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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **OAKLAND DIVISION**

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

18 Plaintiffs,

19 v.

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

22 Defendants.

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

**NOTICE OF THIRD MOTION AND
THIRD MOTION OF CALIFORNIA
BAIL AGENTS ASSOCIATION TO
INTERVENE; MEMORANDUM IN
SUPPORT**

Filed Contemporaneously With:

1. Declaration of Gloria Mitchell;
2. [Proposed] Order Granting Motion to Intervene;
3. [Proposed] Notice of Motion and Motion to Dismiss Per 12(b)(6); Memorandum of Points and Authorities.

Date: December 13, 2016
Time: 2:00 p.m.
Place: Courtroom 1, Fourth Floor
Judge: Hon. Yvonne Gonzalez Rogers



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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the fourth iteration of their Complaint challenging California’s bail laws, Plaintiffs ask this Court for “a declaration that any state statutory or constitutional provisions that require the use of secured money bail to detain any person without an inquiry into ability to pay are unconstitutional.” (Dkt. 71, “3AC,” ¶4.) Plaintiffs further seek an order declaring that California Penal Code §1296b(b) – the California law governing enactment of a bail schedule (the “Bail Law”) – “and any other state statutory or constitutional provisions that require the use of secured money bail to detain any person without an inquiry into ability to pay are unconstitutional.” (*Id.* at Request for Relief, sub (f)).

Plaintiffs mount a full-scale attack on the deeply-rooted, centuries-old institution of bail insurance policies (“bail bonds” or “surety bail”) in this country – an institution expressly sanctioned by the Eighth Amendment and California Constitutions, as well as in centuries of case law interpreting those foundational norms. As a non-profit association of approximately 3,300 bail agents who facilitate the posting of bail bonds by arrestees in California and ensure that bailees attend trial, California Bail Agents Association (“CBAA”) has a direct and unique stake in the outcome of this case. If Plaintiffs’ requested relief is granted, not only would CBAA’s interests in existing bail bond contracts be wiped out, but CBAA’s entire, constitutionally-approved industry would be destroyed, with detrimental effects to California’s criminal justice system. All of these outcomes would occur in the face of a Bail Law that is entirely constitutional on its face and in its application.

The sole remaining named Defendant in this case is the Sheriff of San Francisco, Vicki Hennessy, in her official capacity (the “Sheriff”). In her Answer to the Third Amended Complaint filed on November 1, 2016, the Sheriff pleads *not a single defense* to Plaintiffs’ claims, and has further stated, remarkably, that she “is not required to defend [California’s Bail Law], and she will not.” (Dkt. 101, “Answer,” p. 1). Her attorney, San Francisco City Attorney Dennis Herrera, went one step further in a press conference the same day to announce publicly that he and his client do not believe that the Bail Law is constitutional.¹ In other words, the only law enforcement officer

¹ See <http://sanfrancisco.cbslocal.com/video/category/spoken-word-kpixtv/3571098-herrera-calls-states-bail-system-unconstitutional/> (last visited November 1, 2016).

1 still a party to this case, the Sheriff, has joined forces with the Plaintiffs to pursue the goal of
 2 overturning the constitutional Bail Law of California through judicial, rather than appropriate
 3 legislative, means. All other previously named Defendants have been dismissed with prejudice on
 4 immunity grounds that do not apply to CBAA.² As such, CBAA's interests are completely
 5 unrepresented. Indeed, should CBAA be allowed to intervene and file its proposed Rule 12 Motion,
 6 a copy of which is attached hereto, not only will this be the first time this Court is asked to consider
 7 and rule upon the merits of Plaintiffs' constitutional claims – CBAA will be the *only* party raising
 8 any defense whatsoever of the constitutionally sanctioned and time-honored institution of bail in
 9 this country, and in the state of California.

10 CBAA intends to mount a substantive and multi-pronged defense of the use of surety bail,
 11 pursuant to the California and United States Constitutions, and California state law. These defenses
 12 are described in detail in CBAA's proposed Rule 12 Motion, which is attached to this Motion.³
 13 CBAA also intends to seek a judicial determination of the constitutionality of the Bail Law – relief
 14 that the sole remaining Defendant will not seek. (*See Answer, Dkt. 101*). CBAA also argues that it
 15 is uniquely qualified to present the Court with information and evidence of what bail agents
 16 actually do in California, their essential role in the operation of the criminal justice system, and why
 17 granting Plaintiffs' relief would be tantamount to eliminating an entire legal industry that is
 18 premised on securing pre-trial liberty for citizens under the Eighth Amendment. (*See, e.g., Mitchell*
 19 *Decl., filed herewith*). CBAA should be permitted to enter the case so that the Court may benefit
 20 from a full presentation of the facts and law – something the Sheriff, represented by San
 21

22 _____
 23 ² Plaintiffs' original Complaint, filed October 28, 2015, named the City and County of San Francisco
 24 (the "County") and "the State of California," generically. (Dkt. No. 1). The County and the State
 25 filed a Rule 12 motion to dismiss on immunity and abstention grounds, only. (Dkt. Nos. 20, 26). The
 26 Court dismissed the State on sovereign immunity grounds. (Dkt. 55, at 3). Plaintiffs' amended
 27 Complaints followed (*See Dkt. Nos. 58 (FAC), 62 (SAC), 71 (3AC)*). The 3AC added the Sheriff
 28 and the Attorney General ("AG") as defendants in this action, for the first time. The Sheriff and the
 County filed a Rule 12 motion to dismiss on immunity and abstention grounds, only. (Dkt. No. 76).
 The AG filed a Rule 12 motion to dismiss on immunity grounds and for failure to state a claim (Dkt.
 77); however, the Court reached only the immunity ground. (Dkt. 99, fn. 11). Though Plaintiffs were
 given leave to amend their complaint against the AG by October 25, 2016, they failed to timely do
 so, and thus the dismissal of the AG is with prejudice as of that date. (*Id.*, p. 24).

³ Should it be permitted to intervene, CBAA requests leave to file its proposed Rule 12 Motion to
 dismiss the 3AC, as a first responsive pleading.

1 Francisco's City Attorney, has openly confessed that she will not be providing – when making such
 2 a monumental decision about a Constitutional institution affecting the lives of many California
 3 residents, bail.

4 CBAA satisfies each requirement for intervention as of right under Federal Rule of Civil
 5 Procedure 24(a). This motion is timely made, and as representative of California's bail agents with
 6 an interest in protecting the viability of the bail industry and currently existing contracts, CBAA has
 7 a significantly protectable interest “relating to the ... transaction which is the subject of the action.”
 8 *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). Given Plaintiffs' attempt to enjoin
 9 bail bonds for all persons and eviscerate the bail industry as a whole, CBAA is “so situated that
 10 without intervention the disposition of this action may as a practical matter impair or impede [its]
 11 ability to protect that interest” – indeed, such disposition *necessarily will* impede CBAA's interests.
 12 *Id.* The Sheriff indisputably does not adequately represent CBAA's interests, as she is refusing even
 13 to defend the Bail Law authorized by the state and federal Constitutions that she and City Attorney
 14 Dennis Herrera took an oath to uphold *and defend*.⁴ (*See Answer, Dkt. 101*).

15 In the alternative, CBAA should be allowed to intervene permissively, pursuant to Rule
 16 24(b), since its timely motion necessarily implicates “question[s] of law or fact in common” with –
 17 indeed, inseparable from – those raised by the 3AC. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d
 18 1094, 1108 (9th Cir. 2002)(quoting Fed. R. Civ. P. 24(b)). Allowing intervention in this case will
 19 serve the cause of judicial economy because it will obviate the need for separate suits by the
 20 industry to seek a declaration of legality of bail as practiced under California law. For the reasons
 21 discussed herein, CBAA respectfully requests that the Court grant its motion to intervene pursuant
 22 to Rule 24, and permit the filing of the attached, proposed Rule 12 Motion.

23 II. ARGUMENT

24 A. CBAA Is Entitled to Intervene as of Right.

25 Under Federal Rule of Civil Procedure 24(a)(2), a party may intervene as a matter of right if
 26 four conditions are met: (1) the motion is timely; (2) the applicant claims an identifiable,
 27

28 _____
⁴ California's oath of public office requires public officials to “swear (or affirm) that [they] will support and defend the Constitution of the United States and the Constitution of the State of California...” (Art. 20, Sec. 3).

1 “significantly protectable interest” relating to the property or transaction which is the subject of the
2 action; (3) the applicant is so situated that without intervention, disposition of the action may impair
3 or impede the applicant’s ability to protect that interest; and (4) the existing parties to the action do
4 not adequately represent the applicant’s interest. Fed. R. Civ. P. 24(a); *Wilderness Soc’y v. U.S.*
5 *Forest Service*, 630 F.3d 1173, 1177 (9th Cir. 2011). The Ninth Circuit construes this four-part test
6 liberally in favor of potential intervenors. *Southwest Center for Biological Diversity v. Berg*, 268
7 F.3d 810, 818 (9th Cir. 2001). In deciding a motion to intervene, “[c]ourts are to take all well-
8 pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in
9 intervention, and declarations supporting the motion as true absent sham, frivolity or other
10 objections.” *Id.* CBAA satisfies each prong of the four-part test.

11 **1. This Motion Is Timely.**

12
13 Courts examine three factors to determine timeliness: (1) the stage of the proceedings at
14 which an applicant seeks to intervene; (2) the prejudice to the existing parties if intervention is
15 allowed; and (3) the reasons for and length of any delay. *California Dep’t of Toxic Substances*
16 *Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002).

17
18 CBAA first sought to intervene in this litigation at its very outset, less than two months
19 after Plaintiffs filed their original Complaint. (Dkt. 41.) The Court denied that motion without
20 prejudice, as premature in light of Plaintiffs’ failure to explain whether they intended to challenge
21 California’s bail laws in a way that would implicate CBAA’s interests. (Dkt. 55.) The Court noted
22 that “[o]nly once the Court understands the relief plaintiffs seek in this case, and the defenses the
23 City and CBAA intend to raise in response thereto, can intervention be sufficiently addressed.”
24 (*Id.*) CBAA filed its second motion to intervene within two weeks of the filing by then-named
25 Defendants of their respective 12(b)(6) motions to dismiss. (Dkt. 81.) CBAA’s second motion to
26 intervene was denied without prejudice to re-filing the motion with a proposed pleading attached
27 thereto, by no later than November 1, 2016. (Dkt. 99.)

28
CBAA has timely filed this Motion in accordance with the Court’s order, and has not
caused any delay to these proceedings, let alone delay that would prejudice the existing parties.

1 The pleadings are finally settled – Plaintiffs’ operative complaint is the 3AC, to which this Motion
 2 and the attached proposed Rule 12 Motion, responds. CBAA’s motion is timely. *See, e.g., Idaho*
 3 *Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (allowing intervention four
 4 months after the complaint was filed and two months after the government answered, even though
 5 plaintiff had already filed a motion for a preliminary injunction).
 6

7 **2. CBAA Has Significantly Protectable Interests in the Litigation.**

8 Rule 24(a) requires that an applicant for intervention possess an interest relating to the
 9 “property or transaction” that is the subject of the litigation. This “interest test” serves primarily as
 10 a “practical guide to disposing of lawsuits by involving as many apparently concerned persons as
 11 is compatible with efficiency and due process.” *County of Fresno*, 622 F.2d at 438 quoting *Nuesse*
 12 *v. Camp*, 385 F.2d 694, 700 (D.C.Cir.1967). Generally, a proposed intervenor meets this test if
 13 “the interest [asserted] is protectable under some law, and [] there is a relationship between the
 14 legally protected interest and the claims at issue.” *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d
 15 1173, 1179 (9th Cir. 2011). More specifically, the Ninth Circuit has held that:

16 when, as here, the injunctive relief sought by plaintiffs will have direct,
 17 immediate, and harmful effects upon a third party’s legally protectable interests,
 18 that party satisfies the “interest” test of Fed. R. Civ. P. 24(a)(2); he has a
 19 significantly protectable interest that relates to the property or transaction that is
 the subject of the action.

20 *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir. 1995), *abrogated*
 21 *on other grounds by Wilderness Soc.*, 630 F.3d 1173.

22 “The interest test is not a bright-line rule...[a]n applicant seeking to intervene need not
 23 show that ‘the interest he asserts is one that is protected by statute under which litigation is
 24 brought.’ It is enough that the interest is protectable under any statute.” *U.S. v. Alisal Water Corp.*,
 25 370 F.3d 915, 919 (9th Cir. 2004), *citing Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993).
 26 A non-speculative, economic interest may be sufficient to support a right of intervention. *U.S. v.*
 27 *Alisal Water Corp.*, *supra*, 370 F.3d at 919; *see also Arakaki v. Cayetano*, 324 F.3d 1078, 1088 (9th
 28 Cir. 2003) (stating that Native Hawaiians had a sufficiently related interest to intervene in a lawsuit

1 by taxpayers challenging the provision of benefits by the State of Hawaii and its subdivisions to
2 Hawaiians).

3 As discussed below, CBAA and its members have an economic interest in the enforcement
4 of their currently existing bail bond contracts, which are expressly authorized by the challenged
5 Bail Law, and in the continued viability of their industry. Indeed, it is difficult to imagine a more
6 direct relationship between CBAA’s interests and Plaintiffs’ requested relief – namely, a
7 declaration that the Bail Law – and thus CBAA’s industry – is unconstitutional.

8 **a. CBAA’s Significant Interest in Current Bail Bond Contracts.**

9 CBAA is an association of bail agents licensed by the state of California and the California
10 Department of Insurance, who provide bail insurance policies (“bail bonds” or “surety bonds”) to
11 consumers to secure the release of individuals from jails throughout California. (Mitchell Decl.,
12 ¶¶2, 5.) A bail bond is a legal contract with the state and/or federal agency. *See* Cal. Penal Code
13 §1296b(a) (discussing surety bonds “executed by a certified, admitted surety insurer as provided in
14 the Insurance Code”); (Mitchell Decl., ¶2).

15
16 CBAA has a legally protectable interest in the enforceability of the thousands of the
17 *currently existing* contracts to which its members are parties. Indeed, one such contract exists
18 between Plaintiff Crystal Patterson, and Bail Hotline Bail Bonds, which is a member of CBAA.
19 (*See* Dkt. 25-1, “Surety Bail Bonds Agreement”); (Mitchell Decl., ¶13); (Dkt. 25, Plaintiffs’ Reply
20 in support of Motion for Class Certification, stating “the \$1,500 [Patterson] paid the bail bond
21 company will not be returned, and she will be responsible for the remainder plus interest of her
22 \$15,000 bond”); (3AC, ¶38, stating “Ms. Patterson is still indebted to a private bail bond company
23 for the balance of her \$15,000 debt, plus interest.”). The Surety Bail Bonds Agreement is a valid
24 and enforceable legal contract pursuant to Penal Code §1269b, the California Constitution, and the
25 Eighth Amendment. However, Plaintiffs’ requested relief – a declaration that the laws authorizing
26 such bail bond agreements are unconstitutional – would invalidate the Surety Bail Bonds
27 Agreement, and would render all such outstanding bail bonds contracts illegal and unenforceable,
28 thereby stripping CBAA and its members of their economic interests in tens of thousands of

1 otherwise enforceable contracts, with the stroke of a pen. *See, e.g., Baccouche v. Blankenship*, 154
 2 Cal. App. 4th 1551, 1558 (2007) (“...a contract whose object is a violation of law is itself against
 3 the policy of the law (Civ. Code, §§ 1441, 1667, 1668), and renders the bargain unenforceable.”).

4 **b. CBAA’s Significant Interest in the Bail Industry’s Continued Viability.**

5 CBAA has an additional, concrete economic interest in protecting the livelihoods of its
 6 members and ensuring the continued viability of its industry as a whole. *See Alisal Water Corp.*,
 7 *supra*, 370 F.3d at 919 (an economic interest constitutes a significantly protectable interest where
 8 it is concrete and related to the underlying subject matter in the case).

9 As discussed in more detail in the attached, proposed Rule 12 Motion, CBAA’s industry
 10 came to existence as a direct result of the Eighth Amendment’s prohibition against “excessive
 11 bail,” which necessarily contemplates the propriety of non-excessive bail. *See White v. Wilson*, 399
 12 F.2d 596, 598 (9th Cir. 1968) (“The mere fact that petitioner may not have been able to pay the
 13 bail does not make it excessive.”). “Bail” under the Eighth Amendment is the same thing as
 14 “secured money bail,” as Plaintiffs call it. For instance, in *United States v. Salerno*, 481 U.S. 739
 15 (1997), the Supreme Court made clear that the Eighth Amendment did not mandate a right to bail,
 16 but was only concerned with the *amount* of bail if and when bail was warranted. *Id.*, at 739 (“when
 17 the Government has admitted that its only interest is in preventing flight, bail must be set by a
 18 court *at a sum* designed to ensure that goal, and no more.”) (emphasis added); *see also, Stack v.*
 19 *Boyle*, 342 U.S. 1, 5 (1951) (stating in dictum that “[b]ail set at a figure higher than *an amount*
 20 reasonably calculated [to ensure the defendant’s presence at trial] is ‘excessive’ under the Eighth
 21 Amendment.”) (emphasis added); *Galen v. County of Los Angeles*, 477 F.3d 652, 660 (9th Cir.
 22 2007) (internal citations omitted) (“The state may not set bail to achieve invalid interests . . . nor *in*
 23 *an amount* that is excessive in relation to the valid interests it seeks to achieve.”) (emphasis
 24 added). The Eighth Amendment proscription against *excessive* bail necessarily contemplates the
 25 quantum of bail, and in this case, Plaintiffs’ challenge to the bail schedule as applied to the
 26 indigent is a challenge to the quantum of bail.

27 CBAA’s industry is specifically addressed in the California Constitution, which expressly
 28 recognizes surety bail, including through its own “Excessive Bail” prohibition. *See Cal. Const.*,
 Article 1, §12 (“A person shall be released on bail by sufficient sureties...”); Art. 1, Sec. 28(b)(3)

1 (requiring the safety of the victim and the victim’s family be considered “in fixing *the amount of*
 2 bail”) (emphasis added); Art. 1, Sec. 28(f)(3) (requiring certain considerations to be taken into
 3 account when a judge or magistrates “grants or denies bail or release on a person’s own
 4 recognizance”). CBAA clearly has a legally protectable interest in defending the California bail
 5 bond industry, and Plaintiffs’ lawsuit seeks to obliterate the entire industry.

6 **c. CBAA is Entitled to Intervene on Behalf of its Members.**

7 Besides its right to intervene as a trade association, CBAA also is entitled to intervene on
 8 behalf of its members. Under Ninth Circuit precedent, an organization may intervene on behalf of
 9 its members as long as it demonstrates: (1) the members have a legally protectable interest that is
 10 sufficient for intervention; (2) the defense of the decision is relevant to the associations’ purposes;
 11 and (3) the members are not necessary participants in the suit. *Southwest Center for Biological*
 12 *Diversity, supra*, 268 F.3d at 822 n.3. CBAA members have a legally protectable interest in
 13 providing surety bail services to accused persons in San Francisco, and in the specific outstanding
 14 bail contracts, including Plaintiff Crystal Patterson’s contract. These interests are relevant to
 15 CBAA’s purposes, because protecting its members’ interest and ensuring the continued vitality of
 16 the surety bail industry is at the core of CBAA’s mission. Finally, because Plaintiffs seek
 17 declaratory and injunctive relief against the Sheriff, individual CBAA members are not necessary
 18 participants in this suit. Therefore, CBAA is entitled to intervene in this case on behalf of both
 19 itself and its members.
 20

21 **3. CBAA’s Interests Will Be Impaired If Intervention Is Denied.**

22 Rule 24(a) requires that an applicant for intervention as a matter of right be “so situated
 23 that the disposition of the action *may* as a practical matter impair or impede the applicant’s ability
 24 to protect that interest.” Fed. R. Civ. P. 24(a) (emphasis added). Because “Rule 24 refers to
 25 impairment ‘as a practical matter’ ... the court is not limited to consequences of a strictly legal
 26 nature.” *Forest Conservation Council, supra*, 66 F.3d at 1498, *abrogated on other grounds*,
 27 *Wilderness Soc.*, 630 F.3d 1173, *citing*, Fed. R. Civ. P. 24 advisory committee’s note (stating that
 28 “[i]f an absentee would be substantially affected in a practical sense by the determination made in

1 an action, he should, as a general rule, be entitled to intervene”).

2 Here, CBAA’s interests not only “may,” but *will necessarily be* impaired as “a practical
3 matter” if Plaintiffs’ requested relief – a permanent injunction against the use of bail bonds in San
4 Francisco (and, by likely application to other counties later, presumably the entire State of
5 California) – is granted, because not only will hundreds of thousands of existing surety bail
6 contracts in San Francisco County be voided as unconstitutional, but CBAA’s entire industry
7 would be destroyed overnight, and tens of thousands of contracts held by CBAA members,
8 invalidated. (*See Mitchell Decl.*, ¶14); *Baccouche v. Blankenship*, 154 Cal. App. 4th 1551, 1558
9 (2007) (“[A] contract whose object is a violation of law is itself against the policy of the law (Civ.
10 Code, §§ 1441, 1667, 1668), and renders the bargain unenforceable.”) Plaintiffs concede as much,
11 as their stated goal in this litigation is to have the Court declare that “secured money bail” of the
12 type provided by the bail industry – i.e., “bail,” itself – is unconstitutional. (*See, e.g.*, 3AC ¶ 65.)
13 Indeed, Plaintiffs’ counsel, Equal Justice Under Law, has a larger goal of seeking to “End[] the
14 American Money Bail System” nationwide.⁵ In public statements concerning this lawsuit, counsel
15 for Plaintiffs, Phil Telfeyan, is quoted as follows:

16
17 Telfeyan said he is not trying to destroy the classic, neon-advertising bail bonding industry,
18 but he conceded that **the business model would become obsolete** if he convinces courts
19 that the cash bail system is unconstitutional.⁶ (emphasis added).

20 CBAA submits that such judicially-mandated obsolescence qualifies as injury-in-fact, and
21 certainly as a sufficient risk of impairment to support intervention. *See, e.g., Brooks v. Flagg*
22 *Bros.*, 63 F.R.D. 409, 415 (S.D.N.Y. 1974) (“where specific segments of an industry would be
23 vitally affected by a declaration that the statute which governs their business conduct is
24 unconstitutional, there is little reason to exclude them from participation”); 7C Wright, Miller &
25 Kane, *Fed. Prac. & Proc. Civ.* § 1908.1 (3d ed. 2010) (“in cases challenging various statutory
26 schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized

27 ⁵ *See* EJUL’s website, [http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-](http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system)
28 [money-bail-system](http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system) (last visited November 1, 2016).

⁶ Paul Elias, *Cash Bail System Under Attack As Unconstitutional*, *The Washington Post*, December
26, 2015 at [www.washingtonpost.com/national/cash-bail-system-under-attack-November-1,24,](http://www.washingtonpost.com/national/cash-bail-system-under-attack-November-1,24,2016)
2016).

1 that the interests of those who are governed by those schemes are sufficient to support
 2 intervention.”); *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994); *New York Pub. Interest*
 3 *Research Grp., Inc. v. Regents of Univ. of State of N. Y.*, 516 F.2d 350, 352 (2d Cir. 1975).
 4 Moreover, as the Sheriff has openly disavowed any interest in defending any aspect of the Bail
 5 Law, much less any interest of the bail industry, the CBAA should be allowed to intervene now.
 6 *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994) (holding that timber purchasers’ association had
 7 a sufficient “interest” in environmental groups’ suit against the United States Forest Service where
 8 members had existing timber contracts that were threatened by the ban plaintiffs were seeking);
 9 *New York Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of N. Y.*, 516 F.2d 350, 352
 10 (2d Cir. 1975) (holding that association of pharmacists have a sufficient interest to permit
 11 intervention where the validity of a regulation from which its members benefit is challenged).
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13 **4. CBAA’s Interests Are Not Now Being Adequately Represented.**

14 During the course of this lawsuit’s two successive rounds of motions to dismiss, the named
 15 Defendants’ respective responses have focused almost exclusively on immunity and abstention
 16 arguments, and have not meaningfully grappled with the gravamen of Plaintiffs’ case, which is a
 17 constitutional attack on surety bail, a fundamental element of a carefully balanced system of
 18 criminal justice throughout the United States. In light of the Court’s recent Order (Dkt. 99), the
 19 Sheriff is the sole remaining named Defendant in this action.⁷ The Sheriff’s Answer to the 3AC is,
 20 in essence, a wholesale adoption of the Plaintiffs’ position concerning the constitutionality of the
 21 Bail Law. The Answer asserts no affirmative defenses, and states that “The Sheriff is required to
 22 enforce the State’s law, and she will, unless and until its unconstitutionality is established in the
 23 courts. But she is not required to defend it, *and she will not.*” (Answer, p. 1) (emphasis added). The
 24 City and County of San Francisco have been dismissed with prejudice on immunity grounds. (Dkt.
 25 99.) The Attorney General – the *only* Defendant to raise (albeit, in cursory fashion) a merits
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 28 ⁷ Though the Court found that the Sheriff is a State actor in this context and is entitled to Eleventh
 immunity from suit for money damages, it allowed Plaintiffs’ claim for violation of their Fourteenth
 Amendment rights to go forward, to the extent that declaratory or injunctive relief is sought, under
Ex Parte Young, 209 U.S. 123, 155-56 (1908). (Dkt. 99).

1 argument in her 12(b)(6) motion to dismiss – also has been dismissed on immunity grounds, and
2 due to Plaintiffs’ failure to timely file a fourth amended complaint against the Attorney General,
3 that dismissal is now with prejudice. (*See* Dkt. 99, p.24).

4
5 In light of the party dismissals by this Court, and the Sheriff’s stark capitulation in the
6 Answer to the Plaintiffs’ attack on the Bail Law, resulting in a decision not to defend this action at
7 all, CBAA’s interests are not now being represented in any way. Plaintiffs’ asserted Equal
8 Protection and Due Process claims *have never been addressed* in any of the four Rule 12 motions
9 filed, to date. (*See* Dkt. 99, fn. 11, holding “[b]ecause the Court dismisses the Attorney General on
10 Eleventh Amendment grounds, the Court does not reach the Attorney General’s Fourteenth
11 Amendment arguments”). It is readily apparent from the Sheriff’s Answer that these claims now
12 will *never* be challenged, in the absence of intervention by CBAA, leaving this Court in the
13 untenable position of having to rule on the constitutionality of bail where vigorous argument on the
14 defense side has been co-opted by the Plaintiffs, to the detriment not only of CBAA, but also of the
15 broader California community affected by this case.

16 As reflected in the proposed Rule 12 motion attached hereto, CBAA intends to mount a
17 substantive and multi-pronged defense of the historical use of surety bail, including a detailed
18 discussion of the constitutionality of surety bail pursuant to both the California Constitution and
19 Eighth Amendment to the U.S. Constitution, involving jurisprudence from across the United
20 States. Should this case not be dismissed, CBAA also intends to seek an affirmative judicial
21 determination of the constitutionality of the Bail Law – relief that the Sheriff will not seek. (*See*,
22 Answer).

23
24 The Court’s analysis of Plaintiffs’ claims will benefit from CBAA’s extensive and unique
25 industry expertise concerning how bail works, and the pivotal role bail plays in California criminal
26 justice. *See Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 295 F.3d 1111, 1117 (10th Cir.
27 2002) (stating that a sufficient showing on this factor is made when the would-be intervenor has
28 expertise the government may not have); (Mitchell Decl., ¶1, describing CBAA’s 37 years of
“educating members of the association and general public concerning the important work of bail

1 agents and the services they provide to the public, the Courts, defendants, law enforcement, and
2 the State of California”). For instance, CBAA will highlight the monumental costs to society and
3 the criminal justice system that are involved in abandoning surety bail. Numerous studies have
4 shown that surety bail is a highly effective way of ensuring that people accused of crimes – rich or
5 poor – continue to participate in the justice system through trial. Bail agents work with a variety of
6 third-party co-signors, including family members, employers, and friends, to guarantee that the
7 defendant goes to court and abides by any other conditions of bail. (Mitchell Decl., ¶9.) This
8 provides a network of accountability and a powerful incentive for defendants, not only to appear in
9 court, but to avoid the situations and conditions that resulted in their initial arrest. (*Id.*, ¶9-10.)

11 By contrast, a defendant who is released without surety bail has significantly less incentive
12 to appear for his or her court hearings, and might commit additional crimes while released. *See,*
13 *e.g.*, Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law*
14 *Enforcement from Bail Jumping*, 47 J.L. & Econ. 93, 94 (2004). Innocent Americans bear the brunt
15 of these additional crimes, through additional victimization and deterioration of our communities.
16 Further, when a defendant fails to appear, local courts must rearrange and reschedule proceedings,
17 wasting the time of court personnel and inhibiting the community’s ability to enforce its laws.
18 Studies conservatively estimate that the cost to the public for each failure to appear is
19 approximately \$1,775. *See* Robert G. Morris, Dallas County Criminal Justice Advisory Board,
20 *Pretrial Release Mechanisms in Dallas County, Texas* (Jan. 2013) at 17, available at
21 <http://bit.ly/1tttqJD>.

23 Surety bail provides the greatest protection against an accused’s failure to appear. For
24 instance, bail insurance helps those persons who cannot afford to provide a “cash bond” to avoid
25 the negative consequences of having to proceed through the court system without it, including by
26 permitting bail for only a fraction of what the court requires, and often offering installment plans to
27 facilitate payments. (Mitchell Decl., ¶6.) Without surety bail, the public and the courts will
28 demand that arrested suspects stay behind bars awaiting trial. Moreover, posting a surety bail bond
allows individuals to protect their privacy, rather than providing the wide variety of personal

1 information and having to sacrifice personal liberties, as is typically required with intrusive
2 government-run pretrial services. (Mitchell Decl., ¶12); (*see also* 3AC, ¶74, discussing pretrial
3 services agencies' use of, *inter alia*, "reporting obligations...SCRAM bracelets (for alcohol
4 testing), [and] electronic monitoring" to guard against risks).

5 The surety bail industry provides the single most effective and efficient way to provide
6 defendants with the opportunity to obtain pretrial release without public expense, and without
7 diverting the strained resources of law enforcement. A report published in the Journal of Law and
8 Economics determined that "[d]efendants released on a surety bond are 28 percent less likely to
9 fail to appear than similar defendants released on their own recognizance, and if they do fail to
10 appear, they are 53 percent less likely to remain at large for extended periods of time." Eric
11 Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law*
12 *Enforcement from Bail Jumping*, 47 J. L. & Econ. 93, 118 (2004). A 2007-08 Special Report from
13 the United States Department of Justice reached the same conclusion: "Compared to release on
14 recognizance, defendants on financial release were more likely to make all scheduled court
15 appearances." Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts*,
16 Nov. 2007 (revised Jan. 2008) at 1.

17 Monetary bail schedules, which set default bail amounts for various crimes based on the
18 severity of the offenses, are much more efficient than requiring an individualized bail hearing for
19 every single offense by every single offender. In addition, surety bail agents provide other services
20 to the State, defendants, and co-signors as part of a bail transaction, including monitoring the
21 defendant, reminding him or her to appear in court, or any other requirements an agent places on a
22 defendant at the request of a third party co-signor. (Mitchell Decl., ¶11.)

23 For all of the above reasons, which are just a preview of the substantive arguments CBAA
24 will make in this case, it cannot be said that the Sheriff will "undoubtedly make all of the
25 intervenor's argument" (*County of Fresno, supra*, 622 F.2d at 438-39) – in fact, the Sheriff intends
26 to mount no defense to Plaintiffs' claims, whatsoever, and her attorney, San Francisco City
27 Attorney Dennis Herrera, has publicly stated that the Bail Law contemplated by the Constitutions
28 that he and the Sheriff are sworn to uphold and defend, is unconstitutional. *See*

1 <http://sanfrancisco.cbslocal.com/video/category/spoken-word-kpixtv/3571098-herrera-calls-states->
2 [bail-system-unconstitutional/](http://sanfrancisco.cbslocal.com/video/category/spoken-word-kpixtv/3571098-herrera-calls-states-).

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4 This motion presents much more than “sufficient doubt about the adequacy of
5 representation to warrant intervention.” *Southwest Center for Biological Diversity, supra*, 268 F.3d
6 at 824 (quotation omitted). Having demonstrated all four of the required factors, CBAA is entitled
7 to intervene as a matter of right.

8 **B. Alternatively, CBAA Should Be Granted Permissive Intervention.**

9 Should the Court determine that CBAA is not entitled to intervene as of right, it should
10 nevertheless grant CBAA permission to intervene under Rule 24(b), which provides that “[o]n
11 timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares
12 with the main action a common question of law or fact.” F.R.C.P. 24(b)(1)(B). Permissive
13 intervention requires “(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a
14 common question of law and fact between the movant’s claim or defense and the main action.”
15 *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir. 2011).

16 **1. CBAA Meets Jurisdictional Concerns.**

17 In federal question cases, the district court’s jurisdiction is grounded in the federal
18 question(s) raised by the plaintiff, and therefore an independent jurisdictional basis is not required.
19 *See Geithner, supra*, 644 F.3d at 844; 28 U.S.C. § 1331; *Blake v. Pallan*, 554 F.2d 947, 956–57
20 (9th Cir. 1977); 7C Wright, Fed. Prac. & Proc. § 1917 (3d ed. 2010) (“In federal question cases
21 there should be no problem of jurisdiction with regard to an intervening defendant nor is there any
22 problem when one seeking to intervene as a plaintiff relies on the same federal statute as does the
23 original plaintiff.”). This Court is exercising federal question jurisdiction over Plaintiffs’ claims,
24 and CBAA’s proposed defenses (and sole counterclaim for declaratory relief, should that become
25 necessary) pertain to the same federal questions raised by Plaintiffs. As such, no independent
26 jurisdictional showing is necessary.
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2. CBAA's Motion Is Timely.

As discussed above, CBAA has timely filed this Motion in accordance with the Court's order, and has not caused any delay to these proceedings, let alone delay that would prejudice the existing parties. Indeed, only on the day this motion is being filed, was it first established that the sole remaining defendant in this case, the Sheriff, refuses to defend the Bail Law. Accordingly, CBAA's motion is timely.

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3. A Common Question of Law and Fact Exists Between CBAA's Claim or Defense and the Main Action.

Whether there is a common question of law or fact, is an issue liberally construed by the courts. *Kootenai Tribe, supra*, 313 F.3d at 1111. Unless there are no questions of law or fact common to the main action and a proposed intervenor's claim or defense, the court has discretion to permit the intervention. *Id.* Here, Plaintiffs' claims will remain unchanged if the Court grants this motion. CBAA intends to assert legal defenses that will not be raised by the Sheriff, and if necessary later, to assert a single counterclaim for declaratory judgment concerning the same question posed by the Plaintiffs (namely, the constitutionality of the California Bail Law), and to submit industry expertise on the integral nature of the surety bail system in the criminal justice system, to aid this Court in making a fully informed and accurate decision. CBAA's intervention will not prejudice any of the existing parties or delay the proceedings, and it "will significantly contribute ... to the just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

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C. CBAA Submits A Separate Pleading under Rule 24(c).

Though Rule 24(c) refers to a "pleading that sets out the claim or defense for which intervention is sought," it does not specify what type of pleading is permitted or required. Should CBAA be permitted to intervene, CBAA requests that it be allowed to file the attached, proposed Rule 12 Motion to dismiss, as a first responsive pleading. Should the Court permit any part of Plaintiffs' case to go forward, CBAA is prepared to file an Answer and Counterclaim for declaratory relief, seeking a judicial determination that the California Bail Law is legal and constitutional in its current form.

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III. IF CBAA’S INTERVENTION IS DENIED AT THIS TIME, DENIAL SHOULD BE WITHOUT PREJUDICE

Should the Court determine that the Motion to Intervene is premature at this time, CBAA requests that the Court deny the motion without prejudice. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 101 F.3d 503, 509 (7th Cir. 1996) (suggesting deferral of the decision on intervention if the adequacy of the existing representation has not yet been shown).

IV. CONCLUSION

For the foregoing reasons, CBAA respectfully requests that the Court grant an order allowing it to intervene as a defendant in this action, and to file the proposed Rule 12 Motion to Dismiss Plaintiffs’ 3AC.

Respectfully submitted,

Date: November 1, 2016

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