

**TO: SENATE COMMITTEE ON JUDICIARY**

**FROM:**

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**Judge Brenda Stoss**, 300 West Ash, PO BOX 736, Salina, KS 67402.

**Kansas attorney members of the Kansas Pretrial Justice Task Force**

**DATE: MARCH 18, 2024**

**RE: HB 2755**

Chairperson Warren, members of the committee, thank you for the opportunity to submit written testimony on HB 2755. In submitting these comments, we are speaking solely in our role as members of and on behalf of the Pretrial Justice Task Force appointed by the Kansas Supreme Court in November 2018. We released a thorough report on Pretrial Justice in Kansas in November 2020. It was the result of two years of monthly meetings with task force members and community members including law enforcement and the bonding industry and has been referred to around the country as one of the most comprehensive reports done regarding the state of pretrial justice. The Pretrial Justice Task Force can provide a copy for each Committee member, if requested. But the full report can be found at [PJTFRpttoKSsupremecourt.pdf \(kscourts.org\)](https://kscourts.org/PJTFRpttoKSsupremecourt.pdf) .

During testimony on HB 2755 before the House, Rep. Carmichael questioned whether this bill addressed any of the concerns raised in the Pretrial Justice Report that was commissioned by the Kansas Supreme Court. Respectfully, the answer was that it did not. Hearing that, on behalf of the Pretrial Justice Task Force, we thought it may be beneficial for the members of this committee to understand how this bill relates to the recommendations of the Pretrial Justice Task Force Report. In summary, it is not in conflict apart from one provision that we will discuss today.

Although HB 2755 has several sections that merit support, setting a mandatory minimum that bonding companies must charge in Kansas and requiring premium financing as outlined in proposed amendments to K.S.A. 22-2809b (new section d) is contrary to the Kansas Constitution's mandatory bail or release provision, is contrary to

the recommendations in the Pretrial Justice Report, and, in essence, constitutes price fixing.

First, let's begin with the fact that over half--about 53%--of the people in our jails in Kansas are there on pretrial detention—meaning they have not been convicted of anything. PRETRIAL JUSTICE TASK FORCE REPORT, P. 5. It has been the primary reason for increases in jail populations over the last 30 years. PRETRIAL JUSTICE TASK FORCE REPORT, P. 16. The vast majority are in jail on nonviolent crimes—property and drugs. Many local communities are starting to examine why there has been such a growth in pretrial detention--to the great expense of the taxpayer--and what can be done short of building more jails. That is why there is so much discussion of drug treatment and mental health treatment dollars to divert people out of our jails and into rehabilitation programs. Studies have shown that pretrial detention results in significant negative impacts including financial impact on the detainee's family, lack of ability to consult counsel, loss of benefits, and much more. PRETRIAL JUSTICE TASK FORCE REPORT, PP. 6-8.

And Americans overwhelmingly report that they favor pretrial release, believing strongly in the presumption of innocence. PRETRIAL JUSTICE TASK FORCE REPORT, P. 5. So what happens when someone is arrested?

When a person is arrested in Kansas for a felony, and some misdemeanors, they are brought before a judge who must determine what the conditions of their release will be. Because we have a system in this country of innocence until proven guilty, and a Kansas Constitution that provides a constitutional right to release, the judge starts with the assumption that the person will be released pending trial with no conditions, money bond or otherwise. Both the Eighth and Fourteenth Amendments to the U.S. Constitution and Section 9 of the KS Constitution Bill of Rights call for this premise. The State must establish that the person is a flight risk or a danger to the community before **any** conditions of release can be imposed.

If the person is deemed to be a flight risk, a judge may set a money bond. That means, to be released the person must post some money with the court. The idea being, if they risk losing money if they don't appear in court, they will be more likely to appear. So if a bond is set at \$50,000 and they do not have \$50,000, they may call a commercial bail agent to "post" the bond for them for a fee. That fee has traditionally been 10% in Kansas and elsewhere. So the bonding agent will charge the arrestee \$5,000 and then file an agreement or promise with the court that if the person does not appear, the bonding agency will pay the court \$50,000, though courts often set aside any bond forfeiture ordered if the bonding agency finds and apprehends the person. The \$5,000 is a fee for service and the arrestee-or more likely their family members who came to their aid, is nonrefundable. If the person doesn't appear they will owe the bonding company the whole \$50,000. Money bond has nothing to do with dangerousness and relates only to the risk that the person will not show up for court. And as our report notes, most people show up in court when required. So money bond is limited to situations where the judge believes the person's risk of flight failing to appear is high. Bond itself is a

condition of release, not a method of detention. It is unconstitutional for a judge to set a money bond at an amount that the judge knows the arrestee will be unable to pay with the intention of keeping the arrestee detained. In other words, money is not used as a means to detain, as it appears that the bonding companies that submitted letters in support are suggesting.

Another reason we know that money bond only addresses the risk of flight is because the only time the bonding company would have to pay that underlying \$50,000 bond is if the person does not appear in court. See K.S.A. 22-2807(b). If the person commits a new crime or kills someone, the bonding company has no responsibility to pay up on the bond. If money is unconstitutionally used as a means to detain, it simply means poor dangerous people stay in jail and rich dangerous people get out. Dangerousness is addressed by other release conditions unrelated to money, like house arrest monitors, pretrial supervision, drug treatment, mental health evaluation, etc. But our constitution still establishes a right to release, irrespective of dangerousness. PRETRIAL JUSTICE TASK FORCE REPORT, PP. 67-70—*recommending the legislature amend the Kansas Constitution to allow courts to address dangerousness in the detention decision—a recommendation opposed by the Bail Agents Association*; PRETRIAL JUSTICE TASK FORCE REPORT, PP 183-196—*noting states that have amended their state constitutions for this very reason*.

And under the commercial bonding company business model, bonding companies rarely must pay. Two of the largest bonding companies in the state noted during a presentation to the task force that they only have a loss rate of 0.7%, while another reported a loss rate of 3.2%. PRESENTATION TO PRETRIAL JUSTICE TASK FORCE MARCH 8, 2019, BY THREE BONDING COMPANIES. [Supreme Court Ad Hoc Pretrial Justice Task Force - KS Courts](#) Why is that? Obviously, they are good at their job—they get people to court. But also, the delay involved in the court collecting on a bond forfeiture works to their great benefit. Once the person fails to appear and the bond is ordered forfeited (meaning that bonding company would have to pay that \$50,000), the court is required to:

1. Issue a warrant within 14 days for the defendant's arrest; and
2. Enter the warrant in the national crime information center's index within 14 days.

Failure to do these two things requires that the court set aside any bond forfeiture ordered. K.S.A. 22-2807(c)(2).

Assuming those things are done, the State must file a motion for judgment on the bond (which does not always happen) and the bonding company must be given 60 days' notice—although they know the defendant has failed to appear because it is their business to know that. And there is a two-year statute of limitations for entering judgment on the bond, again even though the bonding company is clearly aware that their client has failed to appear. K.S.A. 22-2807(d).

During that time bonding agents are frantically searching for the defendant and if they locate the defendant, they will immediately ask the court to set aside any bond forfeiture, which we understand to be routinely granted. Of course, it is good that they went out and found the defendant, but it really makes the idea of forfeiture of the money less meaningful. It appears to be a lucrative business model, which in our free-market society we cannot fault.

But apparently, this business model is so lucrative, that there are now bonding companies that are willing to post that \$50,000 bond for just \$500. The bonding company and the defendant/obligor are still on the hook for \$50,000 if the defendant fails to appear, but some are willing to take that risk given the incredibly low rate of forfeiture. The free market system at work.

What this bill does is legislatively mandate that bonding companies charge at least 10%. So it fixes the price at 10%. There can be no competition that would give a lower rate to the consumer. It also mandates *premium* financing agreements if a bonding company allows the poster of the bond (obligor) to enter a financing agreement for the 10% bonding fee. Premium financing agreements target the lower-middle class and the poor.

It appears from the testimony of the bonding companies that the targets of this bill are violent criminals that shouldn't be released unless they have lots of money. But in reality, the majority are people that are arrested for felonies are in the throes of addiction or mental illness that possess drugs or steal property. They are our siblings, our children, our grandchildren who come to us when they get in a bind. It is their families that are then faced with coming up with the bond money and must mortgage their home or dip into their retirement income to do it. Our Pretrial Justice Report supports people being released from jail while awaiting trial—because we know most will return and not violate the law in the meantime. According to research cited in our report, the average person cannot come up with even \$400 in a pinch. PRETRIAL JUSTICE TASK FORCE REPORT, P. 82. So the system preys on middle to low-income people and their families. In fact, only two countries in the world, the United States and the Philippines allow commercial bond companies and several states in this country have outlawed them as predatory. PRETRIAL JUSTICE TASK FORCE REPORT, FN. 375, P. 134.

So what this bill does would be like a baker and member of the Kansas Bakers Association (KBA) (if there is such a thing) who charges \$20 for a loaf of bread—the standard price. When this baker is suddenly faced with bakers that are selling bread for \$2 loaf, he sees his profit diminished. So the KBA comes to the legislature and says please pass a bill that requires bakers to charge \$20 for a loaf of bread because we don't think the competition is very reputable, their bread isn't as tasty, and they should not be allowed to undercut our price. And it goes even further, if I can't afford \$20 for my loaf of bread and want to finance that amount with the baker, I can only finance \$10 (which must be by check, credit card, wire transfer or cash) and I have to be physically present to do that—I can't do it over the phone or internet if the poster of the bond

happens to live out of town. By adopting new section (d) to K.S.A. 22-2809b, that is exactly what the legislature is doing for the commercial bonding industry.

Some bonding companies oppose the 10% requirement up front. Those bonding companies are backed by property and assets, meaning that they can cover a forfeiture themselves by way of property or assets in their possession. While these bonding companies still aim to take 10%, they do not require 10% up front. They work with family members who have some of the initial 10% and are willing to pay the remaining amount over time.

To be consistent with the recommendations in the Pretrial Justice Task Force Report, on behalf of the task force, we request that you to delete proposed new section (d) to K.S.A. 22-2809b as proposed in HB 2755 in its entirety and related new section (f)(2)(A)(ii) because it makes it more costly for people to bond out of jail for no legitimate or constitutional reason.