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August 14, 2018

Assembly Member Adrin Nazarian
State Capitol
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Assemblymember.nazarian@assembly.ca.gov

Dear Assembly Member Nazarian,

Human Rights Watch strongly opposes passage of The California Bail Reform Act, SB 10, and urges you to vote against it. Human Rights Watch, for years, has been a leading advocate nationally for reform of our bail and pretrial incarceration systems. We published a [report](#) in 2011 exposing the harms of the bail system in New York City.¹ In 2017, we published “[Not in it for Justice: How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People](#),”² a detailed analysis of the state’s bail system that identified the harms it causes to individuals, families, communities and the administration of justice itself. In the report, we observed that the existing system violates basic norms of fairness and human rights. We called for bail reform in California. The new SB 10 is simply not bail reform; it replaces one harmful system with another. In fact, it will make many of the problems we revealed in our report even worse.

The problem of pretrial detention in California and the call for reform

In “Not in it for Justice,” Human Rights Watch detailed how prosecutors and judges use unattainable bail as a method of “preventive detention,” by making it impossible for an individual to be released pretrial.³ This *de facto* preventive detention undermines the presumption of innocence by causing people who have not been convicted of a crime to stay in jail for at least 30 days on a misdemeanor and 90 days on a felony just to be able to exercise the Sixth Amendment right to trial. As a result, over 60 percent of prisoners in California jails have been pretrial detainees.⁴

The only option besides staying in jail, for those unable to pay bail amounts, is to plead guilty for a sentence shorter than the time required to wait for trial. Our study of six representative California counties found that between 70 and 90 percent of misdemeanor and non-serious/non-violent felony defendants plead guilty and are released rather than wait until their first possible trial

¹ <https://www.hrw.org/report/2010/12/02/price-freedom/bail-and-pretrial-detention-low-income-nonfelony-defendants-new-york>

² https://www.hrw.org/sites/default/files/report_pdf/usbailo417_web_o.pdf

³ “Not in it for Justice,” p. 37-38.

⁴ “Not in it for Justice,” p. 17-18;

https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB10; Section 1(a) of SB 10, as amended September 6, 2017.

date.⁵ While difficult to quantify, it is certain that many innocent people are pleading guilty and many others are subjected to harsher sentences than they deserve, given the coercive nature of this choice. Judges and prosecutors know that pretrial detention pressures guilty pleas and moves court calendars faster, as people who are out of custody are more likely to assert their rights to litigate their cases.⁶

The Court of Appeals in *In re Humphrey*⁷ condemned the common practice of using unattainable bail as a method of preventive detention. The Court said this practice was unlawful, as well as unfair, ordered judges to end it, and called on the legislature to enact bail reform that respected the presumption of innocence and honored longstanding legal tradition favoring liberty. Advocates throughout California, including Human Rights Watch, have been calling for just this type of legislation.

Unfortunately, SB 10, completely rewritten through a secretive process that excluded community representatives and advocacy/civil rights groups, contradicts the spirit of the *Humphrey* decision and betrays the goals of the bail reform movement.

SB 10 will massively increase preventive detention, not lower pretrial incarceration rates.

While the original version of SB 10 stated an intent to “safely reduce the number of people detained pretrial, while addressing racial and economic disparities in the pretrial system,”⁸ the rewritten bill says only that its intent is to “permit preventive detention of pretrial defendants.”⁹ The bill then sets up a system that allows judges nearly unlimited discretion to order people accused of crimes, but not convicted and presumptively innocent, to be held in jail with no recourse until their case is resolved.

The new SB 10 establishes extraordinarily broad categories of people excluded from release from custody pre-arraignment, including, among others, for low-level violations if the person has a pending case, no matter how minor, or if a person has been arrested for a restraining order violation, even if the arrest turned out to be wrongful or the restraining order invalid.¹⁰ The bill would further allow local courts practically unlimited power to carve out other exclusions from release, resulting in county courts having the ability to detain practically anyone accused of a crime.¹¹

The bill then gives unfettered discretion for judges at arraignment to order preventive detention for a variety of reasons, including if the accused person has a pending case or is on probation, no matter how minor the previous and new charges are.¹² More dangerously, the bill gives judges the right to impose preventive detention for anyone they, in their subjective and unrestricted judgement, believe cannot be assured of avoiding arrest or making all future court dates, even with release conditions.¹³ In other words, the same judges who were found in *Humphrey* to be using money bail to unlawfully hold people in

⁵ “Not in it for Justice,” p. 56.

⁶ “Not in it for Justice,” p. 51-62.

⁷ <https://caselaw.findlaw.com/ca-court-of-appeal/1886990.html>

⁸ Section 2 of SB 10, as amended September 6, 2017.

⁹ Section 1 of the revised SB 10.

¹⁰ Section 1320.10.

¹¹ Section 1320.11.

¹² Section 1320.18.

¹³ Section 1320.18(a)(5).

custody without possibility of release, are simply given the power to do so without having to set a bail amount.

The detention hearing procedures proscribed in the bill violate due process and are so loose that they empower judges to preventively detain at will.¹⁴ Judges may make their decisions based not on reliable evidence presented by witnesses subject to cross-examination, but based on arguments of prosecutors, statements of complaining witnesses relayed by law enforcement, police reports or any other hearsay the judge decides to accept.

SB 10 will require biased, unfair risk assessment tools to determine release eligibility.

The incarceration decision is also influenced and, in some cases, determined by actuarial or profile-based risk assessments.¹⁵ These risk assessment tools take limited information about an individual, including arrest and conviction history and create a profile, then make a statistical estimate of the likelihood that individual will get re-arrested or miss a court date, based on data about other people with similar profiles. These tools tend to reinforce the system's ingrained biases and lack transparency. The data they use, especially arrest and conviction history is greatly skewed by racial and class bias in policing and court outcomes and societal inequities.¹⁶ Even proponents of the tools acknowledge that they will, at best, reflect these biases. Others fear that they will entrench and increase these inequities.¹⁷

Further, the tools are not objective assessors of risk. The risk categories (high, medium and low) required in the proposed legislation, are policy choices, meaning that whoever controls the implementation of the tools can decide how large to make each category. This adjustability of scoring is significant given the proposed scheme in which anyone labelled "high risk" cannot be released pre-arraignment and will have a presumption of preventive detention.¹⁸ The bill places control over implementation of the risk assessment tools entirely in the hands of the judiciary, again giving them unlimited discretion to expand or contract the pool of people ineligible for release.¹⁹ Given the history of California judges using bail to preventively detain and coerce guilty pleas, as described in "Not in it for Justice," this unchecked power is extremely dangerous and completely contrary to the spirit of true bail reform.

Human Rights Watch has warned against any use of these profile-based risk assessment tools, as they are inherently biased, they deny an individualized hearing, they falsely purport to predict the future based on profiles, and they can easily be used to increase incarceration levels.²⁰ The original SB 10 provided for limited use of these tools. While we ultimately do not support that bill, at minimum, it contained some mechanism for oversight. The new bill has no mechanism for oversight to limit bias in their implementation.

The new bill requires that "pretrial services" be responsible for running the risk assessments, gathering information about each accused person and making

¹⁴ Sections 1320.19 and 1320.20.

¹⁵ Sections 1320.9 and 1320.7.

¹⁶ <https://www.hrw.org/news/2018/06/01/q-profile-based-risk-assessment-us-pretrial-incarceration-release-decisions>

¹⁷ <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf>

¹⁸ Sections 1320.10 and 1320.20.

¹⁹ Section 1320.24.

²⁰ <https://www.hrw.org/news/2017/07/17/human-rights-watch-advises-against-using-profile-based-risk-assessment-bail-reform>

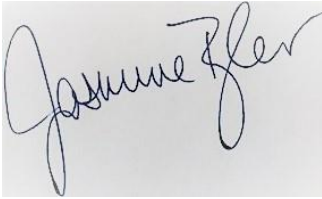
release/incarcerate and supervision recommendations.²¹ The way the pretrial investigations are structured, information will come primarily from law enforcement and will not include comprehensive mitigating information about the accused person.

The bill would make the probation department responsible for recommending release or detention and conditions of supervised release, while allocating supplemental funding for probation departments depending on how many people they supervise and what level of supervision. This arrangement may give probation departments incentive to recommend more supervision. Additionally, the bill gives supplemental funding to the courts and judiciary, while not saving costs of lowered levels of pretrial incarceration. The bill excludes community members from any oversight or even advisory role as to its implementation.

Human Rights Watch urges a “no” vote on SB 10.

We appreciate that many legislators have taken up the call to reform our unfair bail system, but Human Rights Watch objects to this counter-productive bill. We support ending money bail, but this bill will replace it with an equally, and likely more, harmful system that gives unchecked discretion to judges, relying on unfair risk assessments, to preventively detain people who have not been convicted of a crime and could be released safely back to their communities until their cases are resolved.

The new version of SB 10 is simply not bail reform. Please vote against it.



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²¹ Section 1320.9.