IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Barred Business, John Cole Vodicka, and Steven Williams,

Plaintiffs,

v.

Brian Kemp, Governor of Georgia; Christopher M. Carr, Attorney General of Georgia; Keith E. Gammage, Solicitor General for Fulton County; and Will Fleenor, Solicitor General for Athens-Clarke County,

Defendants.

Case No.: _____

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND EXPEDITED PRELIMINARY INJUNCTION

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If not enjoined, Georgia Senate Bill 63 ("S.B. 63") will prohibit Plaintiffs from continuing the constitutionally protected work that charitable bail funds have been doing for over 100 years: organizing to free people detained solely because they cannot afford bail while simultaneously expressing a message in opposition to unjust pretrial detention. Plaintiffs here are a nonprofit organization and individuals who continue that long legacy, making cash bail payments to free impoverished people from detention, and, in doing so, engage with like-minded people toward a common cause; express opposition to poverty-based incarceration; promote a vision of racial equality; and live out the beliefs of their religious faith. Plaintiffs also often provide support to individuals that goes well beyond posting bail—and well beyond anything offered by for-profit bail bond companies—including connecting them to housing, employment, and other wraparound services, and helping ensure they make their court appearances.

Section 4 of S.B. 63 imposes what appear to be the most severe restrictions on charitable bail funds in the nation. They would largely criminalize charitable bail fund activity in Georgia. If allowed to go into effect on July 1, Section 4 will severely restrict the ability of Plaintiffs and others similarly situated to advocate and organize in opposition to poverty-based detention and in support of their neighbors' freedom.

The first restriction—the "three-cash-bail limit"—makes it a crime for any individual, group, or organization to post more than "three cash bonds . . . per year . . . in any jurisdiction." For-profit bonding companies, on the other hand, may seemingly provide an unlimited number of surety bonds. There is no rational, much less substantial, government interest in allowing unlimited for-profit *surety* bonds—backed by a business's promise to pay the full amount potentially in the future—while arbitrarily restricting the number of charitable *cash* bonds where payment is tendered in full.

The second restriction—the "surety licensing requirement"—requires every individual, group, or organization "that purports to be a charitable bail fund with the purpose of soliciting donations to use for securing the release of accused persons" to meet the requirements of surety bond companies, and imposes criminal penalties for failing to do so. Because bonding companies offer courts only a promise to pay in full if the bond is forfeited, state law mandates they fulfill certain requirements, such as maintaining a substantial "cash escrow account or other form of collateral." Ga. Code Ann. § 17-6-15(b)(1). State law also provides sheriffs unlimited discretion to impose unspecified "[a]dditional criteria and requirements" on surety bonding companies, *id.*, and even deny applications that satisfy all stated requirements, *A.A.A. Always Open Bail Bonds, Inc. v. DeKalb Cnty.*, 129 F. App'x 522, 524 (11th Cir. 2005). S.B. 63 illogically imposes these burdensome regulations on charitable bail

funds, even though they tender payment in full and therefore pose no financial risk to the government.

These restrictions infringe Plaintiffs' First Amendment rights of speech, association, and, in the case of Plaintiffs Vodicka and Williams, free exercise of religion. They impose these burdens without advancing any substantial government interest, much less doing so in a narrowly tailored way. Defendants cannot satisfy their burden to prove otherwise. And to make matters worse, the law's incoherent provisions impose criminal penalties on Plaintiffs and others similarly situated without providing constitutionally adequate clarity of what they are allowed, and not allowed, to do.[1]

This Court's swift action is needed. Without injunctive relief, Plaintiffs will be forced to cease their constitutionally protected charitable, advocacy, associative, and religious efforts by July 1 or face criminal penalties. To avoid this outcome and maintain the status quo, the Court should grant Plaintiffs' motion and enjoin enforcement of Section 4.

[1] Section 4's lack of legitimate purpose violates the Equal Protection Clause and the Excessive Bail Clause as well. Because, however, Section 4's criminalization of Plaintiffs' First Amendment activity and unacceptably vague provisions provide more than enough legal basis to entitle Plaintiffs to temporary injunctive relief, Plaintiffs do not rely on Section 4's other constitutional defects for the relief sought here.

BACKGROUND

I. Bail in Georgia.

Under Georgia law, a judge may order a pretrial detainee to be released upon the payment of a specified amount of bail. Ga. Code Ann. § 17-6-1(b)(1). There are two types of bail relevant to this case: cash and surety.

Cash bail involves release of the arrestee upon "depositing cash in the amount of the bond so required with the appropriate person, official, or other depository." Ga. Code Ann. § 17-6-4(a). Once deposited, the government immediately receives the entire bail amount. There is currently no limit on who makes the payment or how many payments may be made by any given person. *Id.*

Alternatively, an arrestee may secure a surety bond from a for-profit bonding company. Ga. Code Ann. § 17-6-15(b)(1). A surety bond constitutes a promise to pay the full amount *if* the court orders it forfeited, and bond companies must therefore meet a number of demanding requirements. For example, anybody engaged in professional bonding must be a resident of Georgia for at least a year, be "a person of good moral character," have no felony convictions, undergo background checks, and "remain[] in good standing" with respect to all applicable laws and rules. Ga. Code Ann. §§ 17-6-50(b), 17-6-15(b)(1)(D). Bonding companies must also maintain a substantial "cash escrow account or other form of collateral"; for companies new to a county, the sheriff

has discretion to determine the amount and conditions, while existing companies may be required to maintain an account of up to $1 million. Ga. Code Ann. § 17-6-15(b)(1)(E). And each company must have "application, approval, and reporting procedures . . . deemed appropriate by the sheriff," and meet whatever "[a]dditional criteria and requirements" are "determined at the discretion of the sheriff." Ga. Code Ann. § 17-6-15(b)(1)(F), (H). Moreover, even if an applicant complies with these requirements, "the sheriff has discretion to decide whether a candidate is acceptable." *A.A.A. Always Open Bail Bonds,* 129 F. App'x at 524.

II. Charitable Bail Funds and Section 4 of S.B. 63.

Charitable bail funds date back to the 1920s, when the ACLU first created one to free individuals arrested under sedition laws. Compl. ¶ 78. Today, there are hundreds of charitable bail funds throughout the country; some are standalone organizations, others are housed within another organization, and still others are unincorporated groups of individuals. These charitable bail funds raise funds to free impoverished people from pretrial detention; their interest "stems not from personal connections to that defendant, but rather from broader beliefs regarding the overuse of pretrial detention among particular neighborhoods, racial or socioeconomic groups, or political organizations." Jocelyn Simonson, *Bail Nullification*, 115 Mich. L. Rev. 585, 600 (2017); *see also* Compl. ¶¶ 77-92.

Plaintiff Barred Business is a Georgia nonprofit organization. Compl. ¶ 12. It believes in building opportunity for people who have prior involvement with the criminal legal system, and it opposes mass incarceration and the money bail system. *Id.* ¶ 13. As part of its mission, it raises and uses funds to pay cash bail for people stuck in pretrial detention because of their poverty. *Id.* ¶ 21.

One of Barred Business's programs is the Black Mamas Bail Out campaign, which works to "free as many Black mamas and caregivers as [they] can so they can spend Mother's Day with their families and in their communities." *Id.* ¶ 15. Barred Business solicits donations for this campaign, builds relationships with the mothers, and provides them with wraparound support services after their release. *Id.* ¶¶ 16-17, 22. Barred Business welcomes the mothers as they exit detention, sponsors a Mother's Day brunch for them, and connects them with previously bailed out women for support. *Id.* ¶¶ 15-20.

Plaintiffs Vodicka and Williams are members of the Oconee Street United Methodist Church in Athens, Georgia, and since 2021 have coordinated and operated a charitable bail fund administered by the Church's Justice & Outreach Committee. *Id.* ¶¶ 23-24, 37. The fund prioritizes people with misdemeanor charges who have low bail amounts but cannot afford to pay even small amounts of money. *Id.* ¶ 25. For Vodicka and Williams, paying bail to

free impoverished individuals is a critical exercise of their Christian faith. *Id.* ¶¶ 33-35, 40.

Enforced by criminal penalties, Section 4 of S.B. 63 mandates that:

> No more than three cash bonds may be posted per year by any individual, corporation, organization, charity, nonprofit corporation, or group in any jurisdiction. Every individual, corporation, organization, charity, nonprofit corporation, or group that purports to be a charitable bail fund with the purpose of soliciting donations to use for securing the release of accused persons shall be required to submit to the same requirements as any professional surety company, including, without limitation, the requirements set forth in . . . Code Sections [17-6-15(1)], 17-6-50, 17-6-50.1, and 17-6-51.

Without this Court's intervention, S.B. 63 will go into effect on July 1, causing substantial harm to Plaintiffs. Both the three-cash-bail limit and the surety-company requirements will severely restrict Plaintiffs' ability to continue their charitable bail efforts. *See* Compl. ¶¶ 132-137.

STANDARD OF REVIEW

A plaintiff moving for a preliminary injunction or temporary restraining order "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In considering a preliminary injunction, courts "must balance the competing

claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 24 (cleaned up).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

A. Section 4 violates the First Amendment.

The First Amendment provides that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ." U.S. Const. amend. I. Section 4 violates Plaintiffs' freedom of speech by preventing them from soliciting donations or paying cash bail as an expression of their beliefs and mission. It infringes the freedom of association by preventing Plaintiffs from working together with various staff, volunteers, and community members to engage in charitable acts and to express their views on systems of incarceration. And it infringes Plaintiffs Vodicka and Williams's ability to freely exercise their religious faith, from which their practice of paying cash bail to free the poor stems.

Once a plaintiff demonstrates that a law implicates First Amendment rights, the burden shifts to the government—even at the preliminary injunction stage—to demonstrate that the law passes constitutional scrutiny. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). Defendants are unlikely to make this showing. Section 4 is irrational, imposing pointless burdens unconnected

to any legitimate government interest, and thus fails any level of First Amendment scrutiny.

1) Section 4 impairs Plaintiffs' speech and expressive conduct.

Each of Section 4's requirements implicates Plaintiffs' speech rights. The three-cash-bail limit restricts Plaintiffs' expressive conduct of paying cash bail in opposition to unjust detention and the money bail system. The surety requirements, meanwhile, restrict Plaintiffs' right to solicit donations for charitable bail by imposing criminally enforced regulatory requirements on any person, group, or entity that "purports to be a charitable bail fund with the purpose of soliciting donations to use for securing the release of accused persons." And because those requirements allow sheriffs unfettered discretion to approve or deny a surety application, the law acts as an impermissible prior restraint on speech.

i. The three-cash-bail limit, as applied to Plaintiffs, severely restricts expressive conduct.

When Plaintiffs pay cash bail on behalf of someone incarcerated due to their poverty, they do so not only to secure the release of one individual, but to express their position on an issue of public concern: the injustice of poverty-based pretrial detention. The Free Speech Clause "affords protection to symbolic or expressive conduct as well as to actual speech." *Virginia v. Black*, 538 U.S. 343, 358 (2003); *see, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989)

(protecting flag-burning); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (wearing a black armband); *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254-55 (11th Cir. 2021) (donating money to charitable causes). Conduct can be expressive even without "a narrow, succinctly articulable message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (considering St. Patrick's Day parade).

To determine whether conduct is expressive enough to merit constitutional protection, the Eleventh Circuit applies a two-part test. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018) (*FNB I*). The court asks (1) "whether '[a]n intent to convey a particularized message was present,'" and (2) "whether 'in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.'" *Id.* (quoting *Spence*, 418 U.S. at 410-11). The question is "whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004).

Plaintiffs' payment of cash bail satisfies that two-part test. First, Plaintiffs intend to convey a message when they pay cash bail. This is plainly demonstrated by specific bailout campaigns. For instance, Barred Business's Black Mamas Bail Out aims not only to bail out Black mothers, but also "to

bring attention to the more than half-million people in jail who have not been convicted of any crime, but don't have the money to post bail." Compl. ¶ 15.

Second, a reasonable observer would interpret Plaintiffs' payment of cash bail as expressing a message. When Plaintiffs go to the jail to bail someone out, they wait around—sometimes for hours—until the person is released so that they can welcome the person with open arms and offer them assistance. *See id.* ¶¶ 17, 29. The people most closely observing Plaintiffs' actions—the court and jail staff—understand that they are not related or personally tied to the individuals they bail out, and instead that their actions are an expression of their mission and beliefs. *Id.* ¶¶ 27-28. And specific campaigns like the Black Mamas Bail Out leave no doubt that a message is intended: Black mothers need to come home. The context surrounding Plaintiffs' bailouts further underscores their expressive purpose—like, for example, when Barred Business hosts a brunch for released mothers and community members to gather and connect around shared causes. Plaintiffs' act of bailing someone out anchors a chain of expressive elements in opposition to poverty-based detention, which includes communications to encourage both donations and public advocacy.

"[H]istory . . . is instructive" as to whether conduct is expressive. *FNB I*, 901 F.3d at 1243. From fighting anti-communist panic to defending the right to protest for civil rights, charitable bail funds have long been expressive

engines opposes injustice. Compl. ¶¶ 78-91. Indeed, "[f]or as long as there have been jail cells and bondage in America, families and communities have pooled their resources together to try to purchase the freedom of their loved ones." Robin Steinberg, Lillian Kalish & Ezra Ritchin, *Freedom Should Be Free: A Brief History of Bail Funds in the United States*, 2 UCLA Crim. Just. L. Rev. 79, 80 (2018). This history further underscores the expressive nature of bail funds' actions. *See FNB I*, 901 F.3d at 1243.[2]

Further underscoring the expressive nature of Plaintiffs' work is the Eleventh Circuit's recognition that contributing and spending money for charitable purposes is protected expressive conduct. *Coral Ridge Ministries Media, Inc.*, 6 F.4th at 1254-55 ("[W]e have no problem finding that Amazon engages in expressive conduct when it decides which charities to support.").

Because the limits on charitable cash bail restrict Plaintiffs' expressive conduct, it is, at minimum, subject to the intermediate scrutiny test from

[2] In a recent divided decision, the Seventh Circuit found that one charitable bail fund's actions did not "inherently express" a particular message. *See The Bail Project, Inc. v. Comm'r, Indiana Dep't of Ins.*, 76 F.4th 569, 573 (7th Cir. 2023). But Plaintiffs' charitable bail work here has a number of expressive elements missing from the record in that case. Moreover, Seventh Circuit precedent differs substantially from the law of this Circuit. *Compare Tagami v. City of Chicago*, 875 F.3d 375, 378 (7th Cir. 2017) (holding only conduct that "comprehensively communicate[s] its own message without additional speech," is protected) *with FNB I*, 901 F.3d at 1244 ("Although [additional] speech cannot create expressive conduct, context still matters.").

United States v. O'Brien, 391 U.S. 367 (1968). As explained below, the law fails any level of First Amendment scrutiny. *See infra* Part I.A.4.

ii. The surety licensing requirement is a content-based restriction on protected speech.

"Above all else, the First Amendment means that government generally has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 618 (2020) (plurality opinion) (internal quotation marks omitted). Section 4 restricts content-based speech by singling out entities that "purport[] to be a charitable bail fund with the purpose of soliciting donations to use for securing the release of accused persons" and mandating that they meet the strict regulatory requirements that apply to for-profit surety companies.

Soliciting donations is a form of protected speech. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442-43 (2015); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) ("[S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes . . . without solicitation the flow of such information and advocacy would likely cease."). That is amply demonstrated by Plaintiffs, who share compelling narratives their bail fund work and generate support from the community, including financial donations, in response. Compl. ¶¶ 22, 35-36.

Section 4 imposes a content-based restriction on that speech because it limits speech based on a "particular subject matter" or its "function or purpose." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Section 4 applies only to speech on a particular subject matter, restricting only requests for charitable donations for one specific cause: paying bail. It does not apply to charitable organizations that solicit funds for other purposes. Indeed, Section 4 is likely viewpoint-based—"an egregious form of content discrimination," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)—because it restricts solicitation in favor of "securing the release of accused persons" but not solicitation in support of charitable causes with differing views on pretrial detention.

iii. The surety licensing requirement is a prior restraint on protected speech.

Among the "requirements" for "professional surety compan[ies]" that Section 4 applies to charitable bail funds is a mandate that the sheriff "approve" the entity. Ga. Code Ann. § 17-6-50(b)(4). To obtain this approval, an entity must meet numerous statutory criteria, along with whatever discretionary "[a]dditional criteria and requirements" the sheriff imposes. Ga. Code Ann. § 17-6-15(b)(1). Even if an entity meets every requirement, the sheriff still retains unfettered discretion over approval. *Id.* § 17-6-15(b)(2); *A.A.A. Always Open Bail Bonds, Inc.*, 129 F. App'x at 524 ("[O.C.G.A. § 17-6-

15] expressly provides for the sheriff to exercise discretion to decide, generally, how many, and specifically, to which, applicants [they] will issue certificates.").

"[A] licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (collecting cases); *see also, e.g.*, *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1221 (11th Cir. 2017). A licensing regime targeting speech will be upheld only if it requires the decisionmaker to apply "neutral criteria," which, if satisfied, will mandate approval. *Lakewood*, 486 U.S. at 760.

Section 4 fails this command. By giving sheriffs unfettered discretion to approve or reject a bail fund's application, Section 4 is materially identical to a law rejected in *Staub v. City of Baxley*, 355 U.S. 313 (1958). In *Staub*, the Supreme Court found that an ordinance requiring a license before soliciting organizational memberships was "an unconstitutional censorship or prior restraint" because the city had total discretion over whether to grant a license, even where applicants submitted all required paperwork. *Id.* at 314 n.1, 322. The same is true here.

2) Section 4 impairs Plaintiffs' religious exercise.

For Plaintiffs Vodicka and Williams, paying cash bail is not only an expression of their views on poverty-based detention, but is also an integral part of their religious practice. Section 4 therefore violates their religious

exercise, which is constitutionally protected "whether communicative or not." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523 (2022). The Free Exercise Clause "protect[s] the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'" *Id.* at 524 (quoting *Emp. Div. v. Smith*, 494 U.S. 872, 877 (1990)). The government violates a plaintiff's Free Exercise rights by "burden[ing] his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Id.* at 525 (quoting *Smith*, 494 U.S. at 879-81). Once a plaintiff makes that showing, the restriction is invalid unless the government can satisfy strict scrutiny. *Id.*

Plaintiffs Vodicka and Williams's bail fund work is part of their religious practice, Compl. ¶¶ 33, 40, and Section 4 burdens that practice in a manner that is neither neutral nor generally applicable. First, Section 4 treats Plaintiffs' religiously motivated charitable bail efforts less favorably than the secular practice of selling surety bonds. *See Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (citation omitted) ("[G]overnment regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."). There is no government interest that would justify favoring surety bonds over cash bonds. *See id.* And though the charitable bail fund limits also apply to secular entities, "[i]t is no answer that

a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue." *Id.*

Second, a law is not generally applicable when it contains "a formal system of entirely discretionary exceptions." *Fulton v. City of Philadelphia*, 593 U.S. 522, 536 (2021). Subjecting Plaintiffs' ability to practice their religion to the sheriff's whims is antithetical to the Free Exercise Clause's guarantees.

Because Section 4 is neither neutral nor generally applicable, it triggers strict scrutiny, requiring the government to show it "was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy*, 597 U.S. at 525. As explained below, the State "cannot sustain its burden under any" level of scrutiny, let alone strict scrutiny. *Id.* at 532.

3) Section 4 impairs Plaintiffs' freedom of association.

The Supreme Court has "'long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.'" *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021) (*APF*) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). The freedom of association protects collective action "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *U.S. Jaycees*, 468 U.S. at 622. "[A]ssociations do not have to associate for the 'purpose' of disseminating a certain message in order to be [protected]. An

association must merely engage in expressive activity that could be impaired[.]" *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000).

Plaintiffs' charitable bail efforts are the linchpin for many collective expressive efforts. For example, through soliciting donations for bailouts, hosting bailout events, and organizing volunteers, Barred Business connects with community members to express their shared values. *See, e.g.*, *APF*, 594 U.S. at 606 (recognizing that charitable organizations associate with donors for expressive purposes). For Plaintiffs Vodicka and Williams, they associate with one another and others to facilitate expressive and religious activity around money bail and unjust incarceration.

By limiting the payment of cash bail and imposing burdensome licensing obligations on any individuals or group "purport[ing] to be a charitable bail fund," Section 4 disrupts the expressive activity that Plaintiffs associate with others to carry out. "As [courts] give deference to an association's assertions regarding the nature of its expression, [courts] must also give deference to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653. For example, no longer being able to operate its bailout campaigns will infringe on Barred Business's relationship-building activities with the individuals it has bailed out and with the broader community. For Plaintiffs Vodicka and Williams, they will be prohibited from associating between themselves and

others for the purpose of bailing impoverished people out of jail and soliciting funds in order to do so.

Section 4 poses an additional associational burden on Barred Business. Surety licensing rules prohibit entities from using people with criminal histories as bondspeople, Ga. Code Ann. § 17-6-50(b), which is entirely at odds with Barred Business's DNA; it was founded by leaders with prior involvement with the criminal legal system, and its mission is to expand freedom and opportunity for other justice-impacted individuals. Compl. ¶¶ 12, 117-18. Centering justice-impacted people is vital to its mission and effectiveness. Forcing an organization to implicitly endorse an idea it vehemently disagrees with—here, that people with criminal records should be excluded from opportunity—is prohibited by the First Amendment. *See Dale*, 530 U.S. at 653 (finding that allowing the plaintiff, who is gay, to serve as a scoutmaster would "interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs"). Furthermore, if nonprofits have a constitutional right to discriminate in some instances, *see id.* at 648, then surely they also have a right *not* to discriminate when inclusion furthers their mission.

Plaintiffs' showing of any interference with their right to associate shifts the burden to the government to explain how its restrictions are narrowly tailored to an important or compelling governmental interest. *APF*, 594 U.S. at 611, 617. Defendants cannot satisfy that or any other level of scrutiny.

4) Section 4 fails any level of First Amendment scrutiny.

As a content-based restriction on speech, and as a non-neutral restriction on religious practice, the law is subject to strict scrutiny and therefore must be "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163; *see also Kennedy*, 597 U.S. at 525. As a burden on the freedom of association, the law is subject to at least exacting scrutiny. *APF*, 594 U.S. at 607 (plurality); *see also id.* at 620 (Thomas, J., concurring) (arguing for strict scrutiny). At minimum, Section 4 is subject to intermediate scrutiny as a burden on expressive conduct. *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1291 (11th Cir. 2021). The law fails even intermediate scrutiny, let alone strict or exacting scrutiny.

Defendants bear the burden of demonstrating that Section 4 passes judicial scrutiny. *See, e.g.*, *FF Cosms. FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1299 (11th Cir. 2017). Under intermediate scrutiny, Defendants must demonstrate that the restrictions are "narrowly drawn to further a substantial government interest . . . unrelated to the suppression of speech." *Id.* This requires Defendants to prove both that Section 4 furthers a substantial government interest and is narrowly tailored to furthering that interest. *See id.* A plaintiff moving for preliminary injunction "must be deemed likely to prevail unless the Government has shown" that the law is constitutional. *Ashcroft*, 542 U.S. at 666.

There is no substantial government interest furthered by an arbitrary limit on cash bail payments. Nor is there any substantial government interest advanced by subjecting charitable bail funds who solicit donations to licensing requirements that were designed for for-profit surety bonding companies.

Furthermore, Defendants cannot rely on just *any* substantial governmental interest, but must prove that Section 4 furthers the "genuine" purpose of the law, "not [one] hypothesized or invented post hoc in response to litigation." *Kennedy*, 597 U.S. at 543 n.8 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). The legislators who supported Section 4 lacked a clear vision of its purpose, and seemingly misunderstood how the law would work. One of the bill's sponsors argued that Section 4 would lead to a "dramatic decrease" in pretrial detention by enhancing the ability of charitable bail funds to provide bonds. Amanda Hernández, *Bail Clampdowns Don't Match What Research Says About Suspects, Experts Say*, Stateline (Feb. 22, 2024), https://perma.cc/4N78-S9AV. But the law provides *no* additional opportunities for charitable bail funds to bail people out; instead, it imposes only arbitrary restrictions and additional, insurmountable barriers.

And even if Defendants were to identify a compelling or substantial government interest furthered by Section 4, they cannot demonstrate that Section 4 is narrowly tailored to further those interests. Defendants are

unlikely to meet their burden, and thus Plaintiffs are likely to prevail on their First Amendment claims.

B. Section 4's vague provisions violate the Due Process Clause.

A law is unconstitutionally vague when "it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). "[S]tandards of permissible statutory vagueness are strict in the area of free expression," *NAACP v. Button*, 371 U.S. 415, 432 (1963), where lack of notice and the prospect of discriminatory enforcement can chill protected speech, *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012). Particularly when a law "abuts upon sensitive areas of basic First Amendment freedoms," the Due Process Clause requires statutes to "provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Section 4 is both sweeping and indecipherable. The surety licensing requirement applies to any individual or entity "that purports to be a charitable bail fund with the purpose of soliciting donations to use for securing the release of accused persons." This raises more questions than answers. Does every person who solicits donations on behalf of a charitable bail fund need to register as a professional bondsperson, even if they do not themselves pay bond? Do bail funds have to register in every county where they solicit donations? What if a group of people organizes to make charitable bail

payments, but never formally "purports" to be a bail fund? By asking law enforcement to decide whether a person, group, or entity "purports" to be a bail fund, the statute fails to provide enough clarity to satisfy due process. *See City of Chicago v. Morales*, 527 U.S. 41, 62 (1999) (striking down law requiring law enforcement to decide a person's "apparent purpose" as "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene").

Similarly unclear is the cash bond limit, which prohibits any individual or "group" from posting more than three cash bonds "per year . . . in any jurisdiction." The term "jurisdiction" is undefined. And the language "any jurisdiction," instead of "per" jurisdiction, appears to count payments made *anywhere* towards its limit—whether or not that's what was intended. Further, the law fails to define "group," potentially subjecting any like-minded individuals who pay charitable bail in tandem to criminal penalties. *See Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.")

Section 4's confusing language is especially problematic because it imposes criminal penalties, rather than civil ones, while lacking any specified mens rea element. *See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*,

455 U.S. 489, 498-99 (1982) (noting that vagueness concerns are mitigated for civil statutes and those with a scienter requirement). The Due Process Clause prohibits Section 4's inscrutable language.

II. The Remaining Preliminary Injunction Factors Tip Decisively in Favor of Granting a Preliminary Injunction.

If Section 4 goes into effect on July 1, it will cause immediate and irreparable harm to Plaintiffs and their charitable bail activities. Plaintiffs have already each made three cash bail payments in 2024, Compl. ¶¶ 32, 42, 132, 136, and risk criminal penalties if they make another cash bail payment this year. Further, because Plaintiffs are not, and may never become, licensed surety companies or bondspeople, Section 4 will force Plaintiffs to immediately cease "purport[ing] to be a charitable bail fund" and "soliciting donations to use for securing the release of accused persons." Section 4 has already caused The Bail Project, a national bail fund, to stop its operations in Georgia. *See* R.J. Rico, *National Bail Fund Exits Georgia Over New Law That Expands Cash Bail and Limits Groups That Help*, Associated Press (June 10, 2024), https://perma.cc/KX94-Y4J5. It will not be the last.

Laws "that violate the First Amendment are 'per se irreparable injuries.'" *LaCroix v. Town of Fort Myers Beach*, 38 F.4th 941, 954-55 (11th Cir. 2022) (internal alterations omitted) (collecting cases). That is because "chilled free speech," due to its "intangible nature, [can]not be compensated for by

monetary damages," *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990), a concern that holds special force where sovereign immunity likely bars any monetary relief, *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013). Here, the harms to Plaintiffs' First Amendment rights are not insubstantial annoyances but existential threats to their advocacy and expression. The irreparable injury to Plaintiffs will also irreparably harm the individuals for whom Plaintiffs are unable to post bail on account of this law—people presumed innocent and judicially authorized for release but held in pretrial detention simply for lacking access to money.

The remaining preliminary injunction factors also favor granting this motion. "[T]he third and fourth requirements—'damage to the opposing party' and 'the public interest'—can be consolidated because neither the government nor the public has any legitimate interest in enforcing an unconstitutional [law]." *LaCroix*, 38 F.4th at 955. Instead, "the public interest is served when constitutional rights are protected." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019).

CONCLUSION

This Court should preserve the status quo and grant Plaintiffs' motion for a preliminary injunction and/or temporary restraining order.

Respectfully submitted this 22nd day of June, 2024,

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**Application for admission pro hac vice forthcoming*

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1D, I hereby certify that this brief has been prepared in Century Schoolbook, 13-point font, one of the font and point selections approved by this Court in Local Rule 5.1C.

/s/ Cory Isaacson
Cory Isaacson

CERTIFICATE OF SERVICE

I hereby certify that, on June 22, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. There is currently no Counsel of Record for Defendants; I certify that I will serve the foregoing on Defendants along with the Complaint.

/s/ Cory Isaacson
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