FO78285
(Civil Case No. VCU274160)
(Criminal Case No. VCM358029)

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

COUNTY OF TULARE,
Plaintiff-Respondent,

v.

LEXINGTON NATIONAL INSURANCE CORPORATION,
Defendant-Appellant,

Appeal from the Superior Court of California, County of Tulare
Honorable Bret D. Hillman

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENT COUNTY OF TULARE

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

The California State Association of Counties ("CSAC") seeks leave to file the attached Brief of Amicus Curiae.[1]

I. Interests of Amicus Curiae

CSAC is a non-profit corporation that supports and represents the interests of California's county governments. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsels' Association of California, overseen by the Association's Litigation Overview Committee, and comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

II. Reasons an Amicus Curiae Brief is Desirable.

This Court will consider whether Appellant Lexington National Insurance Corporation can avoid bail forfeiture in the underlying case on the basis that the bail setting that led to its bond agreement with the defendant was supposedly carried out in violation of the defendant's constitutional rights. But the defendant, who was released from custody after posting bail, has not filed any motion alleging any violation of his own rights. Indeed, the defendant failed to appear for arraignment in his case, and there is no dispute that the trial court properly entered an order of forfeiture as a result. Despite these undisputed facts, appellant seeks to have the trial court's summary judgment of forfeiture set aside because of the alleged constitutional deficiency it attempts to assert on the defendant's behalf. The implications of appellant's position could undo thousands of

[1] No party or counsel for a party authored the attached brief, in whole or in part. No one made a monetary contribution intended to fund the preparation or submission of this brief.

bail bond contracts in California, relieving bail bond agents and sureties of the consequences of forfeiture in cases where they failed to uphold their sole contractual obligation: ensuring the defendant's appearance during all required criminal proceedings. Thus, the issues presented in this case directly impacts the ability of counties, which amicus curiae CSAC represents, to enforce bail bond contracts and seek payment when bail is properly forfeited.

Counsel for amicus curiae CSAC has reviewed the party briefing in this case and does not duplicate those arguments here. Rather, the proposed amicus curiae brief provides this Court with helpful context regarding the appellant's position and arguments, and the possible real-world impacts of a ruling in its favor.

For the foregoing reasons, CSAC respectfully requests that this Court accept the accompanying amicus curiae brief.

DATED: November 18, 2019

Respectfully submitted,

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I. INTRODUCTION

This is an unusual bail bond appeal in which the parties do not dispute that, after the defendant failed to appear at a required hearing, the trial court properly entered an order forfeiting bail—satisfying each and every one of the exacting procedural requirements for doing so. Devoid of any possible procedural attack on the forfeiture order, appellant (also referred to herein as "Surety") has instead devised a new approach to avoid forfeiture of its bond. Surety asserts that recent caselaw recognizing *individual criminal defendants'* constitutional due process and equal protection rights at bail setting should also protect appellant, a surety bail bond company, from enforcement of an otherwise procedurally sound and binding order.

Appellant's argument fails on multiple grounds, each of which respondent ably addresses in its merits brief. In short, recent caselaw held:

> [A] court may not order *pretrial detention* unless it finds either that the defendant has the financial ability but failed to pay the amount of bail the court finds reasonably necessary to ensure his or her appearance at future court proceedings; or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance; or that no less restrictive nonfinancial conditions of release would be sufficient to protect the victim and the community.

(*In re Humphrey* (2018) 19 Cal.App.5th 1006, 1026, emphasis added.)

In this case, however, the court did not order pretrial detention. Instead, the defendant posted bail through a bail bond agent and was released upon an undertaking by the agent that it would ensure the defendant's appearance in court. (See Pen. Code, § 1278, subd. (a).) When the defendant failed to appear at his arraignment, bail was properly forfeited. (See *id.*, § 1305; Respondent's Brief ["RB"] at pp. 8-12.)

Tellingly, the defendant in the underlying criminal proceedings has never filed any motion seeking invalidation of his bail on the basis of any purported violation of the rights recognized in *Humphrey*. And, as respondent explains in its brief, Surety—a party adverse to the defendant—has no right to seek such relief in the defendant's stead. (See RB at pp. 15-18.)

The context in which Surety's argument is made deserves additional scrutiny to better understand its irrationality. Sureties, in general, face little risk in contracting under a statutory scheme that virtually guarantees bail will not be forfeited, even when sureties breach their contractual obligation to ensure a defendant's appearance in court. Beginning with the initial bail bond contract, sureties draft and impose their preferred contractual terms against criminal defendants seeking freedom from confinement. They have everything to gain and nothing to lose from these agreements. Beyond a guaranteed profit from their contracts with defendants, the statutory scheme governing sureties' obligations upon undertaking bail contains a web of required procedures to which the trial court must strictly adhere for a bail forfeiture to be upheld when a defendant fails to appear at a required hearing. And even if a forfeiture is properly entered, the industry may find relief if the defendant later appears, even if the appearance was of his own volition, or was (as is often the case) secured by a law enforcement agency, not the bail agent.

Under this statutory scheme, sureties profit *more* when bail is set above what a defendant could reasonably afford to pay on his own. This adversarial contractual relationship between sureties and defendants creates a *disincentive* for the surety bail bond industry to ensure a defendant's financial ability is assessed at bail setting because a lower bail amount that a defendant could more reasonably afford on his own represents a lost business opportunity for the industry. Nonetheless, in a last-ditch attempt to

escape the consequences of a validly declared forfeiture, Surety now claims to have the defendant's constitutional rights at heart, despite no assertion of those rights from the defendant himself.

This purported constitutional defense is yet another thinly veiled attempt to avoid Surety's contractual obligations in a case where none of the procedural protections that regularly allow it to escape the burden of such a breach apply. Yet, in asserting that it should walk away unscathed despite its failure to ensure the defendant's appearance, Surety ignores the obvious corollary of its argument: if the bail setting were unconstitutional and offered a reason to avoid enforcement of the forfeiture in this case, then it should also void the bail bond agent's contract with the defendant arising out of the same allegedly unconstitutional bail, and Surety should return to the defendant the fees that he paid to obtain the bond. That the Surety does not take its argument to this logical conclusion reveals that its constitutional argument is nothing more than a misdirection aiming to further tip the scales of justice in its favor.

II. BACKGROUND

To better understand Surety's position today, it is worth revisiting the history of the bail bond arrangement and learning from the lessons it provides about the industry's shortcomings. The history of the bail industry dates back to the colonial era, originally derived from the English Bill of Rights drafted in 1641. (Van Brunt & Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next* (Fall 2018) 108 J. Crim. L. & Criminology 701, 710.)[2] Once seen as an opportunity to ensure that individuals charged with crimes could obtain pretrial release while preserving the integrity of the court process through

[2] https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7640&context=jclc (as of Nov. 8, 2019).

assurances that they would attend all required court hearings, the bail bond industry has since outlived its historical purpose. (See *id.* at pp. 714-717.)

The bail industry began to fall out of favor in the 1960s with reform efforts such as the Manhattan Bail Project, which showed that many criminal defendants reliably appear in court of their own volition and need not be required to post bail or be detained until trial. (Kohler, *Vera Institute of Justice: Manhattan Bail Project* at pp. 1-2 (2007) Duke Sanford Center for Strategic Philanthropy and Civil Society.)[3] The Manhattan Bail Project sought to help defendants who were unable to afford monetary bail amounts and to cure other fundamental inequities of the system. (Schnacke, *et al., The History of Bail and Pretrial Release* at p. 10 (Sep. 24, 2010) Pretrial Justice Institute.)[4] What was essentially an early pretrial risk assessment program, the Manhattan Bail Project approach quickly became a success, with less than one percent of defendants chosen for pretrial release failing to appear for trial. (*Ibid*.) As a result, bail reform took hold in many states and at the federal level, with the passage of the Bail Reform Act in 1966 (see 18 U.S.C. § 3146 *et seq*.). In signing that federal legislation, President Lyndon Johnson explained that the Bail Reform Act "assured that no defendant, rich or poor, would be 'needlessly detained pending [his or her] appearance in court.'" (Kohler, *supra*, at p. 2.) As a result of these early and successful efforts at bail reform, by 1990, commercial bail accounted for only about 25 percent of pretrial releases.

[3] https://cspcs.sanford.duke.edu/sites/default/files/descriptive/manhattan_bail_project.pdf (as of Nov. 8, 2019).

[4] https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf (as of Nov. 8, 2019).

(Smith, *Felony Defendants in Large Urban Counties, 1990* at p. 8 (May 1993) U.S. Dep't of Justice, Bureau of Justice Statistics.)[5]

The genesis of the bail industry as we know it today began in the 1990s with efforts by commercial sureties to revive their industry's foothold, including an initiative entitled "Strike Back!," which sought to eliminate non-money-based pretrial services and instead promote and re-institute release on money bond. (Schnacke, *et al.*, *The History of Bail and Pretrial Release* at p. 21 (September 24, 2010) Pretrial Justice Institute.)[6] Slowly but surely, the commercial bail industry succeeded in securing a statutory framework that frequently allows it to escape forfeiture consequences when it fails to meet its contractual obligation to produce the defendant in court. Today, the industry rarely pays forfeitures even when there is no dispute that a bail bond agent has failed to ensure the defendant's appearance. (See *infra*, at section III.A.) Moreover, research shows that the bail bond industry is not any more effective than other forms of monitored pretrial release—including those forms that charge defendants nothing—in ensuring a defendant's appearance at trial. (See *infra* section III.D.) Thus, to the extent there is any benefit to this "bargain," the courts and criminal defendants rarely see it.

III. ARGUMENT

As in every case, Surety in the underlying criminal matter contracted with the trial court to ensure the defendant's appearance at all required court proceedings, agreeing that if the defendant failed to appear, bail would be forfeited and Surety would pay the full bail amount to the court. (CT 23; see also Pen. Code, § 1278, subd. (a).) There is no dispute that Surety failed in this obligation. (Appellant's Opening Brief ["AOB"] at p.

[5] https://www.bjs.gov/content/pub/pdf/fdluc90.pdf (as of Nov. 8, 2019).
[6] https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf (as of Nov. 8, 2019).

8; CT 23.) Thereafter, the trial court followed the statutorily required steps, and having done so, declared the bond forfeited at the arraignment where the defendant failed to appear.

Surety does not claim any failure by the court to adhere to the statutory scheme or identify any other defect justifying an order setting aside the forfeiture. Instead, claiming to stand in the shoes of the defendant, Surety asserts an argument the defendant himself has never raised, demanding that its bond be exonerated based on the purported failure of the trial court to provide a constitutionally appropriate bail setting—at a hearing the defendant, who was *not* in custody at the time, did not attend. No case supports such an absurd conclusion, and the trial court's judgment should be upheld as urged by Respondent.

A. Sureties Face Little Risk in Contracting

As an industry, sureties write approximately 175,000 bail bond contracts each year in California. (Cal. Dept. of Ins., *Recommendations for California's Bail System* at p. 5 (Feb. 2018).)[7] All of the bail bonds that agents submit to courts are underwritten by large insurance companies that offer a product called a surety, of which bail is one type. (*Id.*) California is the largest bail market in the nation (Whorisky, *The Big Spenders Behind the Effort to Repeal California's Bail Reform*, L.A. Times (Oct. 29, 2018)),[8] with approximately 3,200 licensed bail agents and agencies and 17 sureties (Cal. Dept. of Ins., *supra*, at p. 5). In California, agents are required to insure every bail bond they submit to a court, for which they pay a fee to one of the large insurance companies—generally ten percent of the premium the agent charged the defendant for the underlying bail service.

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[7] http://www.insurance.ca.gov/01-consumers/170-bail-bonds/upload/CDI-Bail-Report-Draft-2-8-18.pdf (as of Nov. 8, 2019).

[8] https://www.latimes.com/business/la-fi-california-cash-bail-20181029-story.html (as of Nov. 8, 2019).

(See generally Ins. Code, § 1800, *et seq*.) For example, for a $50,000 bail, a defendant will pay a $5,000 nonrefundable fee to a bail bond agent, who will then pay the insurance company $500 for an insurance policy that is supposed to cover the original $50,000 bail if it is forfeited. (See Gonzales, *Consumer Protection for Criminal Defendants* (2018) 106 Calif. L. Rev. 1379, 1391.) If a defendant's case has not been resolved within a year, most, but not all, bail bond companies charge the defendant a renewal premium on top of the premium paid at the inception of the contract. (Cal. Dept. of Ins., *supra*, at pp. 8-9.) Thus, the bail bond agent stands to make a substantial sum of money by simply executing the contract—money which is never returned, even to a defendant who makes all scheduled court appearances. In addition, the contracts into which the bail agent enters with the defendant commonly operate to indemnify the agent against any actual loss, in that the agent can pursue funds from the indemnitor to the contract—i.e., the defendant or his or her family—if a forfeiture is declared after defendant fails to appear, further reducing any exposure to liability. (Gonzales, *supra*, at p. 1392.)

According to the California Department of Insurance, which regulates the bail industry, "[i]n general, consumers do not realize that bail is an insurance product." (Cal. Dept. of Ins., *supra*, at pp. 8-9.) This is perhaps because the bail bond arrangement does not resemble other insurance markets. Unlike in markets such as property and auto insurance, where companies pay out forty to sixty percent of their receipts in losses, bail surety companies pay virtually nothing in losses because the agents themselves, not the surety companies, are primarily responsible for bail forfeitures after a defendant's failure to appear. (*Ibid*.) Thus, there is little risk for the bail industry as a whole in entering into a contract with the government to guarantee a criminal defendant's appearance. The bail agent automatically receives a nonrefundable fee from the defendant; the surety is

not responsible if the bail agent does not uphold its end of the bargain; and, as discussed below, the cards are stacked in the industry's favor by procedural hurdles that frequently allow the bail agent and surety to escape a forfeiture order even when the agent fails to fulfill its contractual promises. Furthermore, even in those extremely rare instances in which a bail forfeiture is declared and upheld—according to some estimates, in as few as *seven percent* of bonds posted—the bail agent is at little actual risk due to low collection rates. (See *Memorandum Re: Bail Forfeiture*, Santa Clara County Board of Supervisors, at p. 241 (Oct. 4, 2016).)[9] Courts have recognized that "[t]he effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who, in their judgment, is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail." (*Pannell v. United States* (D.C. Cir. 1963) 320 F.2d 698, 699 (concurring opinion).)[10]

In alleging that the defendant's constitutional rights were violated, Surety asks this Court to ignore the lopsided and adverse relationship between it and the defendant and to allow it to take advantage of the defendant one more time to the sole benefit of Surety. The Court should reject that effort.

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[9] http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=7595&Inline=True (as of Nov. 8, 2019).

[10] Indeed, many bail bond agents avoid entering into contracts with defendants whose bail amounts are set as less than $2,000 because the agent will not be able to make a profit, leaving many defendants with no other option—based on nothing but the bail industry's business interests—but to await trial in jail. (See Montgomery, *The Bail Trap*, N.Y. Times (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=0 (as of Oct. 24, 2019).)

B. Sureties Often Avoid Paying When Forfeitures Are Entered.

As far back as 1927, a study of records of the bail system in Chicago led to the conclusion that "professional bondsmen played too important a role in the administration of the criminal justice system and reported a number of abuses by bondsmen, including their failure to pay off on forfeited bonds." (Beeley, *The Bail System in Chicago* (Chicago: Univ. of Chicago Press, 1927; reprinted 1966).) Ninety years later, the problem continues. In California in 2010, bail bond agents owed counties $150 million that, by express contractual obligation, they should have had to pay when their clients failed to appear in court. (Sullivan, *Bail Burden Keeps U.S. Jails Stuffed With Inmates* (Jan. 21, 2010).)[11] California's Department of Insurance has received complaints regarding surety companies that are no longer paying county claims on forfeited bail bonds by arguing that the two-year statute of limitations imposed by the Penal Code prevents enforcement of the forfeiture. In other words, after filing an appeal of a forfeiture—a process which may take many years—the surety then claims that it is no longer obligated to pay after two years elapse, even if the surety loses its appeal. (Cal. Dept. of Ins., *Recommendations for California's Bail System*, *supra*, at p. 9.)

In the underlying case, Surety seeks yet another novel way to avoid its financial obligations after failing to uphold its promise to ensure the defendant's appearance: it argues that, in all cases in which bail was set without individualized consideration of a defendant's financial ability, the bail bond contract with the court should be voided, thereby forgiving the surety's obligation to pay a bail forfeiture even where the surety has failed to ensure the defendant's appearance in court. (AOB at pp. 13-15.)

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[11] https://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed-With-Inmates (as of Nov. 8, 2019).

Setting aside the improper legal premises on which this argument rests—including (1) the fact that caselaw prohibits courts from "order[ing] *pretrial detention*" without making that individualized assessment (see *In re Humphrey*, *supra*, 19 Cal.App.5th at p. 1026, emphasis added), which did not occur here; (2) Surety's waiver of any defects in the bail amount; and (3) Surety's lack of standing to assert the defendant's constitutional rights—all of which Respondent ably addresses in its brief, Surety also ignores the other implications of such a holding. As Surety acknowledges, the allegedly unconstitutional bail order forms the basis of multiple agreements: between the defendant and the government, the defendant and the surety, and the surety and the government. (AOB at p. 14.) If the purportedly unconstitutional bail should function to invalidate Surety's contract with the government, then logically it should also function to invalidate Surety's contract with the defendant. In other words, Surety should retroactively void all contracts it entered into with defendants whose bail was set without individualized consideration of their ability to pay, thereby requiring the return of any fees paid by those defendants (typically 10% of the total bail amount), and voiding any ability for Surety to seek enforcement of the payment from the defendant's family or friends.

But, of course, Surety has not followed its argument to that logical conclusion. Instead, Surety seeks financial forgiveness for *only* itself.

C. The Penal Code's Statutory Bail Scheme Is Replete with Procedural Hurdles that Allow the Bail Industry to Avoid Its Contractual Obligations.

The statutory scheme regulating the bail forfeiture process comprises a series of exacting procedural requirements that a trial court must follow with absolute precision in order to declare a forfeiture. Sureties can and regularly do use the statutes' complexity to their advantage to avoid paying on a bond when they breach their contractual obligations to the court. (See

Justice Policy Institute, *Release: The Bail Bond Industry Is For Profit, But Not for Good* (Sept. 18, 2012).)[12]

To forfeit bail after a defendant's failure to appear, trial courts must adhere to strict procedures with extremely tight deadlines. For example, the trial court must "declare the bail forfeited in open court." (Pen. Code, § 1305, subd. (a).) It must then perform and provide proof of proper legal service of the notice of forfeiture to all parties within 30 days. (*Id.*, § 1305, subd. (b)(1).) The court must file a certificate of forfeiture within 30 days. (*Ibid.*) And after a forfeiture order, the court must enter summary judgment within 90 days. (*Id.*, § 1306, subd. (c).)

Some of these requirements may not seem onerous at first blush, but they have turned into trip wires that allow sureties to escape paying forfeitures based on the trial court's most minor errors in adhering to the statutory requirements—even where they have engaged in major breaches of their own obligations. For example, while sending a notice of forfeiture is standard, sureties will argue that the notice must be sent even where a court verbally declares forfeiture but then reinstates the bail in the same court session after the defendant appears through counsel *five minutes later*. (See *People v. Bankers Ins. Co*. (2019) 36 Cal.App.5th 543, 550 [addressing surety's argument that requirement to mail notice of forfeiture was not relieved where court reinstated bail after declaring forfeiture within minutes in the same hearing]; see also *County of Los Angeles v. Fin. Cas. & Surety, Inc*. (2016) 247 Cal.App.4th 875 [setting aside forfeiture where trial court failed to mail notice of forfeiture on the same day it was declared, even though declaration was made in open court and "the court clerk called the bond agent" to so inform it].)

The statutory framework also allows a surety to avoid its contractual

[12] http://www.justicepolicy.org/news/4389 (as of Nov. 8, 2019).

obligations after forfeiture even where the surety does not contribute to the defendant's reappearance. Penal Code section 1305(c)(1), for example, requires exoneration of a forfeited bond where the defendant turns him or herself in, with *or without* the surety's involvement. (See, e.g., *People v. Accredited Surety & Cas. Co*. (2018) 26 Cal.App.5th 913, 918 [setting aside forfeiture where defendant voluntarily appeared in court within the bail exoneration period pursuant to Penal Code § 1305, subd. (c)(1) despite bondsman's failure to appear].) Or, if law enforcement officers apprehend the defendant and return him or her to the jurisdiction of the court, the surety is similarly allowed off the hook, even though the law enforcement agency—not the bail agent or the surety—performs and pays for the work of returning the defendant. (See Pen. Code, § 1305, subd. (c)(2) [bail is exonerated where defendant appears voluntarily or is "in custody after surrender or arrest"].) Indeed, in Santa Clara County, where a comprehensive local study of local bail and pretrial practices was undertaken in 2016, bail agents admitted that the number of clients they recover is "low"; their estimates ranged from 1-20 percent. Thus, the county or other local police agency bears the associated costs and effort. The Santa Clara County Sheriff's Office estimated that it receives about 140 requests each year to recover fugitives who are in custody outside the region or state. The cost to the Sheriff's Office for a two-day trip to recover a fugitive is $4,500, and the cost for a three-day trip is $7,000—not including salary costs for the deputy sheriff(s) who make the trip as well as support staff time. (County of Santa Clara Bail and Release Work Group, *Consensus Report on Optimal Pretrial Justice* (hereafter *Consensus Report*), at p. 38 (Aug. 26, 2016).)[13]

[13] https://www.sccgov.org/sites/ceo/Documents/final-consensus-report-on-optimal-pretrial-justice.pdf (as of Oct. 24, 2019).

Sureties work within a statutory system that is structured to their advantage at every step of the process. There is every opportunity to avoid paying when a court orders bail forfeited after a bail agent violates its contract with the court by failing to ensure a defendant's appearance. In this case, in which the defendant did not appear at even one hearing before the bond was forfeited, Surety has been unable to rely on its more common arguments to evade forfeiture. Instead, Surety seeks to twist the bounds of standing and constitutional rights to escape the consequences of its breach. This case, however, is a bridge too far. The Court should reject Surety's position that the defendant's constitutional rights serve as a basis to avoid forfeiture.

D. The Surety Seeks to Avoid Enforcement of Contracts That Are Not Even Effective at Ensuring a Defendant's Appearance.

Adding further insult to injury, the purported guarantees offered by the bail industry that the defendant will appear in court are little better than illusory promises. *No* reliable evidence demonstrates that bail agents serve as an effect means of ensuring appearances. Indeed, the available evidence shows, to the contrary, that defendants are *just as likely, if not more likely*, to appear in court in jurisdictions where courts rely on government or nonprofit pretrial services, rather than for-profit bail agents, to assist in ensuring a defendant's appearance.

In Washington, D.C., for example, where there have been no bail bond agents since 1992, more than 80 percent of defendants are released from custody before trial. More than 90 percent of those released defendants make *all* their required court appearances. (Court Services and Offender Supervision Agency for The District of Columbia, *FY 2016*

Agency Financial Report at p. 27 (Nov. 15, 2016).)[14] Similarly, in Kentucky, where for-profit bail has been banned for 38 years, 74 percent of defendants are released before trial, and of this large population, only 6 percent of felony defendants fail to appear for court. (Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry* (Jun. 2014).)[15] Indeed, a working group in Santa Clara County found "that most defendants who are released from custody pending trial will appear for their court dates without any financial incentive, and that many of those who miss a court appearance do so for mundane reasons such as lack of reliable transportation, illness, or inability to leave work or find childcare, rather than out of a desire to escape justice." (*Consensus Report*, *supra*, at p. 2.)

By contrast, 18 percent of defendants released on commercial bail nationwide do not appear, according to a 2007 study. (U.S. Dept. of Justice, *Pretrial Release of Felony Defendants in State Courts* (Nov. 2007).)[16] In Dallas, Texas, which relies heavily on bail, 26 percent of defendants fail to appear. (See Bauer, *supra*.) The disparity in appearance rates is not surprising given that bail agents provide no support services to actually assist with an appearance. In contrast, government-run or nonprofit pretrial services agencies contribute far more to ensuring the integrity of the court process by providing services—without charging fees that low-income clients can scarcely afford—that address the true reasons that defendants fail to appear, and are shown to be far more effective at ensuring court appearances. (See, e.g., Ventura County Probation Agency, *Pretrial*

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[14] https://www.psa.gov/sites/default/files/FY2016%20CSOSA%20AFR%20FINAL%2011-15-2016.pdf (as of Nov. 8, 2019).

[15] https://www.motherjones.com/politics/2014/06/bail-bond-prison-industry/ (as of Oct. 24, 2019).

[16] https://www.documentcloud.org/documents/1097249-pretrial-release-of-felony-defendants-in-state.html as of Nov. 8, 2019.)

Services Presentation [probation office meets with defendants regularly during pretrial period; sends weekly reminders about court dates; and emails, calls, or texts defendants prior to court dates];[17] County of Santa Clara, Office of Pretrial Services ["Pretrial Service officers refer clients to appropriate services within the community, such as substance abuse treatment or domestic violence counseling, for the purpose of intervention that will assist the defendant in successfully completing the period of pretrial supervision."].[18]) Based on their robust service models, pretrial service agencies like Santa Clara's have achieved failure-to-appear rates of *less than five percent*. (See *Consensus Report*, *supra*, at p. 32.)

With low efficacy rates in guaranteeing a defendant's appearance in court as compared to pretrial assessment and monitoring programs that do not rely on a profit-driven model, the bail industry too often offers nothing more than an illusory benefit. Yet at the expense of defendants, their friends and families, and the courts, sureties have too long enjoyed a system which guarantees them financial gain without any accountability to those to whom they have made binding promises. Faced with a rare case in which it must actually make good on its promises, Surety here attempts to twist a constitutional analysis intended to protect the individual rights of criminal defendants facing a liberty deprivation into yet another means to avoid its contractual liability. That attempt should be rejected.

IV. CONCLUSION

For the foregoing reasons, as well as those set forth in respondent's brief, the Court should affirm the trial court's summary judgment.

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[17] https://www.courts.ca.gov/documents/BTB_23_3E_1.pdf (as of Nov. 8, 2019).

[18] https://www.sccgov.org/sites/pretrial/AboutUs/Overview/Pages/Overview.aspx (as of Nov. 8, 2019).

DATED: November 18, 2019

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California State Association of Counties

CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains _____ words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 18th day of November 2019 in San Jose, California.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF SANTA CLARA)

I, Truc Nguyen, say:

I am now, and at all times herein mentioned, have been over the age of eighteen years, employed in Santa Clara County, California, and not a party to the within action or cause; that my business address is Office of the County Counsel, 70 West Hedding Street, East Wing, 9th Floor, San José, California 95110-1770. I am readily familiar with the County's business practice for collection and processing of correspondence for mailing with the United States Postal Service. On [date of mailing], I served the within NAME OF DOCUMENT IN CAPS, by placing a true copy thereof enclosed in an envelope addressed as follows:

which envelope was then sealed, with postage fully prepaid thereon, and placed for collection and mailing at my place of business following ordinary business practices. Said correspondence was deposited with the United States Postal Service at San Jose, California, on the above-referenced date in the ordinary course of business; there is delivery service by United States mail at the place so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____ _____/S/_____
__Truc Nguyen