

Oppose SB 294– Don’t Needlessly Incarcerate Thousands of Granite Staters and do so at a Staggering Financial Cost

SB 294 would mandate the incarceration of people charged with any one of 13 offensesⁱ prior to arraignment pretrial based only on unsubstantiated allegations. If the person demands presentation of actual witnesses, the presumption is against release. The legislation would also amend the bail statuteⁱⁱ to mandate the pretrial incarceration of an individual charged with certain offenses who failed to appear three or more times within the previous three years, regardless of the reason for failing to appear (e.g. lack of transportation).ⁱⁱⁱ The legislation also removes a protection against the pretrial incarceration of people simply because they cannot afford their bail. Finally, the legislation would mandate the pretrial incarceration of an individual charged with any offense if they were on release for any offense at the time, including a Class B misdemeanor offense that carries no jail time if convicted.

This legislation will harm public safety. A recent study by Core Correctional Solutions (funded by Arnold Ventures) that reviewed nearly 1.5 million people booked into jail in Kentucky between 2009 – 2018 found that pretrial detention for any time is associated with a higher likelihood of arrest for a new crime before case disposition.^{iv} As the report noted, these findings are consistent with “decades of research on the effects of custodial sanctions” and “the reality is that getting people out of jail sooner rather than later is better.”^v According to the report’s recommendations, “in most instances, jail is likely the most harmful option during the pretrial stage” and resources focused on treatment and support are far more effective than punishment.^{vi} New Hampshire legislators should oppose this legislation and focus on data-driven solutions to harm in our communities.

Current law already allows the court to detain any individual pretrial if they are a flight risk or danger to the community. Under current law, “[i]f a person is charged with any criminal offense ... the court may order preventive detention without bail.”^{vii} Instead of allowing the court to assess the facts in an individual case, this bill would eliminate the court’s discretion and replace it with a mandatory one-size-fits-all approach that will deprive potentially thousands of Granite Staters of their freedom without any evidence that any of the individuals pose a threat to our communities.^{viii} The court is best equipped to determine who is dangerous and they should retain the power to engage in individualized determinations before depriving someone of their freedom.

This legislation is based in fear, not evidence. Despite the fear-based rhetoric and limited anecdotal stories from some law enforcement leaders, proponents of this legislation have proved no data to support their claims that the current bail system makes New Hampshire less safe. In fact, crime rates in NH have decreased over 14 percent since the implementation of bail reform.^{ix} Legislators should not enact laws that would deprive the freedom of potentially thousands of Granite Staters each year without clear evidence that the incarceration is necessary to protect public safety. Without data, this legislation is dangerous.

This legislation creates a new and unnecessary financial burden on New Hampshire. During the Senate Judiciary hearing on SB 294, the New Hampshire courts estimated that it would require up to an additional \$1.9 million each year to implement this law, including hiring additional judges and support

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staff.^x And, that figure does not include the unknown incarceration expenses that local jails would incur to house potentially thousands of additional people each year at a cost ranging between \$105 and \$125 a day per person.^{xi} Lawmakers should focus our limited tax dollars on investments that will actually make our communities safer and more just.

This legislation will disproportionately harm Black people. New Hampshire's criminal laws are enforced with a staggering racial bias. For example, in 2020 Black people were 3.29 times more likely to be arrested compared with white people.^{xii} For many low-level discretionary offenses the disparities were even more troubling, including 4.8 times for marijuana possession (despite both groups using marijuana at roughly the same rate^{xiii}), 5.9 times for disorderly conduct, and 6.52 times for vagrancy.^{xiv} Because Black people are disproportionately arrested, they will also be disproportionately incarcerated under this legislation's mandatory incarceration regime. In the midst of a national reckoning around systemic racism and police violence, it is unconscionable that legislators would expand the already disproportionate incarceration of Black people in New Hampshire.

This legislation ignores the work of the bail commission. For two years a diverse group of stakeholders, including prosecutors, judges, legislators, jail superintendents, and civil liberties advocates, met to rethink New Hampshire's bail system. The Commission's recommendations were subsequently passed in 2019 and 2020, resulting in a system that carefully balances the need to protect individual liberty while ensuring the safety of our communities. This legislation reflects none of the recommendations from the Commission and would roll back reforms that reduced unnecessary incarceration and saved the state millions of dollars without jeopardizing public safety.

This legislation will over-incarcerate individuals pretrial. Because this legislation too often determines who remains free pretrial by crime type and not individualized findings, this legislation will incarcerate those who are not dangerous; those who are not a risk of flight; those who will be found not guilty; and those who will have charges dismissed.

This legislation raises serious constitutional concerns. The U.S. Supreme Court has made clear that individuals cannot be detained pretrial without bail unless there is a basis of dangerousness, and that dangerousness must be proven by "clear and convincing evidence."^{xv} After an initial hearing in which the prosecution may prevail with calling actual witnesses, this bill instead presumes dangerousness based exclusively on the charge against a person. In addition, in certain cases using a presumption against the defendant, the legislation mandates the incarceration of individuals pretrial unless the individual proves a negative – that they are not dangerous. Putting the burden of disproving dangerousness on the defendant and creating a presumption of pretrial detention raises constitutional concerns.

This legislation flips innocent until proven guilty on its head. This legislation in effect presumes guilt by mandating the detention of individuals based merely on the offense they were charged with, which we know in New Hampshire is sometimes arbitrarily determined and later reduced after the prosecutor reviews the case file. To deny the liberty of someone who is presumed innocent, the evidentiary standard should be high and the burden of meeting it should be on the government. This legislation fails to meet this basic test.

Pretrial detention has a devastating human toll. Pretrial detention, even for a short period of time, increases the likelihood of innocent people pleading guilty to a crime, loss of employment, income, and housing, and traumatic family disruption. This legislation would subject potentially thousands of Granite Staters to these devastating collateral harms.

This legislation would result in the pretrial incarceration of people whose underlying charge does not carry jail time if convicted. This bill specifically allows for pretrial detention for individuals charged only with a class B misdemeanor. The definition of a class B misdemeanor is an offense that carries no jail time. This bill risks imposing a harsher penalty on someone presumed innocent than allowed under the law if that person is subsequently found guilty. This makes no sense.

This legislation mandates pretrial incarceration for failure to appear, regardless of the reason. Under the legislation, individuals shall be incarcerated pretrial if they have failed to appear three or more times in the previous three years or twice in the present case. This legislation ignores the fact that four of the five top reasons that individuals miss their court date have nothing to do with the case or public safety. They are: child care, transportation, employment requirements, or simply forgot.^{xvi} In many cases FTAs could be reduced by simply embracing reminder models that have been effectively deployed in other states, including text and call reminders.^{xvii} These models have reduced FTAs and saved states hundreds of thousands of dollars in unneeded jail and warrant expenses.^{xviii} New Hampshire should avoid this one-size-fits-all approach that risks needlessly re-filling our jails with pretrial detainees.

This legislation expands the criminalization of poverty. In 2018 a bipartisan group of New Hampshire legislators took a major step toward ending the practice of incarcerating individuals simply because they cannot afford their bail. Under current law, judges must consider an individual's income and ability to pay when setting bail. The change was a win-win – it created a process to ensure that people could be detained if they posed a danger to their community, but also protected people from being detained simply because they could not afford their bail. SB 294 would partially roll back this important reform and allow for the incarceration of people simply because they cannot afford their bail. New Hampshire must ensure that its justice system works for all, regardless of their wealth.

Oppose SB 294 - Keep Bail Decisions in the Hands of the Court

ⁱ The offenses are: homicide under RSA 630:1; first degree assault under RSA 631:1; second degree assault under RSA 631:2; domestic violence under RSA 631:2-b; aggravated felonious sexual assault under RSA 632-A:2; felonious sexual assault under RSA 632-A:3; kidnapping under RSA 633:1; stalking under RSA 633:3-a; trafficking in persons under RSA 633:7; robbery under RSA 636:1, III; possession, manufacture, or distribution of child sexual abuse images under RSA 649-A; computer pornography and child exploitation under RSA 649-B; or felonious use of firearms under RSA 650-A:1.

ⁱⁱ RSA 597:2.

ⁱⁱⁱ Current law states that a person can be incarcerated pretrial if they failed to appear three or more times within the previous five years.

^{iv} The Hidden Costs of Pretrial Detention Revisited, Core Correctional Solutions, Mar. 21, 2022, *available at* <https://craftmediabucket.s3.amazonaws.com/uploads/HiddenCosts.pdf>.

^v *Id.* (“These results are largely consistent with those found in previous analyses of data from Kentucky, where no “deterrent effect” of pretrial detention was observed on pretrial outcomes. In addition, that no deterrent effects were revealed is also consistent with decades of research on the effects of custodial sanctions (e.g., incarceration in either jail or prison) on outcomes like recidivism. In fact, the current analyses show that, at least with respect to rearrest during the pretrial period, longer stints in pretrial detention actually did more harm than good in terms of rearrest rates. [¶] The key takeaway from these analyses is that incarcerating people prior to their trial does not result in better pretrial outcomes in terms of failure to appear or rearrest. Indeed, there is no observable “deterrent effect” of pretrial detention, and in fact there is a consistent “criminogenic effect” of pretrial detention on rearrest. This means that the costly option of incarcerating defendants prior to trial is not being translated into a public benefit of an increase in public safety. [¶] It is equally important to note that there is no magic amount of time

spent in pretrial detention that will result in a consistent public benefit (i.e, the “three day rule” can be safely abandoned)—the reality is that getting people out of jail sooner rather than later is better.”)

^{vi} *Id.*

^{vii} See RSA 597:2(III)(a) (“If a person is charged with any criminal offense, an offense listed in RSA 173-B:1, I, or a violation of a protective order under RSA 458:16, III, or after arraignment, is charged with a violation of a protective order issued under RSA 173-B, the court may order preventive detention without bail”)

^{viii} Kevin Landrigan, *Bail reform change clears House committee*, Union Leader, Oct 5, 2021 available at https://www.unionleader.com/news/politics/state/bail-reform-change-clears-house-committee/article_af58860b-e7cc-5b8e-ac43-c474324ed6b1.html.

^{ix} Group A Crimes per 100,000 population have substantially decreased annually since bail reform in 2018, from 4,558.4 per 100,000 in 2018, to 4,305.9 per 100,000 in 2019, to 3,901.4 per 100,000 in 2020. See NH Department of Safety, New Hampshire Crime Summary (Public), 2018, 2019, 2020, available at [Beyond 20/20 Perspective - View Reporting Services report \(nh.gov\)](#).

^x See, Testimony of Mary Ann Dempsey (Judicial Branch), Hearing on SB 294, Jan. 18, 2022, available at https://www.gencourt.state.nh.us/bill_status/billinfo.aspx?id=1995&inflect=2.

^{xi} See, e.g. HB 1306-FN, As Introduced, 2022 Session, available at http://www.gencourt.state.nh.us/lsr_search/billText.aspx?id=1700&type=4.

^{xii} New Hampshire’s population is 1,388,992. In 2020, New Hampshire law enforcement arrested 32,780 white people and 2,084 Black people for all offenses. See, Federal Bureau of Investigation, Crime Data Explorer, Arrests in New Hampshire by Offense, All Crimes, 2020, New Hampshire, available at <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/arrest>. White people comprise 93.1 percent of the population and Black people comprise 1.8 percent of the population, available at U.S. Census Bureau, QuickFacts, New Hampshire, available at <https://www.census.gov/quickfacts/fact/table/NH/PST045221>.

^{xiii} Fred Dews, *Charts of the week: Marijuana use by race, Islamist rule in Middle East, climate adaptation savings*, Brookings, Aug. 11, 2017, available at <https://www.brookings.edu/blog/brookings-now/2017/08/11/charts-of-the-week-marijuana-use-by-race/>.

^{xiv} New Hampshire’s population is 1,388,992. In 2020, New Hampshire law enforcement arrested 1,332 white people and 125 Black people for Drug Possession – Marijuana, 709 white people and 81 Black people for Disorderly Conduct, and 103 white people and 13 Black people for Vagrancy. See, Federal Bureau of Investigation, Crime Data Explorer, Arrests in New Hampshire by Offense, All Crimes, 2020, New Hampshire, available at <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/arrest>. White people comprise 93.1 percent of the population and Black people comprise 1.8 percent of the population, available at U.S. Census Bureau, QuickFacts, New Hampshire, available at <https://www.census.gov/quickfacts/concordcitynewhampshire>.

^{xv} *United States v. Salerno*, 481 U.S. 739 (1987).

^{xvi} Tanner Pruitt, et. al, *Bail Reform in New Hampshire*, The Nelson A. Rockefeller Center at Dartmouth College, June 22, 2020, p. 7, available at https://rockefeller.dartmouth.edu/sites/rockefeller.drupalmulti-prod.dartmouth.edu/files/prs_bail_reform_final.pdf.

^{xvii} *Id.* at 11-14.

^{xviii} *Id.*