

To: The Honorable Representatives of the House Criminal Justice Committee

From: Civil Rights Corps

Re: House Bill 439

Date: May 17, 2018

Civil Rights Corps is a non-profit organization that has brought systemic litigation in state and federal courts nationwide, challenging systems that use money bail to detain impoverished individuals pretrial. These lawsuits – in jurisdictions that include California, Illinois, Alabama, Mississippi, Georgia, Louisiana, Missouri, Kansas, Texas and Massachusetts – have prompted sweeping rulings to address unconstitutional wealth-based detention, including a 193-page comprehensive victory in Harris County, Texas declaring the Harris County money-based bail system unconstitutional, a finding that was recently upheld for the Federal Court of Appeals.¹ Other jurisdictions, such as New Orleans, Louisiana, Atlanta, Georgia and Montgomery, Alabama, have voluntarily reformed their systems to prevent litigation.

The following memo explains our concerns with House Bill 439 that is currently being considered by this Committee. It is our opinion that the bill would not only fail to address the constitutional infirmities currently afflicting the Ohio money-based bail system, but would also entrench and exacerbate these issues.

I. ISSUES WITH THE OHIO MONEY-BASED BAIL SYSTEM

When the government imprisons someone solely due to poverty, where a wealthier person would go free, this violates the constitutional principles of Equal Protection and Due Process. Due Process requires that if the government wants to deny a *presumptively innocent person* the fundamental right to liberty, it must follow rigorous procedures that include an adversarial hearing in open court.

The policy implications are straightforward. When making determinations about money bail, courts *must* ask whether a defendant has financial resources. Without making this inquiry, the court cannot know whether a specified amount of money bail is unaffordable. Having made this inquiry, money bail can be no higher than necessary to satisfactorily ensure court appearance and reasonably ensure community safety. And when an “ability to pay” inquiry shows that a defendant cannot pay, the court must consider alternatives. Setting unattainable bail is an option only after an individualized determination that “no less restrictive alternative” will satisfy the purpose.²

The Ohio money-based bail system does not meet the standard required by our Constitution. Because the Ohio system does not require an “ability to pay” inquiry when money bail is being set, or mandate use of the “least restrictive” release conditions possible, Ohio creates a two-tiered system of justice – one where wealthy people pay their bonds and go home, while poor individuals are thrown in jail. Without significant changes to the status quo, Ohio is failing to meet the Equal Protection and Due Process requirements that have caused courts to invalidate *substantially similar* bail practices in California, Harris County and elsewhere.

II. ISSUES WITH HOUSE BILL 439

Proposed House Bill 439 does not address the constitutional issues noted in the previous section. The legislation does not require “ability to pay” hearings whenever financial bond is being set, meaning that judges can continue to set money bail *without* considering financial resources. By not requiring this “ability to pay” hearing when financial bond is being set, the proposed legislation leaves Ohio vulnerable to constitutional litigation that has succeeded in jurisdictions nationwide.

In *In re Humphrey, ODonnell v. Harris County* and other cases that we have won, courts have emphasized the “rigorous procedural safeguards” that are necessary to protect pretrial liberty – an interest “second only to life itself” in constitutional importance – and prevent wealth-based detention. Among other deficiencies, House Bill 439 does not:

- Require an “ability to pay” hearing – with counsel – when financial bond is being set;
- Create presumptions of release “on own recognizance”;
- Require that, if used, financial bond be no higher than absolutely necessary to reasonably ensure court appearance and reasonably ensure community safety; or
- Require written explanation whenever money bail is set, including why this option was the “least restrictive” to achieve the state’s compelling interest.

While failing to enact these changes, House Bill 439 expands the use of “risk assessment” tools in a way that could undermine reform goals. Algorithmic models of risk assessment frequently use data tainted by systemic racial and economic bias, meaning that pretrial decisions reflect systemic inequities rather than actual danger. As such, House Bill 439 potentially makes the Ohio bail system *less* effective and *less* equitable, while undercutting the “individualized determinations” that our Constitution requires.

Given the issues detailed above, Ohio requires sweeping reforms to its money-based bail system. House Bill 439 not only fails to make these changes, but also misses an opportunity to craft an evidence-based bail system that maximizes equity and community wellbeing. The legislation maintains a system of money bail, though money bail has been shown to reduce court appearances and increase future crime.³ The legislation fails to fund pretrial services, though cheap interventions – like reminders via text message – substantially increase appearance rates.⁴ The legislation does not mandate automatic release of low-level defendants, though such release would reduce the job loss, family ruptures, health effects and trauma that accompanies even *brief* detention. We encourage bail reform that ensures constitutional compliance and furthers community wellbeing, moving us toward a justice system that is worthy of its name.

Please contact us if you would like further information regarding the legal issues surrounding money bail, or reforms that could address these deficiencies and prevent potential litigation.

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¹ ODonnell v. Harris Cty., Texas, 251 F. Supp. 3d 1052, 1167 (S.D. Tex. 2017) (“the court has considered an extensive record consisting of hundreds of exhibits, thousands of hearing recordings, and eight days of arguments and briefing at the motion hearing. The record evidence, the arguments of able counsel, and the extensive case law and commentary on bail and pretrial detention all show that the plaintiffs are entitled to preliminary injunctive relief. Harris County’s policy is to detain indigent misdemeanor defendants before trial, violating equal protection rights against wealth-based discrimination and violating due process protections against pretrial detention without proper procedures or an opportunity to be heard”)

² In re Humphrey, 19 Cal. App. 5th 1006, 1025 (Ct. App. 2018).

³ Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release System*, Pretrial Justice Institute (2013); Laura and John Arnold Foundation, *Research Summary: Pretrial Criminal Justice Research* (2013).

⁴ Brice Cooke et al., *Using Behavioral Science to Improve Criminal Justice Outcomes Preventing Failures to Appear in Court*, Ideas41 and The University of Chicago Crime Lab (2018), 4.