

January 10, 2023

Chair Wanggaard, Chair Tusler, and Honorable Members of the Senate Committee on Judiciary and Public Safety and the Assembly Committee on Judiciary:

The American Civil Liberties Union of Wisconsin appreciates the opportunity to provide testimony in opposition to Assembly Joint Resolution 1 and Senate Joint Resolution 2.

Wisconsin's reliance on cash bail has perpetuated a two-tiered system of justice: one for the wealthy and one for everyone else. AJR 1 and SJR 2 propose amendments to the Wisconsin Constitution that would undermine the safety and stability of people detained pretrial and their communities, exacerbate inequities in the state's cash bail system, and raise significant concerns under the due process clause of the Fifth Amendment and the excessive bail prohibition under the Eighth Amendment to the U.S. Constitution.

Spending even a few days in jail can have devastating, long-lasting consequences for presumptively innocent individuals and their families. The inability to pay cash bail hurts the very things that help someone charged with an offense succeed: employment, stable housing, and strong family and community connections. On top of the risk of job loss, eviction, and the impact on child custody and parental rights, people incarcerated pre-trial can find themselves under a mountain of system-imposed debt. Wisconsin statutes give counties discretion to charge incarcerated people a fee for their incarceration. According to a [2017-2018 report](#) from the Institute for Research on Poverty (IRP), 16 of 22 counties that responded to the IRP survey charged incarcerated people a booking fee or daily rate for room and board. In 2019, [Wisconsin Watch](#) found that at least 23 Wisconsin counties assess "pay-to-stay" fees. Further, Wisconsin jails and telecommunications companies extract more money from incarcerated people and their families, with rates for phone calls as high as \$14.77 for a 15-minute call in some counties, according to [data](#) collected by Prison Policy Initiative in 2021.

In addition to the cascading economic and social consequences, detention poses a systemic disadvantage to people unable to afford the price of freedom pretrial. According to a 2013 study of cases in Kentucky, people held pretrial are four times more likely to receive a jail sentence and three times more likely to receive a prison sentence, even when controlling for other factors such as charge type, demographics, and criminal history. Not to mention, Wisconsin is in the midst of a constitutional crisis, where defendants in poverty—disproportionately people from Black and brown communities—are routinely forced to sit in jail while awaiting the appointment of counsel in violation of the Sixth Amendment.

Studies have also found that pretrial detention can be the strongest single factor influencing a convicted defendant's likelihood of being sentenced to jail or prison. The U.S. Supreme Court has held that, "the presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary," but the changes proposed in AJR 1 and SJR2 would further entrench the reality that Wisconsinites charged with a crime are not innocent until proven guilty but instead innocent until proven poor.

We also cannot ignore the racial and wealth-based disparities that the cash bail system imposes on Wisconsinites, disparities that would be exacerbated by this proposal. According to a [Vera Institute of Justice report](#), in 2015, Black people in Wisconsin were incarcerated at 6.9 times the rate of white people, and Native American people were incarcerated at 6.8 times the rate of white people.

As Chief Justice Rehnquist wrote for the majority in *United States v. Salerno*, "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." 481 U.S. 739, 755 (1987). However, the overly broad "serious harm" language proposed in AJR 1 and SJR 2 turns this principle on its head, allowing a court set the price of a legally innocent person's freedom based on endless hypothetical social, emotional, economic, or other harms (but presumably not the complex harm caused to individuals, families, and communities from incarceration itself). In addition to the significant due process concerns presented by this ambiguity for individuals whose physical liberty is at stake, the additional factors and catchall "totality of the circumstances" that may be considered when setting the price of one's freedom under the proposal do not provide guidance to a court as to when the bail amount set could lead to possible violations of the Eighth Amendment's excessive bail prohibition.

The ACLU of Wisconsin strongly urges committee members to vote against this proposal that would entrench our two-tiered system of justice and increase the damaging human and economic cost of cash bail for people accused of crimes, their families, and their communities.