



## Using the Fourteenth Amendment to Enforce the Constitutional Prohibition against Wealth-Based Detention: An Overview

[Nearly half a million people](#) are currently sitting in jail *not* because they have been convicted of a crime, but because they are being detained while awaiting trial. And, in most cases, these individuals are being detained because they could not pay a sum of money.

Although Congress has considered many proposals that would reform federal bail or incentivize state-level pretrial reforms, no proposal imposes any direct requirements on the states. Congress should introduce legislation directly outlawing unconstitutional wealth-based detention in *state* courts, using the enforcement clause of the Fourteenth Amendment.<sup>1</sup>

### **I. The Unconstitutionality of Wealth-Based Detention**

The bail systems in all but a few jurisdictions nationwide are unconstitutional. Although these systems are quite diverse, for the most part they share the following core feature: arrested people are jailed if they do not pay a sum of money (“money bail”), which is required regardless of whether they have the ability to pay the amount set — or, at least, without a judicial officer finding that they *can* pay. Because poor people are often unable to pay the sum or even a specified portion, they are jailed before their trials. Rich people, similarly situated but able to pay their bonds, are released immediately.

From a constitutional perspective, two problems arise when the state detains a person prior to trial simply because he cannot make a monetary payment. One, jailing someone solely because he cannot pay a sum of money — without making a finding that he is able to pay this amount — infringes the fundamental right to liberty *solely on the basis of wealth*, violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution. Two, jailing someone on an unattainable financial condition deprives a *presumptively innocent person* of the *fundamental right to liberty* without complying with the substantive and procedural requirements that the Due Process Clause necessitates when a court is ordering someone detained. If the state jails someone for not paying money bail, the state must make a procedurally proper finding that either (1) the person is able to pay the sum and is willfully refusing to *or* (2) that jailing the person outright — without allowing the person to pay money bond and secure release — would be permissible under the Due Process Clause because *no other* alternatives exist to satisfy compelling government interests.

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<sup>1</sup> Civil Rights Corps is a nonprofit organization that does litigation and policy work challenging injustice in the criminal-legal system. Our litigation includes challenges to wealth-based pretrial detention, wealth-based denials of driving privileges, wealth-based incarceration over unpaid debt, and probation extension over unpaid fees.

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*First*, the state may not jail someone simply because he has not paid a sum of money without first making a finding that he is able to pay the amount requested. In *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983), the Supreme Court explained that to “deprive [a convicted defendant] of his conditional freedom simply because, through no fault of his own, he cannot pay [a] fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment.” The principles that forbid jailing a *convicted* defendant because he is unable to make a payment apply even more forcefully when the person is being detained pretrial and is presumed innocent of any charges that have been brought against her.

*Second*, if the state requires a money bail amount that a person cannot afford to pay, the state has functionally entered an order of pretrial detention. As a matter of well-settled law, the federal Constitution provides exacting procedural and substantive restrictions to orders that result in pretrial detention. One federal court of appeals concluded that “once a court finds itself in this situation — insisting on terms in a ‘release’ order that will cause the defendant to be detained pending trial — it must satisfy the procedural requirements for a valid detention order.” *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991). And the Supreme Court has determined that the procedural requirements for a valid detention order include a hearing with counsel, legal standards requiring proof of dangerousness by clear and convincing evidence, the opportunity to present evidence, consideration of less restrictive alternative conditions, and reviewable findings. *United States v. Salerno*, 481 U.S. 739 (1987). Federal constitutional law allows the state to enter a detention order only if, after robust procedures, it finds that the detainee poses a severe risk to the public or severe risk of flight.

Courts have found that the money-bail system as it is practiced almost everywhere in this country violates these two Constitutional doctrines: arrestees are jailed merely because they cannot pay money and are, therefore, jailed solely on the basis of wealth and without the procedural protections required by the Constitution.

## **II. The Enforcement Clause of the Fourteenth Amendment**

Congress has the power to “enforce” the provisions of the Fourteenth Amendment against the states. *See* U.S. CONST. amend. XIV § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”). This power, the Supreme Court has held, allows Congress to forbid some practices that are not necessarily unconstitutional in all circumstances, *see South Carolina v. Katzenbach*, 383 U.S. 301 (1966), but does not allow Congress to define the scope of what is and what is not constitutional on its own, *City of Boerne v. Flores*, 520 U.S. 501 (1996). Enforcement legislation must be “congruen[t] and proportional[.]” to the Constitutional harm it seeks to remedy. *City of Boerne*, 520 U.S. at 508. Examples of permissible enforcement litigation include laws authorizing suits by the Justice Department against police departments that engage in patterns and practices of racially discriminatory policing, 42 U.S.C. § 14141; statutes that authorize Justice Department suits to enjoin discriminatory voting practices, 42 U.S.C. § 1973; and statutes that allow individuals to sue state actors who violate constitutional rights, 42 U.S.C. § 1983.

Because state courts nationwide are engaging in wealth-based pretrial detention and thereby violating the Constitution, legislation directly targeting these unconstitutional practices is exactly

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what Section 5 of the Fourteenth Amendment is meant to do. The states are in outright and rampant violation of the requirements of the United States Constitution as those requirements have been defined by federal courts across the country.

### **III. Conclusion**

Each night, the U.S. is detaining almost 500,000 individuals who are presumptively innocent and, often, simply unable to afford money bail. Piecemeal private litigation alone cannot address the Constitutional violations that are occurring every day in our nation's courts; incentives for state reforms, while helpful, do not adequately reflect the urgency of the situation as it now stands. Congressional action to prohibit wealth-based detention is both urgently needed and authorized by the Constitution.