

Oppose HB 38 - Don't Needlessly Incarcerate Thousands of Granite Staters (at a Staggering Financial Cost)

HB 38 would:

- Lower the standard for determining dangerousness for pretrial incarceration from “clear and convincing evidence” to “preponderance of the evidence;”
- Eliminate the protection against pretrial incarceration for individuals who cannot afford their bail; and
- 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 (e.g. marijuana possession) pending a bail hearing, which could take up to 6 days under the legislation.

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.”ⁱ 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.ⁱⁱ And, current law provides the state with the power to challenge a release order they disagree with.ⁱⁱⁱ 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.^{iv} 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 18 percent* since the implementation of bail reform.^v 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. The rhetoric in New Hampshire is similar to the fear-based rhetoric coming from opponents of bail reform in New York and Houston, TX, despite data showing that bail reform in those jurisdictions is reducing incarceration without harming public safety.^{vi} New Hampshire legislators must ensure that laws are driven by facts and evidence, not fear.

This legislation will likely 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.^{vii} 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.”^{viii} 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.^{ix} New Hampshire legislators should oppose this legislation and focus on data-driven solutions to harm in our communities.

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.^x 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^{xi}), 5.9 times for disorderly conduct, and 6.52 times for vagrancy.^{xii} 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 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.”^{xiii} This bill instead presumes dangerousness based exclusively on the charge against a person, which runs counter to the Constitution.

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 fact that they were charged with an offense. 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.

People’s freedom should not come down to little more than a flip of the coin. By lowering the standard for determining dangerousness for pretrial incarceration from “clear and convincing evidence” to “preponderance of the evidence,” decisions about an individual’s freedom would come down to 50 percent plus one. Particularly when we are talking about people who are presumed innocent, such a low standard is unconscionable.

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.

Oppose HB 38 - Keep Bail Decisions in the Hands of the Courts

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ⁱ 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”)

ⁱⁱ 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 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.”).

ⁱⁱⁱ 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.”).

^{iv} 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.

^v Group A Crimes per 100,000 population have substantially decreased annually since bail reform in 2018, from 4,563.94 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 \(nh.gov\)](#).

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^{vi} See, Ames Grawert & Noah Kim, *The Facts on Bail Reform and Crime Rates in New York State*, Brennan Center, Mar. 22, 2022, available at <https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-and-crime-rates-new-york-state>; see also, Andrew Schneider, *Harris County's misdemeanor bail reforms are working, a new report finds*, Houston Public Media, Mar. 3, 2022, available at <https://www.houstonpublicmedia.org/articles/news/criminal-justice/2022/03/03/420398/two-years-on-harris-countys-misdemeanor-bail-reforms-appear-to-be-working-as-intended>.

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

^{viii} *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.”)

^{ix} *Id.*

^x 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/concordcitynewhampshire>.

^{xi} 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/>.

^{xii} 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>.

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