



September 4, 2019

Hon. Xavier Becerra  
Attorney General  
1300 I Street, 17<sup>th</sup> Floor  
Sacramento, California 95814

Attention: Ms. Anabel Renteria  
Initiative Coordinator

Dear Attorney General Becerra:

Pursuant to Election Code Section 9005, we have reviewed the proposed constitutional initiative related to pretrial release and bail (A.G. File No. 19-0006, Amendment #1).

## **BACKGROUND**

### **Existing State Pretrial Release Process**

The State Constitution grants individuals arrested and booked into county jail—who are not charged with certain felony offenses—with the right to release prior to trial. The Constitution specifies that individuals shall be released and the conditions placed on their release shall not be “excessive;” and that trial courts shall consider the seriousness of the offenses charged, their previous criminal records, and the probability of their appearance in court. Individuals generally obtain pretrial release in one of two ways. First, the Constitution authorizes trial courts at their discretion to release individuals on their own recognizance (OR), a promise to appear at their future required court proceedings. Existing statute also authorizes other entities to release individuals on OR under certain conditions. Second, statute allows individuals to be released on bail, a financial guarantee that they will appear at required court proceedings.

***Release on Bail.*** State law requires that the trial court in each county adopt a uniform countywide bail schedule that provides the amount of bail required for release for each eligible criminal offense. These schedules are allowed to vary by county, but typically require more bail for more serious offenses. For example, the 2019 Los Angeles County bail schedule requires \$20,000 for a forgery offense and \$250,000 for the offense of arson of an inhabited building.

State law allows individuals to provide bail in two ways. First, an individual can deposit cash, certain financial instruments (such as a bond issued by the United States), or property with the court that equals the amount of bail required for release. This deposit is generally refundable if the individual appears at all required court proceedings. Second, an individual can pay a nonrefundable fee—typically, no more than 10 percent of the total bail required—to a willing bail agent licensed by the state for a bail bond. The bond is an insurance product in which the

bail agent, backed by a state-licensed insurance company, agrees to pay the full bail amount if the individual does not appear at a required court proceeding. If this happens, the bail agent can seek repayment from the individual. Insurance companies are required to pay a 2.4 percent state insurance tax on the fees—about \$13 million in 2018.

If an individual does not appear in court as required, the court could determine that bail is forfeited. State law then dictates the circumstances under which the full bail amount will actually be paid. For example, bail will not be paid if the individual is returned to custody by law enforcement or by bail recovery agents within 180 days of the court's decision. Similarly, the funds are not required to be paid if the court fails to properly notice the insurance company that bail must be paid within a specified time frame. As a result, bail is actually paid in only a small number of cases. Bail funds are allocated to counties and cities.

***Pretrial Release Before or After Arraignment.*** For certain offenses, individuals can generally be released after providing bail as listed in the bail schedule before their first court hearing—known as arraignment. In some counties, certain individuals can also be released on OR before arraignment, generally at the discretion of the court. These individuals can be required to comply with certain release conditions (such as regular check-ins with the county probation department). Those not released will be detained until arraignment, which typically occurs within 48 hours of arrest.

At arraignment, the court informs individuals of the charges filed against them, appoints an attorney if needed, and considers pretrial release by setting bail (which could deviate from the bail schedule) or authorizing OR. The court can require individuals released on bail or OR to comply with certain conditions. In some cases, individuals can be charged fees to support the costs of certain supervision requirements, such as electronic monitoring. Under existing state law, the court can modify bail and OR decisions and conditions after arraignment. Individuals denied pretrial release or unable to provide the bail set by the court will remain in county jail until trial or the case is resolved.

### **New State Pretrial Release Process**

***State Adopted New Process in 2018.*** The Legislature passed and the Governor signed Chapter 244 of 2018 (SB 10, Hertzberg), which establishes a new state pretrial process. Unlike the existing pretrial process, the new process would not allow individuals to be released on bail. Rather, individuals would solely be released under a new OR process specified in the legislation. Under SB 10, individuals booked for most misdemeanors would be required to be released from county jail within 12 hours of booking. Other individuals arrested for certain offenses would be evaluated by court or county assessment staff using tools to determine their risk of not appearing in court or committing an offense if released. Staff would generally be required to release individuals determined to be low risk on OR prior to arraignment. Depending on rules established by each trial court, certain individuals determined to be medium risk could be released prior to arraignment by assessment staff or a judge. Released individuals could be subject to supervision requirements, such as regular check-ins with county probation or other staff, which could be modified by the court for good cause. Individuals determined to be high

risk—as well as individuals who meet certain criteria (such as being accused of certain severe felonies)—would be detained in county jail until arraignment.

At arraignment, individuals would generally be released on OR unless the district attorney requests a hearing seeking to detain them until trial. The court could only order an individual to be detained under certain conditions—such as determining that there are no supervision requirements (such as electronic monitoring) that can be imposed to ensure the individual’s appearance in court and public safety. Under certain conditions, the court could modify OR decisions and conditions after arraignment. Senate Bill 10 would also prohibit the charging of any fees for any supervision requirements that are imposed as a condition of release.

***Referendum on New State Pretrial Release Process.*** Separate from this proposed constitutional amendment, a referendum regarding SB 10 has qualified for the November 2020 ballot, which means that the law will be voted on for approval or rejection by the voters. If the referendum passes, SB 10 will go into effect. If it does not pass, SB 10 will be rejected and not go into effect. Until the outcome of the election, the state cannot implement SB 10.

## **PROPOSAL**

This measure amends the State Constitution to provide individuals the ability to be released from county jail on bail prior to trial, as well as specify the ways in which bail may be provided and the use of bail schedules. For example, the measure states that the bail schedule shall not be excessive and shall take into account any other factors that the court deems appropriate. In setting the conditions of release, the measure specifies that a judge shall take into account the amount reasonably necessary to ensure that an individual appears in court when required rather than the probability of the individual’s appearance in court. Any future changes to the above constitutional provisions related to pretrial release would have to be approved by the voters.

The measure also specifies that the Legislature could establish a new pre-arraignment release process, provided that it is consistent with the above provisions. For example, the Legislature could not establish a process that eliminates the ability to provide bail for pretrial release.

## **FISCAL EFFECTS**

The fiscal effects of this measure depend on whether voters choose to uphold or reject SB 10 in the November 2020 election. This is because both SB 10 and this measure would impact the existing pretrial process in different ways and could affect one another.

### **Effects if SB 10 Is Upheld**

If voters uphold SB 10, the provisions of this measure would have fiscal effects on both state and local governments. The magnitude and direction of these effects would depend on how this measure and SB 10 are interpreted and implemented. For example, it is unclear what portions of SB 10 would be found by courts to conflict with this constitutional measure and how courts and counties would implement SB 10. We discuss the major fiscal effects below if SB 10 is upheld by voters.

***Pretrial Release Proceedings and Supervision of Released Individuals.*** By maintaining the ability for individuals to provide bail for pretrial release, this measure could reduce some of the additional state and local costs needed to implement SB 10. For example, fewer court and county staff could be needed to assess and supervise individuals to the extent that such individuals chose to provide bail to obtain pretrial release before they are assessed by staff. At the same time, this measure could reduce the savings generated by aspects of SB 10. For example, some arraignment proceedings would continue to require discussions about bail. The magnitude of the impact of the measure on these costs of implementing SB 10 would depend on various factors—particularly how SB 10 is implemented and the number of individuals who choose to provide bail for pretrial release. Thus, the net effect of this measure on state and local government costs of pretrial release proceedings and the supervision of released individuals if voters uphold SB 10 is unknown.

***County Jails.*** While SB 10 would result in the release of certain individuals who otherwise would have been detained until trial, it could also result in the continued detention of individuals who otherwise would have provided bail. Because this measure would maintain the ability to provide bail at any time, it would likely enable some of these individuals to obtain pretrial release or be held for a shorter amount of time in county jail. Thus, this measure is likely to further reduce local government costs related to county jails under SB 10. Such a reduction in costs could reach the low tens of millions of dollars annually.

***Bail Bond Industry Taxes.*** By maintaining the ability to provide bail to obtain pretrial release, this measure would allow the state to continue collecting tax revenue from the bail bond industry. This reduces the amount of revenue that would otherwise have been lost under SB 10.

### **Effects if SB 10 Is Rejected**

If voters reject SB 10, the fiscal impact of the measure on state and local governments is unknown for two primary reasons. First, the fiscal impact would depend on whether the Legislature chose to establish a new pre-arraignment release process that is consistent with the other provisions of the measure and how such a process would function. Second, the fiscal impact would depend on whether the Legislature could have otherwise implemented some or all of the process under preexisting authority.

### **Summary of Fiscal Effects**

We estimate that this measure would have one of the following major fiscal effects, depending on whether voters uphold or reject the state's pending pretrial release process (as adopted by the Legislature in 2018) in the November 2020 election:

- If voters uphold the state's pending pretrial release process, unknown net fiscal effect on state and local governments related to changes in pretrial release proceedings and the supervision of released individuals. Likely reduction in local government costs, that could reach the low tens of millions of dollars annually, from a reduction in the number of individuals or amount of time they spend detained in county jail prior to trial.

- If voters reject the state's pending pretrial release process, unknown fiscal effect on state and local governments. Fiscal effect would depend on whether the Legislature chooses to establish a new pretrial release process as authorized by this measure and how such a process would function, as well as whether the Legislature could have otherwise established such a process under preexisting authority.

Sincerely,

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Gabriel Petek  
Legislative Analyst

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Keely Martin Bosler  
Director of Finance