

**TESTIMONY OF  
THE BAIL PROJECT  
BEFORE THE  
COMMITTEE ON JURISPRUDENCE  
TEXAS STATE SENATE**

**March 18, 2021**

Chair	Sen. Joan Huffman
Vice Chair	Sen. Juan Hinojosa
Members	Sen. Brandon Creighton Sen. Bryan Hughes Sen. Nathan Johnson

Thank you very much, State Senators Huffman, Hinojosa, Creighton, Hughes, and Johnson, for the opportunity to provide comments on Senate Bill 21 (SB21).

SB21 will drastically increase the use of cash bail for Texans who have not been convicted of a crime, is likely unconstitutional, and is a blatant giveaway to the for-profit bail bonds industry. By requiring that cash bail be set, without an individualized hearing, against an expanded list of offenses, some of which are misdemeanors, a larger portion of Texans will inevitably be held pretrial. SB21 is a regressive bill that deviates from Texas's current practice of considering bail only when someone is a flight risk or public safety concern. If this bill passes, cash bail will be imposed based on offense instead of on individual circumstance, denying liberty and due process to Texans who have not been convicted of a crime and likely violating the U.S. Constitution. SB21 also guarantees that there will be a significant increase in the number of people -- mostly poor and people of color -- who will be detained pretrial. Cynically, SB21 does all of this to favor the for-profit bail bond industry, which will undoubtedly see an increase in their revenues because SB21 requires that many more Texans will be forced to pay a for-profit bail bondsman to secure their release from jail pretrial. The use of cash bail -- asking people who have not been found guilty of a crime to pay money upfront or stay in jail -- disgraces the constitution of this country and this state, and the proposal to expand, rather than curtail its use in SB21, would send the wrong message that Texas prioritizes profits over people. We implore you to reconsider the devastating implications of this bill.

**SB21 Will Drastically Increase Cash Bail for People Presumed Innocent Before the Law, Expanding the Population of People Placed Behind Bars Before Any Finding of Guilt Has Been Made**

SB21 promotes the implementation of arbitrary bond schedules in each county, which has been consistently struck down by the court in Texas and throughout the United States. In fact, if passed, this bill would expose our counties to further costly legal actions. Bail schedules take away the discretion of

judges, magistrates, and other judicial officers to set pretrial release conditions that are most appropriate to the individual circumstances of the accused. They tie the hands of our capable judiciary in the name of efficiency and proffer the assembly-line justice that has disproportionately ravaged low-income communities and communities of color throughout the State.

In fact, in Harris County, the consent decree independent monitors in *O'Donnell v. Harris County* found that the elimination of bail schedules, among other changes, has generally resulted in a more just pretrial system with fewer racial and economic inequities, has not caused a spike in crime, and has decreased the footprint of government with commensurate cost savings to taxpayers.<sup>1</sup> We would do better to learn from the experiences there than to turn back the clock to the very practices that led to these legal actions in the first place.

Current practice in Texas as in most of the United States is to consider flight risk and public safety when making a determination of release and when setting bail for an accused person in a case. SB21 deviates from this practice and likely violates Fourteenth Amendment due process protections by creating *de facto* automatic detention for large numbers of people who have not been convicted of a crime.

Setting bail for someone who does not have the means to pay it is essentially punishing someone before they have been found guilty. Requiring it is equivalent to being locked behind bars without any way out, and under SB21, Texas would see many, many more people kept in our jails. There are already over 70,000 people in Texas jails on a given day with about 50,000 of them being held pretrial. Texas taxpayers pay more than \$905 million each year to house those 50,000 individuals, all of whom, without exception, are legally presumed innocent. SB21 takes Texas in the wrong direction and potentially amplifies those numbers by the tens of thousands of cases that would be ineligible for personal recognizance release under the broad exclusions stipulated in the bill.

Beyond the increased direct costs of jailing more people pretrial, the human costs of this bill are staggering. Compared to people who are released while their cases are pending, those who are forced to remain in pretrial detention because of their inability to pay bond have significantly worse outcomes. Because of incarceration's criminogenic effects, people detained pretrial are over 25 percent more likely to plead guilty to a charge before trial to avoid having to remain deprived of their liberty.<sup>2</sup> They are also more likely to be sentenced to jail or prison time due to bias injected into the system that suggests those detained pretrial have "committed a crime."

The impacts of incarceration are not simply limited to the detained individuals. Those who are incarcerated are more likely to lose their jobs, housing, and custody of their children. These consequences are not without a public cost. People who have been jailed because they are poor are ten times more likely to be homeless and suffer higher rates of unemployment and lower wages.<sup>3</sup> Also, in a state where a substantial portion of the incarcerated population has a history of substance use, incarceration only worsens one's probability of overdose death upon release. In addition to overwhelming our county budgets and placing a greater burden on Texas taxpayers, SB21 amplifies the

---

<sup>1</sup> Garrett, Brandon L. (Monitor) and Guerra Thompson, Sandra (Deputy Monitor). *Monitoring Pretrial Reform in Harris County: First Sixth Month Report of the Court-Appointed Monitor*. Document 722-1 in *O'Donnell v. Harris County*, 4:16-cv-01414 (Southern District, Texas. May 16, 2016). Filed September 3, 2020.

<sup>2</sup> Dobbie, W., Goldin, J., & Yang, C. (2018). The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges. *American Economic Review*, 108(2), 201-240.

<sup>3</sup> See Coulote, L. (2018). *Nowhere to Go: Homelessness among formerly incarcerated people*. Northampton, MA: Prison Policy Initiative. Retrieved March 8, 2021, from <https://www.prisonpolicy.org/reports/housing.html> and Dobbie et al. 2018.

destabilizing effects of over incarceration on the unsubstantiated premise that its version of pretrial release and detention will make communities safer.

**SB21 Not Only Violates the Fundamental Principles of Equality, Equity, Justice, and Fairness Embedded Through the U.S. and Texas State Constitutions, but Is Also Likely Unconstitutional**

Chief Justice William Rehnquist affirmed, “In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>4</sup> SB21 casts aside the protections afforded to each of us under the U.S. Constitution by prioritizing incarceration over liberty for people who have not been convicted of any crime. By eliminating the availability of personal recognizance bonds without any mention of an individualized assessment of an accused person’s circumstances, SB21 makes liberty, not pretrial detention, the carefully limited exception.

SB21 also quite likely violates the Fourteenth Amendment of the U.S. Constitution, which asserts that no State shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Yet, in a legal system after SB21, jurisdictions throughout Texas would resuscitate the practice of bail schedules, allowing for pre-set bail amounts without consideration of an individual’s individual circumstance or ability to pay. We would travel back to a time before the progress of the past decade, when secured bail is an automatic order of detention for people who do not have the resources to pay the pre-set amount, a time when a similarly situated but wealthy individual can buy their freedom.

**SB21 Severely Restricts the Operation of Charitable Bail Funds, Further Punishing Those Who Are Poor and Benefiting the For-Profit Bail Industry**

Adding insult to injury, SB21 veers further off course from meaningful bail reform by targeting charitable bail funds, severely curtailing their capacity to operate in Texas and guaranteeing that people seeking bail assistance are limited to turning only to the for-profit, predatory bail bond market. Charitable bail funds offer a public service by providing their clients with critical resources like court reminders, travel assistance, and referrals to social services, all at no cost to the accused or the government. Contrary to the common defense for the continued use of cash bonds, money is not the only way to increase the likelihood that people go to court and uphold public safety. Releasing people without money or surety bond or letting a charitable bail fund post their bond before trial actually yields better results. National research shows that people who are released without paying money bonds show up to court and stay arrest-free at the same rate as those who are forced to pay cash bail. Kentucky, for example, eliminated the private bail industry in 1976; mid-2020 data shows that 87 percent of people released appear for their court date, and 85 percent are not arrested on new charges.

Charitable bail funds, like The Bail Project, unburden states and localities from having to bear the economic burden of detaining someone pretrial, which can cost Texans approximately \$96 per person per day or \$35,032 per person annually and Texans currently pay approximately \$2.2 billion annually to operate its local jails. These charitable bail funds – offering a service that has demonstrated its effectiveness throughout the United States – are integral to what makes communities safer and our criminal legal system more just. If anything, their work should be expanded, not restrained, in the name

---

<sup>4</sup> *United States v. Salerno*, 481 U.S. 739 at 755 (1987)

of public safety. At a time when Texas should do more to reduce its pretrial population, this bill seeks to expand it, compromising the state budget while acting as a giveaway to the for-profit bail bonds industry.

Pretrial liberty should not be a question of money. In Texas, bail bond companies charge a non-refundable fee of 10 percent of the full bail amount, an amount that can be out of reach for those who are poor, sick, and vulnerable whom charitable bail funds help. Charitable bail funds, on the other hand, do not charge fees for assistance. At The Bail Project, bail is paid by us, returned at the end of a client's case, and then used to help someone else. SB21 only exacerbates pretrial detention further by attacking community bail funds and expands the number of people inside Texas's already overpopulated jails.

The Bail Project is relatively new to Texas, operating in the counties of Bexar (San Antonio), Harris (Houston), Hays (San Marcos), Smith (Tyler), and Travis (Austin) since last year. Yet, even in that short time, our clients' appearance rates are trending toward our national average of nearly 90 percent. As many as a fourth of our clients in Texas self-report a substance use disorder. About a third of them are unemployed. Nearly all of them have basic needs such as housing, food, and transportation. Even with these many challenges, they show up to court without the financial incentive of bail. If these individuals are not locked up because of the restrictions on release eligibility stipulated in SB21, they will be locked up by tying the hands of charitable bail funds.

As a result of SB21, well over half of our clients, who had favorable outcomes without incident, would have been incarcerated for the duration of their cases. These are community members who would have languished in jail for weeks or months awaiting court dates. Instead, they were able to return to their families, jobs, and schools, and receive referrals to social services and community resources that meet their specific needs.

As The Bail Project's own work demonstrates, Texas should continue to follow its own example and that of other states by (1) eliminating cash bail; (2) presuming release and making pretrial detention the rare exception, used only when absolutely necessary to prevent imminent violence to an identifiable person or willful flight; (3) providing individualized hearings with robust due process protections in the limited instances when pretrial detention is sought; and (4) establishing a community-based infrastructure for pretrial support to facilitate returning to court and prevent future encounters with the criminal legal system.

Committee Members, The Bail Project, on behalf of other charitable bail funds and most of all on behalf of the communities we serve throughout Texas, invites you to continue to advance the administration of justice. We urge you to vote against SB21, to step forward and not backwards, and to join us in working towards a future where personal liberty and the presumption of innocence are once again the priority of our criminal legal system. Thank you for your consideration.