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CENTER ON COMMUNITY SAFETY, POLICING AND INEQUALITY

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Dear Members of the Judiciary Committee:

We oppose HB 6834. It would exacerbate problems with pretrial detention in Connecticut by combining the worst aspects of cash bail and preventive detention, with few of the protections necessary to legitimize the latter. Moreover, these deficiencies would primarily impact poor communities of color, who already bear a disproportionate burden of the criminal system's effects.

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When it comes to supervising defendants before trial, lawmakers and judges have two tools at their disposal: cash bail and preventive detention. Both have serious drawbacks. Cash bail penalizes poverty, since individuals who cannot afford to post bond remain incarcerated by default, and preventive detention erodes the presumption of innocence by imposing the equivalent of a carceral sentence before guilt is assessed. In light of these concerns, many jurisdictions, nationwide, have recently begun (1) to move away from cash bail; and (2) to strengthen safeguards around preventive detention, in an effort to ensure that its extraordinary remedy—mandatory incarceration of presumed-innocent individuals—is reserved for truly extraordinary cases.

HB 6834 bucks both of these trends. It would make cash bail even more draconian than the status quo. And it would dilute safeguards around preventive detention rather than strengthening them—in some cases, by eliminating those safeguards entirely. For certain categories of arrest, HB 6834 would effectively mandate preventive detention *without any individualized showing of any kind*, let alone the robust individualized showing of necessity that has long underwritten preventive detention in sibling jurisdictions. This would be a major step backward for Connecticut.

I. HB 6834 Would Expand Preventive Detention

HB 6834 would expand the use of preventive detention. The bill aims to reconfigure pretrial process as a means of in-kind punishment: forcing people accused of certain types of crime to

endure the equivalent of a carceral sentence before their guilt is assessed. The bill's own statement of purpose makes this plain. It casts the bill in terms of "increased accountability" for certain firearm offenses,[1] language that telegraphs an intent to punish individuals for criminal conduct not yet adjudicated.

First, HB 6834 would set bail categorically higher for individuals charged with certain firearm offenses, a change that would effectively result in preventive detention—because of inability to pay—in many such cases.[2] *Second*, HB 6834 would increase, and in many cases render mandatory, the use of preventive detention for individuals charged with certain firearm offenses while on probation or parole.

Traditionally, in Connecticut as elsewhere, prosecutors and parole officers exercise discretion when determining, case by case, whether to request a modification or revocation of conditions of release. In other words, the current practice is for prosecutors and parole officers to evaluate cases individually and make recommendations to the court on that basis. HB 6834 would supplant this discretionary system with a largely mandatory one—taking pretrial release off the table *even in cases where a prosecutor or parole officer would have advocated release*.[3] This outcome defies common sense; it runs contrary to decades of criminological research;[4] and it stands to exacerbate race and class disparities in the criminal justice system.

II. The Expansion of Preventive Detention Requires More Procedural Safeguards, Not Fewer

Preventive detention requires robust safeguards. It calls for more individualized review, not less, and it demands procedures—around timing, evidence, burdens of proof, and legal representation—that render that review effective.

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[1] H.B. 6834, 2017 Gen. Assemb., Reg. Sess. (Conn. 2023).

[2] *State v. Pan*, 2022 Conn. LEXIS 294, 25 (Conn. 2022) ("Where a judge sets bail in an amount so far beyond a defendant's ability to pay that it is likely to result in long-term pretrial detention, it is the functional equivalent of an order for pretrial detention, and the judge's decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty.") (quoting *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017)). There can be no dispute that the intent of this provision is to increase the use of preventive detention, as there is no logical or evidence-based connection between the larger payment and public safety. In other words, individuals who pay 30 percent of their bond for their liberty are no safer to the community than those who pay only 10 percent.

[3] H.B. 6834, 2017 Gen. Assemb., Reg. Sess. (Conn. 2023) (explaining that HB mandates: (1) mandates initial detention for people charged with certain firearm offenses while on probation, up to 30 days without a hearing. Detention is therefore automatic in these circumstances, rather than an individualized process that takes into account multiple factors; (2) mandates that prosecutors to petition to revoke conditions of release in certain cases where an individual is arrested on firearms offenses while released in a pending case, rather than exercise their discretion in the manner they normally do; (3) mandates incarceration for individuals arrested for certain firearms offenses while on parole, even though that decision is normally within the discretion of the parole officer who makes individualized determinations.)

[4] Brook Hopkins, Chiraag Bains, and Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. Crim. L. & Criminology 679 (2018); Tina L. Freiburger & Carly M. Hilinski, *The Impact of Race, Gender, and Age on the Pretrial Decision*, Grand Valley State University 320 (2010).

On both fronts, HB 6834 gets the procedural calculus backwards. To begin with, the bill would eliminate individualized determinations even in cases where *all* officials—prosecutors, parole officers, and judges—favor pretrial release. What is more, in many cases HB 6834 would flip the burden of proof, creating a rebuttable presumption that an individual is a threat to public safety; this would require defendants to affirmatively show that their release would not endanger the public. In practice, this could amount to a near-impossible burden—requiring arrestees to "prove the negative," often without access to robust evidence or the ability to challenge the government's evidence.

These reforms are 180 degrees off the mark. Preventive detention is an extraordinary deprivation of liberty; the state may not usually detain people simply because they pose a risk to the public. Preventive detention should be a last-resort measure, bolstered by strong procedural protections. Those include:

- ensuring that detention/release decisions are made within a short time frame and only after a thorough hearing on the merits of the criminal allegations and the enumerated bail factors, at which witnesses are under oath and subject to cross-examination;
- requiring a showing of clear and convincing evidence that the individuals arrested under these provisions should be detained;
- allowing for individualized decision-making (with appropriate risk assessments by trained professionals and with the benefit of multiple sources of information from the defense and the prosecution) in every case where detention is authorized.

On these fronts, HB 6834 falls short. It would create a preventive detention regime that is, on the whole, less discretionary, less attentive to individual circumstance, and more dragnet in nature. This is the opposite of where preventive detention is heading in other jurisdictions—and where Connecticut should aspire to go.

Comparing HB 6834 to the federal approach to preventive detention sharpens the point further into focus. The federal scheme upheld by the Supreme Court in *United States v. Salerno*[5] allowed preventive detention where the decision was made only after a full, adversarial hearing and only after an individualized finding by clear and convincing evidence that an individual poses a "demonstrable danger" and that no less restrictive alternative was viable.[6] In the federal system, prosecutors are required to present live testimony by witnesses under oath about the criminal allegations, and the defense is entitled to cross-examine those witnesses under oath and to present its own witnesses and evidence.[7] In order to detain someone, the judge must specifically find that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."[8] In recognition of the devastating impacts of even short periods of pretrial detention—at a time when an individual can lose their home, their job, and their children in a matter of days—the hearing must happen "immediately"

[5] *United States v. Salerno*, 481 U.S. 739, 755 (1987).
[6] *Id*. at 750.
[7] *See generally* U.S. Const. amend. VI.
[8] 18 U.S. Code §3142 (e)(1).

upon release unless a continuance is requested. Absent good cause, the hearing may not be continued more than three days at the request of the government.[9]

As in the federal system, states that authorize preventive detention have far more robust procedures in place.[10] In Illinois, police must issue notices to appear in most cases, rather than make a custodial arrest.[11] Pretrial detention is authorized only for certain charges, and in order to detain, the state must show that the individual presents "a specific and actual threat to another person or a high probability of willful flight."[12] The procedures for the hearing itself are rigorous, requiring a high probability of willful flight and several procedural requirements: a written petition to detain, judicial discretion to grant a hearing, a maximum of 48 hours for the hearing to take place, and required review of decision to detain at every subsequent court date.

In short, for the federal government and states alike, the prosecution carries significant burdens and courts engage in a deliberative process designed to ensure that detention is used only for individuals and charges for whom no other option is possible. These proceedings are lengthy and thorough, because the decision to flout the presumption of innocence—and incarcerate someone before their guilt is established—is a grave one.

III. By Expanding Preventive Detention, HB 6834 Would Exacerbate Race and Class Disparities in the Criminal Justice System

HB 6834 will entrench already existing race and class disparities in the criminal system. A majority of the pretrial population in Connecticut is non-white.[13] Nonwhite poor defendants are less likely to be able to pay larger bail amounts and more likely to be detained. Expanding cash bail with a 30-percent premium exacerbates the wealth discrimination inherent in any bail system, and the downstream consequences will have racially disproportionate effects as well. Pretrial detention leads to job loss, housing instability, and family disruption.[14] It leads to the suspension or termination of public benefits,[15] increases the probability of conviction, and significantly affects long-term economic prospects.[16] Given the concentrations of poverty and race segregation, the disparate impacts of arrest and preventive detention are borne not just by detained individuals but by their broader communities as well.

IV. Conclusion

Cash bail and preventive detention are both suboptimal tools for ensuring public safety. The former conditions liberty on wealth, which raises major fairness concerns and exacerbates economic inequality. The latter grates against due process and invites overuse by prosecutors.

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[9] 18 U.S. Code §3142 (f)(2).
[10] Sandra G. Mayson, *Detention by Any Other Name*, 69 Duke L.J. 1643, 1651 (2020).
[11] 725 Ill. Comp. Stat. Ann. 5/107-12 (2022).
[12] Connecticut Sentencing Commission, 2022 Report on Pretrial Justice Towards a Fair and Just System 13 (2022).
[13] Connecticut Sentencing Commission, Report to the Governor and the General Assembly on Pretrial Release and Detention in Connecticut 51 (2017).
[14] Alexander Holsinger & Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, 82 Federal Probation 39, 40 (2018).
[15] *Id.*
[16] Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201 (2018).

When preventive detention is on the table, robust protections are necessary—to ensure that individualized decisions, based on evidence and reflecting an adversarial process, are made in as timely a manner as possible. HB 6834 erodes the presumption of innocence and removes procedural protections rather than adding them. It should not be enacted into law.