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**COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY**

**CASE NO. 2024-SC-0311-DG**

**(On Discretionary Grant from the Kentucky Court of Appeals  
No. 2023-CA-0171-MR)**

**MARCIE LYNN TROUTT  
(as Administratrix of the Estate of  
Madelynn Noel Troutt and individually), and  
JEREMY TROUTT**

**APPELLANTS**

**Appeal from Jefferson Circuit Court, Division Nine  
v. Hon. Ann Bailey Smith, Judge  
No. 22-CI-000909**

**THE BAIL PROJECT, INC.;  
CARRIE COLE; HOLLY ZOLLER; and  
SHAMEKA PARRISH-WRIGHT**

**APPELLEES**

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**Brief for *Amici Curiae*:  
Kentucky Association of Criminal Defense Lawyers and  
Kentucky Department of Public Advocacy**

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I hereby certify on February 10, 2025 the foregoing Brief for Amici Curiae was served by first class mail upon the following: the Hon. Ann Bailey Smith, Judge, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, Kentucky 40202 and the Hon. Vincent E. Johnson, Siebert & Johnson PLLC, 2741 Brownsboro Road, Louisville, Kentucky 40206; the Hon. Robert Ott, 730 West Main Street, Suite 300, Louisville, Kentucky 40202; the Hon. Nathan Lennon, 250 Grandview Drive, Suite 550, Ft. Mitchell, Kentucky 41017.

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## **INTRODUCTION**

The primary issue in this case is whether a charitable bail organization – or anyone – can be held civilly liable for damages due to the alleged “negligent bailing out” of a criminal defendant, who after release commits an act of negligence that causes an injury to someone not a party to the criminal action for which he was bailed.

The two signees to this Amicus Brief are the Kentucky Association of Criminal Defense Lawyers (KACDL), a Kentucky non-stock, nonprofit corporation incorporated under the provisions of the Kentucky Nonprofit Corporations Act, Chapter 273 of the Kentucky Revised Statutes (KRS) and the Kentucky Department of Public Advocacy (DPA), an independent state agency created by KRS Chapter 31.

The charter mission of KACDL, in part, is to preserve the adversarial system of justice; maintain and foster independent and able criminal defense lawyers; and ensure justice and due process of law for those persons accused of crimes within the Commonwealth of Kentucky.

The statutory responsibility of DPA, in part, is to establish, maintain, and operate a state-sponsored and controlled system for the representation of indigent persons accused of crimes or mental states in furtherance of the constitutional right to counsel under the United States and Kentucky Constitutions.

## **STATEMENT CONCERNING ORAL ARGUMENT**

Amici are aware of RAP 34(C) which states affirmatively that “[c]ounsel representing an amicus curiae shall not participate in oral argument.” Nevertheless, if the Supreme Court desired to suspend the rule and hear argument on issues raised only by Amici Curiae in its brief, counsel would welcome oral argument in this case and would respectfully ask for its own time for argument as to any issue for which the Supreme Court would like to hear argument.

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**STATEMENT OF THE CASE**

The following facts are taken from the Court of Appeals opinion in this case, Troutt, et al., v. The Bail Project, et al., No. 2023-CA-0171-MR, 2024 Ky. App. Unpub. Lexis 255, 2024 WL 1687053 (Ky. Ct. App., April 19, 2024).

On February 16, 2021, Michael DeWitt (DeWitt) was arrested in Louisville and charged with receiving stolen property (motor vehicle), public intoxication (controlled substance), criminal trespass, disorderly conduct, resisting arrest, and assault on a police officer resulting in physical injury.

On February 24, 2021, The Bail Project, Inc. (TBP) posted a bond for DeWitt, and he was released from custody. Five days later, on March 1, 2021, DeWitt caused a head-on collision with a vehicle driven by Madelynn Troutt, a 17-year-old, who died at the hospital about forty-five minutes after the accident.

The Troutt family filed suit against TBP, claiming it was negligent in failing "to reasonably investigate DeWitt's criminal history and propensity to re-offend before posting his bail bond thereby permitting him to be released from jail." The plaintiffs also alleged TBP failed to comply with duties it undertook "to ensure DeWitt attended the drug rehabilitation program and other terms and conditions of bond," and "breached other duties of care not yet known" to the plaintiffs and other duties that "were the proximate cause" of the accident that resulted in Madelynn's death.

TBP filed a CR 12.02(f) motion to dismiss. TBP argued Kentucky does not recognize the legal duty of a third-party bail surety to control the post-release actions of a criminal defendant. Even if TBP had a duty regarding DeWitt's release, DeWitt's actions were an intervening superseding cause. Additionally, TBP argued its free bail assistance for indigent pretrial detainees was political speech protected by the First Amendment.

The Circuit Court converted the Motion to Dismiss to a Motion for Summary Judgment, which it granted on grounds that TBP did not have a special relationship with DeWitt and did not undertake a duty to control DeWitt's actions upon his release from jail. Thus, TBP owed Madelynn no duty of care.

The Court of Appeals affirmed the grant of summary judgment in favor of Appellees, holding that the Circuit Court correctly found that TBP had no control over DeWitt, did not have a special relationship, and, therefore, had no affirmative duty to control his conduct. Finding that TBP owed no duty of care, the Court of Appeals did not reach the defendants' causation argument.

Not raised in the courts below are the issues for which Amici has concern, not just for the case at issue, but for future cases where criminal defendants, who are presumed innocent unless proven guilty, may have their rights abridged. These rights include (1) the right to bail under Kentucky Constitution Section 16, (2) the right to bail that is not excessive under Kentucky Constitution Section 17 and the Eighth Amendment of the Constitution of the United States, (3) the right to equal protection under the law, and (4) the right to due process, the latter two being guaranteed by the Fourteenth Amendment of the United States Constitution. It is on these constitutional rights, and the seismic shift within the law that would occur in the event this Court does not foreclose completely the creation of a "negligent bailing" cause of action, which Amici seeks to address in this Brief.

Amici hereby request that this Court affirm the opinion of the Court of Appeals and the Trial Court, and acknowledge the Constitutional restraints, both under the United States Constitution and the Kentucky Constitution, which prevent holding a bailor civilly liable for negligently bailing out a criminal defendant who after release commits an act of

negligence, thereby causing injury to another person not a party to the criminal action for which he was bailed.

### **ARGUMENT**

- I. Kentucky grants a constitutional right to bail, and both Kentucky and the United States grant a right to be free from excessive bail, constitutional rights that would be infringed if persons who posted bail for a criminal defendant could be held civilly liable in the event that the criminal defendant committed a tort or a crime upon release.**

We are not unmindful that some defendants, at liberty on bail pending trial of charges, commit other crimes and engage in conduct which focuses attention upon the fact that the charges remain untried. We think that there is an undercurrent of public dissatisfaction at this state of affairs. *Nevertheless, the constitutional guarantees to bail remain unaltered.* Any attempt to impose excessive bail as a means to deny freedom pending trial of charges amounts to a punishment of the prisoner for charges upon which he has not been convicted and of which he may be entirely innocent. Such a procedure strikes a blow at the liberty of every citizen.

Long v. Hamilton, 467 S.W.2d 139 (Ky. 1971) (emphasis added).

Kentucky Constitution § 16 provides with respect to bail that “[a]ll prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great.” Kentucky Constitution § 17 and the Eighth Amendment of the United States both provide that “[e]xcessive bail shall not be required.” Often, this right to bail is exercised and realized (especially in the case of an indigent person) when someone other than the accused posts the bail on behalf of the accused. This “someone” may be the parents of the accused, his spouse, his children, his grandparents, his best friend, or his church. Arguably, these people are the ones who know the defendant best and have the best insight into what are the typical behaviors of the defendant.

A friend or family member desiring to bail out the defendant may have to post a cash bail, a property bond, or a surety bond which makes them liable up to the amount of the bond. Such financial conditions are the “sufficient securities” addressed in Kentucky Constitution § 16, and which may not be “excessive” under § 17, or the Eighth Amendment. This cash or these bonds may be forfeited in the event the defendant is released and flees the jurisdiction or commits another offense against the community or a person. Indeed, a family member may pause at the prospect of losing the cash or property or amount equal to the surety and may choose not to bond out a family member. Nevertheless, it is a choice they may make, and at least so far make without concern that they may be liable for more than the money they put up for bail in the event the defendant gets out of jail, and then commits a death, such as the wrongful death at issue in this case.

**A. Trial Judges, in accordance with constitutional principles, already undertake a due diligence determination of risk of danger to persons if released, including what securities would be sufficient to meet that risk; and bailors should be able to rely upon that determination.**

The person (or charitable bail organization) who bails out the defendant has the benefit of being able to rely upon the discretionary decision of the trial court, who will have reviewed the Administrative Office of the Court’s Pretrial Division’s “pretrial risk assessment,” which takes into account the nature of the offense charged, is considerate of the past criminal acts and reasonably anticipated conduct of the defendant if released, and is sufficient to ensure compliance with the conditions of release set by the Court. The Court then will have made a determination of the defendant’s risk of flight, risk of failing to appear, and risk of being a danger to others. See KRS 431.066(2) and KRS 431.525(1). This is what the constitutions require; as this Court’s predecessor court held in Long v. Hamilton, *supra*, at p. 141:

Each case comprises a set of facts and circumstances peculiar to it and there is no rule of law which will automatically determine for every case the amount of bail which may be required *without violation of the prohibition against excessiveness*. (emphasis added.)

\* \* \*

It is manifest that the amount of the bail should be that which in the judgment of the court will insure [sic] compliance with the terms of the bond. In determining that amount the trial court should give due regard to the ability of the defendant to give bail, the nature and circumstances of the offense charged, the weight of the evidence against him, and the character and reputation of the defendant, but he should regard these factors only to the extent that they have a bearing upon the likelihood that the defendant will flee from the jurisdiction of the court or that he will comply with the terms of the bond.

In short, the trial judge undertakes the appropriate constitutionally required due diligence necessary to set the financial and non-financial conditions of bail without imposing excessive bail. If one accepts at face value that the Court has fulfilled this duty, requiring a bailor, any bailor, to engage in even more diligence than the Court – and to be financially responsible for more than the posted amount of bail – would be to require excessive bail.

**B. A newly created tort of “negligent bailing” violates the excessive bail clauses of the Kentucky and United States Constitutions by increasing the financial risk that must be taken beyond the amount of bail that has been required by the Courts.**

The crux of the Appellants’ argument is that had The Bail Project not relied upon the Court’s bail decision but instead conducted their own “investigation” of the defendant’s background, TBP would have learned something about DeWitt which would have caused TBP to not make his bail, and thus, Madelynn would not have been the victim of his negligent driving. TBP should have been able to predict the future. In other words, reliance upon the judgment of the Court in fixing bail is insufficient and negligent. Were such a “negligent bailing” tort to be created, any bailor’s reliance upon the decision of the Court

would be sorely misplaced, and his belief that his financial risk of bailing out the defendant would be limited to the amount of bail posted or guaranteed would be unfounded. This would lead to several anomalies that would grossly alter the criminal court system as we know it:

First, this new tort would fall most harshly upon the friends and family members who know the defendant best, because in determining whether such a duty was breached, the issue would be whether the bailor, who is now a civil defendant, “knew or should have known” that the defendant posed a significant risk of committing a tort (or crime) if released from jail. Even if the duty were premised on the existence of some “special relationship” between the bailor and the defendant, no one has a more special relationship with a jailed inmate than his family and friends.

Second, even if the new tort were limited to non-family members and non-friends, and was available only in the event a complete stranger to the defendant bailed out the defendant (like a charitable bail organization), this would create the anomalous result of holding harmless those who know the most about the background and potential behavior of the defendant, but posted his bail anyway, and target only those who are most reliant upon the judge’s discretion and the Administrative Office of the Courts’ Pretrial Division’s assessment.

Third, any bailor – family, friend, or charitable bail organization – who may have been willing to risk the amount of the bail set by the court might not be willing to accept the risk for that amount plus whatever potential damages, perhaps millions of dollars, could arise from some unknown, unforeseen tort against someone the bailor may not know or ever meet. The more people unwilling to take this risk, the greater the erosion of the right

to bail is. No one would ever take on an incalculable financial risk that even the Court did not foresee or anticipate.

Two federal district cases discussed the excessive bail clause with regard to bail posted by charitable bail organizations involving only small amounts of money. Although the cases did not address tort liability, they are apposite to the issues in this case. In the case of Tallahassee Bail Fund v. Marshall, 717 F.Supp 3d 1201 (N.D. Fla. – 2024)(appeal pending in 11<sup>th</sup> Circuit Court of Appeals), the district court found that Florida’s bail statute (Fla. Stat. 903.286), which required a portion of a cash bail bond to be applied to pay unpaid costs of court and court fees, violated the Excessive Bail Clause because the state’s “unconstitutional actions have violated its future clients' Eighth Amendment right to be free from excessive bail and that, but for Defendant's withholding of its funds under section 903.286, Plaintiff would have bailed out more pretrial detainees.” Id. at p. 1218.

Previously, in Nashville Community Bail Fund v. Gentry, 496 F.Supp. 3d 1112 (M.D. TN – 2020), the federal district court opined that Tennessee’s bail statute, as put into practice by the Twentieth Judicial Circuit of Tennessee, which includes Nashville, violated the Excessive Bail Clause, because of the requirement that “[a]ny individual who desires to deposit a cash bail with the Clerk pursuant to [Tenn. Code Ann.] § 40-11-118 shall be notified in writing by the Clerk that such cash deposit shall be returned subject to any fines, court costs, or restitution as ordered by the Court.” Id. at p. 1121. In holding the automatic, mandatory application of bail funds to court costs and fees to be unconstitutional, the court held: “[w]hat matters... for the purposes of the Excessive Bail Clause—is whether all or a portion of the bail is being applied for the improper purpose of collecting fines or other costs, rather than ensuring appearance.”

If holding a charitable bail organization liable for the costs and fees of a defendant violates the Excessive Bail Clause, how much more would holding them civilly liable for potentially hundreds of thousands of dollars violate the clause?

Fourth, civil defendants who find themselves defending the reasonableness of their decision to post bail in a case would have a due process right to defend themselves, as the Fourteenth Amendment states that no state shall “deprive any person of life, liberty or property, without due process of law.” No doubt the defendant would attempt to enter into evidence any and all proof that posting bail was reasonable and the resultant damage unforeseeable. While judges acting in their official capacity are absolutely immune from civil liability (Yanero v. Davis, 65 S.W.3d 510, 518 (Ky. 2001), *citing* Stump v. Sparkman, 435 U.S. 349(1988)), they are not immune from the witness chair. A judge’s decision to fix bail, along with the evidentiary based, statistically validated pretrial risk assessment upon which the decision relied, in whole or part, as well as the bailor’s reasonableness in relying on the set bail, would all be material and relevant evidence as to whether a duty was breached. While KRE 605 provides that a judge presiding at a trial may not testify *in that trial* as a witness, KRE 601 provides that every person is competent to be a witness, except as otherwise provided by rule or statute. Furthermore, Kentucky SCR 2.11 requires that a judge disqualify himself as judge in any proceeding in which he is a fact witness, or likely to be a material witness in the proceeding, which impliedly acknowledges that judges may be fact witnesses in cases. Of course, one way for a judge to ensure that he or she will never be a witness in a negligent bailing case is to set bail so high they cannot be made, i.e. excessively. In that event, of course, a proliferation of excessive bail challenges would arise. At the very least, judges would include the possibility of setting up a parent or grandparent for civil liability as an additional factor in setting bail, a factor that would only

increase the number of un-makeable bails. In short, it would turn into the practice of setting bails and making bails on its head.

Finally, the Court or legislature might seek to avoid some of these anomalies by barring the purchase of insurance to cover risk, regulating the use of private “risk assessors,” or prohibiting altogether the plaintiff or defendant from calling judges or pretrial officers to the witness stand by either the plaintiff or defendant. Such actions would foreclose completely the ability of a bailor to offset his financial risk of posting bail, or putting on a good defense at trial; this is an unreasonable and excessive restraint on the constitutional right to bail.

**II. Allowing a negligent bailing tort to proceed against The Bail Project would violate the Equal Protection Clause of the United States Constitution.**

The equal protection clause of the United States Constitution’s Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” Over the years, the clause has been used to eliminate intentionally discriminatory practices in various areas, including race and other protected classes. Poverty, or the lack of wealth, have not been protected by classes. However, where the liberty of an individual depends upon the wealth of the individual, the courts have found a violation of equal protection.

Hence, in Williams v. Illinois, 399 U.S. 235 (1970) the defendant was convicted of theft and sentenced to one year’s incarceration and \$500 fine. When Williams was unable to pay off his fine, the judge ordered him to remain in jail to “work off” his fine at the rate of five dollars per day. In finding a violation of the equal protection clause, the Supreme Court held that “the ceiling on imprisonment must be the same for all defendants regardless of their economic status.” Since a non-indigent person could pay \$500, whereas a poor

person could not, the ceiling on imprisonment was not the same for a poor person as a wealthy person.

Likewise, in Tate v. Short, 401 U.S. 395 (1971), a Texas offender had \$425 in unpaid traffic tickets. Like the trial court in the Williams case, because of his inability to pay, the Texas court sentenced him to the “prison farm” at the rate of five dollars per day to work off his debt, a sentence of eighty-five days. The Supreme Court again held that his sentence violated equal protection of the laws “solely because he was too poor to pay.” See also Bearden v. Georgia, 461 U.S. 660 (1983) (probationer had his probation revoked because he could not pay off his \$750 fine in its entirety; his resultant incarceration violated the equal protection clause.).

These cases are apropos to the instant case because allowing a negligent bailing tort to target the The Bail Project impacts only needy persons who without TBP assistance would be unable to make bail; TBP is a charitable bail organization whose mission is to provide free bail assistance to those who are needy and otherwise could not secure pretrial release from jail.<sup>1</sup> If charitable bail organizations are singled out for this tort, then only those in need of charity will be impacted.

On the other hand, allowing a negligent bailing tort to proceed against any bailor, whether family, friend, or someone else, would make bail a benefit primarily for those with wealth. The more money you have, the more likely you are to assume the risk that the person you bail out will not commit a wrongful death tort. Middle-class Americans would be reluctant to risk their money and property, taking the chance, that son or grandson might “do something stupid” if released. Bail risks becoming a luxury only for the wealthy.

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<sup>1</sup>Defendant/Appellee's Motion to Dismiss, pp. 3-4, Reply in Support of Motion to Dismiss, p. 11, and Brief in Court of Appeals, pp. 8-9, 27-28, and footnote therein.

Of course, nature abhors a vacuum, and out of the ashes of a right to bail, there could emerge newly created cottage industries: First, for-profit-insurance companies could begin insuring against the risk of bailing someone out -- for a price, of course. Kentucky may have outlawed for-profit bail bondsmen; but this tort would let profit-seeking in through the back door as insurance companies and bonding companies would sell insurance to cover the risk of a negligent bail. Wealthy and middle-class citizens could afford a premium; poor citizens cannot. Bail insurance would become a profit center, putting further distance between the “haves” and the “have nots.”

Or a new service area may open up: risk assessors. For a fee, someone will do a private risk assessment and background check on the potential bailee, something to show a jury when arguing in defense that you went beyond what the judge did, paying basically for a second risk opinion. Of course, the private risk assessment one purchases on the market may not be as good as the objective, statistically-validated pretrial risk assessment already in use by Kentucky Pretrial Services, which has been made into the model for the nation by Arnold Ventures; but it will be an additional piece of evidence that the wealthy and middle-class can afford if taken to trial on a negligent bailing lawsuit. The poor person will not be able to afford this.

### **III. Allowing a negligent bailing tort to proceed against The Bail Project would violate the Due Process Clause of the United States Constitution.**

In 1987, the United States Supreme Court addressed bail and detention and held that the Fifth Amendment’s due process clause required that Government could not impose preventative detention absent a finding by clear and convincing evidence that the individual was a danger to himself or others if released. United States v. Salerno, 481 U.S. 739 (1987). The Court stated “[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to the community...a court may

disable the arrestee from executing that threat.” Id. at 751. In the opinion, the Court pointed to evidence adduced by the Government that showed that Salerno was just such an identifiable and articulable threat to the community.

The Fifth Amendment due process clause was applied to the states with the passage of the Fourteenth Amendment to the United States Constitution. Thus, Salerno must be considered binding upon the states.

Appellants basically argue that The Bail Project should not have been allowed to bail out DeWitt until it had done their own “due diligence,” and that had TBP done so, it would not have actually bonded out DeWitt. Accordingly, Appellants should be allowed to sue TBP for bailing out a danger to the community. However, recognition of such a tort – in the absence of a hearing that comports with due process, which did not occur in this case – takes the burden that Salerno placed squarely on the Government to prove dangerousness and instead places a duty to prove lack of dangerousness upon the bailor of the defendant. As no reasonable person would want to incur potentially unlimited tort liability for a “negligent bail,” this tort would effectively result in the actual detention of defendants without the requisite due process hearing required of the Fourteenth Amendment.

### CONCLUSION

Kentucky’s highest court in Long v. Hamilton, *supra* acknowledged that persons who are bailed out of jail thereafter sometimes commit other crimes (or torts), and that there is an “undercurrent of public dissatisfaction” about this. (In fact, at times the public may even be outraged.) Nevertheless, the Long Court expressed that the constitutional guarantees to bail remain unaltered, and that any attempt to impose excessive bail as a means to deny freedom strikes a blow at the liberty of every citizen.

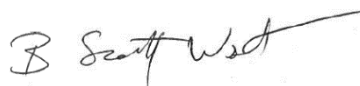
A newly created duty placed upon a bailor to do some level of due diligence prior to bailing out a defendant, or else face a civil lawsuit for breach of that duty that causes damages to someone, is just such an attempt to impose excessive bail. What the Appellants

want in this case is a “means to deny freedom,” because it is the very release of the defendant, DeWitt, of which they complain. Appellants argue that The Bail Project should not have been allowed to bail out DeWitt, until they had done “due diligence,” which in this case can only mean diligence beyond what the trial court already did in setting bail. Implicit in the argument is that *had* TBP done additional investigation of DeWitt, they *would not have* bailed him out, and the judge’s bail decision would have been an irrelevancy at best, rendering excessive bail determinations exercises in futility.

In closing, Amici Curiae urges this Court to harken back to the words and wisdom of Long v. Hamilton: “The answer to the problem posed by the increasing number of defendants who commit other crimes while awaiting trial is a speedier trial of the charges against them. Prompt disposition of criminal charges redounds to the benefit of the accused and the public alike.” Id. at p 142. The answer does not lie in the creation of a new tort, which will fall unequally upon poor persons charged with crimes in violation of the Equal Protection Clause, will cause detention in lieu of bail in violation of Kentucky Constitution Section 16 and the Due Process Clause, and will lead to excessive bail in violation of both Kentucky Constitution Section 17 and the Eighth Amendment.

Amici Curiae respectfully request this Court to affirm the decision of the Court of Appeals in this case and also acknowledge the constitutional impediments to the creation of a “negligent bailing” tort.

Respectfully submitted,



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**WORD COUNT CERTIFICATE**

This document complies with the word limit of RAP 34(B)(4) because, excluding the parts of the document exempted by RAP 15(D) and RAP 31(G)(5), this document contains 4,256 words.

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