

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THE BAIL PROJECT, INC.,)
)
 Plaintiff,)
)
 v.) No.
)
 COMMISSIONER, INDIANA DEPARTMENT)
 OF INSURANCE, in her official capacity,)
)
 Defendant)

**Complaint for Injunctive and Declaratory Relief / Notice of Challenge to
Constitutionality of Indiana Statute**

Introduction

1. The Bail Project, Inc., is a national not-for-profit organization that advocates for an end to cash bail and the mass incarceration that it engenders by paying cash bail for indigent pre-trial detainees who would otherwise be forced to remain in jail pending trial solely because they are poor persons and unable to pay bail amounts. Through these efforts The Bail Project attempts to demonstrate both that cash bail is not necessary to ensure the appearance of a criminal defendant at trial or to otherwise secure public safety and that imposing cash bail on indigent defendants causes great harm. The Bail Project is the only organization in Indiana paying cash bail on a frequent basis to criminal defendants. Indiana’s recently enacted House Enrolled Act 1300 (“H.E.A. 1300”), the substantive portions of which take effect on July 1, 2022, imposes limitations on

“charitable bail organizations” and appears to be directed at, and apply only to, The Bail Project. H.E.A. 1300 vests unfettered discretion in the Commissioner of the Indiana Department of Insurance to deny The Bail Project the ability to act as a charitable bail organization and imposes severe limitations on The Bail Project’s ability to pay bail, which is its expressive advocacy work, all of which violates the First Amendment. It also imposes limitations on charitable bail organizations that are not imposed on other persons paying cash bail or on bail bond agents. This violates The Bail Project’s rights under equal protection. Appropriate injunctive and declaratory relief should issue.

Jurisdiction, venue, cause of action

2. This Court has jurisdiction of this case pursuant to 28 U.S.C. § 1331.
3. Venue is proper in this district pursuant to 28 U.S.C. § 1391.
4. Declaratory relief is authorized by Federal Rules of Civil Procedure 57 and by 28 U.S.C. §§ 2201, 2202.
5. Plaintiff’s claims are brought pursuant to 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States.

Parties

6. The Bail Project, Inc., is a New York nonprofit corporation with its principal office in California. It operates in Indiana as a foreign nonprofit corporation with a registered agent located in Greenwood, Indiana.

7. The Commissioner of the Indiana Department of Insurance (“Commissioner”), who is sued in her official capacity, is the duly appointed head of the agency.

The challenged statute

8. H.E.A. 1300, signed into law by Governor Holcomb on March 15, 2022, provides that the Commissioner regulates the newly established category of “charitable bail organizations.” Ind. Code § 27-10-2-4.1 (eff. July 1, 2022).

9. A “charitable bail organization” is a business entity or nonprofit organization that exists for the purpose of paying cash bail for third parties and does so for more than three defendants in any 180-day period, except for persons who pay bail for close relatives. Ind. Code § 27-10-2-4.5(a) (eff. July 1, 2022).

10. The Commissioner may certify a charitable bail organization that is, among other things, a nonprofit organization under the Internal Revenue Code or Indiana law, is registered to do business in Indiana, is in Indiana, and exists to deposit cash bail for indigent criminal defendants who are not charged with a crime of violence or, if charged with a felony, have never been convicted of a crime of violence. Ind. Code § 27-10-2-4.5(b) (eff. July 1, 2022).

11. Once certified, a charitable bail organization is not allowed to pay bail for a defendant who is charged with a crime of violence as defined in Indiana Code § 35-50-1-2(a), or, if charged with a felony, has ever been convicted of a crime of violence. Ind. Code § 27-10-2-4.5 (a)(2), (g)(2) (eff. July 1, 2022).

12. A “crime of violence” is defined in Indiana Code § 35-50-1-2(a) and includes murder, attempted murder, voluntary manslaughter, involuntary manslaughter, reckless homicide, battery or domestic battery as a Level 2-5 felony, aggravated battery, kidnapping, rape, criminal deviate conduct, child molesting, sexual misconduct with a minor, robbery as a Level 2 or 3 felony, burglary as a Level 1-4 felony, operating a vehicle while intoxicated causing death, catastrophic, or serious bodily injury, child exploitation as a Level 4 or 5 felony, resisting law enforcement as a felony, unlawful possession of a firearm by a serious violent felon, and strangulation as a Level 5 felony.

13. Indiana law also provides that “a reference to a conviction for an Indiana criminal offense appearing within the Indiana Code also includes a conviction for any of the following . . . (3) A substantially similar offense committed in another jurisdiction.” Ind. Code § 1-1-2-4.

14. A charitable bail organization must apply for certification by the Commissioner in accordance with rules that are to be promulgated. Ind. Code § 27-10-2-4.5(c) (eff. July 1, 2022); Ind. Code § 27-10-2-4.6 (eff. upon passage).

15. The Commissioner of the Indiana Department of Insurance may deny, suspend, revoke, or refuse to renew the certification for several reasons, including:

- Violation of any laws of this state in the course of dealing under the certification.
- Willful failure to comply with or willful violation of any proper order or rule of the commissioner.
- When, in the judgment of the commissioner, the certificate holder has, in the

conduct of affairs under the certification, demonstrated:

- (A) incompetency or untrustworthiness;
- (B) conduct or practices rendering the certificate holder unfit to carry on charitable bail activities or making the certificate holder's continuance detrimental to the public interest; or
- (C) that the certificate holder is no longer in good faith carrying on as a charitable bail organization;

and for these reasons is found by the commissioner to be a source of detriment, injury, or loss to the public.

Ind. Code § 27-10-2-4.5(f)(2), (6), (7) (eff. July 1, 2022).

16. A charitable bail organization may only pay cash for bail and may not execute a surety bond for a defendant. Ind. Code § 27-10-2-4.5(g)(3), (i) (eff. July 1, 2022).

Factual allegations

The bail system in Indiana

17. Bail is an amount set by a court that a criminal defendant must pay to be released from pre-trial confinement pending trial.

18. Under Indiana law, when a person is facing criminal charges, the court may release the person pending resolution of the criminal case without bail. In this situation the person is released on his or her own recognizance.

19. Indiana Rule of Criminal Procedure 26 states:

(A) If an arrestee does not present a substantial risk of flight or danger to themselves or others, the court should release the arrestee without money bail or surety subject to such restrictions and conditions as determined by the court except when:

- (1) The arrestee is charged with murder or treason.

- (2) The arrestee is on pre-trial release not related to the incident that is the basis for the present arrest.
- (3) The arrestee is on probation, parole or other community supervision.

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(C) If the Court determines that an arrestee is to be held subject to money bail, the court is authorized to determine the amount of such bail and whether such bail may be satisfied by surety bond and/or cash deposit.

20. If the court determines that bail should be posted, it has broad discretion as to the amount of bail and other release conditions imposed on the pre-trial detainee. *See, e.g., DeWees v. State*, 180 N.E.3d 261, 265 (Ind. 2022).

21. The purpose of bail is to assure the defendant's presence at his or her court hearings and to ensure public safety pending the resolution of the criminal case.

22. In Indiana bail can include cash bail or a surety bond from a bail bond agent.

23. Where cash bail is established, the bail amount is paid to the clerk of the county to secure the person's release and the clerk will hold this money pending disposition of the case.

24. A bail bond agent will usually charge 10% of the bail amount and when that non-refundable amount is paid the agent will present proof of an insurance policy for the entire bond amount to the clerk of the county, thus guaranteeing payment of the entire bail amount. However, no cash is presented to the clerk of the county, just the guarantee.

25. If the defendant appears at all his or her court appearances the cash bail will be released at the conclusion of the case and, if a surety bond has been posted, the bond will

be released.

26. If the person does not appear for court appearances the entirety of the cash or the value of surety bond may be forfeited. Ind. Code § 35-33-8-7.

The Bail Project

27. The Bail Project is a national nonprofit organization that is committed to combating mass incarceration and racial disparities at the front end of the criminal legal system by trying to stop the practice of imposing monetary bail on defendants, which results in low-income and indigent defendants needlessly having to remain incarcerated during the pendency of their criminal cases because of their inability pay bail.

28. Even the imposition of only a small bail amount will often be impossible for an indigent defendant to pay, either through a bail bond agent or through cash on their own, and will result in the indigent defendant needlessly having to remain in jail pending the resolution of their case.

29. This results in significant and potentially permanent disruption of the defendants' lives and that of their families and further prolongs the cycle of poverty that entraps persons.

30. It is The Bail Project's position, as noted on its website that:

Pretrial detention, fueled by unaffordable cash bail, upends the presumption of innocence, tears families apart, and perpetuates racial and economic disparities in the criminal legal system. To combat these injustices, we must steer local pretrial systems away from cash bail and jails and toward release on recognizance and investment in social services and community-based approaches to care and safety. That, in short, is the main objective of The Bail Project.

The Bail Project, FAQ-Why focus on bail?, <https://bailproject.org/faq/> (last visited on March 14, 2022).

31. Being faced with time in jail because of an inability to pay bail may force defendants to plead guilty, even if they are innocent, as the sole means to get out of jail more quickly.

32. The Bail Project was established in 2016 and is committed to protesting against cash bail and advocating for its end.

33. Its protest and advocacy take the form of paying cash bail for defendants for whom a court has established bail.

34. The Bail Project will pay cash bail not only to protect the person, their family, and society in general from the disruptive effects of continued pretrial detention occasioned by the inability to pay bail, but to demonstrate, on a case-by-case basis that requiring a criminal defendant to pay bail is not necessary to ensure court appearances and community safety.

35. The Bail Project will assist its clients by paying the cash bail, and also by taking various steps to ensure that the clients make their court appearances, and by recommending their clients for supportive social services, a model that The Bail Project terms "Community Release with Support."

36. At the outset of each bailout, The Bail Project staff conduct an individualized needs assessment to determine a person's eligibility for their program and a post-release

support plan. The Bail Project then posts bail at no cost to the individual, removing the financial incentive that cash bail creates. Upon release, The Bail Project staff provide clients with court reminders, transportation assistance, and voluntary referrals to social services and community resources based on the person's identified needs when requested.

37. The Bail Project pays the bail out of its National Revolving Bail Fund, which is a sum of money maintained by The Bail Project to pay cash bail for its clients around the country. When a client of The Bail Project has made all of their court appearances and the criminal case is resolved, the refunded bail money is put back into The Bail Project's National Revolving Bail Fund to help additional Bail Project clients.

38. As a result, the same money can be used over and over to pay bail for persons around the country.

39. It is The Bail Project's ultimate goal to eliminate the need for its existence by demonstrating through its protest, expressive activity of paying cash bail, and policy and advocacy efforts that bail is not necessary to ensure that persons appear for their court hearing.

40. The Bail Project, through its payment of bail through the National Revolving Bail Fund, is protesting the imposition of cash bail and is attempting to advocate and be the catalyst for long-term systemic reform that will largely eliminate cash bail.

41. The payment of bail by The Bail Project therefore represents the organization's

essential protest and expressive activity.

42. At the current time The Bail Project is operating in 30 jurisdictions in 20 states.

43. It has provided free bail assistance to over 21,000 low-income persons in these jurisdictions.

44. Nationwide , as of December 2021, the Bail Project has supported clients' return to 72,291 court dates, for a 92% appearance rate. In turn, 92% of The Bail Project's bail funds have revolved, allowing the Bail Project to support additional clients.

45. The Bail Project does not disqualify people based on the type of charge alone because people held on bail are presumed innocent by law and have been deemed to be eligible for pretrial release by a judge, contingent on paying bail. Throughout the country The Bail Project pays bail for persons charged with a variety of crimes, including those which if they were committed in Indiana, would meet the statutory definition of "crime of violence" as set forth in Indiana Code § 35-50-1-2(a), and those who are charged with felonies and have prior convictions for offenses that, if they had been committed in Indiana, would meet the statutory definition of "crime of violence."

46. Since 2018, The Bail Project has operated in Indiana assisting defendants in criminal cases by paying cash bail. The Bail Project began operating in Marion County in 2018 and in Lake County in 2020.

47. To date The Bail Project has assisted approximately 1,000 pretrial defendants in Lake and Marion Counties.

48. The Bail Project has assisted, and is currently assisting, persons in Indiana who have been or were charged with “crimes of violence” as defined in Indiana Code § 35-50-1-2(a) and have assisted, and is currently assisting, persons who were or are charged with a felony and who have prior convictions for a “crime of violence.”

49. The Bail Project recently completed a study of the services provided to its clients facing criminal charges in Marion County, Indiana from December of 2018 through December of 2021.

50. During this time, it provided cash bail and supportive services to almost 800 persons.

51. The overall appearance rate for The Bail Project’s clients in Marion County was 95%.

52. Of The Bail Project’s clients in Marion County who were convicted, only 15% were sentenced to additional time incarcerated beyond what they served before they were released on bail.

53. In Lake County, as of December 2021, The Bail Project had provided cash bail and supportive services to almost 150 persons.

54. The overall court appearance rate for its clients in Lake County was 92%.

The effect of HEA 1300 on The Bail Project

55. To continue its protest and advocacy, which involves paying cash bail, The Bail Project will have to be certified as a charitable bail organization and be subject to the

restrictions in HEA 1300.

56. On information and belief, there is no other organization in Indiana paying cash bail and only The Bail Project will be subject to the certification requirements and limitations in HEA 1300.

57. As noted, HEA 1300 subjects The Bail Project to denial of certification or revocation of certification if in the Commissioner's "judgment," The Bail Project has,

in the conduct of affairs under the certification, demonstrated

(A) incompetency or untrustworthiness;

(B) conduct or practices rendering the certificate holder unfit to carry on charitable bail activities or making the certificate holder's continuance detrimental to the public interest; or

(C) that the certificate holder is no longer in good faith carrying on as a charitable bail organization;

and for these reasons is found by the commissioner to be a source of detriment, injury, or loss to the public.

Ind. Code § 27-10-2-4.5(f)(2), (6), (7) (eff. July 1, 2022).

58. Although the above statute refers to "under the certification," the introductory portion of this section also notes that the commissioner "shall *deny* . . . certification for any of the following causes." Ind. Code § 27-10-2-4.5(f) (eff. July 1, 2022) (emphasis supplied). It therefore appears to apply to the initial certification that The Bail Project will need after June 30, 2022.

59. The Bail Project is today paying cash bail for persons whose cases will be ongoing

on July 1, 2022, so The Bail Project requires certainty regarding what it must demonstrate to satisfy these standards and the standards are vague and uncertain and provide the Commissioner unlimited discretion to deny The Bail Project's application for a license, or revoke one once it is awarded.

60. The Bail Project, as part of its advocacy for the end of cash bail, will continue to pay cash bail for defendants in other jurisdictions who are charged with offenses that would be crimes of violence under Indiana law and who are charged with felonies and have past convictions for what would be crimes of violence under Indiana law.

61. This will allow The Bail Project's license to be denied or revoked as a charitable bail organization is not allowed to pay bail for any defendant charged with a crime of violence or a defendant who is charged with a felony and has a prior conviction for a crime of violence, which includes both the crimes enumerated in Indiana Code § 35-50-1-2(a), and "substantially similar offense[s] committed in another jurisdiction," Ind. Code § 1-1-2-4(b)(3), and there is nothing in HEA 1300 that limits this restriction to the activities of a charitable bail organization in Indiana.

62. Regardless of punishing The Bail Project for these activities outside the State of Indiana, HEA 1300 also prohibits The Bail Project from paying bail for persons in Indiana who have been accused of a crime of violence, or who are facing a felony with a past conviction for a crime of violence.

63. If bail is set by a court for such persons, it severely impedes The Bail Project's

mission and advocacy by preventing it from paying cash bail as it is essential to its protest against cash bail to demonstrate that if a court determines that these persons may be properly and safely released pending trial that this release should occur without imposing cash bail requirements.

64. The prohibition also discriminates against The Bail Project by allowing cash bail for these persons to be posted by friends, families, churches, or other persons, but denies The Bail Project the ability to post bail and by allowing bail bond agents to post surety bonds for these persons. There is no justification, rational or otherwise, for this discrimination.

Concluding allegations

65. At all times the defendant has acted and failed to act under color of state law.

66. HEA 1300 is causing, and, absent an injunction, will continue to cause The Bail Project irreparable harm for which there is no adequate remedy at law.

Legal claims

67. Requiring The Bail Project to restrict its expressive activities outside of Indiana to obtain a license from defendant for its activities inside Indiana represents an unconstitutional condition on its expressive activity and advocacy and violates the First Amendment.

68. Requiring The Bail Project to be licensed based on uncertain and vague standards that leave its ability to engage in its expressive activity at the complete and standardless

discretion of the Commissioner violates the First Amendment.

69. Prohibiting The Bail Project's expressive activity by limiting for whom it can pay cash bail, even though the bail amount has been approved by a state court, violates the First Amendment.

70. Prohibiting The Bail Project's expressive activity by limiting for whom it can pay cash bail, even though no limitation is placed on other persons or entities, and even though no limitations are placed on bail bond agents, violates the Equal Protection Clause of the Fourteenth Amendment.

Request for relief

WHEREFORE, plaintiff requests that this Court

- a. accept jurisdiction of this case and set it for hearing at the earliest opportunity.
- b. declare that HEA 1300 is unconstitutional for the reasons noted above.
- c. enter a preliminary injunction, later to be made permanent, enjoining the application of HEA 1300.
- d. award plaintiff its costs and reasonable attorneys' fees.
- e. award all other proper relief.

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