



**To:** Members of the RCRC Board of Directors  
**From:** Paul A. Smith, Senior Vice President Governmental Affairs  
Elizabeth Howard Espinosa, Partner, Hurst, Brooks, Espinosa, LLC  
**Date:** June 9, 2020  
**Re:** Senate Bill 10 - Bail Reform Referendum - **ACTION**

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### **Summary**

This memo provides an analysis of the referendum to overturn Senate Bill 10 (Hertzberg, 2018), which replaced the money bail system with a system for pretrial release based upon individualized risk assessments and supervision conditions. RCRC staff recommends adopting a “No Position” position on this measure.

### **Background**

Bail is intended to act as a financial guarantee to the court that the defendant will appear for required court proceedings. The 8<sup>th</sup> Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

In California, bail is a constitutional right except for a number of offenses for which a defendant is charged. The State Constitution also allows for an arrestee to be released upon a written promise to appear, known as release on own recognizance. Courts require many defendants to deposit monetary bail in order to be released from custody. An arrestee may post bail with his/her own cash, or may post bail using a bail bond, which in most instances is conducted by a private bail bond business.

Currently, each county sets a bail schedule based exclusively on the charged offense. The bail schedule is used by the arresting officer to allow an arrestee to post bail before his or her court appearance. Once a defendant is brought before the court, there must be an individualized determination of the appropriate amount of bail. In addition, proponents of the current bail system suggest it protects the community – at no cost to the taxpayer – by detaining an individual who could commit subsequent offenses while awaiting trial. However, prior to the enactment of criminal justice realignment in 2011 (commonly referred to as AB 109), the current bail system – as practiced in most counties – did not actually address community safety concerns because there was minimal assessment of risk.

A number of counties have, in recent years, undertaken a review and redesign of their pre-trial detention system and associated release policies to accomplish the goals of: 1)

reducing the county's jail population; 2) ensuring that those who do not pose a risk (re-committing offense and/or being delinquent in court appearances) need not be detained; and 3) ensuring a more socially equitable scheme for defendants. Other jurisdictions – most notably Santa Clara County – have decades of experience with a robust and comprehensive pre-trial services program.

In addition, a number of counties have been sued in federal court with respect to their pre-trial bail scheme.

### **Issue**

In 2018, the Legislature approved and Governor Brown signed into law Senate Bill 10, which fundamentally redesigned the process for determining who must be detained in custody while awaiting trial. In essence, the measure shifted away from a person's ability to post bail to a model that assesses flight and public safety risks.

SB 10 assumes that a defendant will be released on their own recognizance or supervised own recognizance with the least restrictive nonmonetary condition or combination of conditions that will reasonably assure public safety and the defendant's return to court. In addition, SB 10 creates a series of categories of persons and offenses:

- Different levels of review;
- Misdemeanors - Most are cited and released within 12 hours;
- Greater scrutiny as seriousness of the offense increases;
- Detention is based on risk, not lack of money;
- Eliminates cash bail or bail bonds; and,
- When there is very strong evidence that no conditions of release can reasonably assure public safety, a defendant can be detained pretrial, regardless of financial resources.

Unlike previous versions of SB 10, as enacted, avoids imposing a direct mandate on individual counties, but instead gives the local courts authority to contract with counties (i.e. County Probation Departments) to provide pretrial assessment and supervision services. Other county criminal justice system impacts associated with the changes to the pretrial detention system include those affecting sheriff's department, the district attorney, and the public defender's operations and workload. SB 10 specifies an annual process for identifying new costs associated with the new pretrial system and funding those costs through the state budget process.

In January 2019, opponents to SB 10 – primarily led by the private bail bond industry - secured sufficient signatures to place a repeal of SB 10 before voters in November 2020. As a result of the referendum qualifying, implementation of SB 10 has been put on hold, and the Legislature cannot amend its provisions. In addition, the Judicial Council suspended implementation of the measure.

Opponents of SB 10 include those from the bail bond industry, those who believe it would diminish public safety protections, as well as those who believe the measure falls well-short of its intended goal of completely eliminating unnecessary pre-trial detainment by giving judges broad discretion on pre-trial release decisions. On the

other hand, proponents of the reform believe it would help reduce racial and economic discrimination that is inherent in California's cash bail system.

RCRC joined other county partners in opposing previous versions of SB 10 due to the costs associated with implementing pre-trial release assessments. However, RCRC did not offer any formal position on the final version of the bill.

It should be noted that when the measure is presented to the voters, a “Yes” vote will allow SB 10 to take effect, while a “No” vote will preclude SB 10 from being fully enacted and implemented.

### **Staff Recommendation**

RCRC staff recommends the RCRC Board of Directors adopt a “No Position” position for the Bail Reform Ballot Initiative.

The arguments to oppose the Bail Reform Ballot Initiative could be made in the following manner:

- SB 10 will cost counties additional resources as there is little faith that the State of California will adequately address and reimburse for the costs counties will incur to properly implement the bill's pre-trial requirements.
- Many county personnel within the criminal justice spectrum (county supervisors, sheriffs, district attorneys, etc.) believe the current bail scheme is more-than-adequate in determining who should be detained and subsequently prevent individuals from recommitting offenses.
- Each individual county and their courts should determine the conditions of allowing/imposing bail.

The arguments to support SB 10 could be made in the following manner:

- Bail reform will happen! It is a matter of whom will impose that effort – the courts (primarily federal courts) or the Legislature? It would be wise to let SB 10 take effect before the courts impose pre-trial detention conditions that could be more costly, in which case counties would likely be forced to implement bail reforms with no funding mechanism whatsoever.
- California remains only one of a handful of states that currently rely on the private bail bond industry to address its pre-trial detention system. Many other states – even those that are conservative and ‘tough on crime’ - have eliminated the cash-bail system in favor of a more sophisticated assessment of those who should be detained while awaiting trial.
- A number of respected studies suggest that the bail system as found in states such as California disproportionately impact those communities of color as well as the indigent. Access to cash should not be the primary determinant to whether an individual is detained in custody while awaiting trial.

Given the pros and cons relative to the impact on counties, RCRC believes the best course of action is to adopt a position of “No Position” on the measure.

**Attachments**

- Copy of Senate Bill 10
- Summary of Key Provisions of SB 10 (prepared by HBE)