THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0637

State of New Hampshire

v.

Christina A. Hill

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE CHESHIRE COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes oral argument)

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ISSUE PRESENTED

Whether the new bail statute permits a trial court to set bail at a monetary amount the defendant cannot afford, when the court has determined by a preponderance of the evidence that releasing the defendant will not assure her appearance as required.

TEXT OF RELEVANT AUTHORITY

The New Bail Statute

RSA 597:2 (Supp. 2018) Release of a Defendant Pending Trial.

I. Except as provided in paragraph VI, upon the appearance before the court of a person charged with an offense, the court shall issue an order that, pending arraignment or trial, the person be:

(a) Released on his or her personal recognizance or upon execution of an unsecured appearance bond, pursuant to the provisions of paragraph III;

(b) Released on a condition or combination of conditions pursuant to the provisions of paragraph III; or

(c) Temporarily detained to permit revocation of conditional release pursuant to the provisions of paragraph VIII.

II. Except as provided in RSA 597:1-d, a person charged with a probation violation shall be entitled to a bail hearing. The court shall issue an order that, pending a probation violation hearing, the person be:

(a) Released on his or her personal recognizance or upon execution of an unsecured appearance bond, pursuant to the provisions of paragraph III;

(b) Released on a condition or combination of conditions pursuant to the provisions of paragraph III; or

(c) Detained.

III.

(a) The court shall order the pre-arraignment or pretrial release of the person on his or her personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, or cash or corporate surety bail, subject to the condition that the person not commit a crime during the period of his or her release, and subject to

such further condition or combination of conditions that the court may require unless the court determines by a preponderance of the evidence that such release will not reasonably assure the appearance of the person as required. A person who the court determines to be a danger to the safety of that person or the public shall be governed by the provisions of paragraph IV, except that such dangerousness determination shall not be based solely on evidence of drug or alcohol addiction or homelessness.

(b) In determining the amount of the unsecured appearance bond or cash or corporate surety bail under subparagraph II(a), if any, the court:

(1) Shall not impose a financial condition that will result in the pretrial detention of a person solely as a result of that financial condition.

(2) Shall consider whether the person is the parent and sole caretaker of a child and whether, as a result, such child would become the responsibility of the division of children, youth and families.

(3) Shall consider whether the person is the sole income producer for dependents.

(c) For purposes of the court's determination under this paragraph, evidence of homelessness or a lack of a mailing address by itself shall not constitute prima facie evidence of a lack of reasonable assurance that a person will not appear.

(d) If, as a result of the court's decision, a person is detained, the court shall issue on the record findings of fact that document the basis for its decision.

(e) If the court or justice determines by a preponderance of the evidence that the release described in this paragraph will not reasonably assure the appearance of the person, the court shall issue an order that includes the following conditions, subject to the limitation in subparagraph (b)(1):

(1) The condition that the person not commit a crime during the period of release; and

(2) Such further condition or combination of conditions that the court determines will reasonably assure the appearance of the person as required, which may include the condition that the person:

(A) Execute an agreement to forfeit, upon failing to appear within 45 days of the date required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the court or justice may specify;

(B) Furnish bail for his or her appearance by recognizance with sufficient sureties or by deposit of moneys equal to the amount of the bail required as the court may direct; and

(3) Satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of the person or the public.

(f) In considering the conditions of release described in subparagraph (e)(2)(A) or (e)(2)(B), the court may, upon its own motion, or shall, upon the motion of the state, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

IV.

(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, with a violation of a protective order issued under RSA 173-B, the court may order preventive detention without bail, or, in the alternative, may order restrictive conditions including but not limited to electronic monitoring and supervision, only if the court determines by clear and convincing evidence that release will endanger

the safety of that person or the public. The court may consider the following conduct as evidence of posing a danger, including, but not limited to:

(1) Threats of suicide.
(2) Acute depression.
(3) History of violating protective orders.
(4) Possessing or attempting to possess a deadly weapon in violation of an order.
(5) Death threats or threats of possessiveness toward another.
(6) Stalking, as defined in RSA 633:3-a.
(7) Cruelty or violence directed toward pets.

V. A no-contact provision contained in any bail order shall not be construed to:

(a) Prevent counsel for the defendant from having contact with counsel for any of the individuals protected by such provision; or

(b) Prevent the parties, if the defendant and one of the protected individuals are parties in a domestic violence or marital matter, from attending court hearings scheduled in such matters or exchanging copies of legal pleadings filed in court in such matters.

VI. If a person is charged with violation of a protective order issued under RSA 173-B or RSA 633:3-a, the person shall be detained without bail pending arraignment pursuant to RSA 173-B:9, I(a).

VII. In a release order issued pursuant to this section, the court shall include a written statement that sets forth:

(a) All of the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(b) The provisions of RSA 641:5, relative to tampering with witnesses and informants.

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. The law enforcement agency making the arrest shall notify the appropriate court, probation or parole official, or federal, state, or local law enforcement official. Upon such notice, the court shall direct the clerk to notify by telephone the department of corrections, division of field services, of the pending bail hearing. If the department fails or declines to take the person into custody during that period, the person shall be treated in accordance with the provisions of law governing release pending trial. Probationers and parolees who are arrested and fail to advise their supervisory probation officer or parole officer in accordance with the conditions of probations and parole may be subject to arrest and detention as probation and parole violators.

IX. Upon the appearance of a person charged with a class B misdemeanor, the court shall issue an order that, pending arraignment, the person be released on his or her personal recognizance, unless the court determines pursuant to paragraph IV that such release will endanger the safety of the person or the public. The court shall appoint an attorney to represent any indigent person charged with a class B misdemeanor denied release for the purpose of representing such person at any detention hearing.

X. A person detained by a circuit court has the right to:

(a) In the first instance, a hearing in circuit court within 36 hours after the filing of the motion, excluding weekends and holidays on a motion to reconsider the original detention order; and

(b) A decision upon a de novo appeal, pursuant to RSA 597:6-e, II, to the superior court within 36 hours of the filing of the appeal, excluding weekends and holidays.

STATEMENT OF THE CASE & FACTS

The defendant, Christina Hill, faced three felony charges: possession of heroin, possession of crack cocaine, and sale of crack cocaine. T 3.[1] She was arraigned on those charges on November 9, 2018, at which time the parties also addressed bail.

In support of its argument that the defendant should be detained pending trial, the State posited that given her criminal record, she was a danger to the community. T 5. The prosecutor also reported that:

- The defendant was released on bail when she committed the crimes for which bail was being set in this case, T 8-9;
- While out on bail, she failed to comply with the conditions that she report twice a week for drug testing and that she not travel outside New Hampshire, T 9;
- She did travel outside New Hampshire, and was extradited from Massachusetts to face the charges in this case, T 4, 12;
- She was found to have violated the terms of her probation in 2008, 2009, 2010, 2011, and 2018, and served 12 months in jail on at least one of the violations, T 5-7;
- In October 2007, she failed to appear in court as required, T 8;
- As a result of another failure to appear, she was convicted of bail jumping in December 2011, T 6, 8;

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[1] Citations to the record are as follows:
"App." refers to the appendix bound with this brief;
"DB" refers to the defendant's brief;
"DBA" refers to the defendant's appendix; and
"T" refers to the transcript of the bail hearing in this matter.

- She was subject to a deferred prison sentence of 8 months to 3 years, and a suspended prison sentence of 1 to 2 years, T 7.

Defense counsel did not contest these facts. He acknowledged that his client had “a serious substance abuse history.” T 11. He also acknowledged that the defendant’s history might give the court cause to fear that if released, she would not return as required. T 10-11.

The trial court (*Ruoff*, J.) did not find that the defendant was a danger, but did find that she was a risk for flight. T 17. He set high cash bail, explaining:

> [T]he thing that is driving my decision here is really that you’re out on bail when you committed these [crimes] with conditions of a bail order and a deferred sentence for you to focus on treatment…. [T]hat doesn’t appear like any of that was taking effect or doing anything. So I’m not satisfied that any amount of conditions that I could set in this case would assure that.
>
> And that these are sales offenses committed allegedly on the same day that you had court. So I’m not sure this whole process is having an effect on you in terms of your ability to comply with conditions and at least attempt to abide by the law.
>
> ….
>
> But this is, to me, really just a risk of flight, not complying with conditions issue. You have a deferred sentence hearing, a state prison deferred sentence hearing, and that’s going to be moved to be imposed, I would imagine, based on this now that you’re back here. So there’s a lot of incentive for you not to show up in court.
>
> If by some chance you do come up with the 25,000 dollars, which I doubt, there’s going to be a source of funds hearing.…

T 17. In its written order, the court set bail at $10,000 cash. DBA 3.

Defense counsel protested that "[u]nder the terms of the new bail statute, I believe that the Court is required to set an amount of cash bail that will not result in detention simply because the defendant is not able to post the amount of money." T 18. Defense counsel asked the court to set bail at $300, which he said the defendant's uncle might be able to post. *Id.* The court demurred, concluding that the statute permitted pre-trial detention on flight risk facts in "unique circumstance[s]":

> I know there's some disagreement about the language of the new bail statute, but I think that that provision requiring me to set bail in a cash amount in an amount that she can post is unless I find that the condition of that bail amount won't satisfy her appearance or her ability to comply with conditions that I set.
>
> So I think that the law allows me to set an amount regardless of her ability to post it if I make sufficient findings by preponderance of the evidence that just a bail that she can post alone is not sufficient. So that's my interpretation of the bail statute.

T 18.

After appealing the trial court's bail determination to this Court, the defendant resolved her charges. This Court nonetheless permitted briefing in the case to decide this important question of statutory interpretation.

SUMMARY OF THE ARGUMENT

As the trial court found, RSA 597:2 (Supp. 2018) permits the lower courts to hold defendants on high cash bail, resulting in their continued pre-trial detention, in “unique circumstances”: when the court considers the defendant’s financial circumstances and determines by a preponderance of evidence that release will not reasonably assure their return to court. This is so for the following reasons: First, unaffordable cash bail is not the equivalent of “preventive detention without bail.” Thus, detention on high cash bail in flight risk cases is not proscribed by subparagraph IV, which permits “preventive detention without bail” only where the defendant is determined to be a danger. Second, the language of the subparagraph III(a)—which sets up the binary directive to release defendants who are not a flight risk or *not* release them if they are—permitted the bail set here, and that conclusion is supported by language elsewhere in paragraph III that contemplates pre-trial detention in flight-risk cases.

Third, the “financial condition” prohibition of subparagraph III(b)(1), which otherwise would conflict with the detention language elsewhere in paragraph III, does not mean that flight-risk defendants may not be held on high cash or surety bail. It means that the imposition of cash or surety bail cannot be arbitrary or based on a merely de miminis or speculative risk that the defendant will not reappear: detention must be the result not only of the amount of money at issue and the defendant’s financial circumstances, but also of the conclusion that the defendant poses a real risk of flight.

Fourth, a reading of the statute which mandates the release of defendants who are not likely to return to court produces absurd results. Under that reading, even the defendant who declares she will not return if released, and the defendant who is charged with escape, must be released. Fifth, that reading also violates the separation of powers doctrine, since it effects an impermissible legislative intrusion on the trial courts' inherent authority to ensure the due and orderly administration of justice in cases in which the court determines by a preponderance of the evidence that a criminal defendant will not return as required. And sixth, the legislative history supports the position that the bail statute permits detention on high bail in flight-risk cases, since that history refers to the "federal rule," and the federal bail statute permits such detention.

ARGUMENT

UNDER THE NEW BAIL STATUTE, COURTS MAY SET HIGH CASH BAIL WHEN THE PREPONDERANCE OF THE EVIDENCE ESTABLISHES THAT THE DEFENDANT PRESENTS A REAL RISK FOR FLIGHT.

In 2018, the legislature enacted Senate Bill 91, the Criminal Justice Reform and Economic Fairness Act. The bill repealed and reenacted RSA 597:2 (2001), the old bail statute. The new bail statute went into effect on August 31, 2018.[2] The old statute was not a model of clarity. Nonetheless, rather than rewriting the old statute, the legislature recycled the bulk of its language, redistributing existing sections across new paragraphs and combining the old language with a few new provisions. The resulting statute suffers from an opacity that, as the trial court suggested here, *see* T 18, has challenged lower courts tasked with applying it.

This appeal requires this Court to interpret the new bail statute. The interpretation of a statute is a question of law, which this Court reviews *de novo*. *In re Teresa E. Craig Living Tr.*, 171 N.H. 281, 283 (2018). This Court is "the final arbiter[] of the legislature's intent as expressed in the words of the statute considered as a whole." *Id.* (quotation omitted). When construing a statute's meaning, this Court "first examine[s] the language found in the statute, and where possible, … ascribe[s] the plain and ordinary meanings to the words used." *Id.* (quotation omitted). The Court "construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result," *Hogan v. Pat's Peak Skiing, LLC*,

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[2] For ease of distinguishing between the two, RSA 597:2 (2001) is referred to in this brief as the "old statute," and RSA 597:2 (Supp. 2018) as the "new statute."

168 N.H. 71, 73 (2015), interpreting the statute "to address the evil or mischief that the legislature intended to correct or remedy," *State v. Costella*, 166 N.H. 705, 710 (2014) (citation omitted).

As argued in six sections below, as the trial court found, the statute permits the lower courts to hold defendants on high cash bail, resulting in their continued pre-trial detention, in "unique circumstances": when the court determines by a preponderance of evidence that release will not reasonably assure their appearance.

A. High Cash Bail is not the Equivalent of Preventive Detention Without Bail.

An important tenet of the defendant's statutory construction argument is that the trial court's bail order was tantamount to "preventive detention without bail," DB 11, a status reserved for defendants who are a found to be danger under paragraph IV of the new bail statute. Contrary to the defendant's argument, however, the trial court did not set "preventive detention without bail." It set bail at $10,000 cash after learning of the defendant's financial circumstances and determining that the preponderance of the evidence showed that the defendant was a flight risk who would not comply with court-imposed bail conditions and was unlikely to return to court. Paragraph IV, therefore, did not preclude the bail amount in this case and would have no application in other similar cases.

The premise of the defendant's "preventive detention without bail" argument—that bail which is unaffordable therefore constitutes a denial of bail—is unsound. The two are distinct as a matter of fact: When no bail is

set, a defendant stands no possibility of release; when high cash bail is set, release is still possible, even if that possibility is remote. So long as the amount of bail is based on sufficient evidence and rationally related to a legitimate purpose, and therefore does not violate constitutional proscriptions against excessive bail and due process, courts may set unaffordable cash bail. Preventive detention without bail and unaffordable bail are also distinct as a matter of law. *See, e.g., Gillmore v. Pearce*, 731 P.2d 1039 (Or. 1987) (unaffordable bail, set at an amount to ensure the defendant's appearance, was legally permissible given flight-risk evidence, despite the fact that preventive detention was not authorized by statute).

The California Court of Appeal *In re Humphrey*, for example, held that a judge may conclude "that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances," so long as it considers the defendant's financial circumstances and makes explicit findings supporting the conclusion that no less restrictive alternative will satisfy that purpose. *In re Humphrey*, 19 Cal. App. 5th 1006, 1026, 1030, 1037-38 (Cal. Ct. App. 2018), *review granted*, *Humphrey (Kenneth) on H.C.,* 417 P.3d 769 (Cal. 2018). Those factors make the difference between cash bail which serves the legitimate purposes of detention and cash bail which "impermissibly punishes" defendants for their poverty. *Id.* at 1031; *see also Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) ("A bond determination process that does not include consideration of financial circumstances and alternative release conditions is unlikely to result in a bond amount that is reasonably related to the government's legitimate interests."); *State v. Pratt*, 166 A.3d 600, 602, 604 (Vt. 2017) ("Although courts must consider a defendant's financial resources when they set bail,

courts may set bail at a level that a particular defendant cannot secure"; however, "bail requirements at a level a defendant cannot afford should be rare."); *In re Christie*, 92 Cal. App. 4th 1105, 1107 (2001) (whether $1 million bail is excessive, when preventive detention would not otherwise be permissible, depends on the court's statement of explicit reasons for that amount).

Assuming courts undertake appropriate inquiries and make appropriate determinations regarding risk of flight and financial means, unaffordable bail is not the factual or legal equivalent of "no bail." As argued in the sections below, the new bail statute permits the lower courts to set money bail at an amount which is not affordable. The defendant's argument that high cash bail is no different from preventive detention without bail, and thus is available under paragraph IV only in cases involving danger, must therefore fail.

B. The Language of the New Bail Statute Contemplates That in Unique Circumstances, Courts May Detain Flight-Risk Defendants on High Cash Bail.

At issue in this case is the language of new subparagraphs III(a), (b), (d), (e), and (f). Each of these subparagraphs contains language either authorizing the bail order in this case, or supporting the position that such an order is authorized.

Subparagraph III(a) of the new statute replaces paragraph II of the old statute, making some significant changes but retaining the old paragraph's structure and much of its language. Subparagraph III(a) provides that:

> The court shall order the pre-arraignment or pretrial release of the person on his or her personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, *or cash or corporate surety bail*, subject to the condition that the person not commit a crime during the period of his or her release, and subject to such further condition or combination of conditions that the court may require *unless the court determines by a preponderance of the evidence that such release will not reasonably assure the appearance of the person as required. A person who the court determines to be a danger to the safety of that person or the public shall be governed by the provisions of paragraph IV*, except that such dangerousness determination shall not be based solely on evidence of drug or alcohol addiction or homelessness.

RSA 597:2, III(a) (Supp. 2018) (emphasis added). As identified by the italicized text, the new subparagraph makes two significant changes to the old bail statute. First, it cleaves dangerousness from the bail considerations attendant to flight risk, directing the trial court to paragraph IV in cases where the defendant poses a danger to herself or others. (In the old statute, flight risk and dangerousness were subject to the same considerations. *See* RSA 597:2, III (2001).)

Second, new subparagraph III(a) adds "cash or corporate surety bail" to the list of mechanisms by which a defendant *shall* be released—*unless* the person is determined, by a preponderance of the evidence, to be a flight risk. This is important because the mandate that a trial court release a defendant on "cash or corporate surety bail," used with the conjunction "unless," establishes a binary directive: Either the defendant is released on cash or corporate surety bail, or she is subject to cash or corporate surety bail and *not* released because she a flight risk. Thus, as the trial court

suggested, subparagraph III(a) by its terms permits courts to set high cash bail in flight-risk cases.

There are other indications that the statute permits the lower courts to detain flight-risk defendants on cash or surety bail. New subparagraph III(b)(2), which the defendant appears to agree "applies to the setting of cash or surety bail, including where there is a concern of risk of flight" but not "where the defendant is a danger," DB 14, provides that:

> In determining the amount of the unsecured appearance bond or cash or corporate surety bail under subparagraph [I]II(a),[3] if any, the court:…. *Shall consider whether the person is the parent and sole caretaker of a child and whether, as a result, such child would become the responsibility of the division of children, youth and families*.

(Emphasis added.) The italicized language can only mean that the legislature anticipated that a flight-risk defendant would in some circumstances be detained on high bail, since if the defendant is a child's sole caretaker, the only bail-related reason the child would become a ward of the state is if the defendant were incarcerated and thus unable to provide childcare. In other words, the language only makes sense if setting cash or surety bail in an amount that the defendant cannot afford is an option.

This meaning is reinforced by the fact that that language was taken nearly verbatim from old paragraph II, which read:

> The court may also consider as a factor in its determination under this paragraph or paragraph III that *a person who is detained as a result of his or her inability to meet the required conditions or post the required bond* is the parent

[3] New subparagraph III(b) incorrectly retained the old bail statute's reference to paragraph II(a). The reference to "subparagraph II(a)" is a typographical error. *See* Senate Bill 314 (2019) (correcting the error).

> and sole caretaker of a child and whether, as a result, such child would become the responsibility of the division of children, youth, and families.

(Emphasis added.) The absence of the italicized language in the new statute does not change the meaning of the language just described, since that meaning is inescapable. Rather, the italicized language makes abundantly clear the legislature's intent in cases in which the defendant is a child's sole caretaker: to cause a court to weigh the gravity of the consequence to the child when setting bail in an amount that the defendant cannot afford.

Finally, new subparagraph III(d) directs: "If, as a result of the court's decision, *a person is detained*, the court shall issue on the record findings of fact that document the basis for its decision." (Emphasis added.) This provision should not be understood to relate to dangerousness determinations, since no other subparagraph in the paragraph III does, and subparagraph III(a) makes explicit that dangerousness "shall be governed by the provisions of paragraph IV." Thus, like subparagraph III(b), just discussed; subparagraph III(c), concerning the significance of homelessness to the flight-risk determination; and subparagraphs III(e) and (f), discussed below, subparagraph III(d) must pertain to flight-risk defendants. The language of subparagraph III(d) clearly anticipates preventive detention, and therefore supports the State's position that the new bail statute permits pre-trial detention on flight-risk facts.

C. The "Financial Condition" Prohibition of Subparagraph III(b)(1) Does Not Mean that Flight-Risk Defendants May Not Be Held on High Cash or Surety Bail.

The ostensible obstacle to this interpretation is the reference in subparagraph III(e) to subparagraph III(b)(1). Subparagraph III(e) permits a court, having found that a defendant is a flight risk, to impose a non-exhaustive list of bail conditions. It provides:

> If the court or justice determines by a preponderance of the evidence that the release described in this paragraph will not reasonably assure the appearance of the person, the court shall issue an order that includes the following conditions, *subject to the limitation in subparagraph (b)(1)*:
>
> > (1) The condition that the person not commit a crime during the period of release; and
> >
> > (2) Such further condition or combination of conditions that the court determines will reasonably assure the appearance of the person as required, which may include the condition that the person:
> >
> > > (A) Execute an agreement to forfeit, upon failing to appear within 45 days of the date required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the court or justice may specify;
> > >
> > > (B) Furnish bail for his or her appearance by recognizance with sufficient sureties or by deposit of moneys equal to the amount of the bail required as the court may direct; and

> (3) Satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of the person or the public.

RSA 597:2, III(e) (Supp. 2018) (emphasis added). Subparagraph III(b)(1) provides:

> In determining the amount of the unsecured appearance bond or cash or corporate surety bail under subparagraph [I]II(a), if any, the court: *Shall not impose a financial condition that will result in the pretrial detention of a person solely as a result of that financial condition*.

RSA 597:2, III(b)(1) (Supp. 2018) (emphasis added).

The language of subparagraph III(b)(1) appears to conflict with the detention language in III(a), III(b)(2), and III(d), described above. Those other subparagraphs anticipate pretrial detention on cash or surety bail, while subparagraph III(b)(1)'s language appears to prohibit such detention.

Subparagraph III(b)(1) is also in tension with subparagraph III(f), which states:

> In considering the conditions of release described in subparagraph (e)(2)(A) or (e)(2)(B), the court may, upon its own motion, or shall, upon the motion of the state, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and *shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required*.

RSA 597:2, III(f) (Supp. 2018) (emphasis added). The references to subparagraphs (e)(2)(A) and (e)(2)(B) make clear that subparagraph III(f) concerns flight-risk cases exclusively.

Subparagraph III(f) contemplates the following hypothetical scenario: A judge has, under subparagraphs III(a) and III(e), determined by a preponderance of evidence that a defendant is a flight risk. Pursuant to RSA 597:2, III(e)(2)(B), the judge has ordered the defendant to "furnish bail … by deposit of moneys"—that is, the judge has set cash bail. Let's say that the judge set bail at $300 cash—the amount that the defendant here might have been able to post. In this hypothetical judge's considered opinion, $300 is the amount of bail under subparagraphs III(a) and III(e) necessary to "reasonably assure" the defendant's appearance at future hearings. The defendant is able to secure $300 and posts that amount. After a subparagraph III(f) hearing, however, the court, as it is authorized by the statute to do, "decline[s] to accept" the money because its source—as might have been the case here, perhaps an uncle with whom the defendant has no real relationship, and thus to whom the defendant will not feel indebted—"will not reasonably assure the appearance of [the defendant] as required."

So what then? The court has made the lawful determination under subparagraph III(e)(2) that only the $300-cash-bail condition will assure the defendant's return once released, but concludes under subparagraph III(f) that the defendant ultimately cannot meet the condition. It makes no sense under these circumstances that subparagraph III(b)(1) would require the court to jettison its bail determination, and instead set bail at some token amount which guarantees the defendant's release but does nothing to assure her return.

The tension between subparagraph III(b)(1)'s "financial condition" language and the detention language in the other subparagraphs can be resolved. "[W]hen one [statutory] provision seems to permit what another

provision seems to forbid, courts have often treated the provisions as conflicting." *J.P. v. D.C.*, 189 A.3d 212, 219 (D.C. 2018). It is a tenet of statutory interpretation that wherever possible, "[c]onflicting provisions of a statute must be read together to produce an harmonious whole and to reconcile any inconsistencies wherever possible." *SMK, LLC v. Dep't of Treasury*, 826 N.W.2d 186, 189 (Mich. Ct. App. 2012) (citation omitted). This Court's "task is to determine the interpretation of both statutory provisions that best harmonizes them, taking into account their language; their context; their place in the overall statutory scheme; their evident legislative purpose; and the principle that statutes should not be construed to have irrational consequences." *J.P.*, 189 A.3d at 219.

Subparagraph III(b)(1) provides that the court "[s]hall not impose a financial condition that will result in the pretrial detention of a person *solely* as a result of that financial condition." (Emphasis added.) This Court should conclude that the General Court's use of the word "solely" means that the imposition of a financial condition cannot be arbitrary or based on a merely de miminis or speculative risk that the defendant will not reappear: detention must be the result not only of the amount of money at issue and the defendant's financial circumstances, but also of the conclusion that the defendant poses a real risk of flight.

The consideration of the person's financial circumstances required by the new bail statute is not, as the defendant claims, a mandate that the lower courts release a defendant on affordable bail. Rather, as discussed in Section A above, it is an important inquiry that guarantees that the assignment of a bail amount is not arbitrary, but *reasonable*, and therefore

comports with due process of law. As the Ninth Circuit Court of Appeals put it in the context of bail and immigration detention,

> While the temporary detention of non-citizens may sometimes be justified by concerns about public safety or flight risk, the government's discretion to incarcerate non-citizens is always constrained by the requirements of due process: no person may be imprisoned *merely* on account of his poverty.

Hernandez, 872 F.3d at 981 (emphasis added). Thus:

> [W]hen a person's freedom from governmental detention is conditioned on payment of a monetary sum, courts must consider the person's financial situation and alternative conditions of release when calculating what the person must pay to satisfy a particular state interest. Otherwise, the government has no way of knowing if the detention that results from failing to post a bond in the required amount is reasonably related to achieving that interest.

Id. at 992-93.

The new bail statute adds the preponderance of evidence standard of proof to the flight-risk determination. That standard ensures that courts will not impose an amount of bail which detains a defendant only because the defendant cannot afford to pay it. Instead, high bail is the function both of the defendant's financial circumstances and substantial evidence that she will flee. This is consistent with the statutory scheme of the federal bail statute discussed below, and, as noted above, the fact that to assess whether unaffordable bail is excessive bail, other appellate courts require trial courts to specify the evidence supporting detention. *See, e.g., In re Humphrey*, 19 Cal. App. 5th at 1037 ("If the court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a determination by clear

and convincing evidence that no less restrictive alternative will satisfy that purpose.”).

Because the language of subparagraph III(b)(1) may be read in harmony with the provisions of the new bail statute which permit detention on high bail in flight-risk cases, this Court should reject the defendant’s argument that subparagraph III(b)(1) prohibits that result in cases like this.

D. A Reading of the Statute Which Mandates the Release of Defendants Who Are Not Likely To Return to Court Produces Absurd Results.

This Court must also reject the defendant’s preferred interpretation of subparagraph III(b)(1)’s “financial condition” prohibition because that interpretation leads to absurd results. This Court “will not interpret statutory language in a literal manner when such a reading would lead to an absurd result.” *Great Traditions Home Builders*, *Inc. v. O’Connor*, 157 N.H. 387, 388 (2008).

This case demonstrates that absurdity. The defendant’s record shows that she has twice failed to appear in court as required, and thus that the conditions of bail under which she was released failed to assure that appearance. Her record demonstrates that even when the stakes are high, she will not abide by court orders, and that even when ordered not to leave the state, she will do so anyway, requiring state resources to return her here. The defendant repeatedly violated court-ordered bail conditions, court-ordered probation conditions, and the court-ordered conditions of her deferred and suspended prison sentences. If the very real threat of the imposition of suspended prison sentences—a significant loss of liberty—is

not sufficient to "reasonably assure" the defendant's appearance, then neither would be the loss of $300 paid by an uncle. It would be absurd for the trial court to conclude otherwise, and absurd for the law to require that conclusion.

And what if this defendant had informed the court that if released, she had no intention of returning? Or if she had been charged under RSA 642:6 with escaping from custody? In either case, it would be absurd for the law to require the court to set bail in an amount which assured her release, despite the court's obligation to determine the amount of bail that would reasonably assure her appearance. The statute should not be read to compel that result.

E. Under the Separation of Powers Doctrine, the Trial Courts' Inherent Authority to Ensure the Orderly Administration of Justice Cannot be Impeded by a Statute That Prohibits Pre-Trial Detention on High Bail in Flight-Risk Cases.

This Court should also reject the interpretation of the statute pressed by the defendant because if understood that way, the statute would be an unconstitutional encroachment on the authority of the judiciary. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature]." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988), *cited in Polonsky v. Town of Bedford*, 171 N.H. 89, 96 (2018). "[T]he elementary rule is that every

reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* (citation omitted).

"The separation of powers among the legislative, executive and judicial branches of government is an important part of its constitutional fabric." *State v. Merrill*, 160 N.H. 467, 472 (2010). "The doctrine of separation of powers is violated only when one branch usurps an essential power of another." *Id.* "When the actions of one branch of government defeat or materially impair the inherent functions of another branch, such actions are unconstitutional." *Id.*

"It is the duty and responsibility of courts to be alert to protect the judicial processes from being brought into disrepute and to act vigorously when confronted with acts or conduct which tend to obstruct or interfere with the due and orderly administration of justice." *State v. Martina*, 135 N.H. 111, 115-16 (1991) (citation and internal quotation omitted). Trial courts possess the inherent authority "to insure the orderliness of judicial proceedings," and "have power, as a necessary incident to their general jurisdiction, to make such orders in relation to the cases pending before them, as are necessary to the progress of the cases and the dispatch of business." *State v. Laux*, 167 N.H. 698, 702 (2015).

To ensure the orderly administration of justice in criminal cases, trial courts must be able to take the steps necessary to ensure that criminal defendants will appear in court when required. That is the purpose of bail. "[A] primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants." *United States v. Salerno*, 481 U.S. 739, 753 (1987); *see also Ex parte Milburn*, 34 U.S. 704, 710 (1835) ("A recognizance of bail, in a criminal case, is taken to secure the due

attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon."); Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 Colum. L. Rev. 328, 329-30 (1982) ("Historically, defendants thought to pose a risk of flight if released have been denied bail. In these cases, the state's interest in assuring the integrity of the judicial process outweighs the defendant's interest in pretrial liberty."). If, as in this case, the evidence makes clear that if released, it is unlikely the defendant will return to court, the legislature may not bind the trial court's hands by mandating release nonetheless. To do so would materially impair an inherent function of the judiciary.

The State is not aware of any state in which the legislature has banned courts from detaining criminal defendants on high bail in flight-risk cases. Interpreting RSA 597:2 in a way that prohibits courts from doing so here, as advocated by the defendant, would violate the separation of powers doctrine. Since interpreting the statute as urged in this brief permits this Court to avoid that constitutional problem, this Court should find that the bail statute permits pre-trial detention on high bail when a trial court concludes by a preponderance of the evidence that release will not reasonably assure the appearance of the person as required.

F. The New Bail Statute's Legislative History Supports an Interpretation of the New Bail Statute That Permits Pretrial Detention in Flight-Risk Cases.

Finally, if this Court concludes that the conflicting language of the subparagraphs discussed above precludes an understanding of the bail

statute's meaning, the Court may look to the statute's legislative history. "Where more than one reasonable interpretation of the statutory language exists, [this Court] review[s] legislative history to aid [its] analysis." *In re Petition of State of New Hampshire*, 152 N.H. 185, 187 (2005). "If the plain language [of a statute] is ambiguous or conflicts with other statutory provisions, the court may look to other statutory interpretation tools," including legislative history. *People v. Coleman*, 422 P.3d 629, 637 (Colo. App. 2018).

Senator Dan Feltes was the statute's prime sponsor. App. 41. At the January 23, 2018 hearing before the Senate Judiciary Committee on Senate Bill 556, Senator Feltes testified as follows:

> Starting with bail reform, there'll be plenty of testimony behind me talking about how folks who are low income and can't afford cash bail or corporate surety bail get put in jail pending their trial, *just because they can't afford that amount*, and in situations when they're not considered a danger to their self or others.
>
> *So what this bill does, first and foremost … is it adopts ostensibly the federal rule that says you got to look at the person's financial situation*. You got to look at what's going on, and you can't set cash or corporate surety bail at a mark where it will imprison you. *It also says that judges should issue facts, findings of facts on their bail determinations*. That makes sense.
>
> We're talking about the basics here of making sure that dangerousness is looked at in all cases, setting a standard of clear and convincing evidence in those cases, making sure findings of facts are made when bail determinations are made, *and making sure people who are low income and can't afford the cash or corporate surety bail, they're not imprisoned*

> *pending their trial just because they can't pay that amount of money.*

App. 41-42 (emphasis added).

These statements make evident that the problem the senator sought to address was not that defendants who pose a serious risk for flight are detained pretrial—since even bail for wealthy flight-risk defendants may be set at an amount which is unaffordable, and that hardly seems a problem worth reformation—but that poor people who do not pose that risk are held merely because even very low bail is for them unattainable. In other words, the Criminal Justice Reform and Economic Fairness Act was directed not at freeing those who the evidence shows are not likely to return to court, but freeing those who are incarcerated on the sole basis that they are poor.

The senator's reference to the federal bail statute supports that position. Like the New Hampshire statute, *see* RSA 597:2, III(a), the federal bail statute directs that a judge "shall order the pretrial release of the person … unless the [court] determines that such release will not reasonably assure the appearance of the person as required …." 18 U.S.C. § 3142(b) (2012). Like the New Hampshire statute, *see* RSA 597:2, III(b)(1), the federal statute contains a provision, within its "release on conditions" section, that directs that the court "may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2). That provision, however, does not dictate that in flight-risk cases, bail may not be set at an amount that results in the defendant's pre-trial detention. The federal statute in fact permits detention when the case involves "a serious risk that the [the defendant] will flee," which, as in the new RSA 597:2, the government must establish by a preponderance of the

evidence. 18 U.S.C. §3142(f)(2); *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1124 (N.D. Iowa 2018) (noting that while the statute does not make explicit the evidentiary standard necessary for a determination of propensity for flight, the preponderance of evidence standard has been found appropriate).

Thus, contrary to the defendant's contention, when Senator Feltes says that the new bail statute "adopts ostensibly the *federal rule* that says you got to look at the person's financial situation," he cannot be understood to say that in flight-risk cases, bail may not be set in an amount that results in pretrial detention, because there is no such federal rule. Instead, what the senator means is that poverty alone cannot dictate detention.

The Court "construe[s] statutes to address the evil or mischief that the legislature intended to correct or remedy." *Costella*, 166 N.H. at 710 (citation omitted). Senator Feltes's testimony supports the position that the new bail statute was designed to ensure due process of law, entitling poor defendants to the assignment of an amount of bail that is based on their financial resources, a flight-risk determination made according to a specified burden of proof, and an articulation of specific facts "[i]f, as a result of the court's decision, a person is detained." RSA 597:2, III(d) (Supp. 2018).

Any other conclusion suggests a profound misunderstanding of the federal bail statute, diminishing the value of the testimony. In such a case, this Court should not consider SB 556's legislative history. *See, e.g., Costella*, 166 N.H. at 710 (where "a review of the legislative history is unavailing," this Court will not rely on that history to aid in its interpretation of the meaning of statutory language); *Dubins v. Regents of*

Univ. of California, 25 Cal. App. 4th 77, 86 (1994) ("While it is true that courts inquiring into legislative purpose give consideration to statements made by the sponsor of a bill, the rule that legislative intent may be inferred from the statement of the sponsor only applies to a sponsor's statement that is itself unambiguous. Isolated remarks by the sponsor of a bill that are ambiguous are not sufficient to demonstrate legislative intent." (Citations and internal brackets omitted.)).

Relatedly, while it is accurate that, as the defendant claims, Professor Albert Scherr's Judiciary Committee testimony seems to provide some support for the defendant's position, Scherr's testimony also supports the State's position. For example, Scherr testified:

> [W]e monitored for a number of months those who are incarcerated in Hillsborough County pending trial. And a stunning amount of people, 50 to 70 people each month, were there on less than a thousand dollars cash bail … *[T]he huge majority of those people are there because they can't afford the bail, not for any particular belief that they're a risk of flight or a danger to the community.*

App. 56-57. This testimony suggests that the evil at which the legislation was directed was the detention of poor defendants who were not afforded the process due with regard to flight-risk and dangerousness determinations—that is, the arbitrary assignment of cash bail amounts. But if the sum of Scherr's testimony is unclear, it too should be disregarded.

CONCLUSION

The new bail statute establishes a scheme requiring trial courts to ensure that cash and surety bail is set at an amount that is reasonable. It does this by requiring courts to consider a defendant's financial circumstances and risk for flight. In consideration of these factors, as the trial court held here, the lowers courts may in "unique circumstances" set bail at an amount which is unaffordable.

For all the reasons discussed above, this Court should hold that the new bail statute permits a trial court to set bail at a monetary amount the defendant cannot afford when the court has determined by a preponderance of the evidence that release will not assure the defendant's appearance as required.

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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May 20, 2019

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CERTIFICATE OF COMPLIANCE

I, Lisa L. Wolford, hereby certify that pursuant to New Hampshire Supreme Court Rule 16(11), this brief contains approximately 6,869 words, which is less than the total permitted by the rules of court. Counsel has relied on the word count of the computer program used to prepare this brief.

Date: May 20, 2019 *\/s/ Lisa L. Wolford*

CERTIFICATE OF SERVICE

I, Lisa L. Wolford, hereby certify that a copy of the State's brief shall be served on counsel for the defendant, David M. Rothstein, Deputy Director of the New Hampshire Public Defender, through the New Hampshire Supreme Court's electronic filing system.

Date: May 20, 2019 */s/ Lisa L. Wolford*

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SENATE JUDICIARY COMMITTEE

PUBLIC HEARING

SENATE BILL 556-FN

An ACT relative to changes in bail procedures and procedures for annulment of a criminal record.

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1 CHAIRPERSON: We're going to open the public
2 hearing on Senate Bill 556 and call the prime
3 sponsor, Senator Feltes. Good morning, Senator.
4 SEN. FELTES: Good morning, Madam Chair and
5 members of the Committee. For the record, Dan
6 Feltes. Honor to serve Senate District 15, Concord,
7 Hopkinton, Henniker, Warner and Penacook, and to
8 present for your consideration Senate Bill 556,
9 otherwise known as the Criminal Justice Reform and
10 Economic Fairness Act of 2018. It addresses two
11 areas, Madam Chair, and I'll summarize both and hit
12 the high points. Bail reform and annulment reform.
13 Starting with bail reform, there'll be plenty of
14 testimony behind me talking about how folks who are
15 low income and can't afford cash bail or corporate
16 surety bail get put in jail pending their trial, just
17 because they can't afford that amount, and in
18 situations when they're not considered a danger to
19 their self or others.
20 So what this bill does, first and foremost, Madam
21 Chair, is it adopts ostensibly the federal rule that
22 says you got to look at the person's financial
23 situation. You got to look at what's going on, and

1 you can't set cash or corporate surety bail at a mark
2 where it will imprison you. It also says that judges
3 should issue facts, findings of facts on their bail
4 determinations. That makes sense. It also expands
5 to all cases where the courts can look at
6 dangerousness and make sure that they can look at
7 dangerousness in all cases. And that's a pro, I
8 think, public safety element to this. It does not
9 change, Madam Chair. I'll be very clear, it does not
10 change the dangerousness evaluation. There is an
11 ongoing effort through the ICJJC. I think I got that
12 acronym right. Senator Lasky, is that --
13 SEN. LASKY: That's it.
14 SEN. FELTES: An ongoing effort to look at
15 dangerousness and risk assessment and that element of
16 bail reform. We don't go there in this. We're
17 talking about the basics here of making sure that
18 dangerousness is looked at in all cases, setting a
19 standard of clear and convincing evidence in those
20 cases, making sure findings of facts are made when
21 bail determinations are made, and making sure people
22 who are low income and can't afford the cash or
23 corporate surety bail, they're not imprisoned pending

1 their trial just because they can't pay that amount
2 of money.
3 I will be offering an amendment, which is a
4 function of further conversations with the courts.
5 One of the things that is captured in that amendment
6 on the bail reform is it deletes a provision in your
7 bill that says that in class A or B misdemeanors, if
8 someone is held and detained, that there's a
9 resolution of their case within 30 days, it deletes
10 that. That's been found to be -- you know, there's a
11 lot of concerns about that, and the workability of
12 that just deletes that.
13 It also adds in because we're expanding the
14 dangerousness evaluation to all cases, it will add in
15 a provision that says that except that dangerousness
16 determination shall not be based solely on evidence
17 of drug or alcohol addiction or homelessness. And so
18 not solely based on drug or alcohol addiction or
19 homelessness. By being homeless, doesn't mean you're
20 dangerous. By alcohol addiction or drug addiction,
21 doesn't mean your dangerous. And that's just a
22 benchmark, a safeguard against expanding the
23 dangerousness evaluation to go to all cases. I want

1 to make sure that in the event that a judge were to
2 look at someone and say, hey, you know what, you're
3 homeless, I think you're dangerous, that's not going
4 to be the issue for detainment or if you have a drug
5 addiction, I think you're dangerous. That's not
6 going to be the sole basis for that determination.
7 So that's what will be in the amendment when I offer
8 that up. That's bail reform.
9 Annulment reform. Hitting the high points on
10 annulment reform. You know, actually, let me stop
11 there for one second on bail reform and say this,
12 Madam Chair. If you are put in jail pending your
13 trial, you're not even found guilty, but you're in
14 jail pending your trial just because you can't afford
15 bail, you often lose your housing, you often lose
16 your job, and in some cases, you may even lose your
17 kids. So, this is an issue of fairness. It's an
18 issue of economic fairness and it's an issue of
19 protecting taxpayers too. Why lock someone up, spend
20 all the money locking them up just because they can't
21 pay a bail, cash bail or corporate surety.
22 So I think you'll hear some testimony about how
23 this is helpful in reducing costs in all likelihood

1 because there's a lot of folks that are getting
2 locked up pending their trial simply because they
3 don't have money to pay the cash bail or corporate
4 surety.
5 Annulment reform. This is also an issue of
6 economic fairness, Madam Chair. And it does three
7 things in the annulment provisions. Number one, it
8 says that if a case is, let's say this isn't a
9 technical term but thrown out, or if you're found not
10 guilty, or if it's nol-prossed, that that criminal
11 record is automatically annulled. It's not released
12 publicly. A lot of times, Madam Chair, there's some
13 companies that purchase up these criminal records,
14 including the criminal dockets, and then employers
15 and housing providers contract with them and so when
16 somebody's applying for a job or housing, they're
17 like, oh well, you know, you got arrested for this
18 and that and, you know, we don't want to hire you or
19 we don't want to -- we're going to deny your housing,
20 when in reality they were not guilty or it was nol-
21 prossed. And that's an impediment to jobs. That's
22 an impediment to housing and economic opportunity.
23 So this cleans that up.

1 Now there's no -- we can't stop -- in my view
2 anyways, we can't stop situations where arrest logs
3 are publicized. That's still -- you know, you can
4 Google somebody and say -- and find out that there's
5 an arrest log still; right, if that's publicized by a
6 police department. This doesn't address that.
7 There's a huge debate about whether or not that's
8 fair or not, but this doesn't go to that. All this
9 says is you're found not guilty, nol-prossed, the
10 case is gone, get rid of the record, automatically
11 annul it, so to speak.
12 Second, for class B misdemeanors and violations,
13 there is a provision to allow after you've completed
14 all the terms and conditions of whatever you've been
15 charged with, class B and violations, that you can
16 file a form with the court to annul your record.
17 That form is sent to the prosecution and they have an
18 opportunity to object to that annulment. So this is
19 a streamline annulment process for low level
20 offenses. But still, there's an opportunity for
21 prosecution to object to it and in the amendment I'm
22 going to hand out, it makes clear that the court
23 doesn't have to make an initial determination about

1 whether or not you're eligible for annulment. I
2 think the preference was, is let's try to reduce
3 potential administrative burden. Let's reduce
4 administrative burden on the courts. Courts don't
5 make initial determination. What they do is upon the
6 filing of a very simple form that's forwarded to the
7 prosecution, the prosecution can object or not. But
8 the court doesn't have to make that initial
9 determination. And that's been worked on with the
10 court system.
11 Lastly in the annulment provision, Madam Chair,
12 is making sure that there's a possibility for
13 indigent folks to have fees waived to allow them at
14 least the opportunity to file for annulment and
15 making sure all the fees are waivable for indigency.
16 This is a big deal. It's a barrier to employment,
17 Madam Chair. It doesn't change -- I want to repeat
18 this. It doesn't change the standard for annulment.
19 All it does is say that, number one, if you're not
20 guilty and that kind of thing, it's automatically
21 taken care of. We streamline class B and violations,
22 streamline that process and then make sure people
23 have a meaningful opportunity to petition for annul

1 by allowing them to get a waiver of the fees so they
2 can petition.
3 My understanding is Senator French, from talking
4 with him, has an amendment to add to the annulment,
5 which would basically bump up the timeframe from
6 which you can petition to annul for simple drug
7 possession from five or ten years after the sentence
8 to two years after the sentence. I don’t object to
9 that. And I think actually it makes good sense
10 because we’re in the middle of an opioid epidemic and
11 people who have been caught with simple possession,
12 not drug sales, simple possession, are having a hard
13 time getting jobs. And so two years after -- so I
14 understand Senator French’s (inaudible) two years
15 after you fulfill all the terms and conditions of
16 your sentence, then you can petition. Right now,
17 many cases it’s ten years after you fulfill all the
18 terms and conditions of your sentence that you can
19 petition to annul. And obviously, if you’re going to
20 have a hard time getting a job, waiting ten years
21 plus the terms and conditions is a long time. So I
22 don’t object to Senator French’s idea. I think it’s
23 consistent with the theme of this bill.

1 And the last point I'll note is that this has
2 been worked on for several months. You'll hear from
3 a lot of stakeholders about the work that they've
4 done on it. You'll hear about all the different
5 groups that endorse it. You'll hear all this kind of
6 testimony. And I just want to thank everybody behind
7 me, Madam Chair, who have worked on this. I want to
8 thank the Committee who have worked on it. I see
9 this as an extension, Madam Chair, of the debtors'
10 prison reform that we have all worked on in a
11 bipartisan way. And certainly that's reflected in
12 this bill too. This is a bipartisan bill. A lot of
13 people working hard on it, several months. It's a
14 good bill.
15 I will note one thing. When we talk about bail
16 reform, this isn't a complete overhaul of bail. Some
17 people, I think even some superior court judges may
18 prefer to do that. That's not what this is about.
19 This is to try to focus on the major issues that are
20 major problems and the ICJJC along with Senator Lasky
21 will continue to look at risk assessment and stuff
22 like that. Let's move forward with this bill right
23 now. It makes good common sense. It's good fiscal

1 policy for the State too, Madam Chair. And I'll be
2 happy to answer any questions and I have the
3 amendment here that I can give to Jen, which does the
4 things that I mentioned, so.
5 CHAIRPERSON: You're --
6 SEN. FELTES: I'm good.
7 CHAIRPERSON: Okay.
8 SEN. FELTES: Yeah, I'd be happy to answer
9 any questions.
10 CHAIRPERSON: I want to make sure. Okay.
11 Thank you very much for your testimony. Are there
12 questions from the Committee? Senator Lasky?
13 SEN. LASKY: Thank you, Madam Chair. Good
14 morning, Senator Feltes. This two year for drugs and
15 homelessness, is that going to where -- you've got a
16 two year waiting period in this bill.
17 SEN. FELTES: That's the typical -- right.
18 That's typical for most offenses. Senator French's
19 amendment says because that's typical for most
20 offenses, we're going to bump that up for simple drug
21 possession.
22 SEN. LASKY: It's not in the --
23 SEN. FELTES: It's not in my amendment.

1 Senator French has an amendment.

2 SEN. LASKY: Okay.

3 SEN. FELTES: And like I said, I don't

4 object to it and, in fact, I think it's consistent

5 with the purposes of this bill, that Senator French's

6 idea be incorporated. So, in terms of the

7 homelessness and drug addiction, that's on the first

8 section of your amendment and I handed out all the --

9 SEN. LASKY: Um-hmm.

10 SEN. FELTES: I don't even have my copy

11 anymore. So, but basically it says we're expanding

12 the dangerousness evaluation pretrial -- thank you

13 Jen. That's on line 11 and 12 of the amendment I

14 handed out. And the reason is, because you're

15 expanding dangerousness evaluation to all cases, this

16 is just one of the benchmarks that says -- on line

17 11, you can see, it shall be governed by the -- well,

18 let's start on line 10. A person who the court

19 determines to be a danger to the safety of that

20 person or the public shall be governed by the

21 provisions of paragraph 4. We don't -- in this

22 amendment, we don't touch paragraph 4 into the bill

23 in chief. We add clear and convincing evidence as a

1 standard. But everybody is going to be looked at in
2 terms of paragraph 4 in dangerousness now. And
3 because everybody is going to be looked at in terms
4 of dangerousness, the benchmark or the safeguard of
5 except that dangerousness determined shall not be
6 based solely in evidence of drug or alcohol addiction
7 or homelessness has been added. I think people
8 behind me can testify to why that was added, but --
9 and I think it makes good sense. It's just a
10 safeguard that, all right, we're looking at
11 dangerousness for everybody. If someone is homeless,
12 that's no de facto evidence of dangerousness if
13 someone has addiction. That's not de facto evidence
14 of dangerousness. That's what that says.
15 CHAIRPERSON: Good. Thank you. Are you all
16 set? Are there any further questions?
17 SEN. FELTES: Thank you very much.
18 CHAIRPERSON: Senator Feltes, in this
19 amendment that you handed out, you're giving the
20 prosecutor ten days. Do you think that that's a long
21 enough time? I'm thinking prosecutors are very busy
22 today and require them to do something within ten
23 days, we might be tying their hands.

1 SEN. FELTES: Madam Chair, if you want to
2 bump it out to whatever, you know, 15, 20 days,
3 whatever you think is reasonable, I wouldn't object
4 to it.
5 CHAIRPERSON: Okay. My other question is,
6 again, you -- the first page of the amendment, it
7 says for violation with a conviction date on or after
8 January 1, 2019. Why January 1, 2019?
9 SEN. FELTES: I think that was -- I'll defer
10 to people behind me. I think that was a function of
11 conversations with the courts in terms of the
12 administration.
13 CHAIRPERSON: Okay.
14 SEN. FELTES: I think. I don't know.
15 Howie's saying yes, so.
16 CHAIRPERSON: Okay. I'm just concerned
17 after listening to the testimony that you talked
18 about a number of folks who have been convicted for
19 minor possession and things of that nature, and that
20 they can't find jobs.
21 SEN. FELTES: I know.
22 CHAIRPERSON: So we're only going to do this
23 going forward. We're not going to say, okay, anyone

1 who's been convicted. Because if you're saying that
2 there's a ten year -- five to ten years, you would
3 want to alleviate that.
4 SEN. FELTES: I completely one hundred and
5 ten percent agree with you, Madam Chair. I think
6 this is a function of administrative processing --
7 CHAIRPERSON: Okay.
8 SEN. FELTES: -- and people can talk about
9 it. But if -- certainly the legislature can pass
10 laws that provide retroactive relief and we could do
11 that. That was part of the conversations throughout
12 this process, can we provide some retroactive
13 annulment relief, so people with offenses in 2016 or
14 2015 have a better ability to get their records
15 annulled. And I think the thinking was is that would
16 be pretty complicated with the court system and might
17 jack up administrative costs significantly.
18 CHAIRPERSON: Okay.
19 SEN. FELTES: And so that's how we arrived
20 there. But I'm completely with you on the concept,
21 and that's -- I think this is a balance of
22 conversations with stakeholders and people that
23 administer. But in theory, I agree with you. In

1 practice, that's how we arrived where we arrived.
2 CHAIRPERSON: Okay. Thank you very much for
3 your testimony. Are there any further questions?
4 Seeing none --
5 SEN. FELTES: Thank you, Madam Chair.
6 CHAIRPERSON: Thank you very much, Senator.
7 The Chair would call Albert Scherr. Good morning Mr.
8 Scherr.
9 ALBERT SCHERR: Good morning Madam Chair,
10 Senators. My name is Albert Scherr, although nobody
11 calls me Albert. Everybody calls me Buzz. I'm a
12 professor at UNH School of Law. I've been involved
13 in the criminal justice system in New Hampshire since
14 1981. I've trained -- I was a public defender for
15 many years and I became a professor 25 years ago and
16 have been training both defense lawyers and
17 prosecutors. There are now judges on the superior
18 court bench who have taken classes from me, which as
19 my 17-year-old daughter says, makes me wicked old.
20 So the point being, I've been in the system for a
21 long time. I know all the stakeholders and I started
22 working with the ACLU, Senator Feltes and any number
23 of people in the criminal justice community in the

1 summer of last year to see what we could do about
2 bail reform. The impetus for this was the work
3 Senator Feltes put in, bipartisan coalition did on
4 debtors' prison, what I'm going to refer to as
5 backend reform, people who weren't able to pay their
6 fines, were getting jailed, even if they couldn't
7 afford to pay their fines. And through a really
8 powerful bipartisan group, we were able to change
9 that. This is debtors' prison part two. It's
10 frontend reform, rather than backend reform. That
11 is, we're looking at the bail process when a person
12 first gets into the criminal justice system, be it at
13 a misdemeanor level in the circuit court or a felony
14 level increasingly in the first instance at the
15 superior court level, given felonies first.
16 So we took a look at -- you know, I can't say
17 that we have done a comprehensive objective
18 statistical study of the circumstances but we
19 monitored for a number of months those who are
20 incarcerated in Hillsborough County pending trial.
21 And a stunning amount of people, 50 to 70 people each
22 month, were there on less than a thousand dollars
23 cash bail, which I can't say this for certain. There

1 would be certainly exceptions to this. But the huge
2 majority of those people are there because they can't
3 afford the bail, not for any particular belief that
4 they're a risk of flight or a danger to the
5 community. If they're a risk of flight or danger to
6 the community, traditionally what you would see in
7 the system in my experience in talking to many in the
8 system, if you see individuals with high bail, high
9 cash bail or high cash or corporate surety bail,
10 judges just -- that is their, you know, kind of
11 backend reform of preventive detention without
12 calling that. And I understand the motives behind
13 that.
14 So the situation we're really trying to address
15 is -- just let me give you an example. An individual
16 comes in on a misdemeanor shoplifting or theft and he
17 is -- for one reason or another, the judge has some
18 concern about him. And most often when judges
19 consider what to do about bail, they -- you know,
20 they think about the nature of the crime and they
21 think about the other circumstances they know about
22 the crime and the defendant, all important and
23 legitimate considerations. And most -- many judges,

1 not all, have this kind of an informal schedule, oh
2 it’s a shoplifting, oh it’s a burglary or simple
3 assault, I usually set bail at this amount. Well,
4 what hasn’t -- the system has not required those
5 judges to take a look at the individual’s financial
6 condition to see if they’re concerned somebody is not
7 going to show up and they set bail at a thousand
8 dollars, the point of that, the true point of bail
9 when it addresses the risk of somebody not showing up
10 for trial, is to set an amount that they can meet and
11 will cause them pain if they don’t show up. And
12 what’s been happening is an amount gets set without
13 that consideration of the financial circumstance.
14 And so, the jails are around the state, both rural
15 and urban, are filled with people who are in there
16 for just because they can’t meet bail, even though
17 that may not well have been the judge’s intention.
18 So what this reform does is it creates three
19 groups. One group covered by roman numeral one is
20 that group for who the judge has no concerns about
21 flight risk or about dangerousness. And that -- in
22 those circumstances, the judge will set personal
23 recognizance bail. No money is required to be posted

1 in any regard.

2 Group number two is the group for whom -- for one
3 reason or another, the judge is concerned -- there's
4 some concern that they might not show up for trial.
5 There can be all sorts of reasons for that. They
6 live out of state, the seriousness of the offense,
7 prior failures to appear. And group number two is
8 covered by roman numeral three, and it tries to make
9 clear -- all roman numeral three does is try and make
10 clear what the rules are, more clear than the
11 existing statute does, what the rules are for
12 addressing the bail issue for someone there is
13 concern that they will not show up. And that's where
14 we've taken the language from the federal bail
15 statute that basically say you can't accept bail at
16 an amount that means a person will be held simply
17 because they can't pay that amount.

18 Group three is the group for whom there is
19 concern not about not showing up, but there is
20 concern about dangerousness to themselves or to the
21 public. And we have not changed that group other
22 than to expand the people who can fall into that
23 group. In the existing statute, the people who fell

1 into that group, the preventive -- eligible for
2 preventive detention, that is no bail in the case,
3 were primarily people involved in some iteration of a
4 domestic violence crime, and that has been in place
5 for a while. We've expanded that group to anybody in
6 front of the court on a crime, any crime. And so
7 that group is a bigger potential group than it used
8 to be.
9 So what we've done, is we've tried to -- in the
10 end, what we've done is we sorted out what was a lack
11 of clarity in the existing statute. It was unclear
12 where -- it merged together risk of not showing up
13 with dangerousness and made it one bundle of
14 considerations. And it was -- I think it was very
15 confusing for judges. We tried to add clarity,
16 putting in those two considerations in two separate
17 provisions with appropriate burdens of proof.
18 We went through a long process in doing this. We
19 met with Senator Feltes. We talked to people in the
20 criminal justice community. I know Senator Feltes
21 has spoken with the Attorney General's Office on
22 this. We started meeting with members of the
23 judiciary -- leaders in the judiciary in late

1 September and we had made any number of changes to
2 the draft on the bail reform piece in light of ideas
3 that came from the judiciary. I think Senator Feltes
4 said very eloquently this is -- bail is a hard nut.
5 There's a lot of concerns with bail and there's a lot
6 of perspectives on it, and I -- you know, I know
7 there -- I've spoken to criminal defense lawyers who
8 have concerns. I've spoken to judges who had some
9 concerns. I think we've gotten to the best place
10 that all the stake -- that the stakeholders that
11 we've talked to allow us to get to. I don't think we
12 have anyone who is going to be testifying in
13 opposition to this. There are compromises.
14 You know, given my job as a law professor is to
15 think of great ideas in the shower, so to speak. I
16 mean, I have all types of great ideas if I started
17 over how I would write this bail statute, new bail
18 statute. But, you know, that's not what we're here
19 for. So we've made some compromises and we -- you
20 know, this is in line with -- we've checked with the
21 Organization of Superintendents of Houses of
22 Correction. Dave Berry was going to be here, who is
23 the leader of that organization, but he's coming down

1 from North and he didn't want to get on the road.
2 But he has told us directly that that organization,
3 all the superintendents support this legislation
4 because I think there's some cost benefit to it.
5 CHAIRPERSON: Okay. Thank you very much for
6 your testimony. Are there any questions?
7 ALBERT SCHERR: The only thing I would add
8 in terms of the annulment statute, I think Senator
9 Feltes explained it very well.
10 CHAIRPERSON: Okay. All right. Thank you
11 very much. There's no questions.
12 ALBERT SCHERR: Thank you.
13 CHAIRPERSON: Thank you. The Chair would
14 call Sarah Blodgett.
15 SARAH BLODGETT: Good morning, Madam Chair
16 and Committee members. I'm Sarah Blodgett with the
17 Judicial Council. Today, I am testifying in an
18 informational capacity but I anticipate that when
19 this bill goes to the House, I will be testifying in
20 favor of it on behalf of the Council. The Judicial
21 Council is committed to bail reform and is actually
22 involved in some of the initiatives that Senator
23 Feltes mentioned earlier and believes that this

1 legislation is a key component of moving forward in
2 that area. When this was discussed at the Council,
3 there were two concerns, both of which I think are
4 addressed by Senator Feltes' amendment today. One
5 concern was that by expanding preventive detention,
6 folks who are struggling with substance abuse would
7 be held, even if they don't necessarily represent a
8 danger to themselves or the community, but it sounds
9 like that has been addressed. And the other concern
10 was the burden on the courts for resolving cases with
11 detention within 30 days. And that has also been
12 addressed in the amendment.
13 I'm not going to rehash all of the articulate
14 arguments you've heard in favor of bail reform. I
15 just wanted to add that one of the Council's concerns
16 in making sure that bail reform does move forward is
17 the much greater likelihood that someone who has been
18 detained will just plead guilty when their trial
19 comes, instead of having -- taking advantage of their
20 constitutional right to have a jury trial. And so
21 that is one other reason that I would ask you to
22 consider this legislation.
23 CHAIRPERSON: Okay. Thank you very much,

1 Ms. Blodgett. Are there any questions? Seeing none,
2 thank you.
3 SARAH BLODGETT: Thank you for taking my
4 testimony.
5 CHAIRPERSON: The Chair would call Devon
6 Chaffee.
7 DEVON CHAFFEE: Madam Chair, I believe that
8 the argument (inaudible) quite sufficiently. So in
9 respect of your time constraints, I'm going to waive
10 my testimony.
11 CHAIRPERSON: Thank you very much, Ms.
12 Chaffee. The Chair will call Greg Moore.
13 GREG MOORE: Thank you, Madam Chair and
14 members of the Senate Judiciary Committee. My name
15 is Greg Moore. I'm the State Director for Americans
16 for Prosperity and I am here today primarily as a
17 currier. Typically, Americans for Prosperity does
18 not get involved substantially in criminal justice
19 network. The organization within our network that
20 does that is Generation Opportunity. Unfortunately,
21 the Policy Director, David Barnes, was unable to make
22 it here today. So I wanted to submit his written
23 testimony.

1 However, on behalf of Americans for Prosperity,
2 certainly beyond the scope of what David Barnes laid
3 out in his testimony before you, I also wanted to put
4 a little more meat on the bones of some of the costs
5 that are borne by the taxpayers. I was reading a
6 story about three weeks ago in the *Laconia Daily Sun*
7 and it shows the costs for housing unadjudicated
8 individuals in the county jail system. And Belknap
9 County, the County Corrections Superintendent looked
10 specifically at this in the central northern counties
11 of New Hampshire, and he found that Belknap actually
12 had the lowest annualized costs, which is $43,000 on
13 average. And the highest, which was Merrimack
14 County, which amounted to over $103,000 per year to
15 house unadjudicated individuals. So an extraordinary
16 cost is being borne by the taxpayers as well as
17 obviously as laid out in that document, causes
18 hardship for individuals, for families and for
19 employers, the costs being borne by local property
20 taxpayers in order to house unadjudicated individuals
21 who simply cannot afford to make bail is
22 extraordinary. And I would just encourage you to
23 consider that as well and I do have some copies of

1 this that I'll hand out as well.

2 CHAIRPERSON: Thank you very much for your

3 testimony, Mr. Moore.

4 GREG MOORE: Thank you.

5 CHAIRPERSON: Are there any questions from

6 the Committee? Seeing none, thank you. The Chair

7 will call Katherine Cooper. Good morning, Ms.

8 Cooper.

9 KATHERINE COOPER: Good morning. Thank you,

10 Madam Chair and members of the Committee. Just

11 briefly, I would like to point out one or two things.

12 This has been an ongoing problem in New Hampshire for

13 decades and the criminal justice system has tried

14 several different ways to make changes to what was

15 already frankly a pretty good bail statute. But what

16 a lot of this comes down to is simply habit. And we

17 need a change in the law to get people out of their

18 habits. There are many places where you go to court

19 and it's just like almost literally a rubberstamp.

20 This is the charge, this is the $250 cash bail that

21 goes with it. So we need something to shape things

22 up a little bit and get people out of those habits.

23 And I'll tell you a quick story. A good friend

1 of mine became a judge a couple of years ago. We'd
2 worked together for 20 years. He was a prosecutor
3 and a defense lawyer, really good guy. Totally love
4 him. We were at a party a couple weeks after he took
5 the bench and I said, so what did you today? And he
6 told me that he -- told me about a couple of cases
7 and said, yes, and I sent this guy to jail for $500
8 cash bail. And I was like, why? Why did you do
9 that? And he's like, well -- I'm like, you are not
10 supposed to do that. You are supposed to be in there
11 changing these things. And he's like, you know, I
12 just -- I kind of just wanted to get his attention.
13 And, you know, that's the problem that we're faced
14 with. It's -- the best people in the system are
15 still doing these things out of habit. So, having a
16 change like this is really necessary to make sure
17 that we're actually using bail for the reasons that
18 it should be used for, so.
19 CHAIRPERSON: Okay. Thank you very much for
20 your testimony.
21 KATHERINE COOPER: Thank you.
22 CHAIRPERSON: Are there questions? Seeing
23 none, thank you very much. Are there any other

1 members of the public that would like to speak to
2 Senate Bill 556? Seeing none, close the public
3 hearing.
4 (End)
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