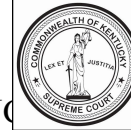


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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO.2024-SC-0311-D
Electronically filed

MARCIE LYNN TROUTT,
ADMINISTRATRIX OF THE ESTATE
OF MADELYNN NOEL TROUTT AND
INDIVIDUALLY, and JEREMY
TROUTT

APPELLANTS

v. Appeal from Court of Appeals, No. 2023-CA-0171;
Jefferson Circuit Court,
Hon. Ann Bailey Smith, No. 22-CI-000909

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

APPELLEES

* * * * *

**MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF
IN SUPPORT OF APPELLEES**

Pursuant to Kentucky Rule of Appellate Procedure (RAP) 34(B), the ACLU of Kentucky and the Kentucky Center for Economic Policy move for leave to file the accompanying *Brief of Amicus Curiae In Support of Appellees*, attached as Exhibit 1, in the above-styled action.¹ In support of their motion, the ACLU of Kentucky and the Kentucky Center for Economic Policy submit the following:

STATEMENT OF INTEREST AND EXPERTISE

The ACLU of Kentucky is the statewide, nonprofit affiliate of a national civil rights organization that is dedicated to the promotion and defense of individuals' civil rights and civil liberties. As part of its mission, the ACLU of Kentucky frequently provides direct legal representation to organizations and individuals in Kentucky's state and federal courts.

¹ Undersigned contacted the parties regarding this motion. Appellees consent to the motion, but Appellants' counsel has not responded to the inquiry.

000001 of 000004

See, e.g., Cameron v. EMW Women’s Surgical Center, P.S.C., et al., 664 S.W.3d 633 (Ky. 2023); *Hart v. Thomas*, 422 F.Supp.3d 1227 (E.D. Ky. 2019); *Miller v. Davis*, 267 F.Supp.3d 961 (E.D. Ky. 2017); *Gingerich v. Commonwealth*, 382 S.W.3d 835 (Ky. 2012).

Moreover, Kentucky courts have frequently permitted the ACLU of Kentucky to file *amicus curiae* briefs in cases involving civil rights and civil liberties issues. *See, e.g., Arkk Properties, LLC, et al. v. Cameron, et al.*, 2023 WL 5170496 (Ky. 2023); *Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cty. Metro Govt.*, Case. No. 19-cv-851, Doc. # 34 (W.D. Ky. Feb. 19, 2020); *Champion v. Commonwealth*, 2016 WL 4973367 (Ky. 2016); *Bluegrass Pipeline Co. v. Kentuckians United to Restrain Eminent Domain, Inc.*, 2014 WL 10288730 (Ky. App. 2014).

The Kentucky Center for Economic Policy (KyPolicy) is a non-partisan, non-profit 501(c)(3) organization conducting research, analysis, and education on important policy issues facing the Commonwealth of Kentucky. KyPolicy is dedicated to producing sound and credible research to improve the public discourse and policy decisions on numerous complex issues, including those related to the criminal legal system. Based on its research and expertise, KyPolicy is uniquely situated to comment on potential harms that would flow from establishing a negligent bailing tort that would impose vicarious civil liability on those who post bail for pretrial detainees.

ARGUMENT

Whether (or not) to allow the filing of an *amicus curiae* brief is within a court’s “sound discretion . . . upon a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice.” *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991) (cleaned up). “In determining whether to grant leave to

file amicus briefing, courts consider several factors, including adequate representation, cognizable direct interest in the outcome, and whether the proposed amici addresses matters or advances arguments different from those raised by the parties.” *Moore v. Humana, Inc.*, 2022 WL 20766503, at *2 (W.D. Ky. Mar. 31, 2022), *reconsideration denied*, 2022 WL 20766504 (W.D. Ky. Dec. 2, 2022) (citing *Nat’l Air Traffic Controllers Ass’n, MEBA, AFL-CIO v. Mineta*, 2005 WL 8169395, at *1 (N.D. Ohio June 24, 2005)).

Here, the ACLU of Kentucky and KyPolicy’s tendered *amicus* brief addresses a matter not raised by the parties but nonetheless appropriate for this Court’s consideration, *i.e.*, the logical consequences upon pretrial incarceration in the Commonwealth should the Appellants’ proffered tort of “negligent bailing” be accepted. Their joint argument is based on informed experience and research. Specifically, the ACLU of Kentucky possesses extensive civil rights litigation experience, generally, and criminal justice policy and litigation experience, specifically, that that would aid the Court in its consideration of this appeal. KyPolicy likewise has extensive criminal justice policy experience, and it produces and analyzes sound research to inform its positions. Finally, this motion is timely submitted, in that it is filed within fifteen (15) days from the later of the date Appellants’ brief is due or is filed. RAP 34(B)(2).

WHEREFORE, for the foregoing reasons, this Court should grant the ACLU of Kentucky and KyPolicy’s motion for leave to file an *amicus curiae* brief in support of Appellees, and order that the tendered amicus brief be filed in this action.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was filed electronically on February 25, 2025 via the CourtNet 2.0 system, which will send electronic notice to the following:

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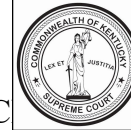
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000004 of 000004

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COMMONWEALTH OF KENTUCKY
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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES

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Certificate required by RAP 30(b)

The undersigned certifies that he did not check out the Record on Appeal in the preparation of this brief, and that copies of this brief were sent to the following named individuals *via* electronic mail on February 25, 2025: Hon. Anny Bailey Smith, Jefferson Circuit Judge—Div. 13, *via* Judicial Assistant Melinda Gordan at melindagordon@kycourts.net; the Hon. Vincent E. Johnson, at vjohnson@siebertandjohnson.com; to the Hon. Nathan Lennon and Robert Ott, at nlennon@reminger.com and rott@reminger.com, respectively; and to the Hon. B. Scott West, at scott@bscottwestlawoffice.com.

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000001 of 000015

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STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF POINTS AND AUTHORITIES.....i

PURPOSE OF AMICUS BRIEF AND ISSUES ADDRESSED.....1

ARGUMENT.....2

I. BURDENS ON THE ABILITY TO POST BAIL EXACERBATE IMPERMISSIBLE OVERCROWDING IN KENTUCKY’S JAILS.....2

A. Kentucky Jails Suffer From Chronic Overcrowding.....2

JENNIFER BURNETT, *Kentucky Association of Counties: 2024 Kentucky county jail classifications* (July 24, 2024) at <https://kaco.org/articles/2024-kentucky-county-jail-classifications/>.....2

KY. DEPARTMENT OF CORRECTIONS, *Weekly Jail Reports*, at <https://corrections.ky.gov/public-information/Researchandstats/Documents/Weekly%20Jail/2025/01-30-25.pdf>.....2

KENTUCKY ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *Locked Up for Being Poor: The Need for Bail Reform in Kentucky*, (Nov. 2021) at <https://www.usccr.gov/files/2021-11/kentucky-bail-report.pdf>.....2, 3

JOHN CHEVES, *Prison populations are falling in most states, but ballooning in Kentucky. Here’s why*, (April 25, 2019) at <https://www.kentucky.com/news/politics-government/article229666564.html#storylink=cpy>.....2

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VERA INSTITUTE OF JUSTICE, *House Bill 5 Will Harm Kentucky Counties* (Feb. 2024) at https://vera-advocacy-and-partnerships.s3.amazonaws.com/BJI_Kentucky%20HB%205%20Fact%20Sheet.pdf.....3

AUSTIN SCHICK, *Kentucky’s high incarceration rate probed by former corrections employee* (Aug. 26, 2024) at <https://spectrumnews1.com/ky/Louisville/news/2024/08/22/kentucky-imprisonment-rates>.....3

000002 of 000015

4C332734-6AF1-48AC-BB80-C5F20A6B060C : 000007 of 000020

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B. Obstacles To Pretrial Release Impact Jail Overcrowding.....4

KY. CONST. § 16.....4

KY. CONST. § 17.....4

KENTUCKY ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *Locked Up for Being Poor: The Need for Bail Reform in Kentucky*, (Nov. 2021) at <https://www.usccr.gov/files/2021-11/kentucky-bail-report.pdf>.....4

DANIEL DESROCHERS AND BETH MUSGRAVE, *This lawmaker tried to reform Kentucky’s cash bail system. Here’s why he failed*, (June 14, 2019) at <https://www.kentucky.com/news/local/watchdog/article231477743.html#storylink=cpy>.....4

LISA AUTRY, *Chief Justice: Conversation on Bail Reform Just Getting Started* (April 18, 2019) at <https://www.wkyufm.org/post/chief-justice-conversation-bail-reform-just-getting-started>.....4

SAMUEL CHRISTOPHER, CHELSEA ROWE, AND DANIEL STURTEVANT, *Dept. of Information and Technology Services: Pretrial Release Outcomes FY 2023-2024 Statewide* (July 26, 2024) at https://www.kycourts.gov/AOC/Information-and-Technology/Analytics/Custom%20Reports/Pretrial_Release_Outcomes_FY_23-24_Statewide.pdf.....5

KENTUCKY ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *Locked Up for Being Poor: The Need for Bail Reform in Kentucky*, (Nov. 2021) at <https://www.usccr.gov/files/2021-11/kentucky-bail-report.pdf>.....5

Amended Order 2023-40.....5

000003 of 000015

4C332734-6AF1-48AC-BB80-C5F20A6B060C : 000008 of 000020

KY. COURT OF JUSTICE: PRETRIAL SERVICES, *Services Offered* (2025) at <https://www.kycourts.gov/Court-Programs/Pretrial-Services/Pages/default.aspx#:~:text=Within%2024%20hours%20of%20the%20individual%27s%20incarceration%2C,in%20the%20county%20where%20the%20charge%20originated.....>.....5

MEGAN STEVENSON, *Assessing Risk Assessment in Action*, 103 Minn. L. Rev. 303 (2018).....6

DEPT. OF INFORMATION AND TECHNOLOGY SERVICES, *Kentucky Pretrial Services Use of Pretrial Risk Assessment* (Apr. 14, 2022) at https://www.kycourts.gov/AOC/Information-and-Technology/Analytics/Custom%20Reports/Use_of_Pretrial_Risk_Assessment_7-1-09to3-31-22.pdf..........6

PRETRIAL SERVICES, *Pretrial Reform in Kentucky* (2013) at <https://www.apainc.org/wp-content/uploads/2017/08/Pretrial-Reform-in-Kentucky-Implementation-Guide-Final.pdf.....>.....6

II. THE LOGICAL CONSEQUENCE OF RECOGNIZING A TORT OF NEGLIGENT BAILING WOULD RESULT IN AN INCREASE IN PRETRIAL DETAINEES THAT WOULD FURTHER EXACERBATE JAIL OVERCROWDING.....6

RUSSELL H. SHEARER, *Costs and Benefits of Audit Disclosure*, Nat. Resources & Env't, SUMMER 1996.....7

Doe v. Bates, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D. Tex. Dec. 27 2006).....7

Koprowski v. Baker, 822 F.3d 248 (6th Cir. 2016).....7

Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs, 641 F.3d 197 (6th Cir. 2011).....7-8

McKnight v. Rees, 88 F.3d 417 (6th Cir. 1996), *aff'd sub nom. Richardson v. McKnight*, 521 U.S. 399 (1997).....8

Stephens v. Bonding Ass'n of Kentucky, 538 S.W.2d 580 (Ky. 1976).....8

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000004 of 000015

Univ. of Kentucky v. Regard, 670 S.W.3d 903 (Ky. 2023).....8

Fletcher v. Com., 163 S.W.3d 852 (Ky. 2005).....9

Lake Cumberland Reg'l Hosp., LLC v. Adams, 536 S.W.3d 683 (Ky. 2017).....9

State v. Mottolese, 124 A.3d 809 (Vt. 2015).....9

III. CONCLUSION.....9

WORD-COUNT CERTIFICATE.....10

4C332734-6AF1-48AC-BB80-C5F20A6B060C : 000009 of 000020

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000005 of 000015

PURPOSE OF AMICUS BRIEF AND ISSUES ADDRESSED

In successfully seeking discretionary review, Appellants (the Troutts) presented four questions for this Court’s consideration, but the grant of discretionary review was not limited to any specific one. In this *amicus* brief, however, the ACLU of Kentucky and the Kentucky Center for Economic Policy address *only* why the Court should answer the Troutts’ first proffered question—whether “the party securing the release of a criminal defendant through bond or bail ever owe or assume a duty to one harmed by the release” [Mot. Disc. Review, at 10]—in the negative.

Specifically, Kentucky jails suffer from chronic overcrowding. And obstacles to bail, whether direct obstacles such as the imposition of higher bail amounts or indirect burdens upon third-parties’ willingness or ability to post bail, only exacerbate those overcrowded conditions. Because the recognition of a negligent bailing tort, as advanced by the Troutts, would disincentivize posting bail for pretrial detainees by third-parties, recognition of such a tort would unnecessarily increase the number of incarcerated individuals awaiting trial and thus contribute to ongoing jail overcrowding.

ARGUMENT

I. BURDENS ON THE ABILITY TO POST BAIL EXASPERBATE IMPERMISSIBLE OVERCROWDING IN KENTUCKY’S JAILS.

A. Kentucky Jails Suffer From Chronic Overcrowding.

In Kentucky, there are 70 Full Service county jails, 4 Regional jails, and 3 Life Safety jails. JENNIFER BURNETT, *Kentucky Association of Counties: 2024 Kentucky county jail classifications* (July 24, 2024) at <https://kaco.org/articles/2024-kentucky-county-jail-classifications/> (last visited Feb. 12, 2025). And as of January 30, 2025, more than 40 of those housed more inmates than their rated capacity. KY. DEPARTMENT OF CORRECTIONS, *Weekly Jail Reports*, at <https://corrections.ky.gov/public-information/Researchandstats/Documents/Weekly%20Jail/2025/01-30-25.pdf> (last visited Feb. 12, 2025). Indeed, 7 of those jails are operating at or above 150 percent of their rated capacity. *Id.* (jails exceeding 150 percent capacity in Adair, Bell, Carroll, Perry, Pulaski, Rockcastle, and Whitley counties).

Unfortunately, this jail overcrowding snapshot is not an anomaly. Indeed, “[f]rom 2008-2018, Kentucky has continually ranked tenth in the U.S. for the most people incarcerated per capita. In 2018, Kentucky’s prison population grew at nearly four times the national average, leading to nearly 73 percent of Kentucky jails being at or over capacity.” KENTUCKY ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *Locked Up for Being Poor: The Need for Bail Reform in Kentucky*, (Nov. 2021) at <https://www.usccr.gov/files/2021-11/kentucky-bail-report.pdf> (last visited Feb. 12, 2025) (citing JOHN CHEVES, *Prison populations are falling in most states, but ballooning in Kentucky. Here’s why*, (April 25, 2019) at <https://www.kentucky.com/news/politics-government/article229666564.html#storylink=cpy>). Indeed, “[a]s of July 2018, 73

percent of Kentucky jails were at or over capacity and close to 10 jails were at or over 200 percent capacity which is most severe in overcrowded county jails.” KENTUCKY ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *Locked Up for Being Poor: The Need for Bail Reform in Kentucky*, 1 (Nov. 2021) at <https://www.usccr.gov/files/2021-11/kentucky-bail-report.pdf> (last visited Feb. 12, 2025).

Despite a temporary reduction in jail overcrowding during the COVID pandemic, the number of county inmates in local jails has steadily risen almost back to their pre-COVID numbers. KENTUCKY CENTER FOR ECONOMIC POLICY, *New KyPolicy Website Shows Kentucky’s Incarcerated Population Increased Again in 2022* (Apr. 28, 2023) at <https://kypolicy.org/kentucky-incarceration/> (last visited Feb. 12, 2025). And the recent passage of HB5 (the Safer Kentucky Act) will further increase the number of pretrial detainees because it “reclassifies at least 20 offenses into a more severe class of felony and creates new felony offenses.” VERA INSTITUTE OF JUSTICE, *House Bill 5 Will Harm Kentucky Counties* (Feb. 2024) at https://vera-advocacy-and-partnerships.s3.amazonaws.com/BJI_Kentucky%20HB%205%20Fact%20Sheet.pdf (last visited Feb. 21, 2025). Moreover, Kentucky’s incarceration rate “continue[s] to rank at the top of the country compared to other states.” AUSTIN SCHICK, *Kentucky’s high incarceration rate probed by former corrections employee* (Aug. 26, 2024) at <https://spectrumnews1.com/ky/louisville/news/2024/08/22/kentucky-imprisonment-rates> (last visited Feb. 12, 2025); *see also* PRISON POLICY INITIATIVE, *Kentucky profile*, at <https://www.prisonpolicy.org/profiles/KY.html#all> (last visited Feb. 12, 2025). And several of the most severely overpopulated jails are chronically overcrowded, even after the COVID pandemic. *See, e.g.*, LEXINGTON HERALD-LEADER STAFF REPORT, *High*

Incarceration rate leaves most of Kentucky's jails overpopulated. See the data. (July, 2022) at <https://www.kentucky.com/news/state/Kentucky/article263382678.html> (last visited Feb. 18, 2025).

B. Obstacles To Pretrial Release Impact Jail Overcrowding

One of the factors contributing to Kentucky's jail overcrowding problem is money bail. In Kentucky, individuals charged with a crime are constitutionally entitled to a bail "unless [they are charged] for capital offenses when the proof is evident or the presumption great." KY. CONST. § 16. And the bail to which they are entitled cannot be "excessive." KY. CONST. § 17. Unfortunately, though, Kentucky's use of financial conditions varies from county to county and disproportionately deprives low-income defendants from being released while awaiting trial. *See, e.g.,* KENTUCKY ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *Locked Up for Being Poor: The Need for Bail Reform in Kentucky*, (Nov. 2021) at <https://www.usccr.gov/files/2021-11/kentucky-bail-report.pdf> (last visited Feb. 12, 2025); DANIEL DESROCHERS AND BETH MUSGRAVE, *This lawmaker tried to reform Kentucky's cash bail system. Here's why he failed*, (June 14, 2019) at <https://www.kentucky.com/news/local/watchdog/article231477743.html#storylink=cpy> (last visited Feb. 12, 2025). Indeed, former Chief Justice Minton expressly acknowledged that problem when he stated that "the current bail system disproportionately affects low-income defendants who aren't able to pay for release after being charged with low-level, non-violent offenses." LISA AUTRY, *Chief Justice: Conversation on Bail Reform Just Getting Started* (April 18, 2019) at <https://www.wkyufm.org/post/chief-justice-conversation-bail-reform-just-getting-started> (last visited Feb. 17, 2025).

For example, in 2023, 26 percent of District Court defendants statewide were released while awaiting trial pursuant to a financial release, but another 23 percent remained detained until disposition. SAMUEL CHRISTOPHER, CHELSEA ROWE, AND DANIEL STURTEVANT, *Dept. of Information and Technology Services: Pretrial Release Outcomes FY 2023-2024 Statewide* (July 26, 2024) at https://www.kycourts.gov/AOC/Information-and-Technology/Analytics/Custom%20Reports/Pretrial_Release_Outcomes_FY_23-24_Statewide.pdf (last visited Feb. 12, 2025).¹

Moreover, despite the fact that Kentucky has used various risk assessment tools since 1976 (and adopted the Arnold Ventures Public Safety Assessment (PSA) on July 1, 2013) to try and address unnecessarily high money bails and jail overcrowding, as of 2018 it had resulted in “only a trivial increase in pretrial release” due, in part, to judicial discretion.² KENTUCKY ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *Locked Up for Being Poor: The Need for Bail Reform in Kentucky*, 1 Nov. 2021) at <https://www.usccr.gov/files/2021-11/kentucky-bail-report.pdf> (last visited Feb. 12,

¹ As with most statistical data provided by the Administrative Office of the Courts (AOC), the AOC includes a disclaimer stating that the data “may not at any particular moment reflect the true status of court cases due to ordinary limitation(s), delay(s) or error(s)” in the reporting system.

² Amici recognize that this Court entered Amended Order 2023-40 implementing the Pre-Arrestment Release Protocol giving “pretrial specialists the authority to release based on specific criteria without contacting a judge.” KY. COURT OF JUSTICE: PRETRIAL SERVICES, *Services Offered* (2025) at <https://www.kycourts.gov/Court-Programs/Pretrial-Services/Pages/default.aspx#:~:text=Within%2024%20hours%20of%20the%20individua%27s%20incarceration%2C,in%20the%20county%20where%20the%20charge%20origi> nated (last visited Feb. 17, 2025). On February 21, 2025, AOC provided (in response to amici’s request) as-yet unpublished statistical data regarding the number of pretrial detainees released pursuant to that protocol. That data reflects an increase in the number of pretrial detainees released by 3-5% (and a reduction in the number of pretrial detainees detained until disposition by 5-6%) over 2023, but it remains unclear what gains, if any, will be achieved in light of HB5’s passage in 2024.

2025) (citing MEGAN STEVENSON, *Assessing Risk Assessment in Action*, 103 Minn. L. Rev. 303, 308 (2018)); DEPT. OF INFORMATION AND TECHNOLOGY SERVICES, *Kentucky Pretrial Services Use of Pretrial Risk Assessment* (Apr. 14, 2022) at https://www.kycourts.gov/AOC/Information-and-Technology/Analytics/Custom%20Reports/Use_of_Pretrial_Risk_Assessment_7-1-09to3-31-22.pdf (last visited Feb. 13, 2025).

Given these jail overcrowding problems, any additional obstacles to pretrial detainees' ability to post bail while awaiting trial only serves to exacerbate those conditions of confinement. *See, e.g.*, PRETRIAL SERVICES, *Pretrial Reform in Kentucky* (2013) at <https://www.apainc.org/wp-content/uploads/2017/08/Pretrial-Reform-in-Kentucky-Implementation-Guide-Final.pdf> (last visited Feb. 17, 2025) (noting that the Monitored Condition Release (MCR) program adopted in 2005 to address jail overcrowding caused, in part, by too many pretrial detainees unable to post bail).

II. THE LOGICAL CONSEQUENCE OF RECOGNIZING A TORT OF NEGLIGENT BAILING WOULD RESULT IN AN INCREASE IN PRETRIAL DETAINEES THAT WOULD FURTHER EXCERBATE JAIL OVERCROWDING.

In this appeal, the Troutts seek recognition of a tort of negligent bailing to allow those who are harmed by out-of-custody criminal defendants to pursue damages claims against those who posted their bail. [Appellants' Br., at 14-23.] They cloak their argument as one about Kentucky's notice pleading standard, but the import is the same—recognition of a new cause of action. If accepted, this argument would erect a substantial obstacle to third-parties' willingness and ability to post bail for otherwise eligible pretrial detainees by imposing potential vicarious civil liability (as well as the expense of being subjected to civil litigation and discovery) for the detainees' post-release conduct.

While potential civil liability can and should deter individuals from engaging in risky or otherwise harmful behavior, it should not be used, as is suggested here, to impose third-party liability on those who choose to post bail (in an amount set by the court based upon statutorily proscribed factors and an individualized, statistics-based risk assessment) to secure the release of a presumed-innocent defendant pending trial. To do so would disincentivize third-parties' willingness to post bail by requiring them to assume the risk of incurring civil liability (or the financial expense of having to defend oneself from meritless claims) for harms that are untethered to their own conduct and that are beyond their control. *See, e.g.,* C. RUSSELL H. SHEARER, *Costs and Benefits of Audit Disclosure*, Nat. Resources & Env't, SUMMER 1996, at 48, 51 (noting that "potential civil liability" is a "disincentive" to corporations and their employees to comply with auditing and disclosure requirements); *cf. Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *3 (E.D. Tex. Dec. 27 2006) ("The Court finds that immunity from all private civil liability comports with the clear Congressional policies to avoid disincentives to innovation and to encourage self-regulation.").

And this prospect of deterring third-parties from posting bail for otherwise eligible pretrial detainees is not mere idle speculation. Rather, the recognition of a cause of action (or making certain conduct more susceptible to civil liability) is well-recognized by courts in other contexts to deter individuals' behavior. *See, e.g., Koprovski v. Baker*, 822 F.3d 248, 256 (6th Cir. 2016) ("Still, the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity, are indemnified by the employing agency or entity, or are acting pursuant to an entity's policy.") (cleaned up); *Smith v. Jefferson Cnty. Bd. of Sch.*

Comm'rs, 641 F.3d 197, 219 (6th Cir. 2011) (in finding that legislative immunity shields school board members from individual capacity claims, noting that “the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability”) (cleaned up); *McKnight v. Rees*, 88 F.3d 417, 419 (6th Cir. 1996), *aff'd sub nom. Richardson v. McKnight*, 521 U.S. 399 (1997) (“Section 1983 provides a cause of action against any person who, under color of state law, deprives an individual of any right, privilege, or immunity secured by the Constitution and federal law. The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights”) (cleaned up).

Here, the disincentive to posting bail would principally deter family members and close associations of pretrial detainees because Kentucky outlawed commercial bail bonding in 1976. *See Stephens v. Bonding Ass'n of Kentucky*, 538 S.W.2d 580, 584 (Ky. 1976). And charitable bail organizations, such as Appellee (The Bail Project), have only served as sureties on a narrow and limited basis in the Commonwealth. *See, e.g., THE BAIL PROJECT, Louisville Transition Report* (2023) at <https://bailproject.org/press/louisville/> (noting cessation of bailing activities after only 5 years).

Nor can it be reasonably asserted that the deterrent effect imposed upon potential sureties, and the resulting impact upon jail overcrowding, is a mere “parade of horrors” argument that should be rejected. [*See Appellants’ Mot. Discretionary Rev.*, at 1 (citing *Univ. of Kentucky v. Regard*, 670 S.W.3d 903 (Ky. 2023)).] On the contrary, these are the “real and natural” consequences that would flow from recognizing a tort of negligent

bailing; thus, they are properly considered by this Court. *See Fletcher v. Com.*, 163 S.W.3d 852, 874 (Ky. 2005) (Lambert, C.J., concurring in part and dissenting in part) (noting that the “real and natural consequence of” the requested constitutional interpretation should be considered); *Lake Cumberland Reg'l Hosp., LLC v. Adams*, 536 S.W.3d 683, 689 (Ky. 2017) (in refusing to recognize the stand-alone tort of negligent credentialing, noting the lack of “need for a new cause of action” as well as the proposed “tort’s far-reaching implications” and its “unknown” impact); *State v. Mottolese*, 124 A.3d 809, 812 (Vt. 2015) (“We have said that the sole constitutionally legitimate purpose of monetary conditions of release is to provide additional assurance of the presence of the accused . . . [and] forfeiture of bail exists not as a punitive tool, but rather to assure that the defendant will appear at court when required. As such, bail may not be forfeited for breach of conditions other than appearance because doing so transforms monetary bail from a guarantor of appearance into a potentially punitive tool useful in the enforcement of all bail conditions.”) (cleaned up).

III. CONCLUSION

For the foregoing reasons, the ACLU of Kentucky and KyPolicy urge this Court to affirm the opinion below.

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