

## HB 2 – Strengthen Civil Liberties Protections in the New Hampshire Budget

### We urge the Senate to take the following positions in HB 2:

1. Support improvements to New Hampshire's bail system (HB 2 Sections 372-373)
2. Oppose unnecessary funding for prison expansion (HB 2 Sections 48-51)
3. Support notification for immigration checkpoints (HB 2 Sections 441-442)
4. Oppose unnecessary funding for increased policing at the northern border (removed from HB 2 by the House)

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1. **Support improvements to New Hampshire's bail system (HB 2 Sections 372-373):** This section would appropriate \$1 million to develop a real time system to ensure that individuals making bail determinations know whether an individual seeking bail is currently on release for another alleged offense. Unlike some legislative proposals this session to amend the bail statute that rely on a one-size-fits-all approach, which would lead to the needless, mandatory incarceration of thousands of Granite Staters each year, this funding is a targeted approach to ensure that people are not granted bail without the court first knowing whether the individual is on release for another alleged offense.

- **Current law already allows the court to detain any individual pretrial and challenge a release order the state disagrees with.** Under current law, “[i]f a person is charged with any criminal offense ... the court may order preventive detention without bail.”<sup>i</sup> In addition, under current law the court has multiple ways to incarcerate someone pretrial if they violate the terms of their release, including committing a new crime.<sup>ii</sup> And, current law provides the state with the power to challenge a release order they disagree with.<sup>iii</sup> Unfortunately, it appears that these facts were conveniently ignored when some attempted to blame bail reform for a recent horrific crime.<sup>iv</sup> This provision in HB 2 will enable the court to better assess the facts in an individual case without unnecessarily depriving anyone of their liberty.
- **Ensure bail decisions are based in evidence, not fear.** Despite the fear-based rhetoric and incomplete anecdotal stories from some law enforcement leaders, those seeking to roll back bail reform have provided 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 18 percent* since the implementation of bail reform.<sup>v</sup> Legislators have considered multiple bills 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. This provision in HB 2 will help ensure that bail decisions are driven by facts and evidence, not fear.

2. **Oppose unnecessary funding for prison expansion (HB 2 Sections 48-51):** As initially filed, HB 2 included \$50 million for the design and “deposit” on a new men’s prison. The House removed \$40 million of the proposed \$50 million “deposit” on the construction of a new prison. We urge Senators to oppose any effort to reinstate the money.

- **New Hampshire must understand future prison bed needs prior to funding and constructing a new prison.** Since 2014, New Hampshire’s prison population has declined 35 percent<sup>vi</sup> and crime has decreased over 31 percent,<sup>vii</sup> showing that we can safely reduce our reliance on incarceration. In addition, approximately half of the monthly new admissions

to the New Hampshire Department of Corrections are for parole violations,<sup>viii</sup> and many others could be eligible to leave the state prison and transition into community-based supervision if adequate resources were being allocated to halfway houses and other community solutions.

- **New prison construction is not a solution to the current, acute conditions crisis.** While there are serious and horrific physical conditions of confinement that need immediate action, construction of a new facility will do nothing to address these short-term needs. We must not allow the current crisis to serve as justification for the construction of a possibly up to half-a-billion-dollar facility,<sup>ix</sup> and especially without a clear understanding of the future of incarceration in New Hampshire, including how we can continue to reduce our need for incarceration while strengthening community safety.
3. **Support notification for immigration checkpoints (HB 2 Sections 441-442):** This section would require state, county, or municipal law enforcement to provide the public with up to 24 hours' notice when they find out that a federal agency intends to conduct an immigration checkpoint.
- **Notice helps to minimize the intrusion and negative impact of checkpoints on New Hampshire motorists.** During federal immigration checkpoints, federal agents stop and seize thousands of individuals travelling through New Hampshire's roadways without any probable cause or reasonable suspicion that a crime has been committed. This provision would bring immigration checkpoints under similar notice requirements to those already required for sobriety checkpoints. Advanced notice is provided for sobriety checkpoints in part to, as the Attorney General indicates in the NH Law Enforcement Manual, "minimize[] motorist surprise, apprehension and inconvenience."<sup>x</sup> The New Hampshire Supreme Court has looked favorably on advance notice in the context of sobriety checkpoints.<sup>xi</sup> Given the same nature of the intrusion that exists with federal immigration checkpoints, this provision simply requires advanced notice to the public similar to the notice that is provided with respect to sobriety checkpoints. Indeed, this provision is modeled, in part, after the Department of Justice's 2020 Law Enforcement Manual<sup>xii</sup> addressing sobriety checkpoints and the one-day notice that was provided in *State v. Hunt*.<sup>xiii</sup>
  - **Immigration checkpoints have been used to circumvent the New Hampshire Constitution.** The New Hampshire Supreme Court has found that "[e]mploying a trained canine to sniff a person's private vehicle in order to determine whether controlled substances are concealed inside is certainly a search in these terms" and law enforcement must "be able to articulate a reasonable suspicion of criminal activity, albeit after the fact, to employ a dog to sniff for contraband."<sup>xiv</sup> Unfortunately, U.S. Customs and Border Protection (CBP) and NH law enforcement have tried to circumvent this. For example, during the August 2017 and September 2017 checkpoints, if contraband was allegedly found CBP agents seized that contraband and surrendered it to state or local law enforcement who were on the scene of the checkpoint (since the September 2017 checkpoint, the border patrol agents keep any alleged contraband found). During these 2017 checkpoints, state or local law enforcement then charged the individual(s) in state court for violating state drug laws. While CBP have claimed these checkpoints are for the purpose of immigration enforcement, their actions have shown that the primary purpose has been the detection of drugs.<sup>xv</sup>
  - **This provision does not require state or local law enforcement to seek out information about federal immigration checkpoints.** This provision merely requires that state or local law enforcement provide up to 24 hours' notice to the public of such immigration checkpoints when they are informed by a federal agency that such a checkpoint will occur. In addition, this provision does not require state or local law enforcement to provide the public with the specific location of the checkpoint. It only requires those agencies to "disclose, *if known*, the date, municipality, and geographical area in which the checkpoint will occur." Finally, the provision provides state and local law enforcement with substantial flexibility regarding the method of public notice. As the provision states, notice methods "may include publishing this information

on the government agency's website and on social media, or the use of press conferences, press releases, radio and television coverage, posters, and flyers.”

**4. Oppose unnecessary funding for increased policing at the northern border (removed from HB 2 by the House):** The House removed a proposed \$1.4 million originally included in the budget to establish a “Northern Border Alliance Program.” We urge the Senate to oppose any effort to add this back into the budget.

- **This proposal was based in fear, not fact.** The stated goal of this program was to address an increase in unauthorized border crossings, but the Governor’s office and Department of Safety have been unable to show any evidence that unauthorized crossings are happening, let alone increasing at near the New Hampshire/Canada border.<sup>xvi</sup> In fact, in response to a 91a request sent by the ACLU of New Hampshire to both the Governor’s office and the Department of Safety seeking information about border crossings at or near the New Hampshire/Canada border, both entities responded that they had no responsive documents to our request.<sup>xvii</sup>
- **History has already taught us what this is really about – using immigration as an pretext to expand government surveillance and policing near the border.** A few years back, we heard similar justifications to support the use of so-called “immigration checkpoints,” which a New Hampshire court later found to be used to circumvent the New Hampshire Constitution to go after Granite Staters for low-level drug possession.<sup>xviii</sup> As the court stated, “while the stated purpose of the checkpoints in this matter was screening for immigration violations the primary purpose of the action was detection and seizure of drugs.”<sup>xix</sup>

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<sup>i</sup> 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 ... .”)

<sup>ii</sup> See, e.g. RSA 597:2(III)(c) (“If there is probable cause to believe that, while on release pending resolution of a previous offense, the person committed a felony, class A misdemeanor, or driving or operating while impaired, there shall be a rebuttable presumption that the person will not abide by a condition that the person not commit a new offense.”); RSA 597:2(VIII) (A person charged with an offense who is, or was at the time the offense was committed, on release pending trial for a felony or misdemeanor under federal or state law, release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under federal or state law; or probation or parole for any offense under federal or state law, except as provided in RSA 597:1-d, III, may be detained for a period of not more than 72 hours from the time of his or her arrest, excluding Saturdays, Sundays and holidays.”); RSA 597:7-a (“I. A peace officer may detain an accused until he can be brought before a justice if he has a warrant issued by a justice for default of recognizance or for breach of conditions of release or if he witnesses a breach of conditions of release. The accused shall be brought before a justice for a bail revocation hearing within 48 hours, Saturdays, Sundays and holidays excepted. I-a. If a person violates a restraining order issued under RSA 458:16, III, or a protective order issued under RSA 633:3-a, or a temporary or permanent protective order issued under RSA 173-B by committing assault, criminal trespass, criminal mischief, or another criminal act, a peace officer shall arrest the accused, detain the accused pursuant to RSA 594:19-a, bring the accused before a justice pursuant to RSA 594:20-a, and refer the accused for prosecution. Such arrest may be made within 12 hours after a violation without a warrant upon probable cause whether or not the violation is committed in the presence of the peace officer. II. A person who has been released pursuant to the provisions of this chapter and who has violated a condition of his release is subject to a revocation of release, an order of detention, and a prosecution for contempt of court. III. The state may initiate a proceeding for revocation of an order of release by filing a motion with the court which ordered the release and the order of which is alleged to have been violated. The court may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before the court for a proceeding in accordance with this section. The court shall enter an order of revocation and detention if, after a hearing, the court: (a) Finds that there is: (1) Probable cause to believe that the person has committed a federal, state, or local crime while on release; or (2) Clear and convincing evidence that the person has violated any other condition of release or has violated a temporary or permanent protective order by conduct indicating a potential danger to another; and (b) Finds that: (1) There is no condition or combination of conditions of release that will assure that the

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person will not flee or that the person will not pose a danger to the safety of himself or any other person or the community; or (2) The person is unlikely to abide by any condition or combination of conditions of release. If there is probable cause to believe that, while on release, the person committed a federal or state felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person shall not pose a danger to the safety of any other person or the community. If the court finds that there are conditions of release that shall assure that the person will not flee or pose a danger to the safety of himself or any other person or the community, and that the person will abide by such conditions, he shall treat that person in accordance with the provisions of RSA 597:2 and may amend the conditions of release accordingly. IV. The state may commence a prosecution for contempt if the person has violated a condition of his release.”).

<sup>iii</sup> RSA 597:6-e (“I. If a person is ordered released by a bail commissioner, the person, or the state, shall be entitled to a hearing, if requested, on the conditions of bail before a justice within 48 hours, Sundays and holidays excepted. II. Subject to RSA 597:2, X, the person or the state may file with the superior court a motion for revocation of the order or amendment of the conditions of release set by a municipal or district court, by a justice, or by a bail commissioner. The motion shall be determined promptly.”).

<sup>iv</sup> Albert Scherr, *The convenient and false narrative about a Manchester tragedy*, Union Leader, Feb. 21, 2023, available at [https://www.unionleader.com/opinion/op-eds/albert-scherr-the-convenient-and-false-narrative-about-a-manchester-tragedy/article\\_2888eaa2-474d-50d4-a222-4174ece92b1b.html](https://www.unionleader.com/opinion/op-eds/albert-scherr-the-convenient-and-false-narrative-about-a-manchester-tragedy/article_2888eaa2-474d-50d4-a222-4174ece92b1b.html).

<sup>v</sup> Group A Crimes per 100,000 population have substantially decreased annually since bail reform in 2018, from 4,563.9.4 per 100,000 in 2018, to 4,311.9 per 100,000 in 2019, to 3,912.0 per 100,000 in 2020, to 3,717.1 in 2021. See NH Department of Safety, New Hampshire Crime Summary (Public), 2018, 2019, 2020, 2021 available at [Beyond 20/20 Perspective - View Reporting Services report \(nh.gov\)](https://www.nh.gov/ndoc/population.htm).

<sup>vi</sup> New Hampshire’s “prisoner” population peaked at 2,910 in 2014, and was down to 1891 in February 2023, a 35 percent reduction. For 2014 incarceration data, see NH Department of Corrections, Prisoner Population Since 1812, available at <https://www.nh.gov/nhdcc/population.htm> For February 2023 data see, NH Department of Corrections, NH DOC Monthly Facility Population Summary Report, available at <https://www.nh.gov/nhdcc/documents/population-summary.pdf>.

<sup>vii</sup> Group A Crimes per 100,000 population decreased from 5,414.5 per 100,000 in 2014 to 3,717.1 per 100,000 in 2021 (the most current year of data available). See, NH Department of Safety, New Hampshire Crime Summary (Public), 2014 & 2021, available at <https://crimestats.dos.nh.gov/public/View/RSReport.aspx?ReportId=22>.

<sup>viii</sup> New Hampshire Department of Corrections, NH DOC Monthly Facility Population Summary Report – All, available at <https://www.nh.gov/nhdcc/documents/population-summary.pdf>.

<sup>ix</sup> Garry Rayno, *Sununu Sets Limit on Next Biennium’s Capital Budget; Says New Men’s Prison Needed*, InDepthNH.org June 20, 2022, available at <https://indepthnh.org/2022/06/20/sununu-sets-limit-on-next-bienniums-capital-budget-says-new-mens-prison-needed/>.

<sup>x</sup> State of New Hampshire, Law Enforcement Manual, 2020 Edition, Nov. 2020, p. 444, available at <https://www.doj.nh.gov/criminal/documents/law-enforcement-manual.pdf>.

<sup>xi</sup> See *Op. of Justices*, 128 N.H. 14, 16 (1986) (“The bill incorporates a general notice [7-day] requirement, calculated to achieve the maximum deterrent effect while not compromising the effectiveness of the checkpoint through disclosure of the precise location(s). The notice requirement would also have the salutary effect of minimizing apprehension on the part of motorists who are detained at the sobriety checkpoint.”); *State v. Hunt*, 155 N.H. 465, 476 (2007) (noting that “seven days advance notice was constitutionally adequate,” but seven days may not be constitutionally necessary, and shorter notice may be sufficient; holding that law enforcement’s decision to submit notice to press day before the checkpoint was appropriate).

<sup>xii</sup> State of New Hampshire, Law Enforcement Manual, 2020 Edition, Nov. 2020, available at <https://www.doj.nh.gov/criminal/documents/law-enforcement-manual.pdf>.

<sup>xiii</sup> *State v. Hunt*, 155 N.H. 465 (2007).

<sup>xiv</sup> *State v. Pellici*, 133 N.H. 523 (1990).

<sup>xv</sup> See, *New Hampshire v. McCarthy*, Docket No. 469-2017-CR-01888 (2nd Cir. Dist. Div. Plymouth, Grafton, May 1, 2018) (“while the stated purpose of the checkpoints in this matter was screening for immigration violations the primary purpose of the action was detection and seizure of drugs.” The court went on to state that CBP and the Woodstock Police Department (WPD) were “working in collaboration with each other with the understanding that the WPD would take possession of any drugs seized below the federal guidelines for prosecution in federal court and bring charges in this court based on that evidence. This evidence was seized in violation of the constitutional rights recognized by the New Hampshire Supreme Court in *State v. Pellici*, *supra*. The New Hampshire Constitution governs the prosecution of state laws in state courts.”). In addition:

- During the August 2017 checkpoint, 33 people who were lawfully in the United States were arrested or summonsed for state drug-related offenses by the WPD. Of these 33 individuals, 31 were charged with possessing small amounts of drugs for personal use (mostly marijuana or marijuana derivatives). All 31 were charged with violation-level offenses. According to Border Patrol, only 25 individuals—including three children (two eleventh graders and a seventh grader)—were detained during this checkpoint due to immigration-related issues. A majority of these individuals allegedly overstayed their visas, and none were

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detected using the drug-sniffing dogs. There is also no evidence that any of these individuals ever crossed the Canadian border.

- During the September 2017 checkpoint, eleven (11) people who were lawfully in the United States were arrested or summonsed for state drug-related offenses by the State Police. One was charged with a violation-level offense and a class B misdemeanor. Another was charged with a class B misdemeanor. The nine (9) other individuals were charged with violation-level offenses under New Hampshire's marijuana decriminalization law that went into effect on September 16, 2017. See RSA 318-B:2-c. According to Border Patrol, only eight (8) individuals were detained for immigration-related reasons during this checkpoint. None was detected using the drug-sniffing dogs. There is also no evidence that any of these individuals ever crossed the Canadian border.
- During the May 26-28, 2018 Memorial Day Weekend checkpoint, Border Patrol reported arresting 17 allegedly undocumented individuals, six of whom were visa overstays (though, again, it did not report the thousands of other individuals it detained without a warrant or reasonable suspicion). Border Patrol also reported seizing "drugs and drug paraphernalia including a small amount of marijuana, hash oil and THC vape oil." Two of the 17 immigrants arrested by Border Patrol came to the United States over 19 years ago from South Korea and were in New Hampshire on vacation with their 23-year-old daughter who was a recipient of the Deferred Action for Childhood Arrivals Program ("DACA").
- During the June 15-17, 2018 Father's Day Weekend checkpoint, Border Patrol reported arresting five undocumented individuals (though, again, it did not report the thousands of other individuals it detained without a warrant or reasonable suspicion). Border Patrol also reported seizing "drugs including marijuana, marijuana edibles and THC vape oil."

<sup>xvi</sup> Amanda Gokee, *Sununu's proposal to increase border patrol under fire*, Boston Globe, Mar. 31, 2023, available at <https://www.bostonglobe.com/2023/03/31/metro/sununus-proposal-increase-border-patrol-under-fire/>.

<sup>xvii</sup> Responses on file with ACLU of New Hampshire.

<sup>xviii</sup> See, *New Hampshire v. McCarthy*, Docket No. 469-2017-CR-01888 (2nd Cir. Dist. Div. Plymouth, Grafton, May 1, 2018) ("while the stated purpose of the checkpoints in this matter was screening for immigration violations the primary purpose of the action was detection and seizure of drugs." The court went on to state that CBP and the Woodstock Police Department (WPD) were "working in collaboration with each other with the understanding that the WPD would take possession of any drugs seized below the federal guidelines for prosecution in federal court and bring charges in this court based on that evidence. This evidence was seized in violation of the constitutional rights recognized by the New Hampshire Supreme Court in *State v. Pellici*, supra. The New Hampshire Constitution governs the prosecution of state laws in state courts.").

<sup>xix</sup> *New Hampshire v. McCarthy*, Docket No. 469-2017-CR-01888 (2nd Cir. Dist. Div. Plymouth, Grafton, May 1, 2018).