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The Honorable John A. Sweeney, A.J.S.C. (Ret.), Chairman
New Jersey Council on Local Mandates
20 West Street, 4th Floor
P.O. Box 627
Trenton, New Jersey 08625-0627

Re: In the Matter of a Complaint Filed by the New Jersey
Association of Counties Challenging Provisions of the
Criminal Justice Reform Act as an Unfunded Mandate
Docket No. COLM-0004-16

Dear Judge Sweeney:

Please accept this letter brief in lieu of a more formal
brief in support of the Respondents' Motion to Dismiss the
Complaint in the above referenced matter.

PLEADING SUMMARY

Complainants Cape May County, Monmouth County, Morris
County, Union County, and Warren County (collectively
represented by the New Jersey Association of Counties ("NJAC")
and hereinafter referred to as "Complainants") have filed suit



with the Council on Local Mandates ("the Council") challenging the constitutionality of two provisions of the 2014 Bail Reform Act, P.L. 2014, c. 31 (codified at N.J.S.A. 2A:162-15 et seq. and hereinafter "Bail Reform Act"), which was passed in concert with a constitutional amendment replacing the State constitutional right to bail pursuant to Art. I, ¶11 with a new system of pretrial release and detention for defendants charged with committing a crime.

The Complainants allege that the requirement for a judge to make a pretrial release decision for a defendant issued a complaint-warrant within 48 hours of the defendant's commitment to jail (hereinafter "pretrial release decision") and the conditions providing that a defendant denied pretrial release be released from jail if not indicted within 90 days, tried within 180 days and that generally requires prosecutors to be ready for trial within two (2) years of a defendant's initial commitment to jail (hereinafter "pretrial detention period") are unconstitutional unfunded mandates.

In November 2014, a constitutional amendment approved by nearly two-thirds of New Jersey voters set the stage for reforming the manner in which courts decide whether, and under what conditions, criminal defendants can be released from custody prior to trial. To implement the contemplated

constitutional revision, the Legislature overwhelmingly passed, and the Governor signed, a comprehensive law reforming the monetary bail system in New Jersey.

Contrary to our old system of monetary bail which guaranteed bail, regardless of risk, to all defendants except those accused of capital offenses, the constitutional amendment, and the enabling law enacted by the Legislature and signed by the Governor, opted instead for a "risk-based" system. Courts now will assess a defendant's likelihood of fleeing justice, committing new crimes if released into the community, or otherwise obstructing justice in deciding whether the defendant should be released from custody or detained until trial. The constitutional amendment granted the Legislature the power to establish by law procedures, terms, and conditions related to pretrial release or the denial thereof.

A critical component of the Bail Reform Act is the efficient processing and review of cases so that a court can determine whether or not a defendant should be detained pending trial. The Legislature determined that a judge must make that pretrial release decision within forty-eight (48) hours after a person is arrested. In those instances when a defendant is denied pretrial release, the Bail Reform Act requires the release of detained defendants if not indicted or brought to

trial within the time frames specified by law. These provisions implement the bail reform amendment now memorialized in the Constitution and the Legislature's authority to enact such laws was expressly authorized by the constitutional amendment approved by the voters.

Art. VIII, §2, ¶5 of the New Jersey Constitution provides that certain categories of laws "shall not be considered unfunded mandates[,]” including “those which implement the provisions of this Constitution[.]” N.J. Const. Art. VIII, §2, ¶5(c)(5). Thus, although the Constitution affords the Council broad authority to review laws enacted by our Legislature, because the provisions at issue here implement Art. I, ¶11 of the New Jersey Constitution, they are beyond the purview of the Council and are not properly subject to challenge as unfunded mandates.

The Complainants' request for injunctive relief also must be denied because the challenged provisions are exempt from the Council's review and cannot be deemed unfunded mandates according to the terms of the Constitution. Even if the Council were to determine that the State Constitution does not bar its review of these provisions, the request for injunctive relief still would be inappropriate because the Complainants fail to meet the standard necessary for the issuance of such

extraordinary relief.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

In 2014, the New Jersey Legislature undertook a major overhaul of our state's system of monetary bail. Until then, our criminal justice system guaranteed that in nearly every case, a defendant would be eligible for monetary bail pending trial. Our resource-based bail system resulted in a significant number of low-level and non-violent defendants being remanded to custody pending trial not because they posed a threat to the community, or were a flight risk, but rather, because they could not afford even modest bail levied by the court. Conversely, numerous defendants accused of committing serious violent crimes who had the financial means to post bail were released back into the community even though they may have posed a threat to commit crimes pending trial or fail to appear for court.¹

The Legislature set out to replace the resource-based model our state had relied on - which had resulted in the pretrial incarceration of many low-risk defendants and the release of many defendants accused of more serious crimes - with a risk-based model that bases pretrial release not on a defendant's financial means, but the risk that the defendant will fail to appear for court in the future, presents a danger to the

¹Until the bail reform act becomes effective on January 1, 2017, judges are prohibited from considering the risk to public safety in setting monetary bail. See, State v. Steele, 430 N.J. Super. 24 (App. Div. 2013), appeal dismissed, 223 N.J. 284 (2014).

community, or may commit new crimes while awaiting trial. To implement such a system, a constitutional amendment was necessary so that judges would have the option of remanding a defendant to custody on the basis of one or more of these criteria.²

The need for reform of the monetary bail system was supported on a bipartisan basis and by the New Jersey judiciary. The public statements of elected officials from both parties indicated that a primary objective of the Bail Reform Act was to reduce significantly the number of low-level and/or non-violent offenders who remained in custody pending trial while granting judges the authority to detain defendants accused of more serious, violent offenses, pending trial. Housing thousands of low-risk defendants in county jail resulted in a significant strain on the criminal justice system because of the length of time they spent in jail awaiting trial and the expenses attendant to their incarceration.³

²Prior to the enactment of the 2014 constitutional amendment, Art. I, ¶11 read "All persons shall, before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great."

³Information provided to the Office of Legislative Services by the NJAC indicated that 12 percent of defendants in county jail are there because they cannot post bail of \$2,500 or less. These defendants are detained for an average of 314 days prior to trial at a cost of \$100 per day. Office of Legislative Affairs, Legislative Fiscal Estimate to Senate Bill 946 at 9 (August 11,

In a letter to the Legislature, Governor Christie emphasized the need to protect communities "from the most serious criminals who, under current law, must be set free if able to post even a fraction of the bail set by a judge."⁴ Assemblyman Troy Singleton stated that "For those men and women who are incarcerated for no other reason [than] because they are poor, this is an opportunity to move forward."⁵

Bail reform was also strongly supported by the New Jersey Judiciary. Chief Justice Rabner convened a committee made up of leading attorneys to examine criminal justice procedures and make recommendations on how those procedures could be improved. The committee issued a 120-page report addressing key concerns regarding low-risk defendants who are detained pending trial because they could not make bail and the often lengthy time defendants remained in custody pending trial.⁶ Chief Justice Rabner supported the Committee's work, noting that "[i]f the proposals that have been presented are enacted, we believe that

2014).

⁴<http://nj.gov/governor/news/news/552014/pdf/20140730b.pdf> (last accessed December 13, 2016).

⁵*Christie Calls For Special Legislative Session to Pass Bail Reform*, Burlington County Times, July 29, 2014.

⁶

https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf (last accessed December 19, 2016).

they will make New Jersey's system of criminal justice better, fairer and safer."⁷

The benefits of bail reform also were highlighted by interested parties to this legislation. The American Civil Liberties Union's Public Policy Director was quoted as saying that "bail reform that establishes pretrial alternatives for non-violent low-risk offenders is not only laudable, it is critical and the ACLU wholeheartedly supports such efforts."⁸ The Drug Policy Alliance noted that "bail reform is sorely needed in New Jersey."⁹

The NJAC also weighed in, submitting information to the Office of Legislative Services showing that roughly 12 percent of all defendants awaiting trial in county jail were non-violent offenders unable to make bail of \$2,500 or less. These individuals, according to NJAC, cost \$100 per day to house in jail and spend an average of 314 days in jail before their cases go to trial. Based on NJAC's information, the OLS estimated yearly cost savings of \$49 million if these individuals were not

⁷*NJ Supreme Court Committee Urges Historic Changes to State's Bail System*, [NJ.com](http://www.nj.com/news/index.ssf/2014/03/chief_justices_committee_urges_historic_changes_in_njs_bail_system.html), http://www.nj.com/news/index.ssf/2014/03/chief_justices_committee_urges_historic_changes_in_njs_bail_system.html (last accessed December 19, 2016).

⁸<http://nj.gov/governor/news/news/552014/pdf/20140729a.pdf> (last accessed December 13, 2016).

⁹Ibid.

remanded to custody but instead released back to the community. Office of Legislative Affairs, Legislative Fiscal Estimate to Senate Bill 946 at 9 (August 11, 2014).

Importantly, the original bill introduced in the State Senate was amended on June 5, 2014 to include statutory timelines for a judge to make a pretrial release decision and, for those defendants held in custody, time limits before indictment or trial. A statement issued concurrently with the adoption of these amendments to the bill notes that the 90-day pre-indictment deadline and the 180-day pretrial deadline were based on recommendations contained in a report released on March 10, 2014 by the New Jersey Supreme Court's Joint Committee on Criminal Justice. Senate Budget and Appropriations Committee, Statement to S. 946 (with committee amendments), June 5, 2014.

In addition, the pretrial release decision time frame was noted as being connected to the creation of the Statewide Pretrial Services Program within the Administrative Office of the Courts so that a judge "could consider the person's circumstances" and make a quick determination whether the person would be held over for trial or released with conditions based on the risk assessment performed prior to the appearance. Ibid. Although the legislation would undergo a few additional changes prior to its enactment, all of these provisions were included in

the final bill.

The result of this work was the Bail Reform Act, which passed by large majorities in both houses of the Legislature. The final vote in the Assembly was 53-7, with 11 not voting and 9 abstentions. In the Senate, the bill passed 29-5 with 6 not voting. Governor Christie signed the bill into law on August 11, 2014.

Under the Bail Reform Act, the court is required to make a decision for a defendant arrested on a complaint-warrant¹⁰ "without unnecessary delay, but in no case later than 48 hours after the eligible defendant's commitment to jail." N.J.S.A. 2A:162-16(b)(1). During that time, the court's pretrial services program will produce a risk-assessment report. The report utilizes an objective, research-based tool that uses factors like prior criminal history to place a predictive, numeric risk score of between 1 and 6 for each defendant on two bases: (1) the likelihood they will fail to appear and (2) the likelihood they will commit a new crime while awaiting trial. Judges will utilize these reports in assessing whether, and under what

¹⁰In New Jersey, arrestees are issued either a complaint-summons or complaint-warrant. R. 3:3. The decision on whether to issue a summons or warrant takes into account the nature and degree of the crime charged, danger to the community, risk of flight and other factors. The procedures at issue in this complaint only apply to defendants issued a complaint-warrant.

supervisory conditions, a defendant will be released pending trial.¹¹

The Bail Reform Act also requires that defendants who are remanded to custody be indicted and brought to trial within specific time periods; otherwise, those defendants must be released, but without the criminal charges being dismissed. N.J.S.A. 2A:162-22a.(1)(a)-(b). Lastly, the Bail Reform Act generally requires that prosecutors be ready for trial within two years of a defendant's commitment to jail. N.J.S.A. 2A:162-23(c).

Along with the passage of the Bail Reform Act was the passage of a concurrent resolution placing a constitutional amendment on the November 4, 2014 ballot. As amended, Art. I, ¶11 would read as follows:

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. It shall be lawful for the Legislature to establish by law procedures, terms, and conditions applicable to pretrial

¹¹Pursuant to a directive issued by the Attorney General, the general policy for police and prosecutors is to charge by complaint-summons (which is outside the scope of the bail reform act) as opposed to complaint warrant. See, Attorney General Directive 2016-6 at 31.

release and the denial thereof authorized under this provision. [emphasis added]

The amendment passed by a margin of 62 percent to 38 percent of New Jersey voters.¹²

The Bail Reform Act made clear its interconnectedness to the constitutional amendment. The Bail Reform Act's effective date provision provides that the provisions in question "shall take effect on the same day that a constitutional amendment to Article I, paragraph 11 of the New Jersey Constitution authorizing the courts to deny pretrial release of certain defendants takes effect." P.L. 2014, c. 31, §21. (emphasis added).

After passage of the Bail Reform Act and the constitutional amendment modifying our system of pretrial confinement, agencies within the criminal justice system began creating and developing processes for the implementation of the Bail Reform Act's provisions to be ready in time for the January 1, 2017 effective date. For example, Chief Justice Rabner issued an order on August 30, 2016 containing comprehensive changes to the New Jersey Court Rules to implement key provisions of the Bail

¹²<http://nj.gov/state/elections/2014-results/2014-official-general-public-question-1.pdf> (last accessed December 7, 2016).

Reform Act.¹³ The Supreme Court adopted several new rules, including R. 3:4A, R. 3:25-4, R. 7:4-9, and R. 7:8-11, amended more than thirty other rules, and deleted one rule. See, Omnibus Order Adopting Criminal Justice Reform-Related Rule Amendments - To Be Effective January 1, 2017 at 2.

On June 30, 2016, Governor Christie signed Executive Order 211, directing the Attorney General to "evaluate the costs, savings, and administrative challenges" of implementing the various Bail Reform Act provisions.¹⁴ On November 30, 2016, the Attorney General released a study analyzing the Bail Reform Act.¹⁵

On October 11, 2016, the Attorney General issued an eighty-four (84) page directive of "interim policies, practices, and procedures to implement Criminal Justice Reform Pursuant to P.L. 2014, c. 31."¹⁶ This directive included extensive guidance for county prosecutors in implementing the various provisions of the Bail Reform Act, beginning with arrest and continuing through

¹³<http://www.judiciary.state.nj.us/notices/2016/n160830a.pdf> (last accessed December 12, 2016).

¹⁴<http://nj.gov/infobank/circular/eocc211.pdf> (last accessed December 7, 2016).

¹⁵<http://www.nj.gov/oag/library/Executive-Order-211--FINAL-REPORT--11.30.16.pdf> (last accessed December 7, 2016).

¹⁶http://www.nj.gov/lps/dcj/agguide/directives/2016-6_Law-Enforcement.pdf (last accessed December 7, 2016).

case screening, first court appearance, criteria for requesting pre-trial detention, plea bargaining, and trial.

On December 6, 2016, less than a month before initiation of this extensive, comprehensive criminal justice reform, the Complainants filed this complaint with the Council challenging the constitutionality of two provisions of the Bail Reform Act. The Complainants allege that (1) the 48-hour pretrial release decision time frame and (2) the pretrial detention periods (Complainants refer to the latter as "speedy trial requirements") will require additional expenditures by county governments without the provision of additional resources by the state and are therefore unconstitutional unfunded mandates. Compl. ¶51, ¶¶55-57.

Respondents are the Attorney General of New Jersey on behalf of the State of New Jersey and the Administrative Office of the Courts as a necessary party whose rights would be affected if this Council rules in Complainants' favor.

POINT I

THE COMPLAINT MUST BE DISMISSED BECAUSE THE
CHALLENGED PROVISIONS OF THE BAIL REFORM ACT
IMPLEMENT A CONSTITUTIONAL PROVISION

The New Jersey Constitution provides the Council with the authority to review laws and determine whether those laws impose an unfunded mandate on local government. See, N.J. Const. Art. VIII, §2, ¶5, N.J.S.A. 52:13H-1 et seq. However, the Constitution limits the Council's authority in specific ways. Certain laws "shall not be considered unfunded mandates" and are thus beyond the Council's purview. Among those laws are "those which implement the provisions of this Constitution." N.J. Const. Art. VIII, §2, ¶5(c)(5). See also, N.J.S.A. 52:13H-3(e).

Here, not only does the challenged law implement the constitutional amendment that replaced our criminal justice system's right to monetary bail with a risk-based process for pretrial release or detention, it is an exercise of the express authority granted to the Legislature under the Constitution to establish the procedures, terms, and conditions of pretrial release and the denial thereof. The manifest constitutional authority for the Legislature to enact this law, coupled with the constitutional provision declaring that such laws cannot be unfunded mandates, preclude the Council's review of this challenge and dictate dismissal of this complaint.

A. The Constitutional Amendment Empowered The Legislature To Enact Laws In Furtherance Of the Objectives Of Bail Reform

The Council is being called upon to interpret the actions of the Legislature in the context of an amendment to the New Jersey Constitution granting the Legislature broad authority to enact laws to effectuate the amendment's purpose.

The constitutional amendment expressly authorizes the pretrial release of all defendants, but allows a court to deny release if it 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 prevent the person from obstructing or attempting to obstruct the criminal justice process." N.J. Const. Art. I, ¶11. It also specifically authorizes the Legislature to enact procedures related to pretrial release and detention authorized by this constitutional amendment. By enacting P.L. 2014, c. 31, the Legislature exercised this power, creating procedures, terms, and conditions applicable to the constitutionally-authorized grant or denial of pretrial release to defendants. As will be discussed more fully below, the two challenged statutory provisions are procedures implementing the constitutional amendment and cannot be reviewed by the Council.

N.J.S.A. 2A:162-16(a) provides that an eligible defendant who is issued a complaint-warrant "shall be temporarily detained to allow the Pretrial Services Program to prepare a risk assessment with recommendations on conditions of release ... and for the court to issue a pretrial release decision." Subsection b. requires the court to "make a pretrial release decision for the eligible defendant without unnecessary delay, but in no case later than 48 hours after the eligible defendant's commitment to jail." The provision requires the court to "consider the Pretrial Services Program's risk assessment and recommendations on conditions of release before making any pretrial release decision for the eligible defendant."

Complainants challenge the procedural requirement that a judge must make a pretrial release decision no later than 48 hours after a defendant's commitment to jail, ostensibly because this may require courtrooms to be open during the weekend (unlike the current bail system, which by court rule allows defendants to remain in custody during weekends and holidays before their initial court appearance to set bail). See, Compl. ¶¶53-55. To prevail, Complainants must show that the procedural requirement for the court to make a pretrial release decision no later than 48 hours after an eligible defendant's commitment to jail is somehow not part of the procedure implementing the

pretrial release provision of the Constitution.

Complainants also challenge as beyond the Legislature's constitutional authority to "establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof" the portions of N.J.S.A. 2A:162-22 and N.J.S.A. 2A:162-23 that establish the duration of time that defendants denied pretrial release may be held pending issuance of an indictment or the commencement of trial. To succeed in its challenge to this provision, Complainants would need to convince the Council that this condition - which embraces the specific constitutional formulation governing pretrial release and detention - neither constitutes a term or condition "applicable to pretrial release and the denial thereof" as set forth in Art. I, ¶11 of the Constitution, nor is part of the procedure implementing the provision authorizing pretrial release and the denial thereof.

It is a bedrock principle of our jurisprudence that legislative enactments are presumed constitutional. State v. Buckner, 223 N.J. 1, 4 (2015). Courts provide strong deference to legislative enactments and place on those challenging such enactments a heavy burden of proof to the contrary. A party challenging a statute's constitutionality must show that it "unmistakably" runs afoul of the Constitution and that its "repugnancy" to the Constitution is "clear beyond a reasonable

doubt." Id., citing Lewis v. Harris, 188 N.J. 415, 459 (2006). See also, Gangemi v. Berry, 25 N.J. 1, 10 (1957). This bar is high because the enactment of laws "represents the considered action of a body composed of popularly elected representatives." Overturning such expressions of the will of the people must be exercised with "extreme self-restraint." Buckner, supra, 223 N.J. at 14 (internal citations omitted).

The Council has also affirmed that its ability to review laws enacting provisions of the New Jersey Constitution is circumscribed. In In the Matter of a Complaint Filed by the Township of Medford, Council on Local Mandates, (June 1, 2009), the Council held that "it [Art. VIII, §2, ¶5] exempts from Council action all statutes and regulations that 'implement' the New Jersey Constitution, not just those that are themselves constitutionally necessary." In the Matter of a Complaint Filed by the Township of Medford, (June 1, 2009) at 7.

This standard should apply here, particularly because of the direct nexus between the Bail Reform Act and the constitutional amendment itself, which not only creates the pretrial release formulation the Bail Reform Act implements, but also vests the Legislature with the express authority to enact laws establishing procedures, terms and conditions. As noted in the Statement To Senate Bill 946, "The bill's provisions would

apply to any eligible defendant who is arrested, and for whom a complaint-warrant is issued, on or after the effective date of the aforementioned sections (which are tied to the approval of a constitutional amendment modifying the right to bail for all persons in order to permit court-ordered pretrial detention) (emphasis added). Statement To Senate Bill 946 (Second Reprint) (July 31, 2014).

The "task in statutory interpretation is to determine and effectuate the Legislature's intent." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009); Burns v. Belafsky, 166 N.J. 466, 473 (2001). Words are to be given their generally accepted meaning, and are to be read and construed within the context of the legislation as a whole. In re Plan for the Abolition of Council on Affordable Hous., 214 N.J. 444, 467-68 (2013). When the plain language of a statute is clear, unambiguous, and subject to only one interpretation, the court must infer the Legislature's intent from the statute's plain meaning. Id. at 467.

The constitutional amendment specifically empowered the Legislature "to establish by law procedure, terms, and conditions applicable to pretrial release and the denial thereof . . ." N.J. Const. Art. I, ¶11. A "procedure" is a "particular way of doing things" or a "series of steps followed in a regular

definite order.”¹⁷ The plain meaning of the word “procedure” includes the pretrial release decision and pretrial detention period because both provisions establish whether and when a defendant will be released or detained prior to trial.

The Legislature, through the Bail Reform Act, has created a comprehensive scheme by which defendants are processed through the criminal justice system from post-arrest detention through trial. It replaces presumptive monetary bail or limited detention pending trial with non-monetary pretrial release with conditions or a limited pretrial detention pending indictment or trial. This process demands efficiency from criminal justice agencies to fulfill the legislative intent that low-level, non-violent offenders avoid incarceration due solely to their inability to post monetary bail and to ensure that dangerous individuals are not released back into the community if they pose a risk to public safety, are likely to commit new crimes, or pose a flight risk. The constitutional amendment granted the Legislature authority to enact procedures related to pretrial release and detention. The provisions at issue in this case fall within the Legislature’s authority and cannot be reviewed by the Council.

¹⁷<https://www.merriam-webster.com/dictionary/procedure> (last accessed December 14, 2016).

1. The Pretrial Release Decision Requirement Is A Procedure Implementing A Constitutional Provision

In enacting N.J.S.A. 2A:162-16b.(1), the Legislature acted to implement the constitutional provision authorizing pretrial release and detention. The process provides for the temporary detention of defendants arrested on a complaint-warrant while the court's pretrial services program prepares a risk assessment and the court makes a release decision, but limits the time a defendant may be so detained at this stage to up to 48 hours. This is an integral part of the risk-based pretrial release system approved by the voters when they amended Art. I, ¶11 of the New Jersey Constitution. Because the establishment of a time period in which the court must make a pretrial release decision is fundamentally part of the procedure applicable to the constitutional provision governing pretrial release, it cannot be reviewed by the Council.

Even in arguing that the 48-hour time limit established under the Bail Reform Act is not constitutionally recognized, the Complainants concede that the pretrial release decision time frame is a "procedure." See, Compl. ¶63. The Complainants focus on the possibility that the release decisions for some defendants will take place during weekend hours (and may, in some cases, be done in person rather than telephonically, thus requiring the courts to be open and staffed during weekend

hours). However, the broad authority the Constitution grants to the Legislature to enact applicable procedures cannot plausibly be read to preclude a procedure that prescribes how long a defendant may be temporarily detained while the court makes its release determination, regardless of which day of the week that time frame will cover.

2. The Pretrial Detention Period Requirements Implement A Constitutional Provision

With regard to the pretrial detention provisions, Complainants claim that the constitutional amendment did not "call for" these provisions. The Complainants claim the provisions are outside the amendment's parameters and thus reviewable by the Council. See, Compl. ¶65. Like the provision requiring a court to make a pretrial release decision within 48 hours of arrest, the pretrial detention provisions limiting the amount of time a defendant can be detained prior to indictment or trial are "procedures" as that term is used in the constitutional amendment. Additionally, these provisions establish either a term or condition applicable to pretrial release or the denial thereof, which amounts to an exercise of the Legislature's constitutionally-delegated authority. Both these grounds provide a basis to conclude that the pretrial detention provision implements a constitutional provision and are not subject to the Council's review.

Specifically, N.J.S.A. 2A:162-22a.(1)(a) and (b) establish the maximum duration that pretrial release may be denied to a defendant remanded to custody pending indictment or trial. N.J.S.A. 2A:162-23(c) generally requires prosecutors to be ready for trial within two years of a defendant's commitment to jail. Put differently, these provisions require the pretrial release of detained defendants who are not indicted or brought to trial within the time frames specified by statute and generally requires a trial commence no later than two years after a defendant's initial detention.

These provisions implement the procedure for denying release to defendants who pose a risk of flight, danger or obstruction of justice by establishing terms and conditions applicable to that denial (and authorizing subsequent release if such terms and conditions are not met) and setting a parameter for the initiation of trial. A provision that conditions the denial of release on a specified time frame that, if not met, will result in a detained defendant's release pending trial is manifestly an exercise of this authority as is the general requirement that trial commence within a time certain. The indictment and trial time frames also can be read as a "term" of pretrial detention (i.e., a person must be indicted within 90 days and/or brought to trial within 180 days, or be released

from jail and prosecutors are generally required to be prepared for trial within 2 years of a defendant's commitment to jail).¹⁸

The use of procedural time frames is not novel. As Complainants note, existing court rules set strict time periods for setting bail (12 hours after arrest), review by a Superior Court judge for those unable to post bail (the following day), and a defendant's first appearance before a judge for those in custody (72 hours, excluding holidays). Compl. ¶61. See also, R. 3:4-1(b), R. 3:26-2(c), R. 3:4-2(a). It would be perverse to suggest that bail reform procedures could be implemented by court rule but not by the Legislature in furtherance of authority provided to it by the New Jersey Constitution.

In sum, Complainants deem temporal limits permissible so long as they do not result in appearances during the weekend or impose on prosecutors a duty to indict or try defendants within a certain time frame. However, because these procedures relate to pretrial release and detention, each is within the authority vested in the Legislature by the New Jersey Constitution; they

¹⁸The NJAC claims that this provision cannot implement the Speedy Trial right because Art. I, ¶10 "does not require a specific timeframe for completion of a criminal trial." Compl. ¶65. However, as the Supreme Court has noted, "[w]hat the Constitution does not bar, either expressly or by clear implication, is left to the Legislature to address." Buckner, supra. Therefore, this provision also could be read as implementing the Speedy Trial right enshrined in our Constitution and therefore, outside the Council's purview.

are not reviewable by the Council.

POINT II

INJUNCTIVE RELIEF IS NOT WARRANTED BECAUSE
COMPLAINANTS HAVE FAILED TO DEMONSTRATE THAT
COMPLIANCE WITH THE PROVISIONS OF THE BAIL
REFORM ACT WILL RESULT IN FINANCIAL HARDSHIP
OR THAT THE PROVISIONS CONSTITUTE AN
UNFUNDED MANDATE

The challenged provisions of the Bail Reform Act do not require counties or local units of government to expend additional financial resources. Moreover, Complainants have failed to show that any financial hardship would result if these provisions were implemented. Thus, Complainants' request for injunctive relief must be denied because the standard for the issuance of such extraordinary relief has not been met.

As previously explained, because the provisions of the Bail Reform Act implement a provision of the New Jersey Constitution, they cannot, as a matter of law, be considered unfunded mandates and injunctive relief cannot be granted. However, if the Council does not agree that the provisions in question implement a provision of the New Jersey Constitution, the Complainants have not provided sufficient proofs necessary for the Council to review their request. See, In the Matter of Complaint Filed by the Special Services School Districts of Burlington, Atlantic, Cape May and Bergen Counties, Council on Local Mandates (July 26, 2007) at 6.

Even if the Council reviewed Complainants' request for injunctive relief on the merits, relief still must be denied because Complainants cannot show that they will suffer a significant financial hardship if required to comply with specific provisions of the Bail Reform Act they challenge or that there is a substantial likelihood the Council will find that the provisions at issue constitute an unfunded mandate.

The Council is permitted to issue "a preliminary ruling enjoining the enforcement of a statute" only when a complaint "demonstrates, to the satisfaction of the council, that significant financial hardship to the county, municipality or school district would result from compliance and there is a substantial likelihood that the statute or the rule or regulation is, in fact, an impermissible, unfunded state mandate." N.J.S.A. 52:13H-16. Here, Complainants cannot show that they will experience a significant hardship if the challenged provisions are enacted or that it has a substantial likelihood of prevailing on the merits.

A. The Complainants Have Not Shown They Will Suffer A Significant Financial Hardship If the Bail Reform Act Provisions Are Enacted

The Complainants' assertion of financial hardship relies on speculation and is unsupported. The resolutions submitted on behalf of those counties who are parties to this matter all

contain identical boilerplate language, claiming that enforcement of the Bail Reform Act in its entirety, and not limited to the challenged provisions, will cost an estimated \$1 million to \$2 million "per county" for hiring of additional staff, implementing new technology, and making capital improvements. But Complainants have failed to show here that any of these additional costs are required to comply with the act, never mind with the narrow provisions challenged in this lawsuit.

First, the provisions at issue do not, in and of themselves, call for additional financial expenditures and the Complainants have not advanced an argument of financial hardship. The pretrial release decision time frame and pretrial detention limits are deadlines only. They are expected to reduce case backlog, reduce inmate length of stay, and mitigate the impacts associated with lengthy incarceration. If a prosecutor fails to meet the deadlines, then the only "cost" would be the defendant's release from pretrial detention, not an additional financial burden or hardship.

In their complaint, Complainants provided estimates of costs anticipated to be incurred by county prosecutors' offices and county sheriffs' offices for the hiring of additional staff

members. See, Compl. Tables 1-2.¹⁹ But neither those provisions of the Bail Reform Act, nor the act itself, require the hiring of any additional assistant prosecutors or sheriff's deputies. There is no evidence presented in this complaint demonstrating that existing resources will be insufficient to meet the challenged provisions or that a financial hardship will befall the Complainants if the provisions at issue here are allowed to go forward.

For example, as to the Bail Reform Act's pretrial release decision time frame, Complainants' primary concern appears to be the risk that court staff and prosecutors will need to work during the weekend. Compl. ¶¶54-56. However, prosecutors' offices currently have procedures in place to handle certain crimes that occur during non-work hours. In fact, all 21 county prosecutors' offices indicated that they currently have assistant prosecutors scheduled on-call overnight for major crime events (e.g., homicides, sexual assaults, police shootings, etc.). Exec. Order No. 211 Study at 29. Thus, although it is likely that counties will employ different procedures following the act's implementation (such as staggering shifts), Complainants provide no evidence to suggest that these different procedures will require additional staff,

¹⁹Data included in these tables for counties not party to this action cannot be considered by the Council.

capital improvements or result in a financial hardship.

Also, counties and their constituent offices are afforded flexibility in meeting the Bail Reform Act's requirements. Specifically, the Attorney General's Directive allows a county prosecutor to issue a countywide directive which authorizes designated supervisory police officers (with sufficient experience and training) to screen charges and make critical decisions as to whether those charges will be pursued by way of a complaint-summons (which falls outside the Bail Reform Act) or complaint-warrant. Attorney General Directive 2016-6 at 21-23. This will significantly mitigate the amount of time prosecutors will spend overseeing such procedures and reduce any non-core hours they will have to work.

Further, as to the pretrial release decision time frame, it is not mandatory that the prosecutor appear in person. Attorney General Directive 2016-6 at 53. At the discretion of the judge, a first appearance may take place remotely with video conferencing, thereby eliminating the need for a courtroom appearance. Ibid. Finally, under the existing New Jersey Court Rules, there already are time constraints on first appearances and bail determinations; the new requirement that a judge issue a pretrial release or detention ruling within 48 hours merely changes the deadline and affords judges the authority to release

or detain a defendant consistent with the Bail Reform Act's provisions.

Complainants also have completely ignored the cost savings aspect of the Bail Reform Act. Reducing the overall jail population and implementing a system that ensures that detained defendants are indicted within 90 days, brought to trial within 180 days, and that prosecutors are generally required to be ready for trial within 2 years of a defendant's commitment to jail, likely will result in significant savings to counties, not a financial hardship. The NJAC anticipated as much when it filed information with the Office of Legislative Services indicating that non-violent offenders who cannot afford \$2,500 in bail spend an average of 314 days in jail awaiting trial. Under the Bail Reform Act, many of those individuals will never spend any time in jail, resulting in significant cost savings because jails will no longer be responsible for housing, feeding, and transporting these defendants; courts will hear far fewer bail reduction and bail source hearings; and prosecutors will not be called into court for those same hearings and appearances.

In fact, the Attorney General's Directive includes a presumption against seeking pretrial detention except in limited circumstances. Attorney General Directive 2016-6 at 60-61. While judges of course retain their own, independent discretion to

jail defendants based on the results of the risk assessment, the expectation is that fewer defendants will be remanded to custody pending indictment and/or trial, which should result in cost savings to counties currently dealing with large jail populations. The Complainants have not provided any support for their position that the "speedy trial requirements" will result in additional costs. The Complainants have merely offered conclusory estimates. If anything, the new procedures will likely result in fewer trials being impacted by these deadlines because fewer defendants will be detained pretrial.

Further, in contrast to the current system, which provides no time limits for when a case must proceed to trial, the Bail Reform Act is designed to reduce the number of defendants held in custody awaiting trial, both by reducing the role of bail in the system (so that low-risk defendants charged with minor crimes who cannot afford bail are not held in jail awaiting trial indefinitely) and by promoting the more expeditious prosecution of cases involving detained defendants. Currently, non-violent offenders who cannot make bail spend on average 314 days - nearly twice as long as mandated in the Bail Reform Act - in jail pending trial. Thus, merely reducing the time a defendant spends in jail awaiting trial from the current average to the statutory cap will result in cost savings.

Simply put, there is no demonstrative showing of a significant financial hardship associated with the provisions challenged by the Complainants. Prosecutors may have to prioritize existing resources to meet the Bail Reform Act's deadlines, but failure to do so imposes no financial obligation, but rather, the defendant's release from custody, without dismissal of charges.

That prosecutors should prioritize those cases where a defendant is deemed such a risk to flee, commit new offenses, or obstruct justice is consistent with the Bail Reform Act's overarching goal of protecting the public from violent offenders who pose a risk to public safety. That these individuals are remanded to custody does not result in a financial hardship, it simply requires that prosecutors prioritize this small subset of cases.

Conversely, Respondents would suffer significant harm were injunctive relief granted. Complainants ask the Council to delay critical procedures of the Bail Reform Act that was enacted with broad bipartisan support and in connection with a constitutional amendment supported by 62 percent of New Jersey voters. While Complainants may argue that they do not seek to dismantle the entire edifice of bail reform, but simply to enjoin the enactment of those provisions that impose time constraints on

judges and the court system, these provisions are critical components of the overall structure of bail reform in New Jersey. Remove them, and the other benefits accruing from the act's passage begin to fall away.

Further, injunctive relief would create uncertainty in the criminal justice system at the least opportune time - just as the Bail Reform Act's provisions are taking effect. Most critically, amendments to the court rules already have been issued by order of Chief Justice Rabner.²⁰ Were the Council to grant Complainants' request for injunctive relief, the court rules would have to be modified just as the remaining provisions of the Bail Reform Act become effective, injecting potential confusion within the vicinages of the state. This uncertainty would be particularly acute for defendants detained prior to indictment or trial. Courts in one part of the state may hold defendants for longer periods of time prior to indictment or trial than others, reducing the cost savings attendant to having fewer inmates and subjecting defendants to the inconsistent administration of justice. These harms are significant, substantial, and would have enormous consequences for the

²⁰See, R. 3:4-2 (amending the time for a defendant's first appearance to comply with 48-hour requirement); R. 3:25-4(b) (requiring release of a defendant in most cases if an indictment is not issued within 90 days); R. 3:25-4(c) (requiring release of defendant in most cases if trial does not commence within 180 days).

criminal justice system.

B. Complainants Cannot Show That There Is A Substantial Likelihood The Bail Reform Act Provisions Constitute An Unfunded Mandate

Even if the Council found that Complainants would suffer a significant financial hardship if the Bail Reform Act provisions were allowed to go into effect, injunctive relief still must be denied because Complainants cannot show there is a substantial likelihood the Council will find the provisions are an unfunded mandate. N.J.S.A. 52:13H-16. Complainants must demonstrate that (1) the Bail Reform Act provisions impose a "mandate" on a local unit of government; (2) additional direct expenditures are required for the implementation of those provisions; and (3) the bail reform provisions fail to "authorize resources, other than the property tax, to offset the additional direct expenditures." In re Complaints filed by the Monmouth-Ocean Education Services Commission, Council on Local Mandates (August 20, 2004) at 6. Complainants have not shown there is a substantial likelihood the Council will find the Bail Reform Act provisions meet this standard.

As noted above, the Bail Reform Act provisions at issue do not require the expenditure of additional funds by local units of government or result in a significant financial hardship. The Complainants' claim of additional costs are speculative and the

resolutions submitted by counties party to this suit are identical but without supporting evidence. Moreover, Complainants fail to account for existing procedures, such as the presence of an on-call assistant prosecutor and video teleconferencing, that can be utilized to meet the Bail Reform Act's new requirements. Complainants also disregard the Attorney General's directive affording prosecutors broad discretion in delegating authority to issue complaint-summons while limiting the types of cases for which prosecutors can request pretrial detention. Finally, Complainants ignore the cost savings that will accrue through the meaningful reduction in county jail population once the Bail Reform Act comes into effect.

The Complainants' inability to show that additional expenditures will be required to meet the requirements of the challenged provisions renders the third prong of the Council's analysis moot.

The purpose of the Bail Reform Act was not to create additional work, but rather, to make the pretrial process fairer and more reflective of the need to protect the public while permitting those who pose little risk to remain free pending trial. Complainants have presented no proof that the Bail Reform Act will create additional defendants or result in a financial hardship. Complainants also fail to take into account the

flexibility and leeway provided to county prosecutors, technological advancements that offer alternatives to in-person court appearances, and the cost savings attendant to having fewer inmates in their county jails and those in county jail being there for less time.

On balance, the Council cannot find on the information before it that the Complainants will suffer a significant financial hardship if the provisions at issue are allowed to move forward or that there is a substantial likelihood Complainant will prevail on the merits. If anything, counties and local units of government will realize cost savings from these new procedures. Accordingly, Complainants' request for injunctive relief must be denied.

CONCLUSION

For the foregoing reasons, the complaint must be dismissed because the provisions at issue in this case implement provisions of the Constitution and are therefore outside the Council's purview. If the Council denies Respondent's motion to dismiss, Complainants' request for injunctive relief must be denied because Complainants have not established that they will suffer a significant financial hardship if the provisions at issue are implemented or that Complainants have a substantial likelihood of success on the merits.

Respectfully Submitted,

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