.'s pretrial justice system), the
21 comments of the Supreme Court and others recognizing the "odorous" impact of private bail
22 companies, *see supra* pp. 5–7, and the experiences of countless victims of private bail company
23 practices, *see* Exhibit 1, Klement Decl.

1 The arguments outlined in the bail industry's proposed motion to dismiss are spurious
2 arguments motivated not by the constitutionality of government practices, but by the financial
3 profits of private industry. The bail bond association's lengthy discussion of surety bonds
4 ignores the fact that Plaintiffs are not challenging the use of all money bail — only the use of
5 money bail to detain individuals who cannot afford it. When used as genuine collateral tailored
6 to the amount needed to incentivize a defendant to return to court, both unsecured and secured
7 bonds can be used as methods of release (as opposed to *de facto* orders of detention). The record
8 makes plain that, in San Francisco — where a $30,000 bail amount was placed on 19-year-old
9 Riana Buffin (who has never been charged with a crime in her life and who had never before
10 been arrested) — money bail is unconstitutionally used to detain people who are indigent, not to
11 motivate court appearances for those who are released. The bail industry's long discussion of the
12 history and need for money bail is irrelevant, because Plaintiffs do not seek the absolute
13 prohibition on all forms of monetary release.

14 The bail bond association's other proposed arguments are similarly off-topic. For
15 example, the industry misunderstands the relationship between constitutional provisions. Just
16 because a practice is contemplated by one provision of the Constitution (such as bail under the
17 Eight Amendment) does not mean that instances of the practice could not run afoul of other
18 provisions. For example, if San Francisco required non-excessive bail from all Muslim arrestees
19 but allowed release to all Christian arrestees, this practice would not violate the Eighth
20 Amendment's Excessive Bail Clause, but it would certainly violate the Equal Protection and Due
21 Process Clauses (along with First Amendment guarantees).

22 The bail bond association's proposed motion obscures the fundamental operation of
23 money bail in San Francisco by discussing different bail amounts for different offenses based on

1 severity. What is at issue in this case is not how different bail amounts for different offenses
2 relate to each other, but how two identical arrestees facing identical charges have their freedom
3 determined solely by their wealth status. A wealthy individual with Riana Buffin's exact same
4 strong community ties, good employment record, lack of criminal history, and charges could
5 purchase her freedom. The bail industry offers no discussion of this basic inequality.

6 Finally, the bail industry's proposed Fourteenth Amendment analysis overlooks two key
7 facts: First, under the Equal Protection Clause, strict scrutiny is appropriate anytime the denial
8 of a fundamental right is at stake. *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312
9 (1976) ("[E]qual protection analysis requires strict scrutiny of a legislative classification only
10 when the classification impermissibly interferes with the exercise of a fundamental right or
11 operates to the peculiar disadvantage of a suspect class."). Thus, it does not matter that wealth is
12 not a suspect class, because the fundamental right of pretrial freedom cannot unequally be
13 infringed *on any basis* without passing strict scrutiny. A hypothetical law that says all short
14 people must be detained pending trial while all tall people go free would be subject to strict
15 scrutiny because it unequally deprives a fundamental right, notwithstanding the fact that height is
16 not a suspect classification. Second, the bail industry sidesteps the Ninth Circuit's binding
17 holding in *Lopez-Valenzuela v. Arapaio*, which struck down Arizona's pretrial detention law
18 under a strict scrutiny analysis because it interfered with a fundamental right without narrow
19 tailoring to a compelling interest. 770 F.3d 772, 782 (9th Cir. 2014).

20 **VI. Conclusion**

21 The bail bond association has not satisfied the requirements for intervention as of right,
22 and this Court should avoid the confusion, distraction, and delay that would arise from
23 permissive intervention. Any of the bail bond association's needs can be met through proper

1 *amicus* participation, which would enable this Court to retain discretion over the timing,
2 frequency, and scope of any *amicus* filings. For all of the reasons argued herein, Plaintiffs
3 respectfully request that this Court deny the bail bond association's motion to intervene.

4 Respectfully submitted,

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14 **CERTIFICATE OF SERVICE**

15 I certify that on January 10, 2017, I electronically filed the foregoing document with the
16 Clerk of the Court using the CM/ECF system, which will send notice of such filing to all
17 attorneys-of-record in this case.

18 /s/ Phil Telfeyan
19 *Attorney for Plaintiffs*