

STATE OF TENNESSEE

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August 4, 2023

Deborah S. Hunt, Clerk  
United States Court of Appeals for the Sixth Circuit  
540 Potter Stewart U.S. Courthouse  
100 East Fifth Street  
Cincinnati, Ohio 45202-3988

**Re: *Jeffery Lichtenstein, et al. v. Tre Hargett, et al.*, No. 22-5028**

Dear Ms. Hunt:

Defendants-Appellees respectfully submit this Rule 28(j) letter concerning the Seventh Circuit's decision yesterday in *The Bail Project, Inc. v. Commissioner, Indiana Department of Insurance*, No. 22-2183, 2023 WL 4944503 (7th Cir. Aug. 3, 2023). *The Bail Project* confirms that the First Amendment does not protect conduct that "does not inherently express any message." *Id.* at \*5.

In that case, The Bail Project insisted that its payment of cash bail constituted expressive conduct because "(1) the organization intends to convey a message through bail payments, and (2) when viewed in context, a reasonable observer would understand its payment as communicative." *Id.* The Seventh Circuit rejected those arguments, which mirror arguments Plaintiffs-Appellants made about their distribution of blank absentee-ballot applications. *See* Opening Br.26-28; Reply Br.6-8. "Without knowledge of The Bail Project's mission and repeat-player status, a reasonable observer would not understand its payment of cash bail at the clerk's office as any message about the bail system." *The Bail Project*, 2023 WL 4944503, at \*5. The actor's "subjective intent is not enough" to transform the action into expressive conduct. *Id.*

Nor does it matter that the “message comes through when coupled with speech explaining” the actor’s “efforts.” *Id.* Just as the district court correctly ruled there was no great likelihood that the distribution of blank absentee-ballot applications would—by itself—be understood to convey the intended message, Appellees’ Br.12-15, the Seventh Circuit identified several alternative ways a reasonable observer might understand the payment of cash bail, *The Bail Project*, 2023 WL 4944503, at \*5. “Because the conduct itself does not convey a message that ‘can be readily ‘understood by those who view[] it,’ the First Amendment does not protect the conduct” the Indiana law regulated. *Id.* (quoting *Tagami v. City of Chicago*, 875 F.3d 375, 378 (7th Cir. 2017) (exposing breasts as part of a political protest was not expressive conduct because it “is not ‘overwhelmingly apparent’ that a woman’s act of baring her breasts in public expresses a political message”)).

The Seventh Circuit’s decision is further confirmation that Plaintiffs-Appellants’ reading of the First Amendment stretches too far.

Respectfully submitted,

/s/ Clark Lassiter Hildabrand

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## CERTIFICATE OF SERVICE

I, Clark Lassiter Hildabrand, counsel for Defendants-Appellees and a member of the Bar of this Court, certify that, on August 4, 2023, a copy of the foregoing Rule 28(j) letter was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Clark Lassiter Hildabrand

Clark Lassiter Hildabrand

Deputy Chief of Staff & Senior Counsel

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