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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**RIANA BUFFIN, ET AL.,**  
Plaintiffs,  
vs.  
**CITY AND COUNTY OF SAN FRANCISCO, ET AL.,**  
Defendants.

CASE NO. 15-cv-04959-YGR

**ORDER DENYING CBAA’S MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. Nos. 132, 136

United States District Court  
Northern District of California

Pending before the Court are plaintiffs’ and California Bail Agents Association’s (“CBAA”) cross motions for summary judgment on plaintiffs’ Equal Protection and Due Process claims. Plaintiffs argue, principally, that San Francisco County’s (the “County”) system of pretrial bail violates the Equal Protection and Due Process clauses of the United States Constitution because it not only contravenes the absolute proscription against wealth-based discrimination in the criminal justice system, but also because personal liberty is a fundamental right, and the County’s system cannot pass strict scrutiny review. In contrast, CBAA essentially argues that no constitutional right to pre-arraignment release exists, that the County’s pre-arraignment policies are subject to rational basis review, and that the County’s policies are constitutional under that standard.

Having carefully considered the pleadings, the fully-briefed motions, and the hearing held on December 12, 2017, and for the reasons set forth below, the Court **DENIES** both motions for summary judgment. As a threshold matter, the Court finds the strict scrutiny standard applies to plaintiffs’ claims. Accordingly, as CBAA concedes, its motion cannot be granted. With respect to plaintiffs, the Court finds the current state of the factual record insufficient to grant summary judgment.

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United States District Court  
Northern District of California

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**I. BACKGROUND**

**A. Factual Overview**

The Court finds the following facts not subject to reasonable dispute:<sup>1</sup>

San Francisco police arrested plaintiff Riana Buffin on October 26, 2015 for grand theft of personal property and conspiracy. Plaintiff Buffin was taken to jail and informed that her bail amount was set at \$30,000. She did not post bail. Rather, she was released after the District Attorney’s office decided not to file formal charges against her, at which point she had spent approximately 46 hours in jail and had not been brought to court for an initial appearance.

San Francisco police arrested plaintiff Crystal Patterson on October 27, 2015 for assault with a deadly weapon or instrument other than a firearm. She was taken to jail, where she was informed that her bail amount was set at \$150,000. After approximately 29 hours, and prior to her initial appearance, plaintiff Patterson was able to post a bond with the financial assistance of relatives and was released.<sup>2</sup> Following plaintiff Patterson’s release, the case against her was discharged when the District Attorney’s office decided not to file formal charges against her.

In California, state law imposes a duty on superior court judges to “prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable felony offenses and for all misdemeanor and infraction offenses except Vehicle Code infractions.” Cal. Penal Code § 1269b(c). In San Francisco, the superior court establishes the Felony and Misdemeanor Bail Schedule (the “Bail Schedule”). The Sheriff’s Department, currently led by defendant Sheriff Vicki Hennessy (the “Sheriff”), determines an arrestee’s bail amount by reference to the Bail Schedule, which sets forth bail amounts based on specific booking charges. The Sheriff’s Department releases arrestees who are eligible for release on bail upon payment of the applicable bail amount as set forth in the Bail Schedule or the posting of a bail bond for the applicable bail

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<sup>1</sup> See generally Joint Stipulation of Facts, Dkt. No. 133-1.

<sup>2</sup> Pursuant to a contract plaintiff Patterson signed with a surety bail agent, the cost of the bond was \$15,000, of which \$1,500 was to be paid up front, with the remainder to be paid in installments over time. Plaintiff Patterson’s uncle paid the surety bail agent the \$1,500 deposit on her behalf, and her sister and grandmother co-signed the surety bail contract.

1 amount as set forth in the Bail Schedule.<sup>3</sup> Not all arrestees are eligible for release on bail.

2 Under state law, some arrestees may apply to a magistrate for pre-arraignment release on  
3 lower bail or on his or her own recognizance (“OR”). *See* Cal. Penal Code § 1269c. This  
4 application may be made without a hearing. *Id.* Pursuant to California Penal Code (“Penal  
5 Code”) sections 1269b and 1269c, individuals charged with certain offenses are ineligible to apply  
6 pre-arraignment for OR release or a reduction in bail, though they may obtain pre-arraignment  
7 release by paying the applicable amount under the Bail Schedule if specified therein, or any  
8 greater amount set by a judge pursuant to Penal Code section 1269c, absent some other legal  
9 impediment to their release. Individuals ineligible for pre-arraignment OR release or pre-  
10 arraignment reduction in bail may be ordered released on their OR, or on reduced bail, after a  
11 hearing in open court in accordance with Penal Code section 1270.1.

12 In setting bail, a judge or magistrate may consider the information included in a report  
13 prepared by an investigative staff employed by the court for the purpose of recommending  
14 whether a defendant should be released on his or her OR. Cal. Penal Code §§ 1275(a)(1), 1318.1.  
15 In San Francisco, the San Francisco Pretrial Diversion Project contracts with the Sheriff’s  
16 Department to provide certain pretrial services, including the OR Project. One of the purposes of  
17 the OR Project is to provide the superior court with information to decide whether to release an  
18 arrestee on his or her OR prior to arraignment.

19 On April 30, 2016, the OR Project staff began using a Public Safety Assessment Tool (the  
20 “PSA Tool”) developed by the Laura and John Arnold Foundation. The purpose of the PSA Tool  
21 is to assess the risk that an arrestee, if released pretrial, will fail to appear or will engage in new  
22 criminal activity, and to generate a release recommendation based on the assessed risk.<sup>4</sup> Various  
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24 <sup>3</sup> Subject to narrow exceptions, in California a person accused of committing an offense  
25 requiring them to remain in custody must be taken before a magistrate judge for arraignment  
26 within 48 hours of his or her arrest, not including Saturdays and holidays. Cal. Penal Code §  
27 825(a)(1).

28 <sup>4</sup> Release recommendations are a function of (1) the score generated by the PSA Tool and  
(2) a decision-making framework (“DMF”) prepared by a working group that includes  
representatives from the San Francisco Superior Court, Sheriff’s Department, District Attorney,  
Public Defender, and Conflict Counsel.

1 procedures followed by the OR Project staff changed with the implementation of the PSA Tool.

2 Prior to the implementation of the PSA Tool, the OR Project staff prepared a report called  
3 an “OR Workup” after interviewing the arrestee, which consisted of the information gathered from  
4 the interview and references, a criminal history report, a summary of the criminal history report,  
5 and a cover sheet. For those arrestees eligible for pre-arraignment release, the OR Workup was  
6 presented to the duty judge.<sup>5</sup> Otherwise, the court considered it at arraignment.<sup>6</sup>

7 Since implementation of the PSA Tool, the OR project staff are no longer required to  
8 interview the arrestee. Rather, they prepare an OR Workup for each arrestee eligible for OR  
9 release (whether at arraignment or before), which includes a summary of the arrestee’s individual  
10 and criminal history, the criminal history printouts, the police report, a cover sheet, and the release  
11 recommendation generated by the PSA Tool and the DMF. As before, for those arrestees eligible  
12 for pre-arraignment release, the OR Workup is either presented to the duty judge in the first  
13 instance or presented to the court for consideration at arraignment. There is no guaranteed  
14 timeline for when the OR Workup will be completed.<sup>7</sup>

15 In assigning bail to plaintiffs, the Sheriff’s predecessor followed California laws governing  
16 the setting of bail and complied with the Bail Schedule.<sup>8</sup>

17 **B. Procedural Overview**

18 Plaintiffs filed their original complaint on October 28, 2015 against the County and “the  
19 State of California” generically. (Dkt. No. 1.) The operative complaint is the Third Amended  
20 Complaint. (Dkt. No. 71 (“3AC”).) Since plaintiffs filed their 3AC, the Court has dismissed all

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22 <sup>5</sup> The duty judge is the judicial officer assigned to rule on applications for pre-arraignment  
release.

23 <sup>6</sup> The OR Workup prior to the implementation of the PSA Tool did not contain a release  
24 recommendation.

25 <sup>7</sup> For pre-arraignment applications, it is generally submitted to and ruled upon by the duty  
26 judge the same working day the OR Project receives the arrestee’s fingerprint record. The OR  
Project did not prepare an OR Workup for plaintiff Patterson because she had already posted bail.  
It did not complete an OR Workup for plaintiff Buffin before she was released.

27 <sup>8</sup> Plaintiff Patterson’s and plaintiff Buffin’s arrests occurred before Sheriff Hennessy  
28 assumed office.

1 defendants except for the Sheriff, who announced that she would not defend this action. (*See* Dkt.  
2 No. 101 at 1.)

3 In this context, CBAA filed its fourth motion to intervene, which the Court granted subject  
4 to certain conditions. (*See* Dkt. No. 119 (“Intervention Order”).) Subsequently, plaintiffs, CBAA,  
5 and the Sheriff (collectively, the “parties”) agreed upon certain stipulated facts and conducted  
6 discovery regarding those facts that were not established through stipulation.

7 While the Court has articulated the scope of this case on numerous occasions,<sup>9</sup> plaintiffs’  
8 summary judgment briefing indicated an attempt to alter the scope of the case drastically.  
9 Namely, plaintiffs asked the Court to “[d]eclare unconstitutional and enjoin the use of money bail  
10 and all pretrial processes that condition release on a monetary sum extracted from a criminal  
11 defendant.” (Plaintiffs’ Motion for Summary Judgment, Dkt. No. 136 at 25 sub. (a) (“Plaintiffs’  
12 Motion”).) Moreover, they argued the Court should “[d]eclare unconstitutional and enjoin the  
13 enforcement of all state laws that create wealth-based pretrial release processes, including but not  
14 limited to California Penal Code sections 1270.1, 1269b, and 1269c.” (*Id.* sub. (c).)

15 In light of the overreaching, and unauthorized, scope of the relief sought by plaintiffs at  
16 this late stage in the litigation, the Court asked them recently to clarify the relief they are seeking.  
17 (*See* Dkt. No. 178.) Plaintiffs responded that they “seek an order declaring unconstitutional and  
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19 <sup>9</sup> In its order on the County’s and the Sheriff’s motion to dismiss the 3AC, the Court  
20 summarized the action as follows:

21 Plaintiffs bring a single count against the County, the Sheriff, and the Attorney  
22 General for violation of their Fourteenth Amendment equal protection and due  
23 process rights when the Sheriff enforces state law by keeping them in jail before  
24 arraignment solely because they cannot afford to pay money bail. Specifically,  
25 plaintiffs challenge defendants’ enforcement of California Penal Code section  
26 1269b, which provides that a sheriff may only collect bail from pre-arraignment  
27 arrestees in the amount fixed, *inter alia*, in the schedule of bail set by the superior  
28 court judges sitting in and for that county.

(Dkt. No. 99 at 1.) Moreover, in its order granting CBAA permissive intervention, the Court  
explained that the 3AC “challenges the San Francisco Sheriff’s use of a bail schedule to detain a  
person prior to being seen by a judicial officer” as required by Penal Code section 1269b, and  
“allege[s] section 1269b has the effect of requiring secured money bail and causes San Francisco  
to detain individuals solely because they cannot afford the cost of release.” (Intervention Order at  
1–2.)

1 enjoining the use of the bail schedule for the class . . . .” (Dkt. No. 181 at 2.)<sup>10</sup> Moreover, they  
 2 seek “an injunction that outlines a framework for a replacement, non-monetary process for the  
 3 class . . . .” (*Id.*) While plaintiffs’ summary judgment briefing is tethered to the overreaching  
 4 scope of the relief sought in their motion, they retreated at oral argument. Against this  
 5 background, the Court will treat plaintiffs’ constitutional challenges as challenges to the Sheriff’s  
 6 use of the Bail Schedule.

## 7 **II. LEGAL STANDARD ON SUMMARY JUDGMENT**

8 A party seeking summary judgment bears the initial burden of demonstrating the absence  
 9 of a genuine issue of material fact as to the basis for the motion. *Celotex Corp. v. Catrett*, 477  
 10 U.S. 317, 323 (1986). Material facts are those that might affect the outcome of the case.  
 11 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is  
 12 “genuine” if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving  
 13 party. *Id.*

14 Where the moving party has the burden of proof at trial, it “must affirmatively demonstrate  
 15 that no reasonable trier of fact could find other than for the moving party.” *Soremekun v. Thrifty*  
 16 *Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). If the moving party meets its initial burden, the  
 17 opposing party must then set out specific facts showing a genuine issue for trial in order to defeat  
 18 the motion. *See Anderson*, 477 U.S. at 250; *Soremekun*, 509 F.3d at 984; *see also* Fed. R. Civ. P.  
 19 56(c), (e). The opposing party’s evidence must be more than “merely colorable” and must be  
 20 “significantly probative.” *Anderson*, 477 U.S. at 249–50. Further, the opposing party may not rest  
 21 upon mere allegations or denials of the adverse party’s evidence, but instead must produce  
 22 admissible evidence showing a genuine dispute of material fact exists. *See Nissan Fire & Marine*  
 23 *Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000). “Disputes over  
 24 irrelevant or unnecessary facts will not preclude a grant of summary judgment.” *T.W. Elec. Serv.,*  
 25 *Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

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 27 <sup>10</sup> The Court will issue a separate order on plaintiffs’ motion for class certification.  
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1           Nevertheless, when deciding a summary judgment motion, a court must view the evidence  
2 in the light most favorable to the nonmoving party and draw all justifiable inferences in its favor.  
3 *See Anderson*, 477 U.S. at 255; *Hunt v. City of Los Angeles*, 638 F.3d 703, 709 (9th Cir. 2011). A  
4 district court may only base a ruling on a motion for summary judgment upon facts that would be  
5 admissible in evidence at trial. *See In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385 (9th Cir.  
6 2010); Fed. R. Civ. P. 56(c).

### 7 **III. DISCUSSION**

#### 8 **A. Eighth Amendment - Prohibition on Excessive Bail**

9           As a threshold matter, CBAA argues that plaintiffs' claims actually constitute a challenge  
10 under the Eighth Amendment's Excessive Bail Clause and should not be considered under a  
11 Fourteenth Amendment analytical framework. According to CBAA, it is entitled to summary  
12 judgment as to this claim on the ground that the bail amounts assigned to plaintiffs were not  
13 unconstitutionally excessive in light of the County's valid government interests. Citing *Galen v.*  
14 *County of Los Angeles*, 477 F.3d 652 (9th Cir. 2007), CBAA avers that because the Sheriff  
15 followed California's bail laws and Bail Schedule in assigning bail to plaintiffs, plaintiffs are  
16 foreclosed from arguing that the bail amounts are unconstitutionally excessive.

17           Plaintiffs respond that not every claim related to pretrial detention must necessarily be an  
18 excessive bail claim. Namely, they argue that rather than challenging the specific bail amounts on  
19 the Bail Schedule, they challenge the County's *discriminatory practices*. Because plaintiffs have  
20 not raised an Eighth Amendment claim, they deem CBAA's argument irrelevant.

21           The Court agrees with plaintiffs. CBAA's mischaracterization of the issues as an Eighth  
22 Amendment challenge to excessive bail is merely a red herring. As plaintiffs note, they do not  
23 challenge the specific amounts set out in the Bail Schedule. (Plaintiffs' Opposition to CBAA's  
24 Motion for Summary Judgment, Dkt. No. 153 at 22 ("Plaintiffs' Opposition").) Rather, their  
25 claims concern the *effect* the Sheriff's use of the Bail Schedule has on those who cannot afford to  
26 pay the set amounts in relation to those who can. CBAA's efforts to recast plaintiffs' claims as  
27 Eighth Amendment claims thus ignore the Supreme Court's express acknowledgement that federal  
28 courts "generally analyze the fairness of relations between the criminal defendant and the State

1 under the Due Process Clause, while [they] approach the question whether the State has  
 2 invidiously denied one class of defendants a substantial benefit available to another class of  
 3 defendants under the Equal Protection Clause.” *Bearden v. Georgia*, 461 U.S. 660, 665 (1983).<sup>11</sup>  
 4 CBAA also overlooks other cases involving similar challenges to bail systems that have been  
 5 decided on Fourteenth Amendment grounds.<sup>12</sup>

## 6 **B. Fourteenth Amendment - Due Process and Equal Protection**

7 The parties principally dispute whether the Sheriff’s use of the Bail Schedule implicates a  
 8 fundamental right and whether the rational basis or strict scrutiny standard of review applies to  
 9 plaintiffs’ Due Process and Equal Protection claims. The ensuing discussion addresses both  
 10 issues.

### 11 **I. Due Process Framework**

12 The Due Process Clause of the Fourteenth Amendment prohibits the government from  
 13 depriving individuals of their life, liberty, or property, without due process of law. U.S. Const.  
 14 amend. XIV, § 1. In general, it “provides heightened protection against government interference  
 15 with certain fundamental rights and liberty interests.” *Washington v. Glucksberg*, 521 U.S. 702,  
 16 720 (1997). Accordingly, the threshold inquiry in every Due Process challenge is “whether the

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 18 <sup>11</sup> Moreover, *Galen*, the case on which CBAA principally relies, did not involve the  
 19 inability to pay. Rather, it involved a challenge to a significant bail enhancement—from \$50,000  
 20 to \$1 million—which the appellant argued was unconstitutionally excessive. *Galen*, 477 F.3d at  
 21 659. The Ninth Circuit concluded that “[b]ecause [Appellant] has offered no evidence that would  
 tend to show that the Commissioner enhanced [Appellant’s] bail for an improper purpose or that  
 his bail was excessive in light of the purpose for which it was set, he has failed to meet his burden  
 for withstanding summary judgment.” *Id.* at 661.

22 <sup>12</sup> See, e.g., *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1147–48 (S.D. Tex. 2017)  
 23 (finding claim against county’s post-arrest detention policies, which in practice detained people  
 arrested for misdemeanor offenses who were unable to pay financial bond longer than those  
 financially able to pay, was not an excessive bail challenge but rather a proper Fourteenth  
 24 Amendment challenge warranting preliminary injunction); *Jones v. City of Clanton*, No.  
 2:15CV34-MHT, 2015 WL 5387219, at \*2 (M.D. Ala. Sept. 14, 2015) (holding that “use of a  
 25 secured bail schedule to detain a person after arrest, without an individualized hearing regarding  
 the person’s indigence and the need for bail or alternatives to bail, violates the Due Process Clause  
 26 of the Fourteenth Amendment”); *Cooper v. City of Dothan*, No. 1:15-CV-425-WKW [WO], 2015  
 WL 10013003, at \*1 (M.D. Ala. June 18, 2015) (finding allegations that city’s arrest and detention  
 27 policies and practices routinely resulted in confinement of individuals solely due to their poverty  
 in violation of Fourteenth Amendment’s Due Process and Equal Protection clauses warranted  
 28 temporary restraining order).

1 plaintiff has been deprived of a protected interest in . . . ‘liberty.’” *American Mfrs. Mut. Ins. Co. v.*  
 2 *Sullivan*, 526 U.S. 40, 59 (1999) (quoting Fourteenth Amendment); *see also Shanks v. Dressel*,  
 3 540 F.3d 1082, 1087 (9th Cir. 2008) (“To state a substantive due process claim, the plaintiff must  
 4 show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty,  
 5 or property interest.”). The Supreme Court has long recognized constitutional limits on pretrial  
 6 detention.<sup>13</sup>

7 By way of background, the Supreme Court in *Salerno* considered, *inter alia*, the  
 8 substantive Due Process implications of the Bail Reform Act of 1984, which required pretrial  
 9 detention of arrestees charged with certain serious felonies if the government demonstrated by  
 10 clear and convincing evidence after an adversary hearing that no release conditions “will  
 11 reasonably assure . . . the safety of any other person and the community.” 18 U.S.C. § 3142(e).  
 12 Applying general Due Process principles, the Court considered whether the law constituted an  
 13 impermissible infringement of arrestees’ liberty interest. The Court explained that the  
 14 “individual’s strong interest in liberty” is “fundamental,” *Salerno*, 481 U.S. at 750, and cited the  
 15 “general rule of substantive due process that the government may not detain a person prior to a  
 16 judgment of guilt in a criminal trial.” *Id.* at 749 (internal quotation marks omitted). But the Court  
 17 concluded that the Bail Reform Act passed constitutional muster because it both served a  
 18 “compelling” and “overwhelming” governmental interest “in preventing crime by arrestees” and  
 19 was “carefully limited” to achieve that purpose. *Id.* at 749–50, 755. Additionally, the Act  
 20 “careful[ly] delineat[ed] . . . the circumstances under which detention will be permitted . . .” *Id.*  
 21 at 751.<sup>14</sup> While the *Salerno* Court itself did not describe its analysis as strict scrutiny, it made

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23 <sup>13</sup> The Court has, *inter alia*: prohibited excessive bail, *see Stack v. Boyle*, 342 U.S. 1, 4–5  
 24 (1951); barred punitive conditions of pretrial confinement, *see Bell v. Wolfish*, 441 U.S. 520, 535–  
 25 37 (1979); prohibited pretrial detention as punishment, *see United States v. Salerno*, 481 U.S. 739,  
 26 746–48 (1987); held that restrictions on pretrial release of adult arrestees must be carefully limited  
 27 to serving a compelling government interest, *see id.* at 748–51; and required a judicial  
 28 determination of probable cause within 48 hours after arrest, *see Cty. of Riverside v. McLaughlin*,  
 500 U.S. 44, 56 (1991). *See also Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 777 (9th Cir. 2014)  
 (en banc) (discussing above cases).

<sup>14</sup> The Act: (1) “narrowly focus[ed] on a particularly acute problem in which the  
 Government interests are overwhelming”; (2) “operate[d] only on individuals who have been  
 arrested for a specific category of extremely serious offenses”—individuals that “Congress

1 clear that under the Due Process Clause, “liberty is the norm, and detention prior to trial or without  
2 trial is the *carefully limited* exception.” *Id.* at 755 (emphasis supplied).

3 In *Lopez-Valenzuela v. Arpaio*, the Ninth Circuit, sitting *en banc*, interpreted *Salerno* to  
4 require strict scrutiny of pretrial detention conditions. 770 F.3d 772, 780–81 (9th Cir. 2014).<sup>15</sup>  
5 Applying *Salerno*’s Due Process framework, the court considered the substantive Due Process  
6 implications of the Fourteenth Amendment with respect to an Arizona constitutional provision  
7 which denied eligibility for bail to individuals who were charged with “serious felony offenses”  
8 and who were in the United States illegally (“Proposition 100”). Citing *Salerno*, the court applied  
9 “heightened scrutiny” because the challenged laws “infringe[d] a fundamental right,” namely, “the  
10 individual’s strong interest in liberty.” *Id.* at 780. Thus, the court explained, the Proposition 100  
11 laws “[would] satisfy substantive due process only if they [were] ‘narrowly tailored to serve a  
12 compelling state interest.’” *Id.* at 781 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).  
13 Because the court found no evidence that the Proposition 100 laws were adopted to address a  
14 “particularly acute problem,” the laws were not limited to “a specific category of extremely  
15 serious offenses,” and the laws employed an “overbroad, irrebuttable presumption rather than an  
16 individualized hearing to determine whether a particular arrestee pose[d] an unmanageable flight  
17 risk,” the court concluded that the Proposition 100 laws were “not carefully limited, as they must  
18 be to survive heightened scrutiny . . . .” *Id.* at 783–84 (internal quotation marks and citations  
19 omitted).

20 Based on the foregoing, this Court concludes that the Sheriff’s use of the Bail Schedule

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22 specifically found” were “far more likely to be responsible for dangerous acts in the community  
23 after arrest”; and (3) afforded arrestees a “full-blown adversary hearing” at which the government  
24 was required to “convince a neutral decisionmaker by clear and convincing evidence that no  
conditions of release can reasonably assure the safety of the community or any person.” *Salerno*,  
481 U.S. at 750.

25 <sup>15</sup> In their summary judgment briefing, plaintiffs do not do not state clearly whether their  
26 Due Process claim is of a procedural or substantive nature. However, given their emphasis on the  
27 alleged deprivation by the government of a right they deem fundamental, in addition to their  
28 reliance on *Lopez-Valenzuela* both in their briefing and at oral argument, the Court understands  
their Due Process claim to be of a substantive nature. Moreover, plaintiffs have not objected to  
CBAA’s consistent characterization of plaintiffs’ Due Process claim as a substantive Due Process  
claim.

1 implicates plaintiffs’ fundamental right to liberty, and any infringement on such right requires a  
 2 strict scrutiny analysis. According to the Ninth Circuit, that liberty is a fundamental right is  
 3 “beyond dispute.” *Hernandez v. Sessions*, 872 F.3d 976, 993 (9th Cir. 2017); *id.* (“[T]he private  
 4 interest at issue here is ‘fundamental’: freedom from imprisonment is at the ‘core of the liberty  
 5 protected by the Due Process Clause.’”) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992));  
 6 *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“Freedom from imprisonment—from  
 7 government custody, detention, or other forms of physical restraint—lies at the heart of the liberty  
 8 that [the Due Process] Clause protects.”); *Foucha*, 504 U.S. at 80 (“Freedom from bodily restraint  
 9 has always been at the core of the liberty protected by the Due Process Clause from arbitrary  
 10 governmental action.”).

11 Relying on *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *County of Riverside v. McLaughlin*,  
 12 500 U.S. 44 (1991), CBAA attempts to frame the right at issue here narrowly, that is, as the “right  
 13 to liberty in the brief period between arrest and arraignment.” (CBAA’s Opposition to Plaintiffs’  
 14 Motion for Summary Judgment, Dkt. No. 143 at 9 (“CBAA’s Opposition”); *see also* CBAA’s  
 15 Motion for Summary Judgment, Dkt. No. 132 at 18 (“CBAA’s Motion”).) Using this  
 16 construction, CBAA argues that no such fundamental right exists but rather that detention is  
 17 “justified and constitutional.” (CBAA’s Motion at 17.) In *Gerstein*, the Supreme Court held that  
 18 the Fourth Amendment requires a prompt judicial determination of probable cause as a  
 19 prerequisite to an extended pretrial detention following a warrantless arrest. 420 U.S. at 124–25.  
 20 The Court did not specify what would meet the promptness standard, instead noting that “the  
 21 nature of the probable cause determination usually will be shaped to accord with a State’s pretrial  
 22 procedure viewed as a whole.” *Id.* at 123. Subsequently, in considering what constitutes a  
 23 “prompt” probable cause determination under *Gerstein*, the Supreme Court held in *McLaughlin*  
 24 that a judicial determination of probable cause within 48 hours of arrest generally will pass  
 25 constitutional muster. 500 U.S. at 56.<sup>16</sup> Essentially, CBAA avers that *McLaughlin* creates a 48-

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27 <sup>16</sup> In so holding, the Court recognized that “some delays are inevitable” where  
 28 jurisdictions “incorporate probable cause determinations into other pretrial procedures . . . .  
 [T]here will be delays caused by paperwork and logistical problems. Records will have to be

1 hour period within which the County can constitutionally detain arrestees pursuant to the Bail  
2 Schedule.

3 CBAA's narrow reading of *McLaughlin* ignores that the Court treated the 48-hour rule  
4 merely as a presumption. The fact that a person is given a determination of probable cause within  
5 48 hours after arrest does not mean that "the probable cause determination in a particular case  
6 passes constitutional muster . . . ." *McLaughlin*, 500 U.S. at 56. Such a hearing may nonetheless  
7 violate the Constitution "if the arrested individual can prove that his or her probable cause  
8 determination was delayed unreasonably." *Id.* CBAA's reference to the "48-hour *outer-limit*  
9 found constitutional for probable cause hearings" is thus misleading. (CBAA's Motion at 17)  
10 (emphasis supplied). Moreover, it is not clear that the *McLaughlin* 48-hour presumption applies to  
11 the inquiry into an arrestee's eligibility for pre-arraignment release. CBAA baldly asserts that "the  
12 context of pre-arraignment bail hearings . . . also implicates the realities of law enforcement and  
13 the heavy burden on the criminal justice system to process defendants in a timely yet effective  
14 manner after arrest." (*Id.*) However, it offers no evidence to support its claim. As one court  
15 noted in a case similar to this one, "[t]he 48-hour probable-cause-hearing standard announced in  
16 [*McLaughlin*] is not a safe harbor . . . ." *ODonnell v. Harris Cty.*, 227 F. Supp. 3d 706, 732 (S.D.  
17 Tex. 2016) (noting "plaintiffs do not challenge the timing of probable-cause hearings"). Finally,  
18 *Gerstein* and *McLaughlin* dealt with the *procedural* safeguards necessary to effect limited post-  
19 arrest detention, and plaintiffs' claim here purports to be of a substantive nature.

20 Accordingly, CBAA's claim is unavailing. The Ninth Circuit has not drawn the narrow  
21 demarcation proffered, instead announcing general Due Process principles in cases involving  
22 detention of adults.<sup>17</sup>

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23 reviewed, charging documents drafted, appearance of counsel arranged, and appropriate bail  
24 determined." *McLaughlin*, 500 U.S. at 55.

25 <sup>17</sup> See, e.g., *Hernandez*, 872 F.3d at 981 ("[W]e reaffirm our commitment to th[e]  
26 principle of fairness for all as embodied in the Due Process Clause . . . . Here, it prohibits our  
27 government from discriminating against the poor in providing access to fundamental rights,  
28 including the freedom from physical restraints on individual liberty."); *Lopez-Valenzuela*, 770  
F.3d at 781 ("The institutionalization of an adult by the government triggers heightened,  
substantive due process scrutiny.") (internal quotation marks and alteration omitted).

Moreover, the District Court for the Eastern District of California, in a case involving a



1 To the extent CBAA frames plaintiffs' Equal Protection claim as one based purely on a  
2 "wealth-based" classification, (*see* CBAA's Motion at 13–14), the Court agrees, as a matter of  
3 legal theory, that wealth-based challenges generally do not warrant strict scrutiny.<sup>20</sup> Here,  
4 however, plaintiffs do not proceed on that basis. Therefore, CBAA's wealth-based classification  
5 challenge fails.

6 With respect to plaintiffs' claim, given their muddled briefing, counsel attempted orally to  
7 clarify plaintiffs' theories. Relying principally on the *Bearden-Tate-Williams* line of cases,  
8 counsel described (i) an Equal Protection claim based on the deprivation of the fundamental right  
9 to personal liberty on an unequal basis; (ii) a Due Process claim based on the deprivation of the  
10 fundamental right to personal liberty; and (iii) a claim based on the "fundamental fairness"  
11 principle, which plaintiffs say involves a "blended analysis between the equal protection and due  
12 process clause[s]."<sup>21</sup> As a threshold matter, the Court does not interpret these cases as giving rise  
13 to a separate "fundamental fairness" claim under the Fourteenth Amendment. The *Bearden* Court  
14 itself noted that the "touchstone of due process" is "fundamental fairness." *Bearden*, 461 U.S.  
15 at 666 n.7 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973)); *see also Quill Corp. v. North*  
16 *Dakota*, 504 U.S. 298, 299 (1992) ("Due process concerns the fundamental fairness of government  
17 activity . . ."). Rather, the Court understands "fundamental fairness" as a consideration that  
18 should *guide* its Fourteenth Amendment analysis, not that a separate claim springs therefrom.

19 That said, an examination of the *Bearden-Tate-Williams* line of cases persuades the Court  
20 that strict scrutiny applies to plaintiffs' Due Process and Equal Protection claims. In *Williams*, the  
21 Supreme Court held that a facially neutral system of imprisoning convicted defendants who did  
22 not pay their fines "works an invidious discrimination" as applied to indigent defendants and  
23 therefore violated the Equal Protection Clause. 399 U.S. at 242. Though the majority did not  
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25 1056.

26 <sup>20</sup> *But see supra* note 17 (noting exception to general rule).

27 <sup>21</sup> *See* Transcript of Proceedings Held on December 12, 2017, Dkt. No. 186 at 5:10–22,  
28 6:16–22 ("Transcript").

1 explicitly call for heightened scrutiny, it used a functionally similar analysis, finding the  
2 government’s “substantial and legitimate” interest in collecting revenues from fines did not justify  
3 “invidious discrimination” against those financially unable to pay the fines. *Id.* at 238, 242. In  
4 *Tate*, the Supreme Court followed and extended the rule in *Williams*, holding:

5       The same constitutional defect condemned in *Williams* also inheres in jailing an  
6 indigent for failing to make immediate payment of any fine, whether or not the fine  
7 is accompanied by a jail term and whether or not the jail term of the indigent  
8 extends beyond the maximum term that may be imposed on a person willing and  
9 able to pay a fine. In each case, the Constitution prohibits the State from imposing  
a fine as a sentence and then automatically converting it into a jail term solely  
because the defendant is indigent and cannot forthwith pay the fine in full.

10 *Tate*, 401 U.S. at 398 (internal quotation marks omitted). The Court similarly found that the  
11 “invidious discrimination” was not justified in light of “other alternatives to which the State may  
12 constitutionally resort to serve its concededly valid interest in enforcing payment of fines.” *Id.* at  
13 399.

14       In *Bearden*, the Supreme Court summarized the rule of *Williams* and *Tate* as follows: “[I]f  
15 the State determines a fine or restitution to be the appropriate and adequate penalty for the crime,  
16 it may not thereafter imprison a person solely because he lacked the resources to pay it.” 461 U.S.  
17 at 667–68. Rather, the Constitution requires the government to use the least-restrictive alternative:

18       [T]he [sentencing] court must consider alternate measures of punishment other than  
19 imprisonment. Only if alternate measures are not adequate to meet the State’s  
20 interests in punishment and deterrence may the court imprison a probationer who  
21 has made sufficient bona fide efforts to pay. To do otherwise would deprive the  
22 probationer of his conditional freedom simply because, through no fault of his own,  
he cannot pay the fine. Such a deprivation would be contrary to the fundamental  
fairness required by the Fourteenth Amendment.

23 *Id.* at 672–73. In so holding, the Court noted that “[d]ue process and equal protection principles  
24 converge in the Court’s analysis” in cases involving the fair treatment of indigents in the criminal  
25 justice system. *Id.* at 665. The Court explained that the question whether differential treatment  
26 violates Equal Protection in such cases is “substantially similar to asking directly the due process  
27 question of whether and when it is fundamentally unfair or arbitrary for the State to revoke  
28 probation when an indigent is unable to pay the fine.” *Bearden*, 461 U.S. at 665–66. The Court

1 reasoned that the answer to that question “cannot be resolved by resort to easy slogans or  
2 pigeonhole analysis, but rather requires a careful inquiry into such factors as ‘the nature of the  
3 individual interest affected, the extent to which it is affected, the rationality of the connection  
4 between legislative means and purpose, [and] the existence of alternative means for effectuating  
5 the purpose . . . .” *Bearden*, 461 U.S. at 666–67 (quoting *Williams*, 399 U.S. at 260 (Harlan, J.,  
6 concurring)) (alterations in original).

7 While the Court disagrees that these cases establish an unambiguous *constitutional right*  
8 not to be detained based on indigence as plaintiffs apparently suggest,<sup>22</sup> the cases appear to require  
9 the Court to consider the instant challenge with heightened review. CBAA argues that the  
10 *Bearden-Tate-Williams* line of cases address additional penalties imposed after a convicted  
11 indigent criminal defendant was unable to pay court-ordered fines or restitution, which  
12 “essentially converted the defendant’s purely-financial penal sentence into jail time for failure to  
13 pay.” (CBAA’s Motion at 14.) For this reason, CBAA maintains that these cases have “no  
14 application to the pretrial bail context . . . .” (*Id.* at 15.) CBAA does not persuade. The Supreme  
15 Court’s holdings and analyses apply with special force in the bail context, where fundamental  
16 deprivations are at issue and arrestees are presumed innocent. Indeed, arrestees who have not  
17 been found guilty have an especially “strong interest in liberty.” *Salerno*, 481 U.S. at 750.

18 Accordingly, the Court is satisfied that strict scrutiny review applies to plaintiffs’ Due  
19 Process and Equal Protection claims. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357  
20 (1978) (“[A] government practice or statute which restricts ‘fundamental rights’ . . . is to be  
21 subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government  
22 purpose and, even then, only if no less restrictive alternative is available.”); *see also Bearden*, 461  
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24 <sup>22</sup> Citing *Bearden*, plaintiffs argue that the County’s use of money bail, which they  
25 describe as “detain[ing] arrestees who cannot afford bail longer than those who buy their  
26 freedom,” violates the “fundamental principle that a government cannot hold someone in jail  
27 solely because she is unable to pay money.” (Plaintiffs’ Motion at 6; *see also id.* at 7 (“[M]oney  
28 bail violates the fundamental proscription of wealth-based detention.”).) According to plaintiffs,  
*Bearden*, *Tate*, *Williams*, and related cases “compel the conclusion that the County’s money bail  
system is unconstitutional.” (*Id.* at 8.)

1 U.S. at 665 (in cases of detaining the indigent, “[d]ue process and equal protection principles  
2 converge in the Court’s analysis.”).

### 3 C. Application and Parties’ Respective Burdens

4 Applying these principles, the Court must determine (i) whether the Sheriff, through use of  
5 the Bail Schedule, has significantly deprived plaintiffs of their fundamental right to liberty, and, if  
6 so, (ii) whether, under the strict scrutiny standard of review, the Sheriff’s use of the Bail Schedule  
7 is the least restrictive alternative for achieving the government’s compelling interests.<sup>23</sup>

8 Plaintiffs first claim that the County’s current bail system infringes on the fundamental  
9 right to pretrial liberty because the “non-monetary release alternatives” it affords to arrestees “are  
10 slower than monetary release” and “those who can afford bail procure release much faster than  
11 those who must wait for the OR Project.” (Plaintiffs’ Motion at 10.) The Court finds genuine  
12 disputes of fact exist as to plaintiffs’ claim of a significant deprivation of liberty.

13 Plaintiffs contend: “Of the 513 people released in 2016 through the OR Project, only 4%  
14 were released in less than 24 hours; nearly 11% spent 24–48 hours waiting for their release; 71%  
15 waited at least two full days; roughly 14% waited for at least three full days.” (Plaintiff’s Motion  
16 at 10.) However, the Sheriff (and CBAA<sup>24</sup>) notes that plaintiffs’ analysis used the wrong data.  
17 (Sheriff Vicki Hennessy’s Response to Plaintiffs’ and CBAA’s Motions for Summary Judgment,  
18 Dkt. No. 149 at 2 (“Sheriff’s Response to MSJs”).) Specifically, the Sheriff argues that plaintiffs  
19 used certain figures which overstate the actual amount of time that individuals released through  
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21 <sup>23</sup> See *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982) (“Because the state  
22 action in this case infringes upon a fundamental right, we must reverse the district court’s  
23 dismissal of [Appellant’s] due process and equal protection claims to enable it to consider whether  
24 . . . a genuinely significant deprivation of a fundamental right has occurred. . . . If such a  
25 deprivation has occurred, then the court must determine whether the . . . policy can survive strict  
26 scrutiny.”) (internal quotation marks and citations omitted); *Nat’l Ass’n for Advancement of  
27 Multijurisdiction Practice v. Berch*, 973 F. Supp. 2d 1082, 1114 (D. Ariz. 2013) (“Plaintiffs  
28 correctly state that rules that infringe on fundamental rights are subject to strict scrutiny . . . , but  
they have not shown infringement on a fundamental right . . . that would trigger that standard of  
review in this case.”).

<sup>24</sup> CBAA concurs with each of the Sheriff’s observations with respect to factual  
inaccuracies contained in Plaintiffs’ Motion. (See CBAA’s Reply ISO Motion for Summary  
Judgment, Dkt. No. 160 at 2 n.2).

1 the OR Project spent in custody.<sup>25</sup> Moreover, the Sheriff (and CBAA) cautions the Court that  
 2 plaintiffs' methodology did not identify all pre-arraignment releases granted through the OR  
 3 Project because it assumed they would all be denominated "Project OR" on certain spreadsheets  
 4 produced by the Sheriff in discovery, which is not necessarily the case. (*Id.* at 2–3.)<sup>26</sup> For this  
 5 reason, the Sheriff states that plaintiffs' count of the number of releases "necessarily understates  
 6 the total." (*Id.* at 3.)

7 In light of the factual dispute as to the meaning of the data, the Court cannot say, as a  
 8 matter of law, that the Sheriff significantly infringed on plaintiffs' fundamental right to liberty by  
 9 "detain[ing] [them] longer" (Plaintiffs' Motion at 10), let alone that the Sheriff has done so by sole  
 10 reason of their indigence.<sup>27</sup> Given that even those who pay the set bail amount are detained for  
 11 some measure of time, the Court cannot find that any amount of detention *per se* is  
 12 unconstitutional. Plaintiffs' motion thus fails. Accordingly, the evidence at trial must ultimately  
 13 show the full context of the detentions at issue.

14 Plaintiffs' motion also fails because plaintiffs have not met their initial burden as to the  
 15 existence of a less restrictive alternative to achieve the government's interests as compared to the  
 16 Sheriff's use of the Bail Schedule. As plaintiffs concede, they must first make a *prima facie*

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 19 <sup>25</sup> According to the Sheriff, the appropriate interpretation of the data shows that of the 513  
 20 people released in 2016 through the OR Project, 49%—not 4%—were released in less than 24  
 21 hours; 42.5%—not 11%—were released between 24 and 48 hours; and 8%—not 71%—were  
 22 released after 48 hours. (Sheriff's Response to MSJs at 2.)

23 <sup>26</sup> The Sheriff explains that when an individual is released under more active supervision,  
 24 either before or after arraignment, the release is denominated "Assertive Case Management."  
 25 (Sheriff's Response to MSJs at 3.) The Sheriff adds that because the Jail Management System can  
 26 record only one release reason, and a person may be detained for multiple reasons, there would be  
 27 additional pre-arraignment releases granted through the OR Project that were not recorded as  
 28 either "Project OR" or "Assertive Case Management." (*Id.*)

<sup>27</sup> The Sheriff indicates that "[h]ad Plaintiffs discussed in advance what statistics they  
 wished to present, we would have tried to reach a stipulation on methodology and results."  
 (Sheriff's Response to MSJs at 3 n.5.) The Court notes that there is no genuine dispute of material  
 fact as to data pertaining to the number of individuals released from custody through the OR  
 Project within three hours or less or within ten hours or less. However, since this action concerns  
 the 48 hours between arrest and arraignment, the Court deems the disputed information critical to  
 understanding the extent of the alleged liberty deprivation.

1 showing in this regard. (*See* Plaintiffs’ Reply ISO Motion for Summary Judgment, Dkt. No. 161  
 2 at 8.) That is, they must make a showing of a “*plausible*, less restrictive alternative[.],” *Ashcroft v.*  
 3 *ACLU*, 542 U.S. 656, 666 (2004) (emphasis supplied). The proposed alternative need not be  
 4 “*more effective*,” *id.* at 669 (emphasis supplied)—plaintiffs must show only that it would be “*at*  
 5 *least as effective*,” *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (emphasis supplied). The current  
 6 record is insufficient on this point. Even plaintiffs’ designated expert witness, Michael Jones,  
 7 testified at his deposition that he is “very ignorant” about the County’s pretrial practices and was  
 8 not offering any opinion about whether any alternatives to the County’s current system of pretrial  
 9 release would be effective in achieving the government’s interests in this County.<sup>28</sup> (Deposition of  
 10 Michael R. Jones, Dkt. No. 144-12 at 81, 113.)<sup>29</sup> Plaintiffs’ prima facie case need not rise to the  
 11 level of scientific precision. However, given the absence of undisputed, competent evidence that  
 12 the proffered alternative systems could be administered feasibly in the specific context of the  
 13 County, plaintiffs have failed to meet their initial burden.

14 Once plaintiffs have made a showing of a plausible, less restrictive alternative, the  
 15 government has the burden of proof under the strict scrutiny standard.<sup>30</sup> CBAA, having stepped

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17 <sup>28</sup> The same issue is posed by the testimony of Judge Truman Morrison and Garry Herceg,  
 18 which describe the pretrial systems of separate jurisdictions (Washington, D.C., and Santa Clara,  
 19 respectively) without opining whether the County could reasonably be expected to implement a  
 similar type of pretrial system. (*See* Dkt. Nos. 136-19, 136-20.)

20 <sup>29</sup> This is not to say that CBAA’s evidence proffered on this point is without flaw.  
 21 Namely, in support of its arguments that plaintiffs’ proposed alternative is not less restrictive and  
 22 is less effective at ensuring court appearance, CBAA cites to “expert” reports which in large part  
 are not based on personal knowledge, are not supported by citations to verifiable sources, and/or  
 fail to articulate a reliable methodology. (CBAA’s Opposition at 16–17.)

23 <sup>30</sup> *See, e.g., Burson v. Freeman*, 504 U.S. 191, 199 (1992) (“To survive strict scrutiny . . .  
 24 a State must do more than assert a compelling state interest—it must demonstrate that its law is  
 25 necessary to serve the asserted interest.”); *see also Miller v. Johnson*, 515 U.S. 900, 920 (1995)  
 (“To satisfy strict scrutiny, the State must demonstrate that its . . . legislation is narrowly tailored  
 26 to achieve a compelling interest.”); *Bernal v. Fainter*, 467 U.S. 216, 227 (1984) (“To satisfy strict  
 27 scrutiny, the State must show that [the statute] furthers a compelling state interest by the least  
 28 restrictive means practically available.”); *Nordyke v. King*, 681 F.3d 1041, 1045 n.2 (9th Cir.  
 2012) (“Strict scrutiny requires the government to show that it has taken the least restrictive means  
 to serve a compelling government interest.”); *c.f. Rodriguez*, 411 U.S. at 51 (“Only where state  
 action impinges on the exercise of fundamental constitutional rights or liberties must it be found to  
 have chosen the least restrictive alternative.”).

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1 into the shoes of the Sheriff as intervenor, must show that plaintiffs’ proposed alternative would  
2 be less effective at serving the government’s compelling interest(s) and/or more restrictive.<sup>31</sup>  
3 Here, plaintiffs and CBAA agree that at a minimum the County has a compelling interest in  
4 ensuring that arrestees appear for trial. (*See, e.g.*, CBAA’s Motion at 20; Plaintiffs’ Opposition at  
5 7.) However, as mentioned previously, the evidence of plausible, less restrictive alternatives to  
6 furthering that interest is disputed (and, in many cases, given plaintiffs’ evidentiary failures, was  
7 not admissible as proffered).

8 Given plaintiffs’ numerous failures of proof, their motion is denied. CBAA’s motion also  
9 fails because it is based on the assumption that no fundamental right is at issue and relies on a  
10 rational basis analysis.

11 **IV. CONCLUSION**

12 For the foregoing reasons, plaintiffs’ motion for summary judgment is **DENIED**, and  
13 CBAA’s motion for summary judgment is **DENIED**.

14 This Order terminates Docket Numbers 132 and 136.

15 **IT IS SO ORDERED.**

16 Dated: January 16, 2018

  
YVONNE GONZALEZ ROGERS  
UNITED STATES DISTRICT COURT JUDGE

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<sup>31</sup> Plaintiffs need only make a prima facie showing as to one effective alternative. To the  
26 extent they introduce competent evidence as to more than one alternative, however, CBAA will  
27 have to show that each proposed alternative would be less effective and/or more restrictive than  
28 the Sheriff’s use of the Bail Schedule. Of note, “[t]he Government’s burden is not merely to show  
that a proposed less restrictive alternative has some flaws; its burden is to show that is less  
effective.” *Ashcroft*, 542 U.S. at 669.