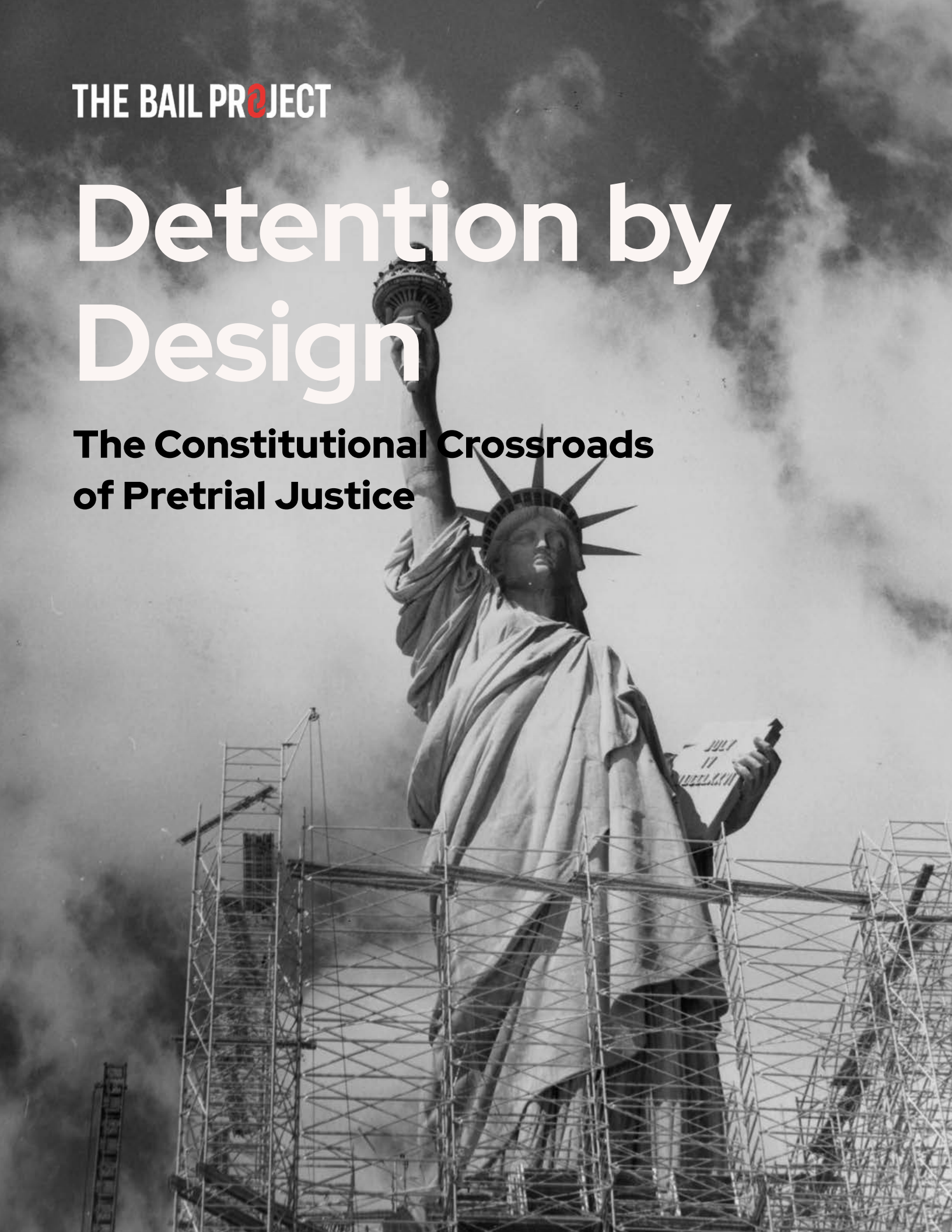


THE BAIL PROJECT

Detention by Design

**The Constitutional Crossroads
of Pretrial Justice**



About The Bail Project






The Bail Project is a national nonprofit working to transform America's pretrial system by eliminating reliance on cash bail and proving that a more humane, equitable, and effective pretrial system is possible. We provide free bail assistance and pretrial support to thousands of low-income people each year while advancing policy change at the local, state, and national levels. Since our founding, The Bail Project has supported over 40,000 people navigating the pretrial system, which includes nearly 35,000 individuals whose release we secured by posting bail and providing supportive services such as court reminders and transportation assistance. With this support, those clients returned to court 92% of the time, proving that support — not wealth — is what makes the system work. We have also provided supportive services through pilot programs to more than 6,000 people, ensuring that both wealth and access to support are never barriers to fairness in the pretrial process. Learn more at bailproject.org.

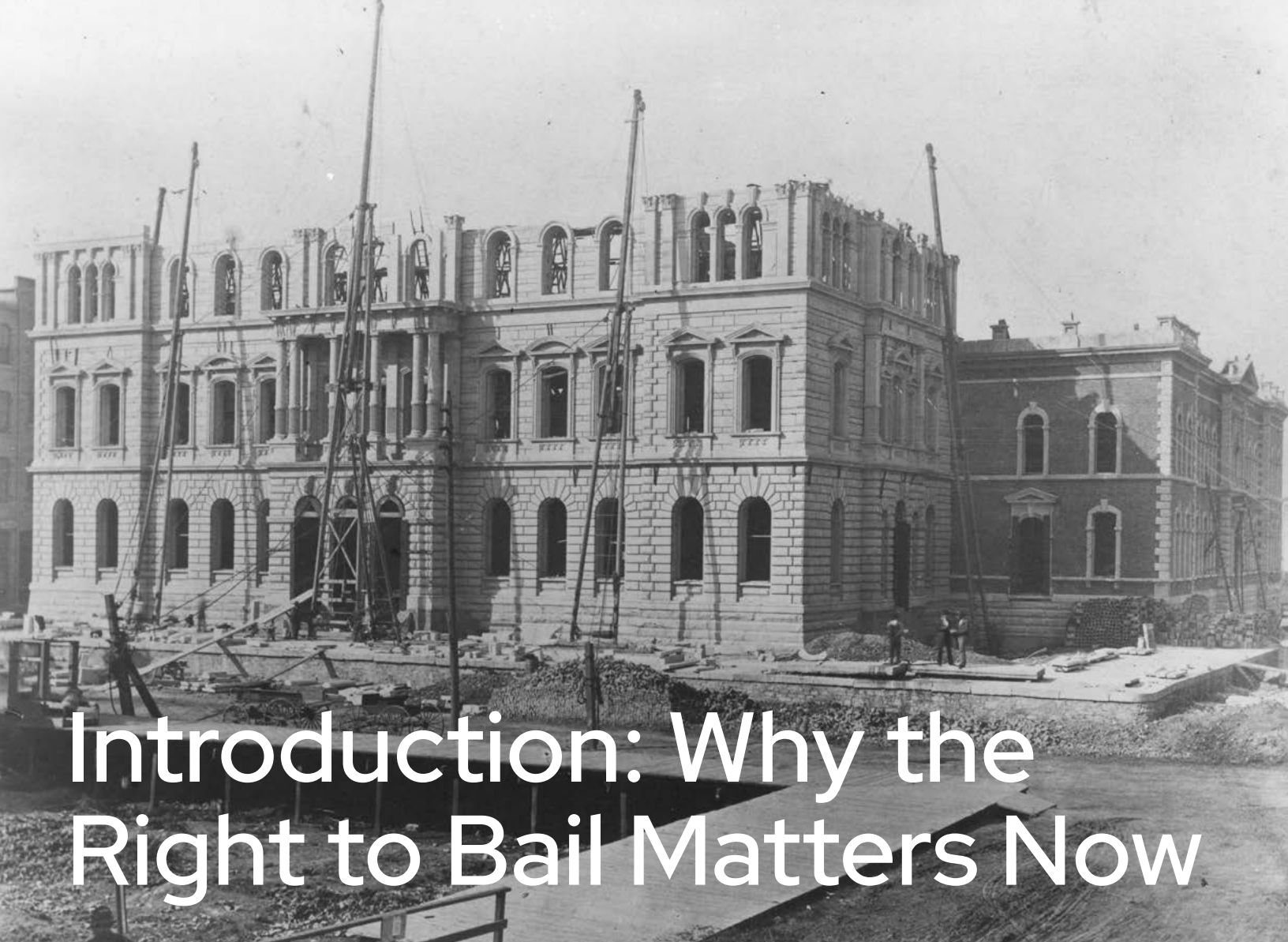
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Disclaimer: The legislative information and analysis contained in this report reflect research and developments as of November 5, 2025. Because laws and policies continue to evolve, certain details may have changed since publication. Readers are encouraged to consult the most recent legislative sources for updates.

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Introduction: Why the Right to Bail Matters Now


Across the United States, a quiet but powerful shift is reshaping pretrial justice:

constitutional amendments that expand preventative detention and entrench the use of cash bail. Since 2021, over a quarter of the states with a constitutional right to bail have proposed or enacted changes to that right, often in response to political pressure, court rulings, or high-profile incidents. These amendments are complex and often overlooked by the general public, yet they carry profound and lasting consequences for due process, equity, and the presumption of innocence.

The stakes could not be higher. The constitutional right to bail is a cornerstone of pretrial liberty. At its core, the right to bail means the right to pretrial release — not just through money, but through fair and reasonable conditions. As states increasingly chisel away at this fundamental right, it is essential for advocates to respond with clarity, precision, and vision. *Detention by Design* from The Bail Project is intended not just as a warning, but as a tool — one that empowers the field to lead with purpose, resist harmful changes, and advance a more just and equitable approach to pretrial justice.

This report is a comprehensive, advocate-focused guide to the evolving landscape of state constitutional amendments related to the right to bail. It provides a strategic framework for understanding and evaluating these changes, organized around three core components: i) the detention eligibility net, which determines who can be detained without bail and under what conditions); ii) the presence or absence of guardrails such as evidentiary standards and definitions of risk; and iii) the level of due process afforded to defendants including rights that protect against arbitrary detention.

“The constitutional right to bail is a cornerstone of pretrial liberty. At its core, the right to bail means the right to pretrial release – not just through money, but through fair and reasonable conditions.”



In addition to this analytical framework, the report draws on years of direct policy work, legal research, and on-the-ground advocacy to offer an in-depth analysis of national trends and the catalysts driving amendment activity. These catalysts include moments of crime panic, the repeal of the death penalty, and legal challenges that have prompted state legislatures to revisit constitutional provisions. The report also includes detailed case studies of seven states and provides model policy guidance for how to write, amend, or oppose constitutional changes affecting the right to bail. It also contains tactical recommendations for advocacy, legislative engagement, coalition building, and public education, giving practitioners the tools they need to act strategically in this fast-moving policy environment.

Together, this research and guidance offer a roadmap for navigating one of the most consequential fronts in the fight for pretrial justice.

Key Findings

Amendments are accelerating:

Between 2021 and 2025, eleven states introduced bail-related constitutional amendments. Most expand detention eligibility, reduce judicial discretion, and lack meaningful guardrails and due process protections.

Detention is being redefined:

Some amendments replace traditional charge-based eligibility with vague and open-ended risk-based language that broadens who can be jailed pretrial, without embedding strong guardrails to limit potential over use.

Cash bail is being entrenched:

States like Ohio and Wisconsin have redefined the right to bail as a right to have monetary conditions imposed — reinforcing wealth-based detention.

Procedural safeguards are rare:

Only nine of 41 states with a right to bail include constitutional language ensuring hearings, legal counsel, or time limits on pretrial detention.

Advocates can win reforms:

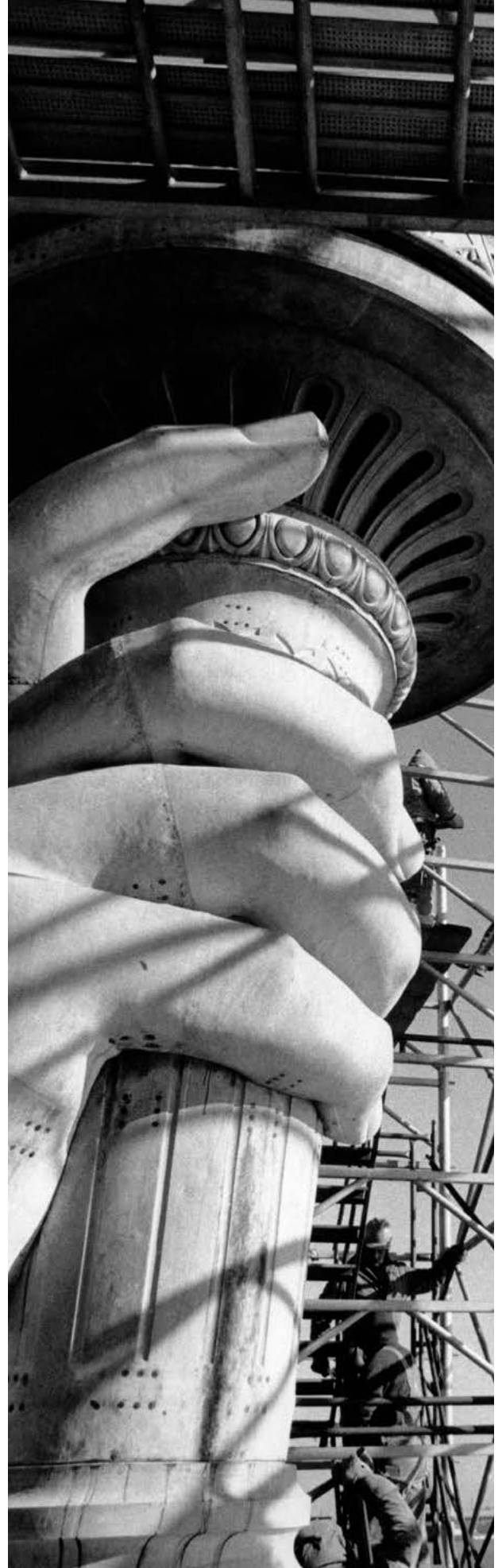
In Texas, sustained advocacy helped secure essential due process protections and guardrails in a 2025 amendment — including an unprecedented right to counsel provision, and a “clear and convincing” evidentiary standard for assessing public safety risk.

The Origin and Erosion of the Right to Bail

Across the United States, 41 states enshrine the right to bail in their constitutions.¹ This right is meant to guarantee that people be released from custody before trial, with very limited exceptions. The structure of original, unaltered right to bail provisions included three essential parts: i) a clear statement affirming the right to bail or release for all people; ii) a narrow exception of who may be denied the right to bail; and iii) a threshold for when detention is allowed. Traditional constitutional language illustrates this: "All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great." In practice, this was supposed to be a broad safeguard of liberty — preventative detention was only allowed in the most extreme cases. As of this writing, 16 states maintain this original, unamended provision.

But over time, the meaning of "bail" has been distorted.² Though many assume it refers only to money, bail historically referred to the legal process of release, not a price tag.³ In fact, the term "sureties" in the language example above referred to people — family members, neighbors, or community figures — who promised to ensure that the accused would return to court and comply with the law. Gradually, those personal promises were replaced with financial guarantees and courts began demanding payment instead of trust. What started as a safeguard of liberty was transformed into a transaction, where freedom depended on cash. Money bail became the dominant form of release. This shift reshaped public understanding and allowed wealth — not safety or fairness — to determine who goes free.

Starting in the mid-20th century, states started to chip away at that original structure by expanding eligibility for preventative detention. Some expanded the "capital crimes" exception to cover violent offenses or those punishable by life imprisonment. Other states created more complex systems, adding factors like criminal history or using new forms of risk assessment with different burdens of proof.⁴ What most states did not do, however, was limit the use of cash bail. Instead, judges continued to rely on setting high bail amounts as the main way — often the only way — to keep people in jail before trial.



"States continue to propose and pass amendments that expand preventative detention while preserving the use of cash bail."

In 1956, Texas enacted the first major amendment to the constitutional right to bail, expanding preventative detention to include people accused of a felony who already had two prior felony convictions.⁵ This opened the door to a wave of "tough-on-crime" amendments in 20 states during the 1970s through the 1990s, as states broadened detention eligibility beyond capital crimes to include repeat felonies, violent offenses, and even first-time felony arrests. In extreme cases, like in New Mexico and Ohio, the shift went further still: any felony charge could be grounds to hold someone without bail.⁶

Amendment activity slowed between 2000 and 2020, but did not disappear. In this period, a few states — most notably New Jersey in 2014 and New Mexico in 2016 — sought to modernize their bail systems. Both paired an expansion of detention eligibility with reforms aimed at reducing or eliminating cash bail. These efforts reflected the bipartisan "smart-on-crime" movement of the 2010s that acknowledged the inequity of cash bail and developed systems where safety — not wealth — would determine who was incarcerated pretrial. Yet they did so without expanding due process protections that would restrict the overuse of preventative detention.

In the decade since the New Jersey and New Mexico reforms, few states prioritized expanding the right to pretrial liberty. Instead, rising public anxiety about crime — especially following pandemic-era spikes — incited a wave of proposals that expand detention and preserve cash bail.⁷ Between 2021 and 2025, several states moved to change their constitutional right to bail, signaling a renewed push to expand pretrial detention and weaken safeguards for release. 2025 alone marked the most active year for such amendments since the late 1980s. In just five years, eleven states — representing over a quarter of those with a constitutional right to pretrial release — introduced resolutions to constrain those provisions. Six states since 2021 have already enacted amendments: Alabama and Ohio in 2022,

Wisconsin in 2023, Colorado in 2024, and Delaware and Texas in 2025.⁸ Two others — Indiana and Tennessee — have advanced resolutions through their legislatures but still face additional procedural steps before final ratification.⁹

While Texas's amendment still expands preventative detention eligibility, it also notably embeds key due process protections that are rare in this landscape. For example, it guarantees the defendant has a right to an attorney at certain hearings where bail may be denied — the first amendment to ever include this safeguard.¹⁰ These protections make Texas an outlier when compared to the other amendments that have passed or advanced in the past five years.¹¹ In contrast, states such as Alabama, Delaware, Indiana, and Tennessee enacted sweeping expansions of detention eligibility without including guardrails needed to prevent misuse. Colorado's amendment was narrower — only adding first-degree murder to the list of offenses eligible for preventative detention — but it likewise failed to strengthen due process protections.¹²

A notable exception to this wave is Illinois. In 2023, it became the first state to eliminate cash bail entirely, replacing it with a system that guarantees pretrial release for most, offers nonfinancial release conditions for others, and, in limited cases, intentional preventative detention. Although not a constitutional amendment, this reform shows that bold legislative change is possible — and often necessary — whether alongside, or instead of, constitutional amendments.

Despite these exceptions, the broader trend is unmistakable: states continue to propose and pass amendments that expand preventative detention while preserving the use of cash bail. Even reforms designed to curb the wealth-based incarceration that results from unaffordable bail often include language that undermines pretrial liberty. If left unchallenged, these measures risk decades of progress.

Where States Stand Today

Today, state constitutions vary widely in how they define and protect their right to bail. In sum, 41 states guarantee some right to pretrial release in their constitutions, with nine offering no such constitutional assurance. Of the 41 states that conditionally guarantee pretrial release, 25 have at some point amended their provisions to expand circumstances where pretrial detention is permissible. Many of these changes cast a wider detention net, allowing judges to jail people based on vague notions of risk, while still preserving or even reinforcing cash bail. The result is a system that punishes poverty, weakens the presumption of innocence, and erodes pretrial freedom. Out of 50 states:

Sixteen states	still retain their original right to bail provisions, which broadly guarantee pretrial liberty and permit preventative detention only in the most limited circumstances — typically for capital offenses. These unamended provisions reflect the traditional model, where the presumption is to release most defendants pretrial and detention is the rare exception. However, in most places, there is an absence of restrictions on cash bail conditions, which serves as a driver of pretrial detention and undermines the broad right to pretrial release.
Twenty-five states	have amended their constitutions to expand the detention net. These amendments often increase the number of charges or circumstances under which someone can be held without bail. Although amended provisions are more likely to include updated guardrails and due process protections compared to unamended provisions, there is still much room for improvement. Amended provisions typically incorporate vague risk-based language that makes pretrial detention more common. Many of these changes occurred during the "tough-on-crime" eras, though recent years have seen a resurgence of similar efforts under the guise of public safety. Overall, amendments to the right to bail can be fair and just if they balance preventative detention with strong due process and clear guardrails to protect overuse — ensuring it remains a rare and limited exception.
Nine states	do not enshrine a constitutional right to bail. In these states, rules governing pretrial release are set by statute or court rule, making them far easier to amend through legislative action or legal challenges. While that structure is not inherently problematic, it does mean there are fewer formal and enduring safeguards against excessive or arbitrary detention.

Figure 1: Constitutional Right to Pretrial Release by Status

Type of Release Provision	States
Constitutional Provision – Unamended <i>Broad Guarantee of Pretrial Release</i>	Alaska, Arkansas, Connecticut, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Montana, North Dakota, South Dakota, Tennessee, Wyoming
Constitutional Provision – Amended <i>Limited Guarantees of Pretrial Release</i>	Alabama, Arizona, California, Colorado, Delaware, Florida, Illinois, Louisiana, Michigan, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, Wisconsin
No Constitutional Provision – Statute or Rule Only <i>Variable Guarantees of Pretrial Release</i>	Georgia, Hawaii, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Virginia, West Virginia

What Drives These Amendments?

It is impossible to know exactly when or where the next constitutional amendment to the right to bail will appear, but history points to clear patterns. Amendments often arise in moments of political pressure, judicial intervention, or policy shifts. Some are reactive — driven by public outcry or unfavorable court rulings — while others are more strategic, designed to bring outdated provisions in line with new policy frameworks.

Across the country, five recurring catalysts have driven bail-related constitutional amendments. Two are bail-specific, while three reflect larger criminal justice or regional shifts.

1. High-Profile Crimes Committed While on Bail

When people released on bail are accused of violent crimes, the resulting public outrage often fuels swift political responses. Media amplification and lawmakers' rhetoric turn these rare cases into justification for tougher pretrial restrictions, frequently through constitutional amendments. Alabama's 2022 amendment and Wisconsin's 2023 amendment both exemplify this pattern, using single tragic cases to expand detention eligibility for so-called "violent offenders."¹³

2. Judicial Rulings on Bail Practices

Court decisions that strike down existing bail practices, such as unaffordable bail or bond schedules, can trigger legislative backlash or reform. In New Mexico (2016), the legislature worked with the state's Chief Justice to curb cash bail while expanding preventative detention.¹⁴ In Ohio (2022), lawmakers took the opposite approach, limiting judicial rulemaking power and embedding cash bail more deeply into the constitution.¹⁵ In both states, judicial rulings directly reshaped the constitutional right to bail.

3. Elimination of the Death Penalty

Many constitutions limit detention without bail to capital offenses. When states abolish or suspend capital punishment, that framework collapses. This disconnect has spurred amendments in New Jersey, Colorado, and Delaware, where repeal or invalidation of the death penalty created momentum to update pretrial detention rules.¹⁶

4. Victims' Rights Amendments

Victims' rights amendments enhance procedural rights for crime victims but often intersect with bail and pretrial decision-making. In some states, they have limited defendants' release rights or complicated traditional bail procedures. California, Missouri, and Oregon offer illustrative examples.¹⁷ In Oregon, for instance, a victims' rights amendment effectively functioned as a bail amendment by altering release eligibility and judicial obligations, even though the right to bail clause itself was untouched.¹⁸

5. Regional Influence and Policy Diffusion

States rarely act alone on bail reform: they frequently borrow language and policy frameworks from each other, often following regional trends. Texas's mid-20th century amendments influenced Arizona, New Mexico, and Oklahoma, while New Jersey's 2014 shift to a risk-based pretrial model has been cited in Indiana and Connecticut.

For Advocates

For reform advocates, recognizing and anticipating these catalysts is critical. High-profile crimes, court rulings, shifts in capital punishment, victims' rights legislation, and regional influence can all create openings for constitutional amendments — sometimes progressive, but more often regressive. Understanding these dynamics helps advocates prepare early, build coalitions, and respond quickly when harmful proposals emerge.

Advocates can also use these moments to advance proactive, equity-focused reform. Preparing model amendment language, running public education campaigns, and engaging stakeholders early can shift the narrative and foreground principles of fairness, proportionality, public safety, and due process.

Amendments in one state often reverberate beyond its borders, sparking copycat efforts — or resistance — elsewhere. By studying lessons from other states and staying alert to regional trends, advocates can strengthen their strategies and work to ensure that the next wave of amendments expands, rather than restricts, the right to pretrial liberty.

Amendment Typologies

As states reshape the right to bail through constitutional amendments, clear patterns are emerging. Each state's legal and political context is unique, but most amendments fall into one of three broad categories. These are not rigid boxes — some combine elements of more than one — but they provide a useful lens for anticipating threats, identifying opportunities, and shaping advocacy strategies.

1. Expanding Preventative Detention

States such as Alabama and Tennessee have broadened who can be jailed before trial by making many offenses detention-eligible. In general, this type of amendment often adds new detention-eligible categories, like "crimes of violence," or targets certain criminal histories and "risk" indicators, like people with prior convictions, without clear criteria or safeguards.

2. Entrenching Cash Bail

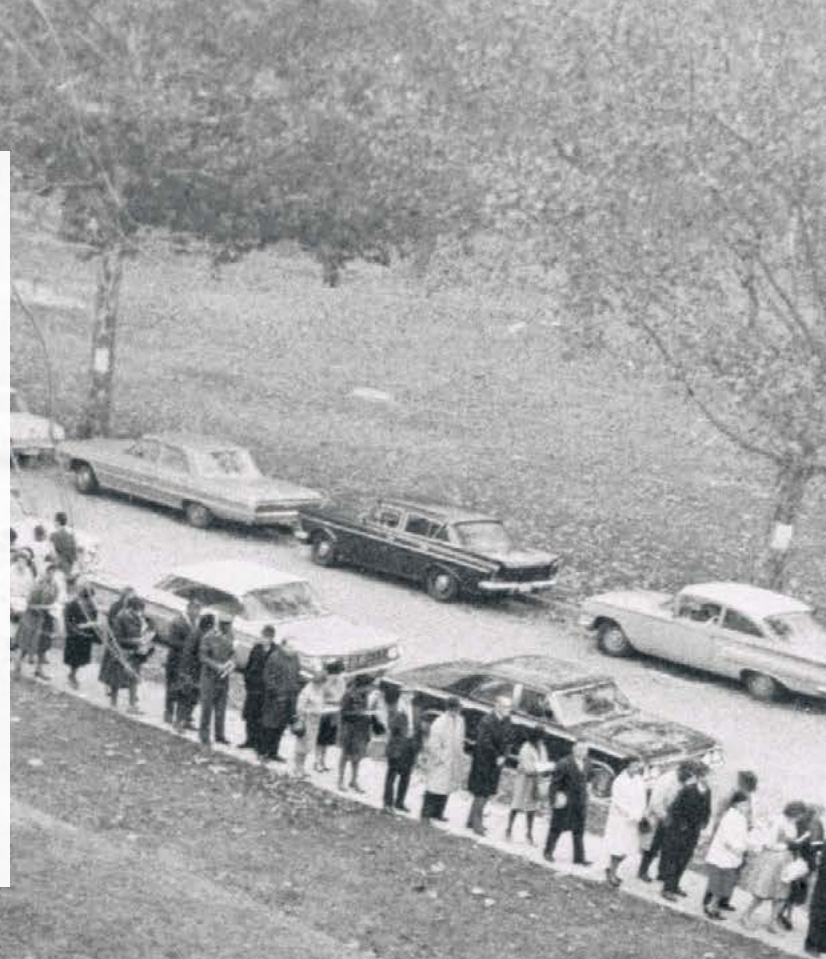
In states such as Ohio and Wisconsin, amendments have reinforced money bail by writing it directly into constitutional language (e.g., "monetary conditions" or "bail amount"). This makes it easier for courts to impose high bail while avoiding scrutiny of detention decisions, and harder to disentangle money from bail in the future.

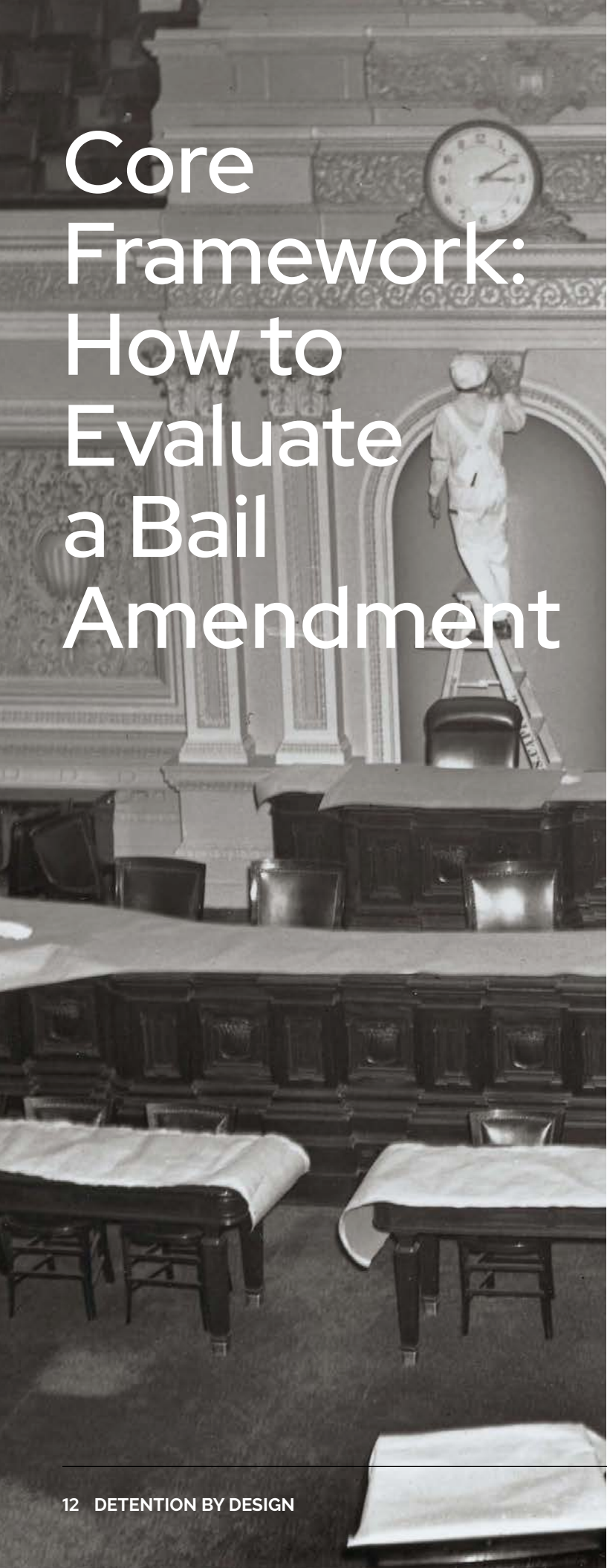
3. Progressive Breakthroughs

A few states, including New Jersey and Texas, have passed amendments that limit preventive detention or unaffordable cash bail. These measures set clearer rules for when detention is allowed and add due process protections such as access to counsel and evidentiary hearings.

Together, these categories show how different amendment models can either advance or erode pretrial justice. Using this framework, advocates can more clearly evaluate proposals, communicate risks, and push for reforms that safeguard liberty.

“Amendments in one state often reverberate beyond its borders, sparking copycat efforts – or resistance – elsewhere. By studying lessons from other states, advocates can work to ensure that the next wave of amendments expands, rather than restricts, the right to pretrial liberty.”





Core Framework: How to Evaluate a Bail Amendment

A close look at state constitutional provisions — past and present — shows that policies governing the right to pretrial release revolve around three foundational elements:¹⁹

1. Detention Eligibility Net:

Who can be held without bail, and under what circumstances?


2. Guardrails:

What limits are placed on the government's power to detain?

3. Due Process:

What procedural rights protect people facing possible detention?²⁰

"As detention eligibility expands, the risk of overreach only grows. Without robust guardrails, detention shifts from being the exception to becoming the norm."



Detention Eligibility Net: Who Can Be Detained?

The detention eligibility net defines when someone can be jailed before trial. In other words, it outlines exceptions to the presumptive right to be released. Historically, this net was narrow, reserved for the most serious charges such as capital offenses. Over time, however, it has widened considerably.

In the 1970s and early 1980s, courts and legislatures debated whether people could be detained based on predictions of future dangerousness.²¹ Critics warned that these predictions were speculative, biased, and unreliable. To avoid relying solely on forward-looking risk assessments, some states added preconditions to charge-based detention: for example, allowing detention only if a person had two or more prior violent convictions alongside a new charge.²² While this approach aims to ground detention decisions in a pattern of past behavior, it still undermines the presumption of innocence — especially when paired with weak evidentiary standards that let detention hinge largely on the current charge and criminal history — neither of which is an adequate standalone predictor of future risk.

In recent years, some states have moved away from charge-based eligibility for detention toward broader, risk-based systems that focus on assessing an individual's likelihood of missing court or posing a public safety threat, rather than relying solely on the charged offense. When carefully designed, this shift can be a step in the right direction. However, many states fail to define "risk" clearly and narrowly, leaving the door open to overly broad preventative detention and undermining the very protections such systems are meant to provide.

The result is a consistent pattern: as provisions governing the right to pretrial release are amended, the detention net keeps widening. Some amendments do this simply by adding more offenses to the list; others by replacing offense-based rules with vague, expansive language about risk. In both cases, the broader and more discretionary the net becomes, the more it threatens the original purpose of the right to bail: ensuring that people are not jailed before trial unless absolutely necessary. Without clear limits on who can be detained and why, the right to bail becomes a right in name only.

Guardrails: Shaping Judicial Decisionmaking

Guardrails are the legal standards judges must apply before ordering pretrial detention. They ensure that eligibility for detention does not automatically mean incarceration and they set limits on when and how courts can deprive someone of their freedom before trial.

In practice, guardrails guide judges to consider three questions:

- **What kind of risk** the person might pose if released?
- **How likely** is that risk to occur?
- **How strong must the evidence be** to justify detention?

These are not the same as procedural due process, like having a hearing or access to counsel. Guardrails are substantive: they define how judges weigh risk and what proof is required. The most common risks considered are failure to appear in court, threats to public safety, and obstruction of justice (e.g., intimidating witnesses).

The problem is that these risks are often vaguely defined. For example, a weak guardrail might allow detention

based on a broad "risk of nonappearance." But many well-meaning people can be assessed as highly likely to miss court, and therefore detained, simply because they do not have reliable transportation to get there. A stronger safeguard would require evidence of a high likelihood of "willful flight" and hold the state to a higher standard of proof. Without that specificity, even fair-minded judges may default to detention. Without clear and narrow descriptions of a specific risk, such language becomes a loophole that can justify nearly any detention decision.

The evidentiary standard matters just as much. Some provisions rely on very low bars, such as "proof is evident or the presumption great," while stronger frameworks require "clear and convincing evidence." As detention eligibility expands, the risk of overreach only grows. Robust guardrails are therefore essential. Without them, detention shifts from being the exception to becoming the norm.

Evidentiary Standard of Proof

An evidentiary standard of proof is the most common guardrail, found in 38 state constitutions. It sets the burden of proof the government must meet to justify pretrial detention.

Most states — 35 — still rely on the traditional standard of "proof is evident or presumption great." Inherited from older constitutional provisions, this language is vague, inconsistently applied, and widely regarded by legal scholars as outdated and inadequate for protecting liberty.²³

By contrast, only eleven states require the more robust "clear and convincing evidence standard," considered the gold standard because it ensures detention is based on strong, reliable evidence rather than speculation or fear.²⁴ A few states use intermediate standards such as "substantial evidence" (one state) or "preponderance of evidence" (one state), while three states provide no evidentiary standard at all — raising serious concerns about arbitrary detention.

Some states also apply layered standards, using one burden of proof to establish whether a charge qualifies for detention and another to decide whether no conditions could mitigate the risk.²⁵ In such systems, the highest standard of proof applied at any stage is critical for assessing how protective the framework truly is.

As more states revisit their right to bail provisions, strengthening evidentiary standards is a clear opportunity for reform. Replacing antiquated language like "proof is evident or the presumption great" with "clear and convincing evidence" would better safeguard liberty, reduce unnecessary detention, and build public trust in the pretrial process.

Description of Risk

Thirteen states require courts to evaluate the type and severity of risk a defendant might pose. These provisions aim to guide judicial discretion and reduce arbitrary decisions. Examples include findings such as:

- "Substantial likelihood the person's release would result in great bodily harm to others."²⁶
- "Release of the offender would pose a real and present threat to the physical safety of any person."²⁷
- "The person would constitute a substantial danger to any other person or to the community, or is likely to flee the jurisdiction of the court if released on bail."²⁸

Federal-Model Language: "No Conditions of Release...":

Eleven states use language drawn from the federal system, requiring courts to detain an individual if they find that "no conditions of release" would ensure court appearance, public safety, or the integrity of the judicial process. That language originally appeared in *Stack v. Boyle* (1951), and it was intended to be a release mechanism.²⁹ However, the federal Bail Reform Act of 1984 repurposed the phrasing so that it would be used as a detention mechanism.³⁰ Since then it has been replicated in many state reforms as a detention mechanism, including modern reforms such as New Jersey and New Mexico. Yet its vague and subjective nature has produced troubling results. Before the federal Bail Reform Act of 1984 fewer than one in four federal defendants were detained pretrial. By 2019, that number had ballooned to three in four.³¹

Overall, if paired with a strong evidentiary standard and clear descriptions of a specific and narrow risk, the federal language can operate as a meaningful safeguard. But on its own, it is vague and highly discretionary, making it easier for courts to justify detention even when less restrictive options are available.

The presence and quality of guardrails are key indicators of how states balance public safety concerns with the presumption of innocence. As more states revisit their right to bail provisions, clarifying and strengthening these guardrails should be a top priority for building a fairer pretrial system.

Procedural Fairness and Due Process

Due process is the backbone of fairness

in the pretrial system. In the context of the right to bail, it ensures that people facing possible detention are treated equally under the law and given a meaningful opportunity to defend their freedom.

Core protections include:

- **A prompt detention hearing**, so people aren't left waiting in jail for days or weeks;
- **The right to legal counsel** at the hearing;
- **The ability to appeal** bail or detention decisions;
- **A written explanation from the court**, so decisions can be reviewed and understood; and
- **Restrictions on the use of cash bail**, so wealth does not determine who is released or detained.

These are not procedural niceties: they are safeguards against a system that can otherwise punish people before conviction.

Yet very few state constitutions include these protections in their right to bail provisions. Of the 41 states with a constitutional right to bail, only nine provide any identifiable procedural safeguards — and even those are limited in scope and strength. Many older, unamended provisions lack any language guaranteeing these basic rights.

Some states rely on statutes to supply these protections. But statutes can be more easily repealed, reinterpreted, or unevenly enforced. Constitutional language, by contrast, is more durable. Embedding due process directly into a constitution creates a higher standard for fairness, holds

courts accountable, and gives advocates a stronger foundation for enforcement. General promises of "fairness" or "justice" are not enough; they must be backed by clear, enforceable requirements that protect liberty at every step of the pretrial process.

The most commonly applied protections, though still rare, include:

- **A guarantee of a detention hearing** (Colorado, Illinois, Louisiana, Mississippi, New Mexico, Texas, and Wisconsin);
- **A maximum timeframe to hold someone pretrial if bail is denied** (60 or 90 days in states such as Colorado, Michigan, Texas, Vermont, and Wisconsin); and
- **The right to appeal a bail denial or seek higher court review** (Mississippi, New Mexico, and Vermont).

Even here, gaps remain. Few states require judges to record or explain their decisions. Fewer still require counsel at a detention hearing or place limits on cash bail, which often operates as a backdoor form of preventative detention even in systems with formal due process rules.

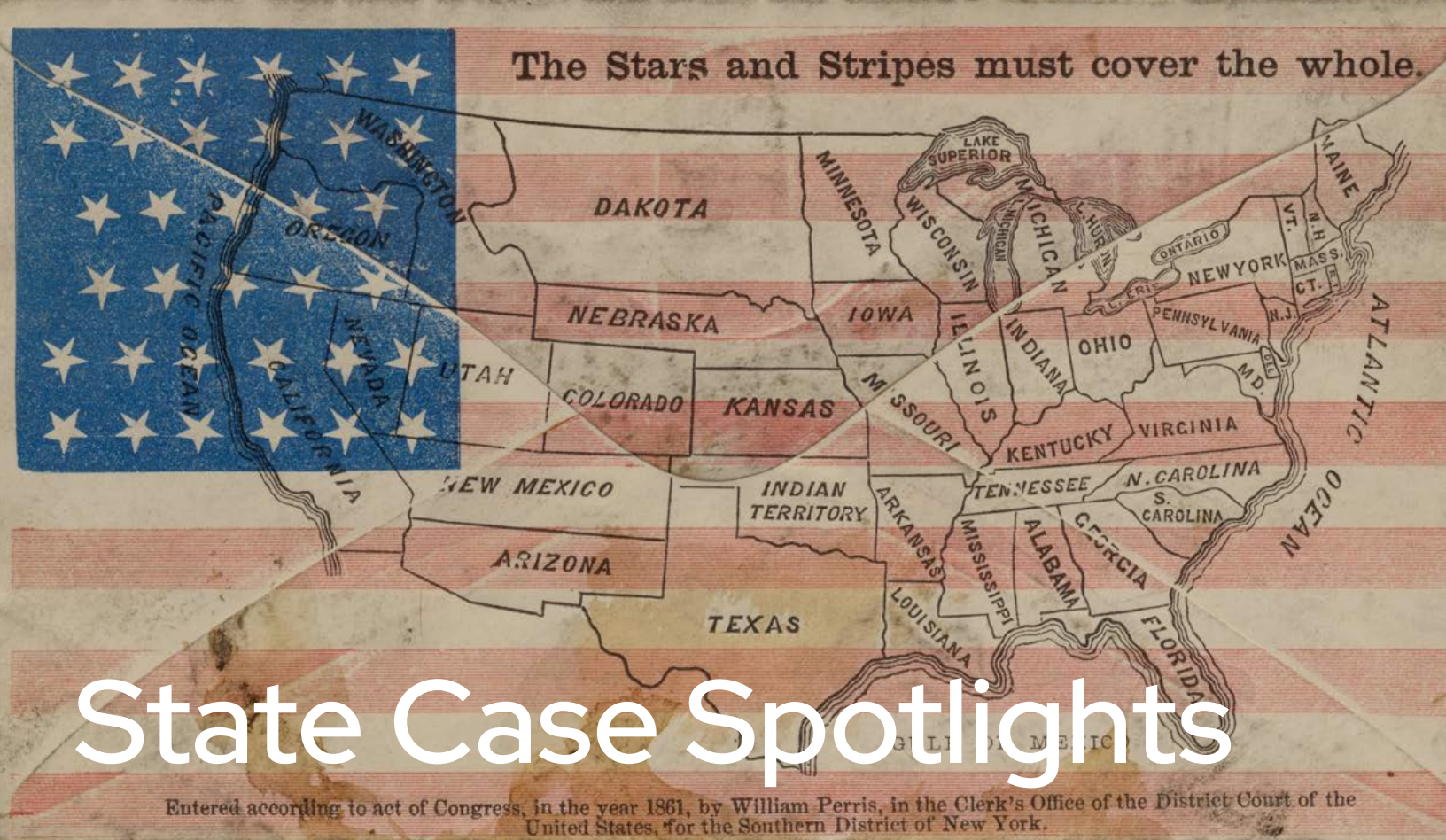
Overall, due process remains one of the most underdeveloped areas of state constitutional bail provisions. Most states rely on weaker statutory protections or court rules, leaving them vulnerable to political change or inconsistent enforcement. Codifying clear, specific due process rights in constitutional language is therefore one of the most critical — and actionable — steps for ensuring fair treatment and protecting pretrial liberty.

"Of the 41 states with a constitutional right to bail, only nine provide any identifiable procedural safeguards — and even those are limited in scope and strength."





"Over the past decade constitutional amendments have reshaped the right to bail. While some reforms have aimed to address genuine gaps in policy, most have expanded preventative detention, entrenched regressive practices, or reinforced the role of money in determining freedom."

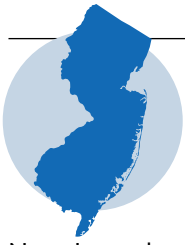


To understand how amendment trends play out on the ground, this section highlights seven states where bail-related constitutional amendments have been introduced, debated, or adopted: New Jersey, Alabama, Ohio, Wisconsin, Delaware, Tennessee, and Texas. Each spotlight outlines the legal context, amendment content, political dynamics, advocacy responses, and resulting impacts.

These case studies are not exhaustive, but they capture a representative cross-section of national activity and offer key lessons for the future. Over the past decade — and especially between 2021 and 2025 — constitutional amendments have reshaped the right to bail with profound consequences for pretrial justice. While some reforms have aimed to address genuine gaps in policy, most have expanded preventative detention, entrenched regressive practices, or reinforced the role of money in determining freedom.

"Constitutional amendments have reshaped the right to bail with profound consequences for pretrial justice."





New Jersey (2014)

PRECEDENT-SETTING REFORM WITH KEY FLAWS

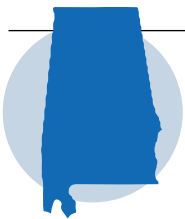
New Jersey's 2014 constitutional amendment, along with its accompanying legislation implemented in 2017, fundamentally reshaped the state's approach to pretrial release.³² New Jersey's reform is perhaps most notable for its near-elimination of cash bail.³³ By moving away from money as a condition for release, the state aimed to reduce the wealth-based disparities that plague the pretrial system.

Although ridding the pretrial system's reliance on money played an important role, another major catalyst for the amendment was the 2007 abolition of New Jersey's death penalty, which had effectively nullified its detention framework. Lawmakers introduced a new alternative that based pretrial detention on an individual's risk, while including a strong presumption of pretrial release, and in doing so, set a national precedent. New Jersey became the first state to explicitly remove charge-based eligibility from its detention net — meaning no alleged offense, no matter how serious, would automatically qualify a person for pretrial detention.³⁴ This was a historic and sweeping redefinition of the right to bail.³⁵

However, the reform also introduced new vulnerabilities. The amendment adopted a vague and open-ended standard derived from the federal system, allowing detention if "no amount of monetary bail, non-monetary conditions, or combination thereof" would "reasonably assure" safety, appearance, or the integrity of the process.

While this standard was intended to be rigorous, it has often been criticized for giving courts wide discretion and enabling overreliance on preventative detention.³⁶ As research on the federal bail system has shown, similarly vague detention standards have contributed to dramatically increased rates of pretrial detention. The main issue is that the amendment fails to narrowly define or specify what types or levels of risks courts should consider. Authorizing detention based on a generalized risk to public safety or nonappearance is overly broad and could sweep in many people who could otherwise be safely released. Another problem with this amendment is that it did not include an evidentiary burden, such as a requirement that courts find "clear and convincing evidence" before detaining someone.³⁷

In sum, New Jersey's amendment marked a bold and forward-thinking departure from the traditional bail framework, but its lack of specificity on risk, absence of a strong evidentiary standard, and reliance on subjective judicial assessment have become cautionary examples. Future reform efforts should preserve the amendment's commitment to minimizing the use of cash bail while strengthening the criteria and process through which detention decisions are made.



Alabama (2022)

EXPANDED DETENTION, MINIMAL SAFEGUARDS

Ratified by voters in 2022, Alabama's amendment — popularly known as *Aniah's Law* — dramatically expanded the state's detention net.³⁸ Previously, bail could only be denied for capital offenses. The new amendment added a wide range of serious offenses, including murder, first-degree kidnapping, rape, and robbery.

The change was driven by the killing of 19-year-old Aniah Blanchard, which sparked public outrage after the accused, already facing serious charges, was released pretrial. The hastily drawn legislation expanded the list of detainable offenses, without embedding due process protections. It eliminated and did not replace the longstanding requirement that detention be supported by evidence (i.e., "proof [that] is evident or the presumption great") — effectively subjecting people accused of specific crimes to automatic detention.

A follow-up bill (HB 130) introduced some procedural rules and evidentiary thresholds, but because these exist in statute — not in the constitution — they remain vulnerable to repeal or reinterpretation.³⁹ In 2025, legislators added more detainable offenses without addressing these shortcomings.⁴⁰ Alabama's approach represents a broader trend: emotionally-driven reform that expands state power to detain while neglecting constitutional safeguards for liberty.



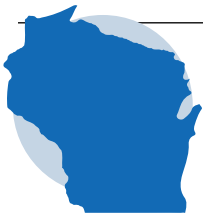
Ohio (2022)

ENSHRINING MONEY BAIL AS A "PUBLIC SAFETY" TOOL

Ohio's 2022 amendment broke from the recent trend of expanding preventative detention by instead doubling down on cash bail. It was enacted after the Supreme Court of Ohio reduced a \$1.5 million bail in *DuBose v. McGuffey*, prompting backlash from Republicans legislators.⁴¹

The amendment stripped the judiciary of rulemaking authority over bail and required judges to consider public safety, offense severity, and criminal history when setting bail amounts. This formalized the use of money bail as a stand-in for dangerousness and gave judges broad discretion to impose high bail as a form of pretrial incarceration.

Critics argue the amendment undermines risk-based, needs-informed release practices.⁴² By cementing money bail and wealth-based detention, it increases the likelihood that people will be jailed simply because they cannot pay.



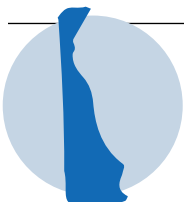
Wisconsin (2023)

LINKING CASH BAIL TO VIOLENCE AND PUBLIC SAFETY

Following the 2021 Waukesha Christmas Parade killings, Wisconsin amended its constitution to expand the use of cash bail in the name of "public safety."⁴³ The amendment created a new category of "violent crimes" and authorized courts to consider prior convictions, flight risk, and broadly defined threats to the community when setting bail amounts.

Before this change, cash bail could only be used to ensure court appearance. The amendment greatly widened judicial discretion, embedding a punitive logic that links cash bail to perceived "dangerousness" — even though research shows wealth-based conditions do not reliably prevent harm.⁴⁴

Wisconsin's reform — like Ohio's — was reactive and fear-driven. By linking liberty to money under the guise of safety, it deepened inequities and set a troubling precedent for future bail policy.

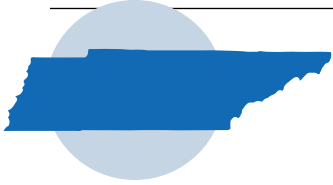


Delaware (2024–2025)

FROM CAPITAL OFFENSE TO BROAD DETENTION NET

Delaware's right to bail provision originally allowed detention only for capital offenses.⁴⁵ When the state's death penalty was declared unconstitutional in 2016, that framework became obsolete.⁴⁶ Lawmakers responded with an amendment that broadened detention eligibility to more than 30 felony offenses and cases involving rearrest.

The amendment included two guardrails: courts must find that "proof is positive or presumption great" that the offense occurred, and make a "clear and convincing" finding that no release conditions would assure appearance or safety. While stronger than many states' provisions, these standards remain vague. The amendment does not define levels of risk or require courts to weigh likelihood or severity of the alleged threat. As a result, judges may interpret almost any risk as justification for detention, especially without clear evidentiary benchmarks.



Tennessee (Ongoing)

BROAD EXPANSION WITHOUT MODERNIZATION

Tennessee's proposed 2024 amendment would expand detention eligibility beyond capital offenses to include terrorism, murder, and other serious crimes.^{47,48} It also keeps the outdated "proof is evident or presumption great" standard and fails to add modern guardrails for assessing risk.

The only new safeguard requires judges to record their reasons for granting or denying bail — a minimal improvement that does little to protect due process or prevent overuse of detention. Like many recent efforts, Tennessee's approach is reactive and risk-averse: it broadens state power while doing little to strengthen accountability or fairness.



Texas (2025)

SUSTAINED ADVOCACY RESULTS IN STRONG DUE PROCESS

Over multiple legislative sessions, Texas lawmakers repeatedly introduced constitutional amendments to expand pretrial detention, seeking to deny bail for a broad range of violent crimes, sexual offenses and trafficking charges. Early proposals were sweeping and lacked safeguards.

In 2023, advocacy by the Texas Pretrial Justice Coalition and its partners narrowed the House version by reducing the list of eligible offenses and clarifying "willful nonappearance" as the standard for assessing flight risk. The Senate rejected those revisions and the measure ultimately failed.⁴⁹

Two years later, Governor Abbott designated bail reform as an emergency item — a move that elevates an issue to high-priority status and allows related legislation to bypass standard procedures and advance more quickly. As a result, multiple amendments — including SJR 5 — sped through the Senate, which was aligned with the Governor's agenda. SJR 5 closely mirrored earlier preventative detention proposals, prompting advocacy groups to mobilize again. Their efforts defeated several regressive amendments outright and secured major improvements to SJR 5 in the House.⁵⁰

The final version of SJR 5 passed and was approved by voters with unprecedented due process protections. It guarantees the right to counsel at certain detention hearings, requires a finding of "clear and convincing evidence" that a defendant poses a public safety risk before bail can be denied, and narrowly defines flight risk as "willful nonappearance."

Texas now stands out as an exception. At a time when many states are enacting regressive amendments with insufficient safeguards, advocates in Texas not only blocked the most harmful proposals but also won some of the strongest due process protections in the nation.



Strategic Considerations for Advocacy

As constitutional right to bail amendments proliferate, advocates must be prepared to engage on multiple fronts: policy design, legislative strategy, and public education. Recent amendments have either expanded preventative detention or entrenched cash bail — both trends that threaten pretrial liberty. That's why it's vital for advocates, organizers, and system stakeholders to understand how the right to bail operates in their state, what is at stake when it is rewritten, and how to seize these moments to advance fairer, evidence-based policy.

Amending a state constitution is not just a legal exercise; it reshapes the rules that govern pretrial freedom. Without careful drafting, even well-intentioned reforms can lead to unnecessary incarceration, allow for arbitrary decisionmaking, and erode the presumption of innocence. Advocates bring unique power to these debates: expertise in the system, lived experience with its failures, and deep empathy for those it harms. This combination is key to advancing stronger constitutional protections that prioritize due process, limit preventative detention, and reject money as the basis for freedom.

This section outlines safeguards and strategies for defending against regressive amendments or crafting affirmative reform. A principled constitutional amendment must clearly define when preventative detention is allowed and under what conditions. Vague language invites broad interpretation, while specificity protects rights and upholds the legitimacy of the pretrial process.

"Progressive bail amendments should embed clear protections that center safety, liberty, due process, and individualized justice."

Progressive bail amendments should embed clear protections that center safety, liberty, due process, and individualized justice. Essential components include:

- **A strong presumption of release:** The amendment should explicitly state that all individuals are presumed eligible for pretrial release, affirming detention as the rare exception.
- **Least restrictive, individualized conditions:** Courts should be required to impose only the least restrictive measures necessary to ensure appearance in court and protect public safety, tailored to the person rather than the charge.
- **Judicial transparency:** Judges should be required to provide written rationales when imposing conditions or ordering detention, ensuring accountability and meaningful review.
- **Protection against wealth-based detention:** The amendment should prohibit the use of cash bail — or at minimum prohibit detention solely because someone cannot afford to pay — so liberty is not conditioned on access to money.

Narrowing Preventative Detention

A principled detention scheme must strictly limit when preventative detention is allowed and base it only on clearly defined risks. These risks should be narrow and explicit. For example, nonappearance should mean "willful flight to avoid prosecution" — not simply missing court for lack of transportation or scheduling conflicts. Public safety risk should be limited to "a serious threat of physical harm or violence against a specific, identifiable person or persons."

By contrast, vague categories such as "community safety" or threats to property are overly broad and invite abuse. If used at all, they should be tightly constrained — requiring evidence of imminent, serious harm linked to an identifiable threat.

Preventative detention should also require a high burden of proof. The state must present "clear and convincing evidence" showing:

- The defendant poses a risk of willful flight; **or**
- The defendant is likely to cause serious harm to a specific person; **and**
- No combination of monetary or nonmonetary conditions could ensure safe release.

These safeguards ensure detention remains the exception, not the rule, and is reserved for exceptional cases where no other conditions will suffice.

Embedding Due Process Protections

Constitutional bail amendments must incorporate strong, enforceable due process protections. These guarantees safeguard the rights of individuals who are presumed innocent but face possible detention.

At minimum, amendments should require a prompt and substantive detention hearing — ideally within 24 to 48 hours of arrest — with the right to legal counsel, especially for indigent defendants. Judges should be required to consider specific statutory factors when making release or detention decisions and to record their reasoning in writing. Defendants must also have an explicit right to appeal, with timelines that reflect the urgency of pretrial confinement. Preventative detention should be time-limited: courts should be required to hold a hearing to reevaluate a detention order and assess if release conditions are applicable — with narrowly defined exceptions — after a person has already been detained for 60 to 90 days without trial.

Together, these protections help ensure that detention remains temporary, exceptional, and consistent with the presumption of innocence.

Three Pillars of Sustainable Bail Reform

Strong policy language alone is not enough. For reforms to endure, they must rest on three pillars: collaboration, education, and implementation.

Collaboration

Reform should be developed through inclusive processes that engage lawmakers, legal practitioners, advocates, and directly impacted individuals. Broad participation ensures the policy reflects lived experience, aligns with practical realities, and garners broader support.

Education

Clear, targeted messaging is critical to building political will. Advocates should tailor communications to policymakers, media, and the public, explaining both the harms of the current bail system and the concrete benefits of reform.

Implementation

Even the best-designed reforms fail without strong enforcement and oversight. Amendments should be paired with mechanisms for monitoring, evaluation, and — where necessary — additional legislation or rulemaking to ensure fidelity in practice.

By centering these principles, advocates can build durable, rights-based pretrial systems and meet the wave of constitutional amendment activity with clarity, foresight, and power.

Real-World Considerations for Reform Campaigns

Whether advancing progressive reforms or defending against regressive proposals, advocates must navigate several strategic realities.

Bail Amendments are Difficult to Defeat Once on the Ballot

Historically, bail-related constitutional amendments pass by wide margins when put to voters. They are often framed as public safety measures — a message that resonates regardless of the details. This makes the legislative stage the most critical battleground. Once an amendment is certified for the ballot, organized opposition faces steep odds.

Know Your State's Amendment Process

Most states allow legislatures to initiate constitutional amendments, but requirements differ. Some demand two legislative approvals, often separated by a general election, followed by voter approval. A few permit citizen-initiated amendments through petition.

Ground Proposals in Research

Policy arguments carry more weight when rooted in data. Evidence on the harms of pretrial detention can shift debates from fear-driven narratives to fact-based discussions of public safety and fairness. Citing credible research builds trust with lawmakers, stakeholders, and the public.

Avoid Copying Flawed Models

Amendment language should not be lifted wholesale from other states or federal policy without careful scrutiny. Even widely praised models can contain vague or problematic provisions. Language must be tailored with clarity, specificity, and attention to local context to ensure it fits the state's legal framework and reform goals.

Taken together, these realities highlight the importance of preparation, precision, and persistence in reform campaigns. Advocates who understand both the political landscape and the legal mechanics are best positioned to shape lasting change.



Conclusion: The New Amendment Era

The surge of constitutional amendments on the right to bail is not an aberration. It marks a structural realignment in how states are reshaping pretrial detention, public safety, and constitutional protections. State constitutions have become critical arenas for policymaking, with amendments increasingly defining the terms of pretrial release and detention.

Between 2021 and 2025, a clear trend emerged: states are turning to constitutional changes that expand preventative detention while eroding core protections such as the presumption of innocence, due process, and the right to release before trial. Some amendments reentrench cash bail, embedding wealth-based detention deeper into legal systems already marred by inequality. Others rely on vague and expansive notions of "risk," allowing detention without clear or consistent criteria. Too often, these measures lack procedural safeguards — like high evidentiary standards, defined eligibility limits, or meaningful hearings — leading to broader carceral nets and a greater risk of arbitrary detention.

This report offers a path forward. It outlines strategies for narrowing detention policies, strengthening guardrails, raising evidentiary standards, and embedding due process directly into constitutional text — guaranteeing timely hearings, access to counsel, written judicial findings, and time limits on pretrial detention.

Looking ahead, advocates must remain vigilant. Constitutional amendments are no longer rare — they are becoming a recurring tool of state policymaking. Meeting this challenge requires not only resisting harmful measures but also advancing proactive reforms rooted in fairness, safety, and human dignity. That means demanding clarity in risk assessments, rejecting cash bail and wealth-based detention, and ensuring every defendant is treated as innocent until proven otherwise.

By understanding the trends, tactics, and policy choices shaping this moment, advocates can protect the right to bail and build a pretrial system that delivers justice rather than punishment.

Appendix I

Right to Bail Amendment Activity (2021-2025)

Year	State	Action	Result
2021	Alabama	The legislature passed HB 131 , expanding the detention eligibility net to include 12 additional offenses.	Amendment ratified to Constitution
	Texas	Legislature introduced at least six different bills seeking to expand the detention eligibility net to cover certain violent, sexual, and trafficking felonies. ⁵¹	Did not pass
2022	Delaware	Legislature passed SB 11 (first of two approvals required). It proposed expanding the detention eligibility net to nearly 40 felony offenses, and inserted the federal model language with a clear and convincing standard as the preventative detention guardrails.	First of two required approvals. Bill replaced with a new version in 2024
	Louisiana	Legislature introduced and advanced SB 4 , which would have removed the established constitutional guardrails, and in its place inserted the phrase "in accordance with law." Effectively making statutory procedures the authoritative policy, and a loophole to change future right to bail law without having to amend the constitution.	Did not pass
	Ohio	Legislature passed HJR 2 ; voters approved corresponding Issue 1. The amendment required courts to consider public safety, offense severity, criminal history, and flight risk when setting bail.	Amendment ratified to Constitution
	Wisconsin	Legislature passed AJR 107 (first of two required approvals). It directed courts to consider specific factors when setting bail for newly defined violent crimes.	First of two required approvals
2023	Connecticut	Legislature introduced and advanced HJ 261 , aiming to modernize the state's right to bail by updating old language and expanding detention eligibility through a risk-based scheme and not solely charge-based.	Did not pass
	Delaware	Legislature introduced HB 251 , seeking to expand detention eligibility to those charged with both a felony and possession of a firearm.	Did not pass
	Indiana	Legislature passed SJR 1 . It proposes transitioning to a risk-based detention framework applicable to all offenses.	First of two required approvals
	Louisiana	Legislature reintroduced and advanced SB 48 , identical to SB 4 (2022)	Did not pass
	New Mexico	Legislature introduced HJR 9 , proposing a risk-based detention scheme for detention covering all offenses.	Did not pass
	Texas	Legislature advanced SJR 44 . The senate version is identical to proposals from 2021, while the House version included stronger guardrails and due process protections.	Did not pass
	Wisconsin	Legislature passed SJR 2 (second required approval). Voters approved the amendment in a special election.	Amendment ratified to Constitution

Year	State	Action	Result
2024	Colorado	Legislature passed HCR 1002 , narrowly expanding detention eligibility to include first-degree murder.	Amendment ratified to Constitution
	Connecticut	Legislature advanced HJ 171 , identical to HJ 261 (2023).	Did not pass
	Delaware	Legislature passed SB 11 (first of two approvals required). Though functionally identical to SB 11 (2022) slight variation requires a restarting of the two-step approval process. ⁵²	First of two required approvals
	Louisiana	Legislature advanced, SB 79 , identical to SB 4 (2022).	Did not pass
	New Mexico	Legislature introduced HJR 3 and SJR 11 , both proposing comprehensive risk-based detention schemes	Did not pass
2025	Tennessee	Legislature passed SJR 919 , aiming to significantly expand the detention eligibility net.	First of two required approvals
	Alabama	Legislature passed SB 118 , expanding the detention eligibility net to include additional violent offenses to the recently enlarged net in 2022.	Placed on May 2026 election ballot
	Delaware	Legislature passed SB 11 . It significantly expands the detention eligibility net to include numerous felony offenses, and inserted the federal model language with a clear and convincing standard as the preventative detention guardrails.	Amendment ratified to Constitution
	Tennessee	Legislature passed SJR 25 (second of two legislative approvals required), which will significantly expand detention eligibility net to include numerous offenses without substantive guardrails.	Placed on 2026 general election ballot
	Texas	Legislature passed SJR 5 and voters approved Prop 3, expanding detention eligibility net to include nine additional offenses while also including strong guardrails and due process protections, such as the right to counsel at the bail denial hearing and a clear and convincing evidentiary standard. Additionally, the Legislature advanced two separate amendments, SJR 1 and SJR 87 , which aimed to expand detention eligibility without substantive guardrails and protections.	SJR 5 - Amendment ratified to Constitution SJR 1 & SJR 87 - Did not pass

Appendix II

Core Elements of Right to Bail Amendments

Detention Eligibility Net

The following examples illustrate different types of detention eligibility nets (key phrases are *italicized*):

Traditional Detention Eligibility Net (Example)

- "All persons shall be bailable by sufficient sureties, *except for capital offenses*, when the proof is evident or the presumption great."

Expanded Charge-Based Detention Eligibility Net (Oklahoma)⁵³

- "All persons shall be bailable by sufficient sureties, except that bail may be denied for:
 1. *Capital offenses when the proof of guilt is evident, or the presumption thereof is great;*
 2. *Violent offenses;*
 3. *Offenses where the maximum sentence may be life imprisonment or life imprisonment without parole;*
 4. *Felony offenses where the person charged with the offense has been convicted of two or more felony offenses arising out of different transactions; and,*
 5. *Controlled dangerous substances offenses where the maximum sentence may be at least ten years imprisonment.*

Expanded Risk-Based Detention Eligibility Net (New Jersey)⁵⁴

- "All persons shall, before conviction, be eligible for pretrial release. *Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process.*"

Guardrails

The following examples illustrate variations in guardrail language (key components are *italicized* and color-coded as follows: **Blue** = Evidentiary Standard, **Green** = Type of Risk, **Red** = Severity/Degree of Risk).

Traditional Guardrail (Example)

- "All persons shall be bailable by sufficient sureties, except for capital offenses, *when the proof is evident or the presumption great.*"

Amended Guardrail (Colorado)⁵⁵

- "All persons shall be bailable by sufficient sureties pending disposition of charges except:
 - (a) For capital offenses *when proof is evident or presumption is great;* or
 - (b) When, after a hearing held within ninety-six hours of arrest and upon reasonable notice, *the court finds that proof is evident or presumption is great as to the crime alleged to have been committed and finds that the public would be placed in significant peril if the accused were released on bail* and such person is accused in any of the following cases..."⁵⁶

Amended Guardrail (Vermont)⁵⁷

- "All persons shall be bailable by sufficient sureties, except as follows:
 - (1) A person accused of an offense punishable by death or life imprisonment may be held without bail *when the evidence of guilt is great*.
 - (2) A person accused of a felony, an element of which involves an act of violence against another person, may be held without bail *when the evidence of guilt is great and the court finds, based upon clear and convincing evidence, that the person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence.*"

Due Process Protections

The following are examples of due process provisions included in state amendments to the right to bail (key clauses are *italicized*).

Expedited Hearings (Michigan)⁵⁸

- "...If a person is denied admission to bail under this section, *the trial of the person shall be commenced not more than 90 days after the date on which admission to bail is denied*. If the trial is not commenced within 90 days after the date on which admission to bail is denied and the delay is not attributable to the defense, *the court shall immediately schedule a bail hearing and shall set the amount of bail for the person.*"

Written Findings and Expedited Hearings (Mississippi)⁵⁹:

- "...In any case where bail is denied before conviction, *the judge shall place in the record his reasons for denying bail*. Any person who is charged with an offense punishable by imprisonment for a maximum of 20 years or more or by life imprisonment and who is denied bail prior to conviction *shall be entitled to an emergency hearing before a justice of the Mississippi Supreme Court.*"

Right to Appeal and Motion to Request Relief (New Mexico)⁶⁰

- "...Bail may be denied by a court of record pending trial for a defendant charged with a felony *if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.*

A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail *shall not be detained solely because of financial inability to post a money or property bond*. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond *may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner.*"

Appendix III

How States Use a "Clear and Convincing" Standard to Limit or Deny Bail

When states seek to amend their constitutional right to bail, they typically aim to expand eligibility for bail denial or preventative detention. One of the most effective ways advocates can protect against the overuse of detention is by fighting for strong, substantive guardrails to be written in the amendment.

A key guardrail is a high evidentiary standard or burden of proof. In other words, how strong must the evidence be to justify detention? Requiring a "clear and convincing" evidentiary standard helps ensure that detention decisions are grounded in strong, reliable evidence rather than speculation or bias.

The table below identifies eleven states that mandate a "clear and convincing" evidentiary standard for judges to deny pretrial release. These states specify the conditions — typically related to the defendant's potential risks (e.g., nonappearance in court, threat to public safety) — that must be proven at this standard to justify detention. The examples provided illustrate how these risks are defined, with some states using broader or more specific language than others.

State	What Must Be Proven by "Clear and Convincing" Evidence
California	"...a substantial likelihood the person's release would result in great bodily harm to others." OR "...the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released."
Delaware	"...that no condition or combination of conditions of release will do all of the following: 1. Reasonably assure the person's appearance at court proceedings. 2. Reasonably assure the protection of the community, victims, witnesses, or any other person. 3. Reasonably maintain the integrity of the judicial process, such that the person will not obstruct or attempt to obstruct justice."
Louisiana	"...there is a substantial risk that the person may flee or poses an imminent danger to any other person or the community."
Michigan	"...that the defendant is not likely to flee or present a danger to any other person."
New Mexico	"...no release conditions will reasonably protect the safety of any other person or the community."
Oregon	"...that there is danger of physical injury or sexual victimization to the victim or members of the public by the criminal defendant while on release."
Texas	"...that the granting of bail is insufficient to reasonably ensure the safety of the community, law enforcement, and the victim of the alleged offense."
Utah	"...the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail."
Vermont	"...the person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence."
Washington	"...of a propensity for violence that creates a substantial likelihood of danger to the community or any persons..."
Wisconsin	"...that the accused committed the felony and a requirement that there be a finding by the court that available conditions of release will not adequately protect members of the community from serious bodily harm or prevent intimidation of witnesses."

Endnotes

- 1 Right to bail clauses are typically found in state constitutions' Bill or Declaration of Rights sections. However, they are sometimes difficult to find or buried in sections that are not obvious. For example, they can sometimes be found in victims' rights amendments. In any case, it is advised to search the entirety of the constitution to find all affiliated right to bail language.
- 2 Timothy R. Schnacke, "Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform," *National Institute of Corrections*, August 2014, <https://www.supremecourt.ohio.gov/docs/Boards/Sentencing/Materials/2016/March/bailReformFundamentals.pdf>.
- 3 In 2023, this was affirmed again by the Supreme Court of Illinois in their ruling on the constitutionality of the Pretrial Fairness Act, which eliminated the use of cash bail. The Court ruled that the same phrase above — "bailable by sufficient sureties" — does not necessitate or even imply the use of money as a condition of release. See: *Rowe v. Raoul*, No. 129248, Illinois Supreme Court, 2023, <https://s3.documentcloud.org/documents/23879881/rowe-v-raoul-2023-il-129248.pdf>.
- 4 For further details on the intricate detention eligibility criteria, refer to the "Detention Eligibility Net" content within the "Core Framework: How to Evaluate a Bail Amendment" section. Additionally, review the examples of detention nets provided in Appendix II.
- 5 In total, Texas has amended its constitutional right to bail six times — the most amendments by any state. Each subsequent amendment has expanded eligibility for preventative detention. In 2025, the legislature passed and voters approved another amendment, SJR 5, thereby ratifying the constitution.
- 6 For New Mexico, see: N.M. Const. art. III, § 13. For Ohio, see: Ohio Const. art. I, § 9.
- 7 These increases in crime rates have largely subsided after the quarantine period ended. See: Ernesto Lopez and Bobby Boxerman, "Crime Trends in U.S. Cities Mid-Year 2025 Update," Council on Criminal Justice, July 2025, <https://counciloncj.org/crime-trends-in-u-s-cities-mid-year-2025-update/>.
- 8 Alabama passed a subsequent amendment in 2025 that added several more detention eligible offenses to this 2022 expansion. The amendment needs final approval from voters in 2026 before it becomes law.
- 9 In Indiana, a constitutional amendment must be approved by two separate legislative sessions. The initial passage occurred in 2023, and it will require a second passage in the 2025-2026 legislative session. Tennessee successfully passed its amendment through its legislature and still requires final approval from voters at an election in 2026.
- 10 At a minimum, the new amendment requires counsel for these newly expanded circumstances where bail can be denied, but there are preexisting circumstances for bail denial in the state's right to bail provision where an attorney is not expressly guaranteed.
- 11 For a more detailed breakdown of Texas' 2025 amendment, see the "State Case Spotlights" section.
- 12 While Colorado's amendment may not severely limit the right to bail compared to other states, it still does not include any language that provides strong due process protections for accused people as they are assessed by the court as to whether they should be denied bail.
- 13 Mike Cason, "Family commemorates Alabama bail reform law named for Aniah Blanchard," *AL.com*, June 24, 2021, <https://www.al.com/news/2021/06/family-commemorates-alabama-bail-reform-law-named-for-ani-ah-blanchard.html>. See also: Naomi Kowles, "A tale of two tragedies: How Wisconsin is sidestepping key recommendations in push for bail," *Channel3000.com*, March 13, 2022, http://www.channel3000.com/news/investigates/a-tale-of-two-tragedies-how-wisconsin-is-sidestepping-key-recommendations-in-push-for-bail/article_a46deca6-0977-5634-bda7-2a91d4db8d7b.html.
- 14 Jeff Proctor, "Bail amendment passes convincingly," *New Mexico In Depth*, Nov. 9, 2016, <https://nminddepth.com/2016/bail-amendment-passes-convincingly/>.
- 15 David Forster, "Ohio Supreme Court bail ruling sparks debate over public safety and penalizing the poor," *WOUB.org*, April 15, 2022, <https://woub.org/2022/04/15/ohio-supreme-court-bail-ruling-sparks-debate-over-public-safety-and-penalizing-the-poor/>.
- 16 For New Jersey, see: "Pretrial Release: State Constitutional Right to Bail," National Conference of State Legislatures, February 14, 2025, <https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-state-constitutional-right-to-bail>. For Colorado, see: Olivia Prentzel, "Amendment I: Should Colorado judges be able to deny bail to people charged with first-degree murder?" *The Colorado Sun*, October 7, 2024, <https://coloradosun.com/2024/10/07/amendment-i-explained-colorado/>. For Delaware, see: Delaware General Assembly, "Senate Bill 11," 2025 Regular Session, <https://legis.delaware.gov/BillDetail?legislationId=141747>.
- 17 For California, see: Cal. Const. art. I, § 28, https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=CONS§ionNum=SEC.%2028&article=I. For Missouri, see: Mo. Const. art. I, § 32, <https://revisor.mo.gov/main/OneSection.aspx?section=I+++32&bid=31735&constit=y>.
- 18 Or. Const. art. I, § 43, https://www.oregonlegislature.gov/bills_laws/Pages/OrConst.aspx.
- 19 For clarity, this breakdown focuses solely on the major components that are typically included across existing constitutional right to bail amendments. It is not an exhaustive list of every component of policy found in right to bail provisions. For example, bail revocation language is an important policy, but is not frequently dealt with in constitutional provisions — and only accounted for by three states (MS, TX, WI). It is not detailed here as it more or less follows the same structure of detention eligibility with accompanying guardrails. Moreover, right to bail provisions are not exhaustive themselves and do not account for every bail-related policy that should be considered in robust and comprehensive bail reform efforts. For more information on the utility of bail revocation and consideration of other bail-related policies in the right to bail, readers are encouraged to review the work of right to bail scholar Timothy R. Schnacke and the Center for Legal and Evidence-Based Practices, <http://www.clebp.org/home.html>.
- 20 To review examples of current language in states' constitutional right to bail amendments that articulate each of these three core policy components, readers are encouraged to see Appendix II.

- 21 Timothy R. Schnacke, "'Model' Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention," Center for Legal and Evidence-Based Practices, April 18, 2017, http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf.
- 22 Ibid.
- 23 Alicia Virani, et al. "Coming Up Short: The Unrealized Promise of In Re Humphrey," UCLA School of Law, October 2022, https://law.ucla.edu/sites/default/files/PDFs/Criminal_Justice_Program/Coming_Up_Short_Report_2022_WEB.pdf.
- 24 Please review the table in Appendix III, which lists the states that use the "clear and convincing" standard and the specific finding that must be made by the court with this threshold of evidence.
- 25 For examples of what these layered evidentiary standards look like, readers are encouraged to review both the description of Tennessee's proposed amendment, provided in the "State Case Spotlights" section, and to review the Guardrails examples in Appendix II of this report.
- 26 Cal. Const. art. I, § 12. See also: Cal. Const. art. I, § 28.
- 27 Ill. Const. art. I, § 9.
- 28 Utah Const. art. I, § 8.
- 29 *Stack v. Boyle*, 342 U.S. 1, 5 (1951). The Court explained that "the fixing of bail [release] for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." See also, Timothy R. Schnacke, "Memorandum re: Information to Help With State Attempts to Change Constitutional and Statutory Right to Bail (Release) and 'No Bail' (Preventive Detention) Provisions," Center of Legal and Evidence-Based Practices, August 31, 2023, http://www.clebp.org/images/Memo_on_State_Constitutional_Release_and_Detention.pdf. "If someone says that 'a person may be detained if no conditions provide reasonable assurance of court appearance and public safety,' they are basically articulating a release standard for a detention provision. The standard derives from *Stack v. Boyle* (a release case)."
- 30 In *United States v. Salerno* (1987), the Supreme Court upheld the legality of the language that allowed detention when "no conditions or combination of conditions suffice to provide reasonable assurance of court appearance or public safety."
- 31 Alison Siegler, "Freedom Denied: How the Culture of Detention Created a Federal Jailings Crisis," University of Chicago Law School Federal Criminal Justice Clinic, October 2022, https://freedomdenied.law.uchicago.edu/static/media/Freedom-Denied-Full-Report_33d80c1e-78a1b4612aee.pdf.
- 32 N.J. Const. art. I, ¶ 11.
- 33 New Jersey's update of its language, substituting "bailable" for "eligible for pretrial release" is also a significant modification as it disentangles the conflation of monetary conditions with release, a conflation that is typically attributed to "bail."
- 34 Although New Jersey's updated constitutional amendment removed any reference to specific charges or general offense categories eligible for preventative detention, the accompanying legislation provided a broad outline of offense categories and criminal histories for which a prosecutor could motion to seek preventative detention. This also included a catch-all clause of "any other crime for which the prosecutor believes there is a serious risk" of nonappearance, danger to a person or the community, or, obstruction of justice. See: New Jersey Legislature, "Senate Bill 946," 2014 Regular Session, <https://www.njleg.state.nj.us/bill-search/2014/S946>.
- 35 As a result, New Jersey's pretrial jail population has substantially decreased. Following the enactment of bail reform, the state also saw a decrease in overall crime and violent crime steeper than the national average. See: Kylie Murdock and Jim Kessler, "Analyzing Cash Bail Reform," Third Way, July 11, 2023, <https://www.thirdway.org/memo/analyzing-cash-bail-reform>.
- 36 To read about the sources of criticism surrounding the usage of the Federal standard, as employed here in New Jersey's amendment, readers are encouraged to review the content on the Federal-Model language in the above section entitled, "Guardrails: Shaping Judicial Decisionmaking."
- 37 The amendment's accompanying legislation to change statutory language did include a "clear and convincing" burden of proof, but paired it only with the open-ended federal standard mentioned above, as opposed to using it to find a risk of willful flight or a specific threat to public safety.
- 38 For more background, see: Alabama Legislature, "House Bill 131," 2021 Regular Session, <https://legiscan.com/AL/text/HB131/2021>. See also: Mike Cason, "Family commemorates Alabama bail reform law named for Aniah Blanchard," *AL.com*, June 24, 2021, <https://www.al.com/news/2021/06/family-commemorates-alabama-bail-reform-law-named-for-aniah-blanchard.html>.
- 39 Alabama Legislature, "House Bill 130," 2021 Regular Session, <https://legiscan.com/AL/bill/HB130/2021>.
- 40 Alabama Legislature, "Senate Bill 118," 2025 Regular Session, <https://legiscan.com/AL/bill/SB118/2025>.
- 41 For more background, see: Ohio General Assembly, "House Joint Resolution 2," 2022 Regular Session, <https://www.legislature.ohio.gov/legislation/134/hjr2>. See also: David Forster, "Ohio Supreme Court bail ruling sparks debate over public safety and penalizing the poor," *WOUB.org*, April 15, 2022, <https://woub.org/2022/04/15/ohio-supreme-court-bail-ruling-sparks-debate-over-public-safety-and-penalizing-the-poor/>.
- 42 Organizations and policy advocates from across the political spectrum publicly criticized the amendment's sustained reliability on money as a condition of release. See: "ACLU of Ohio Releases Comment on Issue 1 Passage," ACLU of Ohio, November 9, 2022, <https://www.acluohio.org/press-releases/aclu-ohio-releases-comment-issue-1-passage/>. See also: Vittorio Nastasi, "Ohio Issue 1 (2022): Determining bail amounts based on public safety," Reason Foundation, September 25, 2022, <https://reason.org/voters-guide/ohio-issue-1-determining-bail-amount-based-on-public-safety/>. See also: Robert Alt, "Ohio Should Not Expand the Dangerous Policy of Permitting Violent Offenders to Buy Their Way Out of Jail," The Buckeye Institute, April 6, 2022, <https://www.documentcloud.org/documents/22019677-alt-roberthjr2testimony/>.
- 43 For more background, see: Wisconsin Legislature, "Senate Joint Resolution 2," 2023 Regular Session, <https://docs.legis.wisconsin.gov/2023/related/proposals/sjr2>. See also: Naomi Kowles, "A tale of two tragedies: How Wisconsin is sidestepping key recommendations in push for bail," *Channel3000.com*, March 13, 2022, www.channel3000.com/news/investigates/a-tale-of-two-tragedies-how-wisconsin-is-sidestepping-key-recommendations-in-push-for-bail/article_a46deca6-0977-5634-bda7-2a91d4db8d7b.html.

- 44 Terry-Ann Craigie and Ames Grawert, "Bail Reform and Public Safety: Evidence from 33 Cities," Brennan Center for Justice, August 15, 2024, <https://www.brennancenter.org/media/13174/download/bail-reform-public-safety-report.pdf?inline=1>. See also: Don Stemen and David Olson, "Is Bail Reform Causing an Increase in Crime?" Harry Frank Guggenheim Foundation, January 2023, <https://www.hfg.org/wp-content/uploads/2023/01/Bail-Reform-and-Crime.pdf>.
- 45 Del. Const. art. I, § 12.
- 46 See: "Delaware," Death Penalty Information Center, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/delaware>.
- 47 Tennessee successfully passed its amendment through the legislature in 2025 and still requires final approval from voters at an election in 2026 before it can be officially added into the constitution.
- 48 This expansion includes any offense listed in the 'Truth in Sentencing' act passed in 2022 (see Tenn. Code Ann. § 40-35-501). There are currently a litany of offenses that are now ineligible for release from prison until at least 85% of the sentence is served. As such, all these offenses are presumably captured in this *pretrial* detention net — and given the amendment language, any changes to this law between now and 2026 Election Day can also be included in this detention net.
- 49 Texas Legislature, "Senate Joint Resolution 44," 2023 Regular Session, <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=88R&Bill=SJR44>.
- 50 To learn more about the different amendments mentioned here, please review the table in Appendix I, which lists out all the proposed amendments in the Texas Legislature in 2025.
- 51 The bills were introduced and reintroduced across the regular legislative session and three different special sessions. Two of these bills ([SJR 3](#) and [SJR 1](#)) successfully passed the Senate but both failed to receive the required two-thirds majority vote in the House.
- 52 Although Delaware successfully passed an amendment in 2022, this version — albeit substantively the same — contains slightly different language. As such, this restarts the process and is considered the first of two legislative approvals needed.
- 53 Okla. art. II, § 8.
- 54 N.J. Const. art. I, ¶ 11.
- 55 Colo. Const. art. II, § 19.
- 56 These particular guardrails only apply in certain circumstances where bail denial is being considered and do not apply to those who are accused of committing first degree murder, accounted for in the 2024 amendment to Colorado's right to bail — allowing for bail to be denied in these cases. For these cases, the only guardrail provided is the less rigorous "when proof is evident or presumption is great."
- 57 Vt. Const. ch. II, § 40.
- 58 Mich. Const. art. I, § 15.
- 59 Miss. Const. art. III, § 29.
- 60 N.M. Const. art. II, § 13.

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