



Texas Conservative Coalition Research Institute

Senate Committee on Criminal Justice

June 5, 2024

Regarding the Committee's Charge: *Examine "charitable bail organizations" that pay bail for defendants, thereby relieving them of any financial incentive to appear in court. Study the operations and funding sources of these organizations. Make recommendations to ensure accountability for "charitable bail organizations" that provide free bond for arrested individuals that reoffend while out on bond; further restrict these organizations' ability to post bail for violent individuals; and promote transparency.*

Background

The Eighth Amendment to the United States Constitution states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹ Federal courts, however, have acknowledged that bail may be denied to defendants in limited cases when they pose a threat to public safety.² Courts have also held that a defendant's bail cannot be set at a figure which exceeds the amount that is reasonably likely to ensure his or her presence appearance at trial.³

The Texas constitution provides additional safeguards against defendants being confined prior to trial. Article 1, Section 11 of that document generally prohibits the imposition of bail except in limited circumstances, including capital cases and certain cases in which the defendant is accused and/or has been convicted of two felonies.⁴

An important point about bail is that many defendants make use of a bail bond company when posting bail. In exchange for the defendant (or a related party, such as a close family member) paying a non-refundable fee that is a small percentage of the bail amount, the bail bond company will post the bail amount for the defendant. The defendant is then released, but if he fails to appear in court, bail bondsmen have broad authority to track the defendant down and arrest him. If the defendant ultimately fails to appear, the bail bond company can lose the bail it posted on his behalf; thus, the company is highly motivated to ensure that the defendant appears in court.

Senate Bill 6 (87S2, Huffman) implemented at least three important bail reforms. First, it required the Office of Court Administration (OCA) to develop a public safety report system (PSRS) that is used to generate reports for magistrates and judges when determining bail for a given defendant that provides specific information on that defendant (e.g., his criminal history).

Second, that bill also eliminated the ability of courts to release defendants on personal bond if they are accused of any one of a number of violent or sex-related offenses. Personal bond is essentially a promise by the defendant, in lieu of posting bail, to appear in court as scheduled. When a court allows release on

personal bond, Texas law permits the imposition of a small fee on the defendant (the greater of \$20 or 3 percent of the set bail amount).⁵

Third, SB 6 created a number of requirements for charitable bail organizations (CBOs), sometimes referred to as bail funds. A CBO is defined as an organization that is a 501(c)(3) organization that is registered in the applicable county to pay bail for defendants. The CBO obtains a certificate from the county clerk by proving its 501(c)(3) status and that it is current with all of its IRS-required filings. Each month, the CBO must file a report with the county's sheriff that details certain information, including the defendants for whom the CBO has paid bail and any dates those defendants failed to appear in court as required. A CBO may not accept compensation for posting bail, and failure to abide by the above statutory requirements may result in the CBO being suspended. A CBO that is suspended or otherwise not compliant with the statutory requirements may not post bail for a defendant. Each year, OCA must publish a report that aggregates the data in the reports that CBOs submit to county sheriffs. Notably, the provisions of SB 6 do not apply to CBOs that post bail for fewer than four defendants in a 180-day period.

SB 6 would have implemented a joint resolution (SJR 3, 87S2), had the Legislature adopted it and had voters approved it. Senate Joint Resolution 3 would have expanded the number of cases in which bail could be denied to defendants accused of certain violent or sex-related crimes, provided there was clear and convincing evidence that the defendant is a flight risk or a threat to public safety. But with only 87 "yea" votes in the House, SJR 3 was not adopted.

Analysis

At the outset of addressing the Committee's charge, it should be emphasized that criticism of CBOs should not be conflated with an unqualified endorsement of requiring cash bail in all cases. Denying a defendant bail is in great tension with the presumption of innocence that is a bedrock principle of the American criminal justice system. The purpose of requiring cash bail is to ensure that the defendant has a financial incentive to appear in court as scheduled; Article 17.01 defines bail as "the security given by the accused that he will appear and answer before the proper court the accusation brought against him . . ."⁶

Reasonable questions can be raised about the wisdom of requiring bail in some cases, such as non-violent misdemeanors. If a defendant is arrested for such an offense but lacks the means to pay the bail, he or she must remain in jail until the applicable trial (or other disposition of the case). This can lead to poor defendants losing their jobs, falling into debt, failing to receive appropriate health care, and experiencing strained relationships with family and friends, any of which might increase a defendant's recidivism risk. Moreover, defendants who are confined to jail prior to trial may be entirely innocent of the charges brought against them. Even defendants who are innocent of the charges may feel pressure to acknowledge guilt if doing so will get them released from jail earlier than they would otherwise be released.

As part of a legal settlement, Harris County implemented a system in 2017 in which bail is generally not required for release for people charged with misdemeanors, although it can be required in some circumstances (e.g., family violence, repeat DWI offenders, or prior violations of release on personal bond).⁷ The monitor of this system, the Wilson Center for Science and Justice at Duke University, has

released periodic reports on the implementation of the system. In the most recent report, from March 2024, the monitor praised the program, stating “The bail reforms . . . have saved Harris County and residents many millions of dollars, improved the lives of tens of thousands of persons arrested for misdemeanors, and these large-scale changes have produced no increase in new offenses by persons arrested for misdemeanors.”⁸

While there have been some positive results from the program, it should also be noted that the Harris County program did see a rise in the bond failure rate among arrestees for misdemeanors who were released. That rate quickly rose from 16 percent for cases filed in 2015 and 2016 (before the program was implemented) to 30 percent in 2018, before declining to 26 percent in 2022.⁹ As the monitor’s report notes, however, bond failure is not necessarily a good proxy for a defendant’s failure to appear. A bail bond can fail for other reasons, such as the defendant failing to pay the applicable fee to the bail bond company or violating bail conditions (e.g., avoiding certain places).¹⁰

The report notes that certain factors- a felony charge that accompanies the misdemeanor charge, homelessness, mental illness, and a criminal history- increase the likelihood of nonappearance by a defendant who has been bailed out.¹¹ Most strikingly, a defendant with a previous failure to appear is almost five times as likely not to appear as a bailed-out defendant without such a history.¹² The lesson that can be drawn from the data is that a blanket position on setting bail for defendants may not be appropriate; rather, a number of circumstances should be considered.

Unfortunately, CBOs tends to be rigid in their opposition to cash bail. As one official with the Bail Project (a longstanding CBO) has stated: “The use of cash bail is unconscionable, is thoroughly un-American, and considers people guilty until proven wealthy. It has corrupted our criminal legal system, and its consequences impact us all.”¹³ This view leaves little room for the idea that bail may be necessary in some cases to ensure that the defendant appears in court.

Notably, Texas law (consistent with federal courts’ interpretation of the Eighth Amendment) already provides that, when bail is set, the magistrate should impose “the least restrictive conditions, if any, and the personal bond or cash or surety bond necessary to reasonably ensure the defendant’s appearance in court as required and the safety of the community, law enforcement, and the victim of the alleged offense.”¹⁴ This takes into account to at least some extent the defendant’s financial condition, because a bail amount of (for example) \$5,000 may be enough to ensure a poor defendant’s appearance in court, whereas a much higher figure may be necessary for a wealthy defendant. In addition, Texas law allows a defendant who lacks the financial means to pay a bail amount that is set by a bail schedule (i.e., a court’s guideline of bail amounts for various offenses) to file an affidavit and provide supporting documentation to request that the bail figure be lowered.

CBOs have existed for decades. They rose to prominence, however, after George Floyd died while being arrested by a Minneapolis police officer in 2020. There are now more than 100 CBOs in the country;¹⁵ the National Bail Fund Network (NBFN) alone includes more than 90 nonprofits in 38 states,¹⁶ including the Texas Organizing Project in Texas.¹⁷ NBFN estimates that \$100 million or more was raised in the second half of 2020, largely from individuals.¹⁸ Incredibly, the Minnesota Freedom Fund went from \$231,000 in donations in 2019 to more than \$41 million in 2020.¹⁹

While many CBOs receive donations through a sort of “crowdsourcing,” there have unquestionably been large donations by organizations. Open Philanthropy (founded by Facebook co-founder Dustin Moskovitz), the National Football League, and the Audacious Project (a sub-unit of TED, of “TED Talk”

fame) are just a few examples of organizations that have donated to CBOs.²⁰ The Audacious Project's donation to the Bail Project in 2018 was \$30 million.²¹ In at least one case, the Bail Project received \$150,000 in Indiana taxpayer funds over two years.²² This fact led to scrutiny when the CBO bailed out a defendant who went on to commit murder.²³

The Track Record of Charitable Bail Organizations

There are numerous examples of defendants bailed out by CBOs who have gone on to commit serious crimes once released. A particularly tragic story in Texas involved Shane James, who was charged in January of 2022 with aggravated assault against his own family members. He was bailed out by the Texas Organizing Project, promptly removed his ankle monitor,²⁴ and would eventually go on to murder six people, including his own parents.²⁵ The Texas Organizing Project received more than \$700,000 and \$500,000 from George Soros's Open Society Policy Center in 2019 and 2021, respectively.²⁶

Another notable case in which the Texas Organizing Project paid bail involved defendant Hassain Muhammad Jr., who was bailed out by that CBO in November 2022 when facing a charge of criminal trespass. A February 2024 news article states that, "Since then, Muhammad has been criminally charged in seven new cases, including three charges of criminal trespassing, criminal mischief, possession of drugs in a drug-free zone, theft and burglary of a building with the intent to commit theft . . ." ²⁷ After being released on bail and allegedly committing more crimes, Muhammad was again bailed out by the same CBO in November 2023.²⁸ This raises serious concerns that CBOs are bailing out habitual offenders irrespective of the threat they may pose to the public.

Stories similar to those of Shane James and Hassain Muhammad have led to widespread reaction against CBOs in various states across the country, with legislation being introduced in (at least) Georgia, Kentucky, Minnesota, Pennsylvania, Tennessee, Virginia, and Indiana. Just a few weeks ago, Georgia enacted a law that increases the number of offenses which require monetary bail, and prohibits CBOs (among other persons) from paying bail for more than three people in a year.²⁹ In 2023, the Seventh Circuit Court of Appeals upheld a recently-enacted Indiana statute that requires CBOs to pay a \$300 biennial fee to the state and prohibits them from bailing out defendants who are accused of violent crimes or have certain violent crime histories.³⁰ Last month, Kentucky enacted a measure that prohibits CBOs from posting bail of \$5,000 or more for a defendant.³¹

CBOs and their proponents argue that the people they bail out appear in court at very high rates, which they say proves that CBOs are not undermining the purpose of bail. For example, the Bail Project claims that 91 percent of defendants it bails out later appear in court as required.³² A Los Angeles County study found that defendants bailed out by the Bail Project did indeed appear at higher rates than other bailed-out defendants, although much of that might be attributable to the support services provided by that organization to the defendants it bails out. On the other hand, an investigation by *CNN* found that defendants bailed out by CBOs failed to appear in court at roughly double the rate as other bailed out defendants; 52 percent versus 24 percent in Seattle, and 42 percent versus 22.5 percent in Minnesota.³³

The intuitive concern with CBOs is that the defendant has zero "skin in the game" when a third-party organization bails him out of jail. In contrast, if a defendant or a family member pays the bail, he has a powerful incentive to appear in court as promised. Similarly, if the bail is paid by a commercial bail bond company, that company will have an incentive to ensure that the defendant appears in court; or, if the defendant fails to appear, the company will have a strong incentive to track him down and bring him to court. As a 2016 law review article warning of the dangers of the "crowdsourcing" of bail payments aptly

stated, “If there is little or no relationship between the defendant and those supplying the money, the bail money provides no incentive to prevent the defendant from simply fleeing the jurisdiction. This is especially true if the money does not have to be paid back or, even if it does, if lenders are unlikely to collect.”³⁴

Admittedly, a CBO does have some incentive to see the defendant appear in court, because the CBO will then receive the back the money it used to pay the bail, after which it can use that same money to bail out another defendant, and so on and so forth. Thus, it may be in the CBO’s interest to exclude from its consideration defendants who pose a flight risk. But even assuming CBOs are capable of correctly evaluating defendants for flight risks, they are unlikely to have the authority and capability to track them down. More importantly, the defendant himself has no reason to care about whether the CBO gets its money back.

Incongruities in the Annual OCA Report on Charitable Bail Organizations

As noted above, SB 6 required OCA to publish a report each year on CBOs. A report, which is due by December 1st each year, has been released for each of FY 2022 and FY 2023. The reports appear to be incomplete in some respects, and action by the Legislature may be necessary to correct it.

The data in both reports indicate that only four counties in the state provided CBO reports: Bexar, Harris, Hays, and Travis counties. The table below lists the number of defendants bailed out by CBOs who failed to appear in court as scheduled, disaggregated by fiscal year and county.

Table: Defendants Released on Bail Paid by CBOs Who subsequently Failed to Appear (FTA) in Court, By County, FYs 2022 and 2023

	FY 2022 ³⁵	FY 2023 ³⁶
Bexar	240	321
Harris	81	188
Hays	50	121
Travis	3	8
TOTAL	374	638

Notably, all bails paid by CBOs in Bexar County in each year involved the Texas Organizing Project. All bails paid by CBOs in the other three counties involved the Bail Project. Curiously, the report for FY 2023 states without elaboration that the Bail Project stopped paying bail after July 2023.³⁷

As the table indicates, bail outs by CBOs increased significantly from FY 2022 to FY 2023, although the figures for future years could drop if the Bail Project has indeed stopped paying bail for defendants in Texas.

The reports by OCA appear to be flawed in at least two respects. First, the FY 2022 report indicates that only three defendants out of 374 failed to appear in court,³⁸ which if true would be an extraordinarily low number. Moreover, those three failures to appear occurred in April and June, with entire months showing no failures to appear. Second, the FY 2023 report does not list failures to appear at all.

The data in the reports on failures to appear does not accord with other data; for example, a news report from February 2024 indicated that, dating back to October 2022, in 58 of 196 cases (approximately 30 percent) in which the Texas Organizing Project had bailed out defendants, the bailed-out defendants were re-arrested, “usually for failing to show up for court appearances.”³⁹ Yet there is no indication of these failures to appear in the OCA reports.

Under current law, CBOs are required to report data (including the dates all applicable defendants failed to appear in court) to the county sheriff’s office, which is then required to report it to OCA, which is then required to aggregate and publish the data. One or more of CBOs, sheriffs, or OCA are failing to adhere to the law. This is critically important for more reasons than the need to have good data; CBOs that do not fulfill their reporting obligations under the law are not permitted to continue paying bail for defendants and can be suspended from doing so for an entire year by the sheriff after receiving a warning.

Recommendations

Although imposing additional restrictions on CBOs in Texas may be subject to legal challenge, the decision by the Seventh Circuit mentioned above suggests that the Legislature has ample discretion in regulating CBOs. While being mindful that some criticisms of cash bail are not without merit, the Legislature could enact the following reforms to promote public safety and increase the likelihood that defendants will appear in court as scheduled:

1. Prohibit CBOs from posting bail in cases in which a defendant faces charges for a violent or sex-related crime. A logical choice for the list of such crimes would be those set forth in SB 6 (crimes for which release on personal bond is no longer permitted).
2. Prohibit CBOs from posting bail in cases in which a defendant’s criminal history indicates that he is a threat to public safety and/or a habitual offender.
3. Prohibit CBOs from posting bail for a defendant who has a previous failure to appear after release on bail or has otherwise violated conditions of release on bail.
4. Cap the amount of bail a CBO may pay in a given case.
5. Provide that CBOs are not eligible to receive grants or other funding from the State or any of its political subdivisions. While there is no evidence that this is currently happening, eliminating the possibility that taxpayer funds would be used in this way should not be controversial.
6. When registering with the county, a CBO should be required to state whether it will refrain from paying bail for any category of defendant (e.g., a convicted felon).
7. Ascertain from witnesses why the FY 2022 and FY 2023 OCA reports apparently failed to report large numbers of defendants who failed to appear in court after they were bailed out by CBOs.
8. Impose a fine on CBOs that fail to fulfill their required reporting duties.

END NOTES

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- ¹ <https://constitution.congress.gov/browse/amendment-8/#:~:text=Eighth%20Amendment%20Cruel%20and%20Unusual,cruel%20and%20unusual%20punishments%20infi>cted.
- ² See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987).
- ³ See, e.g., *Stack v. Boyle*, 342 U.S. 1 (1951).
- ⁴ <https://statutes.capitol.texas.gov/Docs/CN/pdf/CN.1.pdf>
- ⁵ Article 17.42(4), Code of Criminal Procedure, <https://statutes.capitol.texas.gov/Docs/CR/htm/CR.17.htm>.
- ⁶ <https://statutes.capitol.texas.gov/Docs/CR/htm/CR.17.htm>
- ⁷ <https://sites.law.duke.edu/odonnellmonitor/wp-content/uploads/sites/26/2024/03/ODonnell-Monitor-Seventh-Report-v.17.pdf> (p. iv).
- ⁸ <https://sites.law.duke.edu/odonnellmonitor/wp-content/uploads/sites/26/2024/03/ODonnell-Monitor-Seventh-Report-v.17.pdf> (p. v).
- ⁹ <https://sites.law.duke.edu/odonnellmonitor/wp-content/uploads/sites/26/2024/03/ODonnell-Monitor-Seventh-Report-v.17.pdf> (p. vii).
- ¹⁰ See, e.g., <https://delaughterbailbonds.com/blog/4-common-reasons-that-cause-a-bail-bond-to-fail/>.
- ¹¹ <https://sites.law.duke.edu/odonnellmonitor/wp-content/uploads/sites/26/2024/03/ODonnell-Monitor-Seventh-Report-v.17.pdf> (p. viii).
- ¹² *Id.*
- ¹³ https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-issues-in-criminal-justice/the-high-price-of-cash-bail/
- ¹⁴ Art. 17.028, Code of Criminal Procedure, <https://statutes.capitol.texas.gov/Docs/CR/htm/CR.17.htm>.
- ¹⁵ <https://www.cnn.com/2023/03/21/us/bail-reform-bail-charities-invs/index.html>
- ¹⁶ <https://www.philanthropy.com/article/nonprofit-bail-funds-fueled-by-a-surge-of-funds-after-george-floyd-protests-face-new-challenges#:~:text=In%202020%2C%20as%20racial%20justice,much%20as%20the%20previous%20year.>
- ¹⁷ <https://www.communityjusticeexchange.org/en/nbfn-directory#texas-en>
- ¹⁸ <https://www.philanthropy.com/article/nonprofit-bail-funds-fueled-by-a-surge-of-funds-after-george-floyd-protests-face-new-challenges#:~:text=In%202020%2C%20as%20racial%20justice,much%20as%20the%20previous%20year.>
- ¹⁹ <https://www.cnn.com/2023/03/21/us/bail-reform-bail-charities-invs/index.html>
- ²⁰ <https://www.philanthropy.com/article/nonprofit-bail-funds-fueled-by-a-surge-of-funds-after-george-floyd-protests-face-new-challenges#:~:text=In%202020%2C%20as%20racial%20justice,much%20as%20the%20previous%20year.>
- ²¹ <https://www.philanthropy.com/article/nonprofit-bail-funds-fueled-by-a-surge-of-funds-after-george-floyd-protests-face-new-challenges#:~:text=In%202020%2C%20as%20racial%20justice,much%20as%20the%20previous%20year.>
- ²² <https://www.cnn.com/2023/03/21/us/bail-reform-bail-charities-invs/index.html>
- ²³ *Id.*
- ²⁴ <https://www.kxan.com/news/crime/what-we-know-about-the-suspect-in-tuesdays-shooting-spree-in-austin-san-antonio/>
- ²⁵ <https://cbsaustin.com/news/local/body-cam-video-shows-police-encounter-with-austin-shooting-spree-suspect>
- ²⁶ <https://www.foxnews.com/politics/soros-nonprofit-donated-1m-group-that-previously-bailed-out-suspect-charged-deadly-texas-shootings>
- ²⁷ <https://www.ksat.com/news/ksat-investigates/2024/02/07/nearly-30-of-bexar-county-defendants-bailed-out-by-texas-organizing-project-rearrested-in-same-case/>
- ²⁸ *Id.*
- ²⁹ <https://abcnews.go.com/Politics/georgia-governor-signs-controversial-bail-fund-restrictions-expands/story?id=108744778#:~:text=The%20bill%20comes%20amid%20ongoing,called%20%22Cop%20City%22%20protests.&text=A%20controversial%20Republican%20backed%20bill,law%20by%20Gov.%20Brian%20Kemp.>
- ³⁰ <https://www.indystar.com/story/news/local/2023/08/10/the-bail-project-loses-lawsuit-appeal-law-limiting-nonprofit-still-in-effect/70566318007/>

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- ³¹ https://www.wdrb.com/news/politics/controversial-kentucky-crime-bill-touted-at-gop-ceremony/article_baad8596-fb3f-11ee-9bb5-dfabe9ad825d.html
- ³² <https://bailproject.org/policy/turning-a-blind-eye-to-the-bail-bond-industry/#:~:text=By%20posting%20free%20bail%20assistance,own%20money%20on%20the%20line.>
- ³³ <https://www.cnn.com/2023/03/21/us/bail-reform-bail-charities-invs/index.html>
- ³⁴ <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2912&context=hlr> (p. 1321) (internal footnotes omitted).
- ³⁵ <https://www.txcourts.gov/media/1455397/bail-report-fy-2022.pdf> (p. 10).
- ³⁶ <https://www.txcourts.gov/media/1457571/bail-report-2023.pdf> (p. 11).
- ³⁷ <https://www.txcourts.gov/media/1457571/bail-report-2023.pdf> (p. 11).
- ³⁸ <https://www.txcourts.gov/media/1455397/bail-report-fy-2022.pdf> (p. 10).
- ³⁹ <https://www.ksat.com/news/ksat-investigates/2024/02/07/nearly-30-of-bexar-county-defendants-bailed-out-by-texas-organizing-project-rearrested-in-same-case/>