

Oppose SB 92 – Don’t Needlessly Incarcerate Thousands of Granite Staters and do so at a Staggering Financial Cost

SB 92 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 Finally, the legislation would mandate the pretrial incarceration of an individual charged with certain offenses, including driving or operating while impaired (a fine only offense if convicted), if they were on release pending resolution of certain previous offenses, including the same fine only offense.

This legislation will not make our communities safer. Current law already allows a judge to detain individuals pretrial if they are a flight risk *or danger* to the community.^{iv} This one-size-fits-all legislation will deprive potentially thousands of Granite Staters of their freedom without any evidence that any of the individuals pose a threat to our communities.^v Judges are 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 creates a new and unnecessary financial burden on New Hampshire. It is estimated that New Hampshire courts would require up to an additional \$3 million each year to implement this law, including hiring additional judges and support staff.^{vi} 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.^{vii} Lawmakers should focus our limited tax dollars on investments that will actually make our communities safer and more just.

As COVID-19 again spreads through New Hampshire’s jails, this legislation would unnecessarily add potentially thousands of additional people to those facilities. As the highly transmissible COVID-19 omicron variant spreads, New Hampshire jails, including Rockingham and Strafford, are already facing new outbreaks.^{viii} Research shows that reductions in the United States incarceration rate would have prevented millions of COVID-19 cases and tens of thousands of deaths, both inside jails and prisons and in their surrounding communities.^{ix} That’s because incarcerated people are housed in close quarters, are often in poor health, are unable to engage in social distancing practices recommended by the CDC, and thus are at heightened risk of becoming infected with and dying from COVID-19. People who work in jail facilities are also at heightened risk of contracting COVID-19 and bringing it back into their communities. This bill would be deeply harmful in the best of times, during COVID it can be deadly.

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 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.^x 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 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.”^{xi} 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.^{xii} 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.^{xiii} These models have reduced FTAs and saved states hundreds of thousands of dollars in unneeded jail and warrant expenses.^{xiv} New Hampshire should avoid this one-size-fits-all approach that risks needlessly re-filling our jails with pretrial detainees.

ⁱ The offenses are: homicide under RSA 630; 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} 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”)

^v 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.

^{vi} *Id.*

^{vii} 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.

^{viii} Megan Fernandes & Karen Dandurant, *How Seacoast shelters, nursing homes, jails cope with COVID outbreaks*, Fosters Daily Democrat, De. 22, 2001, available at

<https://www.fosters.com/story/news/local/2021/12/22/seacoast-nh-maine-homeless-shelters-nursing-homes-jails-covid-outbreaks/8981402002/>.

^{ix} Bill Chappell, *Crowded U.S. Jails Drove Millions Of COVID-19 Cases, A New Study Says*, NPR, Sept. 2, 2021, available at <https://www.npr.org/2021/09/02/1033326204/crowded-jails-drove-millions-of-covid-19-cases-a-new-study-says>.

^x 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 \(nh.gov\)](#).

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

^{xii} 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.

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

^{xiv} *Id.*