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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3104

BRITTAN HOLLAND, individually and on behalf of all others similarly situated; LEXINGTON NATIONAL INSURANCE CORPORATION,

Appellants,

v.

KELLY ROSEN, Pretrial Services Team Leader; MARY COLALILLO, Camden County Prosecutor; CHRISTOPHER S. PORRINO, Attorney General of New Jersey,

Appellees.

Appeal from the United States District Court
for the District of New Jersey

Argued: February 21, 2018
Filed: July 9, 2018

Before: Ambro, Restrepo, and Fuentes,
Circuit Judges

OPINION OF THE COURT

AMBRO, Circuit Judge

New Jersey's system of pretrial release has long relied on monetary bail to ensure the presence of an accused person at trial. *State v. Robinson*, 160 A.3d 1, 5 (N.J. 2017). But in 2017, following an amendment to its Constitution, the New Jersey Criminal Justice Reform Act took effect. It replaced New Jersey's former monetary bail system with a new framework that prioritizes the use of non-monetary conditions of release over monetary bail to secure a criminal defendant's pretrial liberty.

Brittan Holland and Lexington National Insurance Corporation challenge this feature of the Reform Act as a violation of the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, and the Fourth Amendment of the United States Constitution. They seek a preliminary injunction enjoining Kelly Rosen, the Team Leader for Pretrial Services in the Criminal Division of the Superior Court of New Jersey, Mary E. Colalillo, the Camden County Prosecutor, and Christopher S. Porrino, the Attorney General of New Jersey, and their agents (for convenience we refer to the named officials and their agents collectively as the "State"), "from taking any actions to enforce statutory provisions [of the Reform Act] . . . that allow imposition of severe restrictions on the pre-trial liberty of presumptively innocent criminal defendants without offering the option of monetary bail." Proposed Order of Plaintiffs Granting Motion for a Temporary Restraining Order and a Preliminary Injunction at 2, *Holland v. Rosen*, 277 F. Supp. 3d 707 (2017) (No. 17-4317).

After considering the standing of Holland and Lexington to bring suit, we conclude, as did the District Court (per Judge Simandle), that only the former may make the challenge here. On the merits, the question key to Holland's contentions is whether there is a federal constitutional right to deposit money or obtain a corporate surety bond to ensure a criminal defendant's future appearance in court as an equal alternative to non-monetary conditions of pretrial release. Our answer is no. Thus we affirm the District Court's comprehensive and well-reasoned ruling.

I. Background

A. New Jersey Pretrial Release and Detention Prior to the Criminal Justice Reform Act

Prior to the Reform Act, New Jersey's system of pretrial release relied heavily on the use of monetary bail, requiring defendants to post either cash or arrange with a third party a bond for their release. *Robinson*, 160 A.3d at 5; N.J. Att'y Gen. Law Enf't Dir. 2016-6, at 9 (2016) ("AG Dir. 2016-6"); Chief Justice Stuart Rabner *et al.*, Report of the Joint Committee on Criminal Justice 26 (2014) ("JCCJ Report"). Some defendants were released on personal recognizance (that is, undertaking a personal obligation to appear) or unsecured appearance bond (making a personal promise to pay, and sometimes obtaining a co-signor's promise to pay, a sum of money in the event of flight). *See State v. Rice*, 350 A.2d 95, 99 (N.J. Super. Ct. Law Div. 1975). For most, however, release on bail required the security of cash deposited with the court equal to the full amount of bail set, ten-percent cash bail, corporate surety bond, or property bond. JCCJ Report

at 21-22. There was a presumption in favor of full cash bail for certain bail-restricted offenses. For most other offenses defendants were presumed to have a ten-percent cash bail option, *id*. at 22, which allowed them to deposit ten percent of the sum with the court and undertake a personal recognizance for the remainder. *State v. Moncrieffe*, 386 A.2d 886, 887 (N.J. Super. Ct. App. Div. 1978). Alternatively, defendants could post a corporate surety bond from an insurance company, which, after collecting a non-refundable fee from them and sometimes requiring collateral, executed a contract with the court and became responsible for the full amount of bail if the defendants failed to appear in court. JCCJ Report at 22. A final option was to post a property bond, for which defendants or their surety pledged real property, such as a deed to a house. *Id.* The court in setting bail was only authorized to consider the risk of flight of defendants and was not authorized to consider any danger they may have presented. AG Dir. 2016-6, at 9; JCCJ Report at 19.

In 2012 two organizations—the Drug Policy Alliance and Luminosity—studied New Jersey's county jails and found that 73.3% of those held in custody were awaiting trial, and 38.5% of the total jail population had the option to post bail but were in custody due only to their inability to meet the terms of bail. Marie VanNostrand, New Jersey Jail Population Analysis 11, 13 (2013) ("VanNostrand Report"). One in eight inmates—12% of the total population—was in custody because he or she could not pay $2,500 or

less.[1] *Id.* at 13. The median length of stay for pretrial detainees was 314 days. *Id.* at 12.

The State took steps to address these inequities. Governor Christie called in 2012 for a constitutional amendment to allow for pretrial detention in serious cases. *See* Office of the Courts, Criminal Justice Reform: Annual Report to the Governor & Legislature 1 (2016). And in 2013 Chief Justice Rabner established the Joint Committee on Criminal Justice, "comprised of judges, prosecutors, public defenders, private counsel, court administrators[,] and staff from the Legislature and [the] Governor's office." JCCJ Report at 1.

In a March 2014 report the Committee examined the consequences of the State's then-current bail system and recommended a major change to its approach. *Id.* In practice, the State's reliance on monetary bail resulted in the release of defendants who could afford to pay for their release, even if they posed a substantial risk of flight or danger to others, and the pretrial detention of poorer defendants who presented minimal risk and were accused of less serious crimes. *Id.* at 1-2. The report, supported by extensive research, found significant consequences to pretrial custody: defendants detained in jail while awaiting trial pled guilty more often, were convicted more often, were sentenced to prison more often, and received harsher prison sentences, than those released before trial. *Id.* The Committee sought to promote defendants' liberty interests by shifting from a

[1] This statistic represents those defendants for whom bail was set at $250,000 or less, with the assumption they had a ten-percent cash bail option. *See* VanNostrand Report at 13.

"resource-based" to a "risk-based" system of bail that relies heavily on release (with non-monetary conditions to address defendants' particular risks) rather than pretrial detention. *Id.* at 2-3. The Committee did not recommend the abolition of monetary bail, though it did expect that relying on particular, and often nuanced, conditions would result in monetary bail being set with far less frequency. *Id.* at 61.

The Legislature ultimately adopted a proposal to amend the State Constitution 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 release and the denial thereof authorized under this provision.

N.J. Const. art. I, ¶ 11 (2017). The Legislature also drafted the Criminal Justice Reform Act to implement changes to the State's bail system and provide for

more timely trials.[2] The Act, described in greater detail below, stemmed from the passage of the proposed constitutional amendment, which voters approved by a margin of 61.8% to 38.2% in November 2014. *See* Div. of Elections, Dep't of State, Official List: Public Question Results for 11/04/2014 General Election Public Question No. 1, at 1 (Dec. 2, 2014). Both the amendment and the Act took effect on January 1, 2017.

B. The Reform Act

The Reform Act's three goals are "primarily [to] rely[] upon pretrial release by non-monetary means to reasonably assure an eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, [and] that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process."[3] N.J. Stat. Ann. § 2A:162-15 (2017). Importantly, the Act applies only to "eligible defendants"—those issued "a complaint-warrant . . . for an initial charge involving an indictable offense or a disorderly persons offense." *Id.* A defendant charged by a complaint-summons will be released from custody and is not subject to the Act. *Id.* § 2A:162-16(d)(1).

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[2] The speedy trial reforms are not implicated by this appeal. They can be found at N.J. Stat. Ann. § 2A:162-22 (2017).

[3] The Act presumes there is a reasonable assurance the eligible defendant will not obstruct or attempt to obstruct the criminal justice process unless the prosecutor provides the court with contrary information relevant to that risk. *Id.* § 2A:162-17(e). As such, it is mentioned below only generally and not with respect to Holland personally.

The Reform Act establishes a multi-step process the court must follow when deciding to release or detain an eligible defendant. First, he or she is temporarily detained to allow the Pretrial Services Program ("Pretrial Services") to prepare a Public Safety Assessment and recommendation for release conditions and for the court to issue a pretrial release decision. *Id.* § 2A:162-16(a).

The Public Safety Assessment model, developed by the Laura and John Arnold Foundation, considers nine factors to measure the risk an eligible defendant will fail to appear in court and the risk he or she will engage in new criminal activity while on release. *See* American Civil Liberties Union of New Jersey *et al.*, New Jersey Pretrial Justice Manual 7, 8 (2016) ("ACLU Pretrial Justice Manual"). The Assessment for each eligible defendant is based on relevant information gathered from his or her electronic court records. AG Dir. 2016-6, at 27. The eligible defendant's risks for failure to appear and for new criminal activity are graded on a scale of one to six, with six being the greatest risk. He or she may also be flagged for new violent criminal activity. *Id.* These scores map onto a Decision-Making Framework that recommends a pretrial monitoring level based on the intersection of failure to appear and new criminal activity scores, the new violent criminal activity flag (should there be one), and other factors. *Id.*; *see also* Pretrial Release Recommendation Decision Making Framework (DMF) (March 2018).

Level 1 recommends eligible defendants report once a month by phone. Level 2 recommends monthly telephonic reporting, monthly in-person reporting,

and some monitored conditions (*e.g.*, a curfew). Level 3 recommends weekly telephonic or in-person monitoring and monitored conditions. Level 3+ recommends all the same conditions as level 3 plus electronic monitoring and/or home detention. If release is not recommended, the matrix suggests the eligible defendant be detained pretrial or, if released, ordered to comply with level 3+ conditions. ACLU Pretrial Justice Manual at 10.

The eligible defendant's first appearance must occur no later than 48 hours after his or her commitment to jail, subject to certain exceptions. N.J. Stat. Ann. § 2A:162-16(b)(1). At the first appearance the court must make a pretrial release decision unless the prosecutor files a motion for detention, in which case it will hold a separate pretrial detention hearing. *Id.* §§ 2A:162-17, 2A:162-18(a)(1). In general, that hearing must occur no later than the eligible defendant's first appearance, or three working days from the date the motion for detention was filed, unless the eligible defendant or prosecutor seeks a continuance. *Id.* § 2A:162-19(d)(1).

Not all eligible defendants may be detained pretrial. Rather, a prosecutor may only move to detain an eligible defendant charged with certain crimes, and the court must find clear and convincing evidence that no condition, or combination of monetary and non-monetary conditions, of release can reasonably assure the Act's goals. *Id.* §§ 2A:162-15, 2A:162-18(a)(1), 2A:162-19(a), (e)(3).

At the pretrial detention hearing, the eligible defendant has the right to counsel and to have counsel appointed if he or she is financially unable to obtain

representation. He or she is also afforded the opportunity to testify, present witnesses, cross-examine witnesses, and present information by proffer or otherwise. *Id.* § 2A:162-19(e)(1). The eligible defendant may also subpoena and call the State's witnesses. ACLU Pretrial Justice Manual at 42. Rules concerning admissibility of evidence in criminal trials do not apply to this hearing. N.J. Stat. Ann. § 2A:162-19(e)(1). Further, the eligible defendant is entitled to significant discovery for the detention hearing, including that the prosecutor's office shall provide "any available preliminary law enforcement incident report concerning the offense and the affidavit of probable cause," along with all statements or reports relating to the affidavit, evidence the State relies on to establish probable cause at the hearing, and the risk factors that the State advances at the hearing. N.J. Ct. R. 3:4-2(c)(1) (2017). The prosecutor's office must also provide all exculpatory evidence. *Id.* If there is no indictment, the prosecutor must establish probable cause that the eligible defendant committed the predicate offense. N.J. Stat. Ann. § 2A:162-19(e)(2).

The court may take into account numerous factors to determine whether to detain the eligible defendant. They include, for example, the nature of the offense charged, the history and characteristics of the eligible defendant, the nature and seriousness of his or her risk of danger, and the release recommendation of Pretrial Services. *Id.* § 2A:162-20. If the court orders detention, it must include written findings of fact (along with a statement of the reasons for detention) and direct that the eligible defendant be afforded a reasonable opportunity for private consultation with counsel. *Id.* § 2A:162-21(a). An eligible defendant

ordered detained is entitled to appeal that decision in an expedited manner. *Id.* § 2A:162-18(c). Additionally, the hearing may be reopened at any time before trial if the court finds information that was not known to the prosecutor or the eligible defendant at the time of the hearing and that has a material bearing on whether there are conditions of release that will reasonably assure the Act's goals. *Id.* § 2A:162-19(f).

If the court does not order detention, it must determine what release conditions, if any, should be imposed on the eligible defendant. *Id.* § 2A:162-18(d). It needs to consider all the circumstances, the Public Safety Assessment and recommendation for release conditions, plus any information provided by a prosecutor or the eligible defendant. *Id.* §§ 2A:162-16(b)(2), 2A:162-17(a). Based on this information, the court shall order him or her to be released on personal recognizance or on execution of an unsecured appearance bond if either option would reasonably assure the Act's goals. *Id.* §§ 2A:162-16(b)(2)(a), 2A:162-17(a). If not, the court may order him or her released on a non-monetary condition or combination of conditions, "with the condition or conditions being the least restrictive . . . that the court determines will reasonably assure" the Act's goals. *Id.* § 2A:162-16(b)(2)(b); *see also id.* § 2A:162-17(b). If none of the above will reasonably assure those goals, the court may order the eligible defendant released on monetary bail, other than unsecured appearance bond, to assure his or her appearance in court (but not to assure a person or the community's safety), or a combination of monetary bail and non-monetary conditions to assure the goals that apply. *Id.* §§ 2A:162-16(b)(2)(c), 2A:162-17(c)(1), (d)(1), 2A:162-18(a)(2).

The release conditions imposed may require, at the minimum, that the eligible defendant refrain from committing any offense during release, avoid all communication with an alleged victim of the crime, avoid communication with specified witnesses who may testify concerning the charged offense, and comply with "any one or more non-monetary conditions" in the statute. *Id.* § 2A:162-17(b)(1). These non-monetary conditions include that the eligible defendant:

> (a) remain in the custody of a designated person . . . ;
>
> (b) maintain employment, or, if unemployed, actively seek employment;
>
> (c) maintain or commence an educational program;
>
> (d) abide by specified restrictions on personal associations, place of abode, or travel;
>
> (e) report on a regular basis to a designated law enforcement agency, or other agency, or pretrial services program;
>
> (f) comply with a specified curfew;
>
> (g) refrain from possessing a firearm, destructive device, or other dangerous weapon;
>
> (h) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription . . . ;
>
> (i) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in

> a specified institution if required for that purpose;
>
> (j) return to custody for specified hours following release for employment, schooling, or other limited purposes;
>
> (k) be placed in a pretrial home supervision capacity with or without the use of an approved electronic monitoring device . . . ; or
>
> (l) satisfy any other condition that is necessary to reasonably assure [the Act's goals].

Id. § 2A:162-17(b)(2). If the court orders conditions contrary to the Public Safety Assessment's recommendation, it must provide an explanation for its decision in the document that authorizes the eligible defendant's release. *Id.* § 2A:162-23(a)(2). Additionally, the State Superior Court may later review conditions of release on its own motion, or a motion by the prosecutor or the eligible defendant, alleging there has been a "material change in circumstance that justifies a change in conditions." N.J. Ct. R. 3:26-2(c)(2). Any review of conditions under this rule must be decided within 30 days of the date the motion was filed and the judge may set new conditions of release on a finding that there has been a material change in circumstances. *Id.*

The State has released statistics on pretrial release and detention for the year following the Reform Act's implementation. In 2017 142,663 defendants were charged by either a complaint-warrant or a complaint-summons. Of those, 44,319 defendants were issued a complaint-warrant. Prosecutors filed 19,366 motions for pretrial

detention, and courts ordered 8,043 eligible defendants detained. The pretrial detention rate for all eligible defendants was 18.1%, and the overall pretrial detention rate (considering complaint-warrants and complaint-summonses) was 5.6%. *See* Office of the Courts, Criminal Justice Reform: Annual Report to the Governor & Legislature 4 (2017) ("CJR Report 2017"). Pretrial monitoring level 3+ was ordered for 8.3% of eligible defendants. *See* Initial Release Decisions for Criminal Justice Reform Eligible Defendants (January 1 - December 31, 2017) ("Initial Release Decisions 2017"). Additionally, judges ordered only 44 eligible defendants to post monetary bail in 2017. Overall, the State's pretrial jail population was reduced by 20%. CJR Report 2017, at 4.

C. The Parties

Holland was arrested in April 2017 for his alleged involvement in a bar fight, and he was charged with second-degree aggravated assault. The Affidavit of Probable Cause in support of the criminal complaint noted Holland struck the victim in the face in the parking lot outside a bar, then continued to strike the victim in the head and face after he fell to the ground, causing serious bodily harm. Holland then fled the scene and was apprehended at his home with his clothing covered in fresh blood.

The Camden County Prosecutor's Office filed a motion for pretrial detention due to the severity of Holland's alleged offense and his prior conviction for simple assault. The Decision-Making Framework recommended pretrial detention in part because the Public Safety Assessment flagged Holland for a risk of

new violent criminal activity. Represented by a Public Defender, Holland negotiated for level 3+ non-monetary pretrial release conditions in exchange for the prosecutor's withdrawal of the motion. He appeared in court and accepted the negotiated agreement, which included home detention and electronic monitoring, and he declined to proceed with a pretrial detention hearing. Holland is currently on pretrial release with conditions including home detention (except for employment) and electronic monitoring. He has not sought a judicial determination of his conditions of release or any modification of the agreed conditions.

Lexington is a Florida corporation based in Maryland. It operates through independent bail bondsmen who are licensed by the New Jersey Department of Banking and Insurance and registered with the Superior Court clerk. It primarily underwrites bail bonds and acts as a corporate surety of bail bonds.

D. Procedural History

Holland and Lexington filed a class action Complaint and a Motion for a Preliminary Injunction on June 14, 2017. The State then filed an opposition to the injunction motion, to which Holland and Lexington replied. The American Civil Liberties Union filed a motion for leave to appear as *amicus curiae* on behalf of itself and the ACLU of New Jersey, Drug Policy Alliance, Latino Action Network, and National Association for the Advancement of Colored People - New Jersey Conference. The District Court granted the request of the national ACLU, which then submitted a brief and participated in oral argument in

support of the State. The Court convened a preliminary injunction hearing; after hearing oral argument, it denied the motion.

First, the Court considered Holland and Lexington's standing to raise their claims. It held Holland has standing on his own (called first-party standing) because his alleged injury would be redressed by a favorable judicial decision. However, it held that Lexington lacks first-party and third-party standing, the latter allowing a litigant to assert in certain circumstances claims of other parties. The Court reached its conclusion about third-party standing after finding Lexington had sufficiently alleged injury, but even assuming it has a close relationship with criminal defendants, it did not sufficiently allege criminal defendants face obstacles to pursuing their own claims that only Lexington can address adequately. The Court did not opine on whether Lexington's alleged injury fell outside the "zone-of-interests" of the Eighth, Fourteenth, and Fourth Amendments.

Second, in response to the State's argument that the Court must abstain from interfering with Holland's ongoing state criminal prosecution per *Younger v. Harris*, 401 U.S. 37 (1971), it applied *Gerstein v. Pugh*, 420 U.S. 103 (1975) (narrowing the scope of *Younger* abstention), and held abstention is not warranted.

Third, the Court addressed the merits of Holland's motion for a preliminary injunction. It examined the history of the Eighth Amendment's Excessive Bail Clause and held the argument for the right to monetary bail was unlikely to succeed on the

merits. The Court then reviewed the procedures provided by the Reform Act and concluded the statute did not violate procedural due process and, in any event, Holland waived the process available to him by agreeing to level 3+ conditions. It also held the statute's subordination of monetary bail did not violate substantive due process because Holland did not present any grounds for finding an option to obtain monetary bail is a fundamental right or is implicit in the concept of ordered liberty. Finally, it held the conditions imposed on Holland were not an unreasonable search under the Fourth Amendment because the prosecutor had to show there was probable cause for his charged offense, and Holland waived the opportunity to have a full pretrial detention hearing.

The Court turned to the likelihood Holland will suffer irreparable harm. It held there was scant likelihood of that occurring if an injunction were denied because Holland's suggested harm was the deprivation of his constitutional right to the option, alongside non-monetary bail, of monetary bail, which would have required the Court to hold there was such a right. Moreover, it noted Holland still has the ability to seek a modification of his conditions of release in the New Jersey court.

The balance of harms weighed against granting the requested injunction. The Court noted that such an injunction mandating consideration of monetary bail risked reinstalling the system of financial requirements that previously relegated to pretrial detention those unable to meet modest monetary bail requirements. It found the harm to Holland of denying

the injunction was minimal because, even if monetary bail were set for him, he would likely have to pay a non-refundable bail bond premium.

Finally, the Court determined the public interest disfavors an injunction. It found the reforms implemented by the State support the public interest, particularly in light of the well-documented shortcomings of the prior monetary bail system.

II. Jurisdiction and Standard of Review

The District Court had federal question jurisdiction, 28 U.S.C. § 1331, and we have jurisdiction over final orders of the Court under 28 U.S.C. § 1291. We exercise plenary review over challenges to the constitutionality of statutes. *United States v. Pendleton*, 636 F.3d 78, 82 (3d Cir. 2011). With respect to the denial of a preliminary injunction, we review findings of fact for clear error, legal conclusions *de novo*, and the decision to grant or deny the injunction for an abuse of discretion. *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015).

A preliminary injunction "is an extraordinary remedy . . . which should be granted only in limited circumstances." *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1426-27 (3d Cir. 1994) (citation omitted). We do not issue that relief "unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted) (emphasis omitted). That burden typically involves four factors: (1) a reasonable likelihood of success on the merits; (2) irreparable harm to the applicant; (3) whether the denial of a preliminary injunction

would injure the moving party more than the issuance of an injunction would harm the non-moving party; and (4) whether the grant of relief would serve the public interest. *Del. Strong Families*, 793 F.3d at 308.

The first two factors are prerequisites for a movant to prevail. *Cf. In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015) (citing *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 386 (7th Cir. 1984) (Posner, J.)) (reasoning, in the analogous context of a stay pending appeal, the movant must demonstrate both of the first two factors). The former requires Holland to "demonstrate that [he] can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not)." *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). Because we hold Holland has not made that demonstration, we do not delve deeply into the second factor, which would require Holland to show "that [he] is more likely than not to suffer irreparable harm in the absence of preliminary relief." *Id.* Though Holland argues irreparable harm exists because he is "subjected to severe restrictions of liberty without being offered the constitutionally required alternative of monetary bail," Appellants' Br. at 51-52, we discern in the Eighth, Fourteenth, and Fourth Amendments no constitutional requirement of monetary bail on the same priority level as non-monetary bail. Hence Holland is unlikely to suffer irreparable harm absent a preliminary injunction. (And, as the District Court noted, he may seek to modify his conditions of release in the New Jersey court.)

As Holland has not made the threshold showing on both of the prerequisite factors, we do not consider

and balance the third and fourth factors—"the possibility of harm to other interested persons from the grant or denial of the injunction[] and . . . the public interest." *Reilly*, 858 F.3d at 176 (citation omitted).

III. Standing

Before we reach the constitutional questions raised in this appeal, we address the parties' standing. The State argues the District Court erred in holding Holland has first-party standing because he did not suffer an injury-in-fact and because his alleged injury is not redressable by a court. Lexington asserts the Court also erred in holding it lacks third-party standing because it has a common interest with criminal defendants and they face obstacles to appealing their pretrial release decisions.

For Holland to have standing, he must "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The parties do not contest that Holland's alleged injury is traceable to the State's conduct. Rather, the State raises three arguments contesting Holland's standing. It argues before us that Holland did not allege in his Complaint that the "unconstitutional process" injured him, but rather it was the imposition of non-monetary conditions of pretrial release without considering monetary bail as a non-subordinated option. Additionally, it contends that, even if monetary bail were considered alongside non-monetary release conditions, Holland would still be subject to restrictive conditions to address his risk

to the community or other persons. Finally, it asserts Holland failed to carry the burden of demonstrating he has an injury-in-fact (*i.e.*, one that is real and particular to him, called in constitutional argot "concrete and particularized") in part because he opted out of the pretrial detention hearing.

Each of the State's arguments fails. First, the State reads Holland's Complaint too narrowly. His prayer for relief—a preliminary injunction against imposing "severe restrictions on . . . pre-trial liberty . . . without offering the option of non-excessive monetary bail"—could fairly be read to mean the State court must offer (or have the option to offer) monetary bail when setting release conditions. Second, even assuming the Act's process is unconstitutional, the District Court correctly determined that if monetary bail were required to be considered on equal footing with non-monetary release conditions, Holland's injury—the "unconstitutional process"—would be redressed regardless what release conditions would be imposed. *Cf. Stehney v. Perry*, 101 F.3d 925, 931 (3d Cir. 1996) (holding plaintiff's injury would be redressed by a new employment review). Third, if the Act's process deprived Holland of a constitutional right, his injury would be both concrete and particularized even though he opted out of the hearing. Holland contends he did not have access to a constitutionally compliant process. If so, this affected him personally and in a real way by disallowing him the opportunity to have monetary bail set even if he had agreed to participate in the process provided.

Lexington does not challenge the District Court's holding that it lacks first-party standing, and instead

argues on appeal that the Court erred in holding it lacks third-party standing. We have recognized the prudential doctrine of third-party standing, which, to repeat, allows in limited circumstances litigants to assert claims based on the rights of third parties. *See Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 287-88 (3d Cir. 2002). It may be appropriate "if a course of conduct prevents a third-party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement." *Id.* at 288 (citation omitted) (quotation marks omitted). A plaintiff asserting a third-party claim needs to meet three conditions: "[(]1) the plaintiff must suffer injury; [(]2) the plaintiff and the third party must have a 'close relationship'; and [(]3) the third party must face some obstacles that prevent it from pursuing its own claims." *Id.* at 288-89. Lexington, as the plaintiff, asserts it satisfies each of these conditions: it suffered an injury because the Reform Act "all but eliminated" the use of monetary bail and bail bonds; it has a common interest with criminal defendants like Holland in courts considering monetary bail alongside restrictive release conditions; and criminal defendants subject to home detention and electronic monitoring face obstacles to pursuing litigation themselves because of the nature and cost of challenges to pretrial-release decisions.

The State does not challenge that Lexington has sufficiently alleged injury due to its loss of business by the Act's shift away from monetary bail. Even assuming this factor is met, Lexington fails to satisfy the second and third conditions required for third-party standing—it has no relationship, let alone a

close relationship, with potential criminal defendant-customers. In *Kowalski v. Tesmer*, the Supreme Court considered whether a "future attorney-client relationship with as yet unascertained Michigan criminal defendants who will request, but be denied, the appointment of appellate counsel" based on the operation of a state statute met the "close relationship" factor. 543 U.S. 125, 130 (2004) (citation omitted) (quotation marks omitted). It held the hypothetical relationship was not a "close" one; indeed, "they have no relationship at all." *Id.* at 131. The closeness of Lexington's hypothetical relationship with potential customers closely mirrors that of attorneys with potential clients.

We also follow *Kowalski* to hold Lexington has not demonstrated that potential criminal defendant-customers face obstacles to pursuing their own claims. The attorneys in *Kowalski* argued indigent defendants are hindered in advancing their own constitutional rights because "unsophisticated, *pro se* criminal defendants could not satisfy the necessary procedural requirements, and, if they did, they would be unable to coherently advance the substance of their constitutional claim." *Id.* at 132. The Supreme Court rejected this "hypothesis" by pointing to examples of pro se criminal defendants challenging the denial of appellate counsel. *Id.* We similarly reject Lexington's hypothesis that criminal defendants under home detention and electronic monitoring face obstacles to pursuing litigation when Holland appears to have the unfettered ability to do so.

In this context, Holland has standing to bring his constitutional claims. Lexington does not.

IV. Likelihood of Success on the Merits

Holland challenges the Reform Act on the ground there is a constitutional right to have the option of posting monetary bail to secure pretrial release.[4] We address the likelihood of success for each constitutional argument in turn.

A. Eighth Amendment

The Eighth Amendment to our Constitution provides in part that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII. It applies to the State of New Jersey through the Fourteenth Amendment. *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (internal citation omitted); *Sistrunk v. Lyons*, 646 F.2d 64, 66 (3d Cir. 1981). Though there persists a rigorous debate whether the Excessive Bail Clause incorporates a "right to bail" inherent in its proscription of excessive bail, that is not the question we answer today. Even assuming the Eighth Amendment provides a "right to bail," we must determine whether that right requires *monetary* bail (*i.e.*, cash bail or a corporate surety bond) to be considered in line with non-monetary release conditions.

At time of the Constitution, "bail" in criminal cases relied on personal sureties—a criminal defendant was delivered into the custody of his

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[4] We understand "monetary bail," as Holland uses the term, to refer to only cash bail and corporate surety bonds, Appellants' Br. at 1, 2, 6, 15-16, because he does not mention or allude to property bonds and because the Reform Act retains unsecured appearance bonds (also a form of monetary bail) for those eligible defendants who pose little risk of flight and danger. *See* N.J. Stat. Ann. §§ 2A:162-16(b)(2)(a), 2A:162-17(a); *see also Rice*, 350 A.2d at 99.

surety,[5] who provided a pledge to guarantee the defendant's appearance at trial and, in the event of nonappearance, a sum of money.[6] Anthony Highmore, *A Digest of the Doctrine of Bail; In Civil and Criminal Cases*, v-vi, 197 (1783). In the English tradition of bail that influenced early American practice, the pledge did not require any upfront payment to secure the conditional promise to pay, and producing the defendant for trial voided any later-arising obligation to pay. June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 520-21 (1983); F.E. Devine, *Commercial Bail Bonding* 5 (1991) (citing William Blackstone, *Commentaries on the Laws of England* 340-42 (Chitty Ed. 1857)); *see also* Lord Edward Coke, *A Treatise of Bail and Mainprize* (1635), *reprinted in* Lord Edward Coke & William Hawkins, *Three Law Tracts* 279 (1764) (explaining "bail" derived from the French word *bailer*, meaning "to deliver," "because he that is bailed, is as it were delivered into the hands and custody of those that are his pledges and sureties."). Additionally,

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[5] A defendant in a surety's custody is not physically confined by him; rather, the surety is legally responsible for producing the defendant at trial. *See* Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 Hous. L. Rev. 731, 746-47 (1996).

[6] In his Commentaries, William Blackstone mentions defendants sometimes giving a pledge on their own behalf in criminal cases (akin to what is now known as an unsecured appearance bond), but it appears this practice was less common as compared to personal suretyship. F.E. Devine, *Commercial Bail Bonding* 4 (1991) (citing William Blackstone, *Commentaries on the Laws of England* 297 (Chitty Ed. 1857)).

unlike corporate sureties of today, personal sureties did not receive any compensation for making a pledge on behalf of the criminal defendant. Devine at 6-7; Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Nonfinancial Release Conditions*, 19 New Eng. J. on Crim. & Civ. Confinement 267, 274 (1993).

The early adoption of a personal surety system is reflected in a number of American colonies' laws. New Jersey's colonial predecessor, for example, provided "[t]hat all persons arrested shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or presumption great." Aaron Leaming & Jacob Spicer, *The Grants, Concessions, and Original Constitutions of the Province of New Jersey* 235 (2d ed. 1881); *see also Sistrunk*, 646 F.2d at 68 n.13. It is in this context numerous colonies prohibited excessive bail. *See, e.g.*, *Cobb v. Aytch*, 643 F.2d 946, 958-60 n.7 (3d Cir. 1981) (en banc) (citing Virginia Bill of Rights § 9 (1776); Massachusetts Bill of Rights art. XXVI (1780)).

Prior to the ratification of the United States Constitution, the Northwest Ordinance created a federal statutory right to bail that replicated that of New Jersey. *See* Northwest Ordinance, 1 Stat. at Large 52, art. 2 (1787) ("All persons shall be bailable, unless for capital offences where the proof shall be evident or the presumption great."). After its ratification, the Judiciary Act of 1789 did largely the same. *See* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 ("[B]ail shall be admitted, except where the punishment may be death . . . .").

By contrast, the Constitution's Bill of Rights, through the Eighth Amendment, prohibited excessive bail. The Amendment was taken, with minimal alteration, from the English Bill of Rights of 1689. In England that clause was not thought to afford a right to bail in all cases, "but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." *United States v. Perry*, 788 F.2d 100, 111 (3d Cir. 1986) (quoting *Carlson v. Landon*, 342 U.S. 524, 545 (1952)); *see also* Bill of Rights, 1 W. & M. st. 2, c. 2, preamble, cl. 10 (1689). In a similar vein, many states' constitutions, including that of New Jersey, separately guaranteed bail by sufficient sureties for non-capital offenses and prohibited excessive bail.[7] N.J Const. of 1844, art. I, ¶¶ 10, 15 (1844); *see also* Caleb Foote, *Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 959, 975 (1965).

In the context of the early personal surety bail system, the Eighth Amendment prohibited the demand that a surety pledge an excessive sum of money to secure the defendant's release. *See United States v. Burr*, 25 F. Cas. 55, 62 (Va. Cir. Ct. 1807). Thus personal surety bail may be characterized as a form of monetary bail, in that the surety agreed to pay a sum of money if the defendant failed to appear. But Holland does not argue the Amendment provides a right to personal surety bail; rather, he asserts the Amendment provides a right to pretrial release secured by cash bail or corporate surety bond. He has not shown, however, that "bail" at the time of the

[7] As in England, courts sometimes allowed defendants to make a pledge on their own behalf (alone or with third parties as co-signors). *See Respublica v. Burns*, 1 Yeates 370, 370 (Pa. 1794).

Constitution's ratification contemplated either of these two forms of monetary bail, and we find no evidence that they were in practice at that time. Hence, even if the Eighth Amendment provides a "right to bail," we do not construe its original meaning to include a right to make a cash deposit or to obtain a corporate surety bond to secure pretrial release.

Contemporary definitions of "bail" reflect its early form and a broader meaning that has taken hold over time. "Bail," in the criminal justice context, is defined variously as: (1) "the custody of a prisoner or one under arrest by one who procures the release of the prisoner or arrested individual by giving surety for his due appearance;" (2) "the security or obligation given for the due appearance of a prisoner in order to obtain his release from imprisonment;" (3) "the temporary delivery or release of a prisoner upon security for his due appearance;" (4) "one that agrees to assume legal liability for a money forfeit or damages if a prisoner released on bail fails to make his due appearance in court;" and (5) "the process by which a person is released from custody." *Bail*, Webster's Third New Int'l Dictionary 163 (1971). The last iteration is how we often think of bail colloquially: a means of achieving pretrial release from custody conditioned on adequate assurances.

The Supreme Court's use of "bail" since the middle of the Twentieth Century points to this broader definition. In *Stack v. Boyle*, the Court described a statutory "right to bail" as the "traditional right to freedom before conviction," and "[t]he right to release before trial . . . conditioned upon the accused's giving adequate assurance that he will stand trial and

submit to sentence if found guilty." 342 U.S. 1, 4 (1951). The early practice of bail was the "securing [of] oaths of responsible persons to stand as sureties for the accused," whereas the practice in the 1950s was "requiring a bail bond or a deposit of a sum of money subject to forfeiture [to] serve[] as additional assurance of the presence of an accused." *Id.* at 5. Bail is a "conditional privilege" that enables accused persons "to stay out of jail until a trial has found them guilty." *Id.* at 8 (Jackson, J., concurring).

In *United States v. Salerno*, the Supreme Court addressed a constitutional challenge to the Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3150, contending that it violates the Excessive Bail Clause because it allows a court to set bail and order detention for reasons not related to risk of flight. 481 U.S. 739, 752-53 (1987). The Court held the Act did not violate the Eighth Amendment because "[t]he only arguable substantive limitation of the [Excessive] Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil." *Id.* at 754. The Court's reasoning treats "bail" not narrowly, but broadly as "release before trial . . . conditioned upon the accused's giving adequate assurance[s]." *Stack*, 342 U.S. at 4. (Similarly, we have previously described bail as reconciling "pretrial liberty with the need to assure the defendant's presence at trial," *Sistrunk*, 646 F.2d at 68, and the Excessive Bail Clause as "applicable solely to . . . conditions of release or detention designed to assure a criminal defendant's appearance at trial . . . ," *Perry*, 788 F.2d at 112.)

With this understanding, we consider Holland's argument that the Reform Act violates the Eighth Amendment because it bars a New Jersey court from considering or offering criminal defendants monetary bail alongside restrictive conditions such as home detention and electronic monitoring. Under an original meaning, even assuming there is a "right to bail," we have already noted it did not contemplate monetary bail as Holland describes it, *i.e.*, cash bail or corporate surety bond. Neither does a contemporary definition of bail mean exclusively monetary bail; non-monetary conditions of release are also "bail."

Holland further argues that, under a broad definition of "bail," the Reform Act would violate the Eighth Amendment by subjecting defendants to home detention and electronic monitoring "when monetary bail would suffice." Appellants' Br. at 39 n.1. In effect, he asserts the Eighth Amendment's prohibition of excessive bail is violated when there is a less restrictive alternative to the conditions of release ordered by a court. But that is not the test articulated by *Salerno*; for those conditions, however restrictive, to violate the Eighth Amendment, they must be "excessive in light of the perceived evil." *Salerno*, 481 U.S. at 754 (quotation marks omitted); *see also United States v. Gardner*, 523 F. Supp. 2d 1025, 1031 (N.D. Cal. 2007). Holland's release conditions are hardly excessive in light of the State's legitimate interest in addressing his risk of flight and risk of danger to others; the existence of a purportedly less restrictive means does not bear on whether the conditions are excessive.

Holland also claims the Reform Act violates the Excessive Bail Clause because it imposes severe restrictions on "all defendants[']" pretrial liberty except those who can be released on their own recognizance.[8] Appellants' Br. at 36. This statement and Holland's claim that the Reform Act "authoriz[es] severe liberty restrictions of *non-dangerous* defendants" misconstrue the Act's statutory requirements. *Id.* at 38 (emphasis in original). The conditions of release imposed on Holland may only be applied if they are the "least restrictive . . . conditions that the court determines will reasonably assure [his] appearance in court when required [and] the protection of the safety of any other person or the community . . . ." N.J. Stat. Ann. § 2A:162-16(b)(2)(b). In practice this has resulted in pretrial monitoring level 3+ home detention and electronic monitoring being ordered for 8.3% of eligible defendants, far from "all defendants." And if a court sought to impose home detention and electronic monitoring on a non-dangerous defendant who presents little risk of flight, it would have to contend with the Act's command that only the least restrictive conditions reasonably assuring the Act's goals may be imposed. If those conditions were excessive in light of the State's legitimate interests, it would also come up against the Eighth Amendment's proscription of excessive bail. This hypothetical scenario, we point out, does not

[8] Holland further argues on appeal that the Reform Act imposes severe restrictions on all defendants without any heightened showing of dangerousness, thus violating the Excessive Bail Clause. Whether a heightened showing ought to be required is not properly before us because it was not raised in the District Court. *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

concern Holland, who has not challenged his classification as a potentially dangerous defendant.

Finally, though he waived his statutory right to a pretrial detention hearing, Holland still has an opportunity to argue for a change in his release conditions and potentially request that monetary bail be set. This requires a material change in circumstances justifying a modification. N.J. Ct. R. 3:26-2(c)(2).

In this context, Holland has not demonstrated a likelihood of success on the merits of his argument that the Excessive Bail Clause guarantees a right to monetary bail. Regardless whether the Clause incorporates a right to bail, the latter is not limited to cash bail or corporate surety bonds; it is, to repeat, "release before trial . . . conditioned upon the accused's giving adequate assurance[s]." *Stack*, 342 U.S. at 4. The Clause does not dictate whether those assurances must be based on monetary or non-monetary conditions. Hence the Eighth Amendment does not require a New Jersey court to consider monetary bail with the same priority as non-monetary bail for a criminal defendant.

B. Fourteenth Amendment

The Fourteenth Amendment of the Constitution forbids states from depriving "any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV. This provision contains both substantive and procedural components. *Steele v. Cicchi*, 855 F.3d 494, 501 (3d Cir. 2017). Holland claims the Reform Act's subordination of monetary bail violates both.

1. Substantive Due Process

Substantive due process "limits what [the] government may do regardless of the fairness of [the] procedures that it employs," *id.* at 501 (citation omitted), to "guarantee protect[ion] against government power arbitrarily and oppressively exercised," *id.* (alteration in original) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). To show a violation, Holland must first demonstrate that he has "been deprived of a particular interest that is protected by . . . substantive due process." *Id.* (citation omitted) (quotation marks omitted). This requires "a careful description of the asserted fundamental liberty interest . . . ; vague generalities . . . will not suffice." *Chavez v. Martinez*, 538 U.S. 760, 775-76 (2003) (quotation marks omitted); *see also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).[9]

For a putative right to be "fundamental" under the Due Process Clause, it must be "deeply rooted in this Nation's history and tradition," *Lutz v. City of York, Pa.*, 899 F.2d 255, 267 (3d Cir. 1990) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)), or "implicit in the concept of ordered liberty," *id.* (citation omitted); *see also Glucksberg*, 521 U.S. at 720-21. Both the Supreme Court and our Court have repeatedly warned that we cannot read these phrases too broadly to expand the

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[9] The State argues we should not engage in a substantive due process analysis because Holland's claim is covered by the Eighth Amendment and/or the Fourth Amendment. For the reasons contained in this opinion, those constitutional provisions do not protect Holland's claim, and thus we proceed to our analysis of substantive due process. *See Lewis*, 523 U.S. at 843.

concept of substantive due process, as "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). A court "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Lutz*, 899 F.2d at 267 (citation omitted).

If the right is fundamental, its infringement must be "narrowly tailored to serve a compelling state interest." *Chavez*, 538 U.S. at 775; *see also Glucksberg*, 521 U.S. at 721 (citation omitted). But where fundamental rights or interests are not implicated or infringed, we typically require only a "legitimate state interest that the legislature could rationally conclude was served by the statute." *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000) (citation omitted).

We have previously held substantive due process protects freedom "from government custody, detention, or other forms of physical restraint prior to any determination of guilt." *Steele*, 855 F.3d at 502 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)) (quotation marks omitted); *see also Perry*, 788 F.2d at 112 ("[T]here is a substantive liberty interest in freedom from confinement."). Nevertheless, "an arrestee's right to freedom from pretrial detention is subordinated . . . where there has been an adjudication that detention is necessary because an arrestee presents an identified and articulable threat to an individual or the community . . . or to ensure [his or her] presence at trial . . . ." *Steele*, 855 F.3d at 502 (quoting *Salerno*, 481 U.S. at 750-51, and *Bell v. Wolfish*, 441 U.S. 520, 523 (1979)) (quotation marks

omitted); *see also Perry*, 788 F.2d at 113 ("[A] demonstration of dangerousness justifies deprivation of liberty by civil commitment without offending the substantive due process limitation upon government.").

Holland, however, claims substantive due process protects his right to have the option to deposit money or obtain a corporate surety bond to secure his future appearance before he may be subjected to "severe deprivations of pretrial liberty." So "[w]e begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 710.

Holland has not pointed us to any evidence of cash bail or corporate surety bonds in early bail practice in the United States, nor did our search reveal any. Rather, both modern forms of bail appear to have emerged in the mid-to-late Nineteenth Century, largely as a product of the expansive frontier and urban areas in America diluting the personal relationships necessary for a personal surety system. Comment, *Bail: An Ancient Practice Reexamined*, 70 Yale L.J. 966, 967-68 (1961); Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 Hous. L. Rev. 731, 749 (1996). With respect to cash bail, some jurisdictions deemed the practice illegal because it would not secure the government's interest in the accused appearing at trial.[10] But by the

[10] *Butler v. Foster*, 14 Ala. 323, 325-26 (1848); *United States v. Faw*, 1 Cranch C.C. 486, 486 (D.C. Cir. 1808); *Smart v. Cason*, 50 Ill. 195, 197 (1869); *State v. Reiss*, 12 La. Ann. 166, 166-67 (1857) ("There is no law which authorizes a Sheriff to receive money as

Twentieth Century many jurisdictions (even if not yet states) enacted statutes to allow it in certain circumstances,[11] and others followed in the early and mid-Twentieth Century (including some jurisdictions that had previously barred it).[12] Outside the statutes'

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a security for the appearance of persons accused of crime. Where parties are admitted to bail under bonds and recognizances, they are not absolutely discharged, but are (as it were) transferred from the custody of the Sheriff to the friendly custody of the sureties in the bond or recognizance."); *People v. Rutan*, 3 Mich. 42, 50-51 (1853); *Reinhard v. Columbus*, 31 N.E. 35, 38 (Ohio 1892).

[11] Alaska Crim. Proc. Code ch. 23, § 229 (1900) (adopting law of Oregon); Ariz. Rev. Stat. tit. 12, ch. 5, § 1981 (1887); Ark. Code Prac. Civ. & Crim. Cases tit. 5, ch. 3, § 84 (1869); Cal. Crim. Proc. Code ch. 119, pt. 4, tit. 3, ch. 7, § 151 (1850); Ind. Rev. Stat. ch. 4, art. 9, § 1706 (1881); Iowa Code pt. 4, tit. 25, ch. 196, § 3232 (1851); Kan. Stat. ch. 82, art. 9, § 145 (1868); Ky. Crim. Code tit. 5, ch. 3, § 84 (1867); Mass. Gen. Laws pt. 4, tit. 2, ch. 212, § 68 (1882); Mont. Rev. Stat. div. 3, ch. 11, § 249 (1879); Nev. Rev. Stat. ch. 53, tit. 4, pt. 10, § 2141 (1873); 1898 N.J. Laws 875; N.Y. Crim. Proc. Code pt. 4, tit. 11, ch, 1, art. 5, § 648 (1850); N.D. Rev. Crim. Proc. Code ch. 6, art. 5, § 7856 (1895); Okla. Stat. ch. 72, art. 5, § 67 (1890); Or. Crim. Code tit. 1, ch. 25, § 1483 (1887); Tenn. Code pt. 4, tit. 4, ch. 10, art. 4, § 5167 (1857); Utah Code Ann. tit. 76, ch. 16, § 4662 (1898); Wash. Rev. Code ch. 83, § 1036 (1881); Wisc. Stat. tit. 33, ch. 195, § 4816 (1898); *Cressey v. Gierman*, 7 Minn. 398, 404 (1862) (citing state statute that permits defendants to deposit money in lieu of bail); *Raisin Fertilizer Co. v. Grubbs*, 19 S.E. 597, 597 (N.C. 1894) (same).

[12] D.C. Code ch. 20, § 938 (1906); Idaho Penal Code tit. 23, ch. 235, § 5647 (1901); 37 Ill. Comp. Stat. ¶ 3363 (1920); La. Code Crim. Proc. Ann. art. 97 (1929); 1919 Mich. Pub. Acts 332 (1919); S.D. Codified Laws tit. 11, ch. 11, § 590 (1903); *Holcombe v. Pierce*, 43 So. 2d 640, 642-43 (Ala. 1949) (noting 1949 Act amended Alabama Code to permit cash bail); *Puchuneicz v. Chellis*, 27 Ohio N.P. (n.s.) 494, 495 (1929) (noting Chapter 14, Section 8 of new criminal code allows for deposit of cash in lieu of

circumscribed scope, however, numerous jurisdictions made clear that cash bail was not available in common law as an alternative to obtaining a personal surety.[13]

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recognizance); *State ex rel. City of Beckley v. Roberts*, 40 S.E.2d 841, 845 (W. Va. 1946) (noting 1943 Act authorized cash bail). *Compare* Conn. Gen. Stat. tit. 20, ch. 13, pt. 3, § 1 (1875), *with* 1909 Conn. Pub. Acts ch. 72 (1909). *Compare* Fla Laws div. 5, pt. 2, tit. 2, ch. 1, art. 2, § 3926 (1906), *with* Fla. Laws div. 5, pt. 2, tit. 2, ch. 1, art. 2, § 3936a (1914). *Compare* Maine Rev. Stat. Ann. tit. 11, ch. 135, § 6 (1916), *with* Maine Rev. Stat. Ann. tit. 11, ch. 145, § 28 (1930). *Compare* R.I. Gen. Laws tit. 37, ch. 354, § 15 (1909), *with* R.I. Gen. Laws tit. 40, ch. 407, § 6323 (1923). *Compare* S.C. Crim. Code tit. 1, ch. 2, § 28 (1902), *with* S.C. Crim. Code tit. 1, ch. 2, § 37 (1912). *Compare* Va. Code. tit. 41, ch. 198, § 4972 (1918), *with* Va. Code tit. 41, ch. 198, § 4973a (1924). *Compare* Wyo. Stat. Ann. div. 5, tit. 2, ch. 2, § 5182 (1899), *with* Wyo. Stat. Ann. ch. 397, § 6087 (1910). *Compare Commonwealth v. Fortini*, 27 Pa. D. 521, 522 (1918) ("[W]e have no statute in Pennsylvania that permits cash bail."), *with* 1919 Pa. Laws 102, § 2 (1919). Cash bail also became an option in Maryland and New Hampshire, but it is unclear whether its basis was statutory. *Outerbridge Horsey Co. v. Martin*, 120 A. 235, 235-36 (Md. 1923); *Rockingham Cty. v. Chase*, 71 A. 634, 635 (N.H. 1908). The same was true for the then-Territory of Hawaii. *See Territory v. Ah Sing*, 18 Haw. 470, 471 (1907).

[13] *Paton v. Teeter*, 37 Cal. App. 2d 477, 479 (Dist. Ct. App. 1940) (holding cash bail may not be accepted in place of a surety absent a statutory provision authorizing such acceptance); *Palakiko v. Cty. of Maui*, 22 Haw. 759, 760 (1915) (same); *State v. Owens*, 84 N.W. 529, 530 (Iowa 1900) (same); *Applegate v. Young*, 61 P. 402, 402 (Kan. 1900) (same); *Badolato v. Molinari*, 174 N.Y.S. 512, 514 (Crim. Ct. 1919) (same); *Exchange Trust Co. v. Mann*, 269 P. 275, 276 (Okla. 1928) (same); *Brasfield v. Town of Milan*, 155 S.W. 926, 927 (Tenn. 1913) (same); *Kellogg v. Witte*, 182 P. 570, 571 (Wash. 1919) (same). *But see Rowan v. Randolph*, 268 F. 529, 530 (7th Cir. 1920) (holding a judge does not have the discretion to refuse to accept cash bail and require a surety in common law

Even through the 1950s a few jurisdictions had no statutory provision for cash bail, and we see no evidence its practice was accepted based on prior decisions not overturned.[14]

Rather than a product of statute, by contrast it appears commercial bail bonding was a product of economic opportunity presented by the eroding personal surety system. The first bail bond business in the United States is widely thought to have formed in 1898 in San Francisco. *The Old Lady Moves On*, Time Mag., Aug. 18, 1941. By 1912 the Supreme Court recognized the permissibility of commercial contracts for bail bonds. *Leary v. United States*, 224 U.S. 567, 575 (1912). But widespread criticism of the practice, leading to reform, shortly followed. A landmark study

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"where the penalty of the bond is payable in money" and the amount of the penalty was tendered upfront as security).

[14] *Lowrie v. Harvey*, 10 P.2d 335, 335-36 (Colo. 1932) (noting no statutory provision for the acceptance of cash or its equivalent in lieu of bond); *Scarboro v. State*, 62 S.E.2d 168, 170 (Ga. 1950) ("Indeed, even judicial or other officers who are empowered to admit persons accused of crime to bail[] have no right, in the absence of express statutory authority, to accept a deposit of money in lieu of bail or as a substitute for a recognizance, and the release upon the making of such a deposit, of a person held in custody under a criminal charge is illegal.") (citation omitted); *Cooper v. Rivers*, 48 So. 1024, 1025 (Miss. 1909) (noting no law authorizing sheriff to take money as a deposit in lieu of bail); *Snyder v. Gross*, 95 N.W. 636, 637 (Neb. 1903) ("[A] deposit of money instead of the usual bail was not authorized."). *Compare* Ga. Code Ann. § 27-418 (1933), *with* Ga. Code Ann. § 17-6-4(a) (1982). *Compare Dufek v. Harrison Cty.*, 289 S.W. 741, 742 (Tex. App. 1926) (noting cash bail not authorized), *with Smith v. Decker*, 312 S.W.2d 632, 634 (Tex. 1958) (noting option to deposit cash in 1957 Act).

on the bail system in Chicago in the 1920s described rampant abuses in professional bail bonding, including bondsmen's failure to pay on forfeited bonds. Arthur L. Beeley, *The Bail System in Chicago* 39-44 (1927). Criticism of reliance on monetary bail, of which commercial bail bonding was a key feature, continued through the 1950s. By that time scholars had criticized the monetary bail system as discriminatory, arbitrary, and ill-suited to ensuring a defendant's appearance in court. *See* Wayne H. Thomas, Jr., *Bail Reform in America* 14-15 (1976). Ultimately, these concerns motivated federal and state governments to reform their bail laws to deprioritize monetary bail (including corporate surety bonds) under non-monetary conditions of release. *See* Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214 (1966); *see also* S. Rep. 98-225, at 5 n.7 (1983); Thomas at 181.

Historical practice informs whether the option to post cash or obtain a corporate surety bond for bail is fundamental. *Cf. Medina v. California*, 505 U.S. 437, 446 (1992). The "settled tradition" of cash bail we see in our nation's history is that it is only available as an alternative to obtaining a personal surety when a statute so permits, and, in the absence of statutory permission, it is generally unavailable. *Id.* Additionally, we see no historical basis for a right to obtain a corporate surety bond, as this relatively modern practice was quickly limited by reform. Nor have we found any historical authority supporting an option to deposit money or obtain a corporate surety bond in lieu of the release conditions to which Holland agreed, namely, home detention and electronic monitoring. In sum, to the extent Holland contends there is a history of a "right to bail," that right does

not require cash bail or a corporate surety bond to be available as an alternative equal to other release conditions.

As we discern no historical basis for concluding substantive due process requires criminal defendants to have the option to post cash or obtain a corporate surety bond to ensure their future appearance in court, *id.* at 448, we turn to whether either practice is "implicit in the concept of ordered liberty." *Lutz*, 899 F.2d at 267 (citation omitted). Holland contends bail is fundamental to our scheme of ordered liberty because it ensures freedom before conviction for presumptively innocent defendants who pose little flight risk and no danger, and it enables them to prepare a more complete defense. To be sure, "bail constitutes a fundament of liberty underpinning our criminal proceedings," *Sistrunk*, 646 F.2d at 70, but we cannot say the same of Holland's requested forms of monetary bail.

Reliance on monetary bail, including cash bail and corporate surety bond, through the middle of the Twentieth Century came at a cost: criminal defendants who were unable to post or pay even modest sums to secure their release were kept in jail.

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.

Stack, 342 U.S. at 7-8 (Jackson, J., concurring). Monetary bail often deprived presumptively innocent

defendants of their pretrial liberty, a result that surely cannot be fundamental to preserving ordered liberty.

As a result, we hold cash bail and corporate surety bond are not protected by substantive due process because they are neither sufficiently rooted historically nor implicit in the concept of ordered liberty. Hence the Reform Act's subordination of monetary bail to non-monetary conditions of release need only be rationally related to a legitimate State interest. And it is—New Jersey's interests in ensuring defendants appear in court, do not endanger the safety of any person or the community, or obstruct their criminal process, are no doubt legitimate. *See Salerno*, 481 U.S. at 750-51; *Bell*, 441 U.S. at 523; *Steele*, 855 F.3d at 502; *Perry*, 788 F.2d at 113. The State's shift away from monetary bail as a primary option was designed to serve those interests: it found the reliance on monetary bail resulted in the release of defendants who had the means to pay regardless of their flight risk or danger, and the pretrial detention of poorer defendants even if they were accused of less serious crimes and posed little risk. JCCJ Report at 1-2. Reliance on non-monetary conditions of release instead of monetary bail thus allows the State to release low-risk defendants, who may be unable to afford to post cash or pay a bondsman, while addressing riskier defendants' potential to flee, endanger the community or another person, or interfere with the judicial process that decrees their guilt or innocence.[15]

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[15] Though we do not apply strict scrutiny, it would appear that New Jersey's reliance on non-monetary release conditions is more narrowly tailored than the system in place before the

2. Procedural Due Process

Pretrial release and detention decisions implicate a liberty interest—conditional pretrial liberty—that is entitled to procedural due process protections. *See United States v. Delker*, 757 F.2d 1390, 1397 (3d Cir. 1985). But "not every potential loss of liberty requires the full panoply of procedural guarantees available at a criminal trial." *Id.* "[D]ue process is flexible and calls for such procedural protection as the particular situation demands." *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) (quotation marks omitted).

Procedural due process requires us to balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Reform Act. Holland's argument to the contrary—that monetary bail is less restrictive of liberty than non-monetary bail—is belied by the early statistics on the Act. In its first year, New Jersey's pretrial jail population was reduced by 20%, whereas the non-monetary conditions to which Holland agreed were ordered for only 8.3% of eligible defendants.

The State asserts Holland waived any procedural due process argument because he opted out of the pretrial detention hearing that was available to him. To be sure, "[i]n order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate." *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000). That did not happen because Holland chose to forgo his right to the available hearing. But, for the sake of completeness, we nonetheless address his process contentions.

Holland argues the Reform Act violates procedural due process because it enables the State court to impose on criminal defendants home detention and electronic monitoring without having the option to impose monetary bail together with or in place of these non-monetary conditions. We do not decide whether non-monetary conditions such as home detention and/or electronic monitoring restrict criminal defendants' pretrial liberty. Even assuming these conditions would satisfy the first balancing factor, the other two factors do not point to a violation of Holland's right to procedural due process.

We evaluate the deprivation risk to Holland's pretrial liberty interest by considering "the fairness and reliability of the existing . . . procedures[] and the probable value, if any, of additional procedural safeguards." *Mathews*, 424 U.S. at 343. Due to the prosecutor's pretrial detention motion, Holland had access to a pretrial detention hearing to determine whether he would be detained pretrial and, if not, what conditions of release would be imposed on him.

The questions Holland poses are, first, whether the procedural protections supplied to him in this hearing were adequate given the Reform Act's restrictions on a State court's ability to set monetary bail, and, second, whether procedural due process requires the court to consider monetary bail in line with non-monetary conditions.

We briefly restate the Reform Act's existing procedures that applied to Holland had he taken advantage of them. Before the prosecutor brought a pretrial detention motion, Pretrial Services prepared a Public Safety Assessment and recommendation for release conditions that flagged him as a risk to commit new violent criminal activity. It recommended that he be detained pretrial. Following Pretrial Services' recommendation, the prosecutor moved for pretrial detention; hence Holland was entitled under the Reform Act to a pretrial detention hearing. At the hearing he had the right to counsel or to have counsel appointed, the opportunity to testify, present witnesses, cross-examine witnesses, and present information. N.J. Stat. Ann. § 2A:162-19(e)(1). He was also able to subpoena and call the State's witnesses. ACLU Pretrial Justice Manual at 42. Further, rules concerning the admissibility of evidence in criminal trials did not apply to this hearing, N.J. Stat. Ann. § 2A:162-19(e)(1), and Holland was entitled to receive significant discovery, including all exculpatory evidence, a copy of the charging documents, all statements and reports that relate to the affidavit of probable cause, plus any additional evidence the prosecutor

relied on at the detention hearing to establish probable cause and to support any Public Safety Assessment. N.J. Ct. R. 3:4-2(c)(1); *see also Robinson*, 160 A.3d at 19.

The court could then take into account various factors to determine whether any monetary or non-monetary release conditions, or combination of conditions, would reasonably assure not only Holland's presence at trial but also the other goals of the Act. These factors include: the nature and circumstances of the offense charged; the weight of the evidence against Holland and the admissibility of any evidence sought to be excluded; his history and characteristics; the nature and seriousness of his dangerousness on pretrial release; and Pretrial Services' recommendation of release or detention. N.J. Stat. Ann. § 2A:162-20. If the court then decided against pretrial detention, it could have imposed only the least restrictive non-monetary condition or combination of conditions that would reasonably assure Holland's presence at trial and the safety of the community and other persons, provided release on personal recognizance or an unsecured appearance bond would not reasonably assure those goals. *Id.* §§ 2A:162-16(b)(2), 2A:162-17(a)-(b). Monetary bail, other than unsecured appearance bond, was an option only if non-monetary bail was found inadequate. *Id.* §§ 2A:162-16(b)(2)(c), 2A:162-17(c)(1), (d)(1), 2A:162-18(a)(2).

The Reform Act's applicable procedures mirror those in the federal Bail Reform Act of 1984. In response to a facial challenge that the federal Bail Act failed to satisfy procedural due process before criminal

defendants may be detained pretrial, the Supreme Court reviewed the Act's procedures and held the "extensive safeguards suffice to repel a facial challenge." *Salerno*, 481 U.S. at 752. It noted the Bail Act's protections were "more exacting than those . . . found sufficient in the juvenile context, . . . and they far exceed[ed] what [the Court] found necessary to effect limited post[-]arrest detention . . . ." *Id.* (citing *Schall v. Martin*, 467 U.S. 253, 275-81 (1984); *Gerstein*, 420 U.S. 103).

Salerno informs our view that the risk of erroneously depriving Holland's pretrial liberty is low under the New Jersey Reform Act's procedures given its subordination of monetary bail. All of the procedures the Court held were "extensive safeguards" under the federal Act are included in the New Jersey Act's pretrial detention hearing. And the New Jersey Act adds the additional protection of extensive discovery.[16] Beyond these extensive safeguards, the Reform Act allows only the least restrictive non-monetary condition, or combination of conditions, reasonably assuring the Act's goals. Considering all the protections available to Holland under the Reform Act, the risk of erroneous deprivation of his pretrial liberty—ostensibly through the imposition of home detention and electronic

[16] Though Holland argues on appeal that procedural due process requires a heightened showing before a State court may order home detention and electronic monitoring, as required for pretrial detention, he did not raise this argument in the District Court, and thus it is not properly before us. *See Hormel*, 312 U.S. at 556.

monitoring—is low even if the court were unable to consider monetary bail.

The probable value of requiring the court to consider monetary bail in line with home detention and electronic monitoring is also low. Holland contends that monetary bail preserves liberty, whereas home detention and electronic monitoring encumber it. Thus, the argument goes, giving the court the option to release criminal defendants on monetary bail in lieu of home detention and electronic monitoring would necessarily reduce the risk of an erroneous deprivation. His counsel also suggested during oral argument that the court should set monetary bail to account for any flight risk but still have the option to set restrictive non-monetary conditions to account for potential danger. Or. Arg. Tr. at 27.

The first argument is refuted by the actual effect of the Reform Act; the second is hypothetical. New Jersey decided to shift from its prior monetary bail system because it resulted in more criminal defendants being detained in jail pretrial, and "civil detention . . . results in the deprivation of the most fundamental of all personal liberties." *Perry*, 788 F.2d at 113. As noted above, in the year since the Act took effect New Jersey's pretrial jail population was reduced significantly while home detention and/or electronic monitoring was ordered for few eligible defendants. CJR Report 2017, at 4; *see* Initial Release Decisions 2017. Monetary bail, as it existed in New Jersey prior to the Reform Act, resulted in more restrictions of criminal defendants' pretrial liberty, not fewer. Additionally, the notion the court should set

monetary bail to account for Holland's flight risk, while also having the ability to set restrictive non-monetary conditions to account for his danger to others, would result in more than the non-monetary bail conditions Holland accepted. Perhaps what he proposes is that using monetary bail to mitigate flight would reduce the restrictiveness of the non-monetary conditions the court sets, thus reducing the risk of erroneous deprivation of liberty. If so, he provides no support for this hypothetical outcome.

The final *Mathews* factor, the State's interest, also indicates the Reform Act's procedures, which subordinate monetary bail to non-monetary conditions of release, do not violate procedural due process. This factor includes the public interest, "the administrative burden and other societal costs that would be associated with [the additional] requir[ement]" along with financial costs to the State. *Mathews*, 424 U.S. at 347. The Reform Act's goals include not only the reasonable assurance of eligible defendants' appearance at trial, but also the safety of the community and other persons, and the integrity of the criminal justice process. Holland does not contest that monetary bail fails to address his risk of danger. Thus the State's strong and legitimate interest is not served by placing consideration of monetary bail in line with conditions designed to mitigate danger to other persons and the community. Moreover, the public interest also includes, broadly, pretrial liberty. As explained above, studies have revealed reliance on monetary bail results in greater encumbrance of pretrial liberty, as many pretrial detainees are kept in custody because of their inability to post even modest monetary bail. And the Reform Act has thus far been

effective in reducing the pretrial detention population. Even if home detention and electronic monitoring may be considered restrictions on pretrial liberty, they may only be imposed if they are the least restrictive conditions that reasonably assure the Reform Act's goals. Also of marginal note is the administrative burden of imposing an additional procedural requirement. The State posits that the burden of requiring the court to consider monetary bail in line with non-monetary conditions would include retraining court personnel, prosecutors, public defenders, and private defense attorneys, and promulgating one or more new court rules, which would be financially and human-resource intensive. In any event, the State's interest weighs against finding a violation of procedural due process.

Though we reach no holding on whether home detention and electronic monitoring impinge Holland's pretrial liberty, we assume they do. Even so, we hold the lower priority of monetary bail to non-monetary bail conditions does not make constitutionally inadequate the extensive safeguards available to Holland under the Reform Act. Those procedures—together with the low probable value of requiring the court to consider monetary bail alongside home detention and electronic monitoring, and the State's interest—indicate the subordination of monetary bail does not violate procedural due process, especially when Holland retains the option of seeking a modification of his bail conditions should circumstances change.

* * * * *

In sum, we hold the Reform Act's subordination of monetary bail to non-monetary bail conditions does not violate either component of the Due Process Clause. Substantive due process does not provide a right to monetary bail. It is neither historically rooted to the time of our Bill of Rights nor implicit in the concept of ordered liberty, and the Reform Act's subordination of it to non-monetary release conditions is rationally related to the State's legitimate interests in assuring defendants appear at trial, the safety of the community and other persons, and the integrity of the criminal justice process. As for procedural due process, the extensive safeguards provided by the Reform Act are not made inadequate by its subordination of monetary bail. Moreover, Holland still may move the State court to modify his bail based on a change of circumstances, wherein he may be able to argue he no longer presents a danger and thus the conditions of release imposed on him should be less restrictive. *See* N.J. Ct. R. 3:26-2(c)(2).

C. Fourth Amendment

Unlike his Eighth Amendment and Due Process arguments, Holland does not argue the Fourth Amendment provides a right to monetary bail. Rather, he asserts the Reform Act violates the Fourth Amendment's prohibition of "unreasonable searches and seizures" because the conditions to which he agreed, *i.e.*, home detention and electronic monitoring, are "unreasonable" inasmuch as they involve significant intrusions on his privacy and are not needed to promote the State's legitimate interest

when monetary bail would serve the same interest less intrusively.[17]

The Fourth Amendment provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. It is binding on the states by the Fourteenth Amendment. *Maryland v. King*, 569 U.S. 435, 446 (2013). But not all searches and seizures run afoul of it. "The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). To determine whether a seizure is reasonable, we examine the totality of circumstances and balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Schneyder v. Smith*, 653 F.3d 313, 325 (3d Cir. 2011) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal citation omitted)). Likewise, to assess whether a search is reasonable, we balance "the degree to which [it] intrudes upon an individual's privacy and, on the other hand, the degree to which [it] is needed for the promotion of legitimate governmental interests." *United States v. Sczubelek*,

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[17] Holland cursorily contends his release conditions were not based on reasonable suspicion or probable cause that he will commit a crime, but makes no argument to support this claim. Thus we do not address it on appeal. *See Free Speech Coalition, Inc. v. Att'y Gen.*, 677 F.3d 519, 545 (3d Cir. 2012). We also refrain from considering his argument that the State's interest in home detention and electronic monitoring is unreasonable absent a heightened showing of dangerousness because it was not raised to the District Court. *Hormel*, 312 U.S. at 556.

402 F.3d 175, 182 (3d Cir. 2005) (quoting *United States v. Knights*, 534 U.S. 112, 119 (2001)).

We do not accept as given that placing an electronic monitor on an individual and then tracking his whereabouts always constitute a search and seizure, and that home detention is a seizure. In *Grady v. North Carolina*, 135 S. Ct. 1368 (2015), the Supreme Court held that "a State . . . conducts a search when it attaches a device to a person's body, *without consent*, for the purpose of tracking that individual's movements." *Id.* at 1370 (emphasis added). Holland does not challenge on appeal the District Court's finding that he consented to the conditions imposed on him. We are aware of no binding authority that holds consented-to tracking and consented-to home detention are a search and a seizure.

Even assuming they are, we cannot estimate the extent to which they intrude on Holland's privacy. Holland alleges the ankle bracelet he wears for monitoring purposes requires him to stay near a power outlet for several hours a day while the device charges, precludes him from traveling on a commercial airplane, and discloses "a massive amount of private information about [his] life to the state." Appellants' Br. at 50. But the District Court did not find any facts that support an intrusion on privacy; rather, it assumed these practices are intrusive. We too assume without deciding they are at least somewhat intrusive.

That intrusiveness, however, is lessened by Holland's reduced expectation of privacy. "Once an individual has been arrested on probable cause for a

dangerous offense that may require detention before trial, . . . his or her expectations of privacy and freedom from police scrutiny are reduced." *King*, 569 U.S. at 463. Holland does not challenge that he was arrested on probable cause for a dangerous offense, and thus we consider his expectation of privacy to be reduced.

Against Holland's reduced privacy interest we balance the State's interest. The Supreme Court has held "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials" and a "legitimate and compelling" interest in preventing crime by arrestees. *Id.* at 452-53 (citations omitted). These mirror the goals espoused by the State in the Reform Act, and Holland does not challenge the legitimacy of them. Rather, he argues the conditions are not reasonable because monetary bail could serve the same legitimate interests in a less intrusive manner. We repeat the State found monetary bail did not adequately address flight risk and could not, by its nature, address risk of danger.

In any event, Holland's argument fails as a matter of law because the Supreme Court "has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means . . . ." *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawotomie Cty. v. Earls*, 536 U.S. 822, 837 (2002); *see also Illinois v. Lafayette*, 462 U.S. 640, 647 (1983). The existence of a less intrusive means does not itself render a search or seizure unreasonable. Whether the conditions to which Holland agreed are in themselves unreasonable, regardless of the availability or unavailability of monetary bail, is

beyond the scope of our inquiry and in any event can be revisited if circumstances change.

We hold Holland is unlikely to succeed on the merits of his argument that the Reform Act violates the Fourth Amendment because monetary bail could serve the same legitimate government interest in a less intrusive manner than the conditions to which he agreed. The Supreme Court has repeatedly disavowed a "less intrusive means" standard for determinations of reasonableness under the Fourth Amendment, *see Lafayette*, 462 U.S. at 647, and we will not adopt one here.

V. Conclusion

Holland has standing to bring his claims that the Reform Act violates the Eighth, Fourteenth, and Fourth Amendments of the United States Constitution, but Lexington does not. He has not, however, made a threshold showing of the first two factors required to prevail on a motion for a preliminary injunction. He has not demonstrated a sufficient likelihood of success on the merits of his argument that the Reform Act violates a constitutional right to cash bail or corporate surety bonds. We find no right to these forms of monetary bail in the Eighth Amendment's proscription of excessive bail nor in the Fourteenth Amendment's substantive and procedural due process components. We also reject Holland's "less intrusive means" theory of a Fourth Amendment violation, and so we hold he has not made a sufficient showing of a violation of that constitutional amendment. Without a constitutional right violated, and with reconsideration of current release conditions an option if circumstances suggest

and a request made, irreparable harm does not exist. Thus we affirm the District Court's denial of Holland's motion for a preliminary injunction.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 17-4317 (JBS-KMW)

BRITTAN B. HOLLAND and LEXINGTON NATIONAL INSURANCE CORPORATION,

Plaintiffs,

v.

KELLY ROSEN, MARY E. COLALILLO, and CHRISTOPHER PORRINO,

Defendants.

OPINION

Simandle, District Judge:

I. Introduction

This dispute centers on the constitutionality of New Jersey's recently-enacted Criminal Justice Reform Act ("CJRA"). The matter is presently before the Court upon the motion of Plaintiffs Brittan B. Holland ("Holland") and Lexington National Insurance Corporation ("Lexington") for a preliminary injunction enjoining Defendants Kelly Rosen, the Team Leader for Pretrial Services in the Criminal Division of the Superior Court of New Jersey; Mary E. Colalillo, the Camden County Prosecutor; and Christopher S. Porrino, the Attorney General of New Jersey, (collectively, "the State Defendants" or

"Defendants"), as well as their agents, "from taking any actions to enforce statutory provisions [of the CJRA] . . . that allow imposition of severe restrictions on the pre-trial liberty of presumptively innocent criminal defendants without offering the option of monetary bail." (Pl. Proposed Order.)

Holland is presently on pretrial release from the Superior Court of New Jersey on conditions including home confinement (except for employment) and electronic monitoring, but not cash bail, as he faces charges for second-degree aggravated assault. Lexington is a bail bond provider that alleges its business in New Jersey has essentially dried up since the CJRA took effect on January 1, 2017, although it does not allege it has a bonding relationship with Holland or any other person processed under the CJRA.

The primary issue before the Court is whether Plaintiffs have a "reasonable probability of eventual success" on their claims that the CJRA violates Holland's Fourth, Eighth, and/or Fourteenth Amendment rights under the U.S. Constitution. This inquiry necessarily requires the Court to also consider jurisdictional issues, such as whether Plaintiffs have standing to bring their constitutional claims and whether the Court must abstain under *Younger v. Harris*, 401 U.S. 37 (1971), in light of Holland's ongoing state prosecution.

The Court heard oral argument at a Preliminary Injunction Hearing held on August 22, 2017 [Docket Item 42], and no testimony was offered beyond various affidavits and attached documents. After careful consideration, Plaintiffs' Motion for a Preliminary

Injunction will be denied for the reasons explained below. The following constitute the Court's findings of fact and conclusions of law upon Plaintiffs' Motion for a Preliminary Injunction, pursuant to Federal Rule of Civil Procedure 52(a).

II. Background

A. Historical Perspective on Bail in New Jersey

As under the Eighth Amendment of the U.S. Constitution, the New Jersey State Constitution ("State Constitution") provides: "[e]xcessive bail shall not be required." *N.J. Const.* art. 1, ¶ 12. For more than a century, the State Constitution additionally required: "[a]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great." *N.J. Const. of 1844*, art. I, ¶ 10; *see also N.J. Const. of 1947*, art. I, ¶ 11 (2016) (retaining same language from 1844 Constitution).[1] Thus, New Jersey has long considered the right of an individual to bail before trial to be "a fundamental one." *State v. Johnson*, 61 N.J. 351, 355 (1972).

The constitutional guarantee that a criminal defendant be "bailable by sufficient sureties" produced tension in New Jersey's criminal justice

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[1] In 2007, New Jersey abolished the death penalty, *P.L.* 2007, *c.* 204 (Dec. 17, 2007), thereby guaranteeing that, under the State Constitution, *all* criminal defendants would be "bailable by sufficient sureties," *N.J. Const. of 1947*, art. I, ¶ 11. This provision of the State Constitution was amended effective January 1, 2017, as discussed below.

system. On one hand, "any defendants—even those who posed a substantial risk of flight or danger to the community—could be released if they had access to untainted funds to post as bail." *State v. Robinson*, 229 N.J. 44, 52-53 (2017). On the other hand, "poorer defendants accused of less serious crimes, who presented minimal risk, were held in custody if they could not post even modest amounts of bail." *Id.* at 53.

For example, a 2013 Report revealed that on a particular day in 2012, a total of 13,003 inmates were housed in 20 of New Jersey's 22 county jails. Marie VanNostrand, Ph.D., Luminosity & the Drug Policy Alliance, *New Jersey Jail Population Analysis* 8 (Mar. 2013), https://university.pretrial.org/viewdocument/new-jersey-jail-popu) [hereinafter, "*VanNostrand Report*"]. About 9,500 inmates (or 73% of the sampled jail population) were confined because they were awaiting trial or sentencing in either Superior or Municipal Court. *Id.* at 11.[2] Most importantly, more than 5,000 inmates (or 38.5% of the sampled jail population) were in custody simply because they could not afford bail. *Id.* at 13.[3] A total of 1,547 of

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[2] The average length of stay in jail for a criminal defendant awaiting trial was 314 days. *VanNostrand Report* at 12.

[3] Prior to enactment of the CJRA, criminal defendants in New Jersey had the option of posting bail with cash or by the 10% Deposit Option and the Cash/Bond Option. *VanNostrand Report* at 13. The latter Options enabled criminal defendants to pay a bail bondsman or company a fee in exchange for the bondsman posting bail for the defendant. *See Dobrek v. Phelan*, 419 F.3d 259, 261 (3d Cir. 2005) (citing *Cap. Bonding Corp. v. N.J. Supreme Court*, 127 F. Supp. 2d 582, 584 (D.N.J. 2001)). Once the bondsman posted bail, it then became his responsibility to get the

those inmates (or 12% of the sampled jail population) were in pretrial custody because they could not afford $2,500 or less, including about 800 inmates who could have secured their release for $500 or less. *Id.* "In other words, one in eight inmates, who posed little risk, sat in jail pretrial because they were poor, while defendants charged with serious crimes who posed a substantial risk of danger or flight could be released into the community without monitoring so long as they could make bail." *Robinson*, 229 N.J. at 53.

In 2012, Governor Chris Christie called for a constitutional amendment to reform New Jersey's pretrial detention system. *Id.* Chief Justice Stuart Rabner of the New Jersey Supreme Court subsequently established a Joint Committee on Criminal Justice ("the Joint Committee") to examine "issues relating to bail and the delays in bringing criminal cases to trial." Joint Committee, *Report of the Joint Committee on Criminal Justice* at 1 (Mar. 10, 2014), available at https://www.judiciary.state.nj.us/courts/assets/criminal/finalreport3202014.pdf. The Joint Committee was comprised of members from all three branches of state government and included judges, prosecutors, public defenders, private counsel, court administrators, and staff from the Legislature and Governor's office. *Id.*

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defendant to court. If the defendant failed to appear, then the bail posted was forfeited, and the bondsman either became responsible for the amount of bail or for ensuring that the fugitive defendant was captured and brought to court. If, on the other hand, the defendant appeared in court on his own accord, the posted bail would be returned to the bondsman, who would also keep the original fee paid by the defendant.

On March 10, 2014, the Report of the Joint Committee on Criminal Justice was issued. *Id.* According to the Joint Committee:

> the current system presents problems at both ends of the spectrum: defendants charged with less serious offenses, who pose little risk of flight or danger to the community, too often remain in jail before trial because they cannot post relatively modest amounts of bail, while other defendants who face more serious charges and have access to funds are released even if they pose a danger to the community or a substantial risk of flight.

Id. at 2. To that end, the Joint Committee first recommended that "New Jersey should move from a largely 'resource-based' system of pretrial release to a 'risk-based' system of pretrial release." *Id.* at 8. Among several other proposals, the Joint Committee further recommended that "[a] statute should be enacted requiring that an objective risk assessment be performed for defendants housed in jail pretrial, using an assessment instrument that determines the level of risk of a defendant," and "[n]onmonetary conditions of release that correspond to the level of risk should be established." *Id.*

After conducting hearings on the Joint Committee's findings and recommendations, the State Legislature proposed and passed the Criminal Justice Reform Act, *S.* 946, *A.* 1910 (2014). On August 11, 2014, Governor Christie signed the CJRA into law. *L.* 2014, *c.* 31 (codified at N.J.S.A. 2A:162-15 to -26).

Enforcement of the CJRA was predicated on ratification of a proposed amendment to the State

Constitution that would authorize New Jersey courts to deny the pretrial release of certain defendants. *See* N.J.S.A. 2A:162-15 Note. In a state-wide referendum held on November 4, 2014, New Jersey voters approved such an amendment by a vote of 68% to 32%. Div. of Elections, Dep't of State, *Official List: Public Question Results for 11/04/2014 General Election Public Question No. 1* (Dec. 2, 2014), http://nj.gov/state/elections/2014-results/2014-official-general-public-question-1.pdf.

The amendment, which took effect on January 1, 2017, replaced Article 1, Paragraph 11 of the State Constitution (which had previously guaranteed all criminal defendants the right to be "bailable by sufficient sureties") with the following:

> 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 release and the denial thereof authorized under this provision.

N.J. Const. art. 1, ¶ 11. Notably, the amendment did *not* affect the "excessive bail" clause of the State Constitution, *N.J. Const.* art. 1, ¶ 12.

B. The Criminal Justice Reform Act

Through enactment of the CJRA, New Jersey sought to promote three separate goals in considering conditions of pretrial release: (1) reasonably assuring the person's appearance in court; (2) protecting the community and persons; and (3) preventing the obstruction of justice by persons awaiting trial. *See* N.J.S.A. 2A:162-15. To that end, the CJRA modified New Jersey's previous criminal justice system in several ways. First, the CJRA permits judges to order the pretrial detention of certain defendants if the court "finds clear and convincing evidence that no condition or combination of conditions can reasonably assure the effectuation of [the CJRA's] goals." *Id.*; *see also* N.J.S.A. 2A:162-18(a)(1). Second, the CJRA shifts New Jersey's bail system away from one that is resource-based (*i.e.*, posting money bail) and towards one that relies upon an objective evaluation of an individual defendant's level of risk. N.J.S.A. 2A:162-17, -25(d); *see also Report of the Joint Committee on Criminal Justice* at 8 (recommending that "New Jersey should move away from a largely 'resource-based' system of pretrial release to a 'risk-based' system of pretrial release"). Finally, the CJRA establishes speedy trial deadlines for defendants who are detained pending trial, N.J.S.A. 2A:162-22, which is not at issue in this case.

1. The Pretrial Release Decision

Once a complaint-warrant is issued based on a judicial officer's finding of probable cause, an "eligible

defendant"[4] "shall be temporarily detained to allow the Pretrial Services Program to prepare a risk assessment with recommendations on conditions of release." N.J.S.A. 2A:162-16(a). Within 48 hours of a defendant's commitment to jail, the court must make a "pretrial release decision." N.J.S.A. 2A:162-16(b)(1).

In making a pretrial release decision, the court must impose "the least restrictive condition, or combination of conditions, that the court determines will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process." N.J.S.A. 2A:162-17(d)(2). Thus, the purposes of pretrial release are enlarged to address concerns not only of appearance in court but also protection of the safety of other persons and the community and deterring obstruction of the criminal justice process—concerns not normally addressed through monetary bail.

To assist in the pretrial release decision-making process, the CJRA provides a five-stage, hierarchical process for courts to follow. *Robinson*, 229 N.J. at 55-57. First, the court must order that a defendant be released on his own personal recognizance or an unsecured bond if such release is adequate to ensure the defendant's appearance in court and safety of the public. N.J.S.A. 2A:162-16(b)(2)(a), -17(a). Second, if

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[4] Under the CJRA, "eligible defendant" is defined as "a person for whom a complaint-warrant is issued for an initial charge involving an indictable offense or a disorderly persons offense unless otherwise provided in sections 1 through 11 of *P.L.* 2014, *c.* 31." N.J.S.A. 2A:162-15.

release on personal recognizance is inadequate, the court may release the defendant on "a *non-monetary* condition or conditions,[5] with the condition or conditions being the least restrictive condition or combination of conditions" that are adequate to ensure the defendant's appearance in court and the safety of the public. N.J.S.A. 2A:162-16(b)(2)(b), -17(d)(2) (emphasis added.) Third, if non-monetary conditions are inadequate, the court may release the defendant subject to monetary bail, but *only* to reasonably assure the defendant's appearance in court. N.J.S.A. 2A:162-16(b)(2)(c), -17(c).[6] Fourth, if the above non-monetary conditions are insufficient, the court may release the defendant subject to a combination of monetary and non-monetary conditions reasonably calculated to assure the defendant's appearance in court and safety of the public. N.J.S.A. 2A:62-16(b)(2)(c), -17(d). Fifth, if the prosecutor has moved for pretrial detention and a judge determines no combination of monetary and non-monetary conditions are adequate to ensure the defendant's appearance in court or safety of the public, the court may order that the defendant remain

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[5] Non-monetary conditions of release may, for example, require that the defendant "remain in the custody of a designated person;" "maintain employment, or, if unemployed, seek employment;" "report on a regular basis to a designated law enforcement agency . . . or pretrial services program;" "comply with a specified curfew;" "refrain from owning a firearm;" or "be placed in a pretrial home supervision capacity with or without the use of an approved electronic monitoring device." N.J.S.A. 2A:162-17(b)(2).

[6] As explained below, Plaintiffs assert that monetary conditions should be considered up front, rather than as a last option, because the U.S. Constitution provides a right to consideration of monetary bail.

detained pending a pretrial detention hearing. N.J.S.A. 2A:162-16(b)(2)(d), -18(a)(1).

Before making any pretrial release decision for an eligible defendant, a judge is required to consider, but is not bound by, the Pretrial Services Program's risk assessment and recommendations on conditions of release (described below). N.J.S.A. 2A:162-16. "If the court enters an order that is contrary to a recommendation made in a risk assessment when determining a method of release or setting release conditions, the court *shall* provide an explanation in the document that authorizes the eligible defendant's release." N.J.S.A. 2A:162-23 (emphasis added).

2. The Risk Assessment Instrument

Under the CJRA, the Pretrial Services Program's risk assessment must be conducted using a "risk assessment instrument" that is approved by the Administrative Director of the New Jersey Courts. N.J.S.A. 2A:162-25(c). This instrument must be "objective, standardized, and developed based on analysis of empirical data and risk factors relevant to the risk of failure to appear in court when required and the danger to the community while on pretrial release." N.J.S.A. 2A:162-25(c)(1).

In partnership with the Laura and John Arnold Foundation, the New Jersey courts adopted an automated risk assessment instrument that contains a risk *measurement* component, called the Public Safety Assessment ("PSA"), as well as a risk *management* component, called the Decision Making Framework ("DMF"). Glenn A. Grant, J.A.D., New Jersey Courts, *2016 Report to the Governor and Legislature* at 4 (Dec. 31, 2016), available at

https://www.judiciary.state.nj.us/courts/assets/criminal/ 2016cjrannual.pdf.

a. The Public Safety Assessment

Under the risk assessment instrument adopted by the New Jersey courts, the state police must first gather criminal history information from various law enforcement and court databases, including the NJ State Police criminal case history system, the PROMIS/GAVEL criminal database, the MACS municipal court database, and other sources. *State v. C.W.*, 449 N.J. Super. 231, 238-39 (Mar. 21, 2017) (citing N.J. Attorney General Law Enforcement Directive No. 2016-6 at 15-16 (October 11, 2016), available at http://www.nj.gov/oag/dcj/agguide/directives/2016-6_Law-Enforcement.pdf). The PSA then uses the information derived from these sources to address nine risk factors: (1) the defendant's age at the time of arrest; (2) whether the offense charged is "violent"; (3) other charges pending against the defendant at the time of the alleged offense; (4) prior disorderly persons convictions; (5) prior indictable convictions; (6) prior "violent" convictions; (7) prior failures to appear at a pre-deposition court date within the two years preceding the alleged offense; (8) prior failures to appear at a pre-disposition court date more than two years preceding the alleged offense; and (9) prior sentences to incarceration of 14 days or more. *C.W.*, 449 N.J. Super at 239; *see also* ACLU of New Jersey, NACDL, and NJ Office of the Public Defender, *The New Jersey Pretrial Justice Manual* at 8 (Dec. 2016), available at https://www.nacdl.org/NJPretrial/. These objective risk factors are race and gender neutral, and do not require the police to interview the

defendant. *2016 Report to the Governor and Legislature* at 4.

Using an algorithm, the automated process generates the PSA, which "scores" three different categories: (1) Failure to Appear ("FTA"); (2) New Criminal Activity ("NCA"); and (3) New Violent Criminal Activity ("NVCA").

i. Failure to Appear Score

A defendant's FTA score, which is used to calculate the risk that a defendant will fail to appear at future court proceedings, is calculated using the following framework: (1) if the defendant has a pending charge against him he receives one point; (2) one point is added if the defendant has a prior conviction; (3) another point is added if the defendant failed to appear at a pre-disposition court date more than two years ago; and (4) if the defendant failed to appear at a pre-disposition court date within two years of the alleged offense, two point are added (and if the defendant failed to appear at more than one pre-disposition court dates within the past two years, four points are added). *The New Jersey Pretrial Justice Manual* at 8. The defendant's raw score is then converted into a six-point scale, with one being the lowest score a defendant can receive and six being the highest. *Id.*

ii. New Criminal Activity Score

A defendant's NCA score, which is used to predict the risk that the defendant will commit new criminal activity while on release, is calculated using the following framework: (1) if the defendant is 22 years old or younger he receives two points; (2) three points are added if there were pending charges against the

defendant at the time of the arrest; (3) one point is added if the defendant has a prior disorderly persons offense; (4) another point is added if the defendant has a prior conviction for an indictable offense; (5) one more point is added if the defendant has been convicted of a "violent" crime on one or two occasions (if there are three or more convictions for crimes of violence, two points are added); (6) if the defendant failed to appear at a pre-disposition court date within two years of the alleged offense, one point is added (and if the defendant failed to appear at more than one pre-disposition court dates within the past two years, two points are added); and (7) if the defendant has previously been sentenced to a term of incarceration, two more points are added. *Id.* Again, the defendant's raw score is converted into a six-point scale, with one being the lowest score a defendant can receive and six being the highest. *Id.*

iii. New Violent Criminal Activity Flag

Finally, a score is generated to determine if a criminal defendant should be flagged for NVCA, which indicates that there is a greater statistical likelihood the defendant will engage in new violent criminal activity if released. A defendant receives a NVCA flag if he scores four or more points under the following framework: 1) a defendant receives two points if the current offense is considered "violent"; 2) one point is added if the offense is "violent" and the defendant is under 21; 3) an additional point is added when the defendant has pending charges against him at the time of the alleged offense; 4) one point is added if the defendant has a prior conviction; and 5) one more

point is added if the defendant has one or two prior "violent" convictions (if the defendant has three or more he receives two points). *Id.* at 9. Under the CJRA, a NVCA flag "make[s] release less likely," and criminal defendants "who are released after receiving a flag will be released under more onerous conditions." *Id.*

b. The Decision Making Framework

After the PSA scores are calculated, the Pretrial Services Agency provides a recommendation to the judge in a "Decision Making Framework" about whether a defendant should be released pending trial and, if so, under what conditions. *Id.* at 10.

The Decision Making Framework recommends a Pretrial Monitoring Level ("PML") for each criminal defendant, which ranges from release on one's own recognizance ("ROR") to pretrial detention. *Id.* A defendant released ROR will have no conditions or restrictions placed on them. *Id.* At PML 1, a defendant is required to report to a pretrial services officer by phone once per month. *Id.* At PML 2, a defendant must report to a pretrial services officer once a month in person, once a month by telephone, and be subject to monitored conditions such as a curfew. *Id.* At PML 3, a defendant is monitored in-person or by phone every week, and he is subject to additional monitored conditions. *Id.* At PML 3 Plus Electronic Monitoring or Home Detention ("PML 3+"), a defendant is subject to all the same conditions previously described, but may also be confined to their home and/or required to wear a GPS monitoring device on their ankle at all

times. *Id.* Finally, as an option of last resort, a defendant will be detained in jail pending trial. *Id.*

The DMF is a four-step process. First, as described in *See* Section II.B.2.a, *supra*, the defendant's PSA is completed to produce FTA and NCA scores and a flag for NVCA. *Id.* Second, the court determines whether the pending charges are serious enough on their own to warrant a recommendation of "release not recommended; if released maximum conditions," irrespective of the PSA. *Id.* Such charges include murder, aggravated manslaughter, aggravated sexual assault, and carjacking. *Id.* Pretrial detention (or PML 3+, if released) is also recommended when the defendant receives an NVCA flag in the PSA *and* the charged offense is "violent." *Id.* Third, the court applies the FTA and NCA scores to a DMF matrix. *Id.* at 11 (chart describing DMF matrix.) Fourth, the court determines whether the defendant has been charged with a No Early Release Act crime. *Id.* (citing N.J.S.A. 2C:43-7.2, 30:4-123.51(b)). If so, the recommended PML is increased by one level (*e.g.*, from ROR to PML 1 or from PML 1 to PML 2). *The New Jersey Pretrial Justice Manual* at 11.

3. The Pretrial Detention Hearing

If a prosecutor applies for pretrial detention,[7] the court must hold a pretrial detention hearing no later than the defendant's first appearance or within three days of the prosecutor's motion. N.J.S.A. 2A:162-

[7] The CJRA enumerates the offenses for which a prosecutor may seek pretrial detention. *See* N.J.S.A. 2A:162-19(a) (including, for present purposes, aggravated assault).

19(d)(1). The court may, however, grant a continuance of up to three days upon request by the prosecutor or up to five days upon request by the defendant. *Id.*

At the pretrial detention hearing, the defendant has a right to be represented by counsel and, if indigent, have counsel appointed. N.J.S.A. 2A:162-19(e)(1). The defendant also has the right to testify, present witnesses, cross-examine any of the prosecutor's witnesses, and present information by proffer. *Id.* The prosecutor, meanwhile, carries the burden to establish probable cause that the eligible defendant committed the predicate offense. N.J.S.A. 2A:162-19(e)(2).

Ultimately, the court may order the defendant detained only if the judge finds by "clear and convincing evidence that no amount of monetary bail, non-monetary conditions of pretrial release[,] or combination of monetary bail and conditions" are adequate to ensure the defendant's appearance in court, the safety of the public, and that the eligible defendant will not obstruct or attempt to obstruct justice. N.J.S.A. 2A:162-18(a)(1), -19(e)(3).

In making a pretrial detention hearing determination, the court may take into account information including: (a) the nature and circumstances of the offense charged; (b) the weight of the evidence against the eligible defendant; (c) the history and characteristics of the eligible defendant; (d) the nature and seriousness of the danger that would be posed by the eligible defendant's release; (e) the nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the eligible defendant's

release; and (f) the PSA and DMF prepared by the Pretrial Services Program (described above). N.J.S.A. 2A:162-20. Thus, at the detention hearing, the PSA and DMF scores are not binding or even presumptive of the judge's determination of detention or release, but are factors that must be considered, along with others, to adjudicate whether the prosecution has met its burden of detention.

If the court orders a defendant detained pending trial, the judge must "include written findings of fact and a written statement of . . . reasons" in an order. N.J.S.A. 2A:162-21(a). If the court authorizes a defendant's release contrary to the Pretrial Services Program's recommendation, "the court shall provide an explanation" in the order of release. N.J.S.A. 2A:162-23(a)(2).

A defendant has the right to appeal a judge's pretrial detention hearing decision. N.J.S.A. 2A:162-18(c). Any such appeal "shall be heard in an expedited manner." *Id.*

Additionally, under the New Jersey Court Rules, "a Superior Court may review the conditions of pretrial release . . . on its own motion, or upon motion by the prosecutor or the defendant alleging that there has been a material change in circumstance that justifies a change in conditions." N.J.S.A. 3:26-2(c)(2). Under this Rule, any review of conditions "shall be decided within 30 days of the filing of the motion." *Id.*

C. Effect of the CJRA on New Jersey's Criminal Justice System

The Criminal Justice Reform Act took effect on January 1, 2017. N.J.S.A. 2A:162-15. This reform has shown great success in placing persons into pretrial

release who would previously have been held in jail for failure to meet monetary bail and because pretrial monitoring options were largely unavailable. As a result, many fewer defendants are being detained in jail as they await trial, as shown by the following statistics.

According to statistics published by the New Jersey Courts, on June 30, 2017, there were 5,717 inmates pending trial. New Jersey Courts, *CJRA Statistics*, Chart C, available at https://www.judiciary.state.nj.us/courts/assets/criminal/cjrearlyreport1.pdf. By comparison, on the same day in 2015, there were 8,845 inmates waiting for trial. *Id.* This drop in the pretrial jail population represents a 35.4% decrease over a two-year period. *Id.*; *see also* Smith Decl. at ¶ 12.

Between January 1 and June 30, 2017, 9.9% of eligible defendants were released on their own recognizance, 21.5% were released under PML 1, 14.7% were released under PML 2, 25.8% were released under PML 3, 10.8% were released under PML 3+, and only 14.2% were detained. *CJRA Statistics*, Chart A.

Furthermore, detention motions have not been automatically granted. Over the same six-month period, for example, 60% of prosecutors' detention motions were granted, while 40% were denied. *CJRA Statistics*, Chart B.

D. Plaintiff Holland

On April 6, 2017, Holland was arrested and charged with second-degree aggravated assault, N.J.S.A. 2C:12-1(B)(1). (Exs. A, B, & C to Feldman Decl.) According to police records, Holland engaged in

an altercation with an unnamed individual in the parking lot of Joe's Tavern in Sicklerville, New Jersey. (Holland Decl. at ¶ 7; Ex. C to Feldman Decl.) First, Holland allegedly struck the unnamed individual in the face, causing him to fall to the ground. (*Id.*) Then, once the unnamed individual was on the ground, Holland allegedly "continued to strike [him] repeatedly about the head and face causing serious bodily harn [sic][,]" including multiple face fractures. (*Id.*) According to police records, Holland fled the scene and was later arrested at his home, where "[h]is clothing was covered in fresh blood." (*Id.*)

The Pretrial Services Program in Camden County collected information for Holland's Public Safety Assessment for determination of detention or release by the judge.[8] As the parties acknowledged at oral argument, Holland ultimately received a PSA score of 2 (out of 6) for Failure to Appear, a score of 2 (out of 6) for New Criminal Activity, and was flagged for NVCA. [Docket Item 42; *see also* Docket Item 43.][9] Due to the NVCA flag, the DMF generated by the Pretrial

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[8] Of note, prior to the alleged incident that led to Holland's arrest, he had been convicted of simple assault, (Feldman Decl. ¶ 8), which New Jersey law treats as a disorderly persons offense, N.J.S.A. 2C:12-1(a).

[9] It is not clear from the record how Holland received such low PSA scores, but still received a flag for NVCA. Assuming Holland was given the minimum four points required under the NVCA framework to receive a flag, the Court deduces that the PSA calculated Holland's NVCA score as follows: two points under Factor 1 for Holland's pending second-degree assault charges; one point under Factor 4 for Holland's prior simple assault conviction; and one point under Factor 5, again, for Holland's prior simple assault conviction.

Services Program recommended that Holland be detained pending trial. (Feldman Decl. ¶ 7.)

Consistent with the CJRA and Attorney General Directive 2016-6, Section 7.4.1, Camden County Assistant Prosecutor Leo Feldman prepared a motion for Holland's pretrial detention. (Feldman Decl. at ¶ 8.) On April 7, 2017, Assistant Prosecutor Geraldine Zidow submitted a Notice to the Camden County Superior Court, explaining that the State planned to move for Holland's pretrial detention. (Ex. E of Feldman Decl.) Assistant Prosecutor Zidow also filed a Certification, affirming that Holland "is charged with a crime and there is a serious risk that: the defendant will not appear in court as required [and] the defendant will pose a danger to any other person or the community." (*Id.*)

Prior to Holland's pretrial detention hearing, Assistant Prosecutor Feldman met with Holland's court-appointed attorney, Brad Wertheimer, Esq. (Feldman Decl. ¶ 9.) At this meeting, Mr. Wertheimer agreed to recommend to his client that, in exchange for Prosecutor Feldman withdrawing the prosecution's motion for pretrial detention, Holland would agree to be released under PML Level 3+, which would include house arrest (except for employment), electronic monitoring by GPS monitoring device, weekly reporting, and no contact with the victim. (*Id.* at ¶ 10.)

On April 11, 2017, a pretrial detention hearing was held before the Honorable Kathleen Delaney, J.S.C. (*Id.* at ¶ 14; Ex. G to Feldman Decl.) During the hearing, Holland agreed to a level PML 3+ in exchange for the State withdrawing its application for detention. (*Id.* at 4:17-25; 5:1-8.) After finding that

Holland was indigent,[10] the court waived the cost of the ankle bracelet. (*Id.* at 5:18-19.) The court also granted Holland permission to go to work. (*Id.* at 4:1-6; 5:1-2.) Holland was subsequently released, subject to the PML Level 3+ terms outlined above. (Holland Decl. at ¶ 18.)

According to Holland, under home detention, he "cannot shop for food or other necessities," nor can he take his son to baseball practices, "which is an important aspect of [his] custodial responsibilities and

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[10] The record is incomplete regarding Holland's financial status and his ability to meet a reasonable monetary bail if one were set in lieu of the non-monetary conditions he complains of. In the Superior Court, he has been determined to be indigent and is represented by the Public Defender (Feldman Decl. ¶ 19), and the judge waived Holland's fee for the electronic monitoring device due to indigency (Tr. Apr. 11, 2017 at 5:18-19). On the other hand, Holland has full-time employment as a lead journeyperson (Tr. Apr. 11, 2017 at 4:1-5), and his counsel asserts that "with the help of a bail bondsman, he could have posted bail to secure his release at trial" (Pl. Rep. Br. at 3), and that under the previous system of monetary bail, he "would have used his own financial resources or those of his family (likely with the help of a surety like Lexington) to pay the required amount for release." (Pl. Rep. Br. at 15, citing Holland Decl. ¶ 11.) The amount of his hypothetical monetary bail is unknown, as is his ability—with or without a bondsman—to meet the required amount. It is possible, and perhaps likely, that Holland, accused of a serious crime of violence and presenting the flight risk of one who allegedly fled from the scene of the crime, would have been, before January 1, 2017, in the large category of individuals who were detained because they could not meet the high monetary bail requirements, notwithstanding the availability of bail bonding. In other words, to the extent Holland's case rests on the premise that he would be released on monetary bail without significant non-monetary conditions, that hypothetical is doubtful in his circumstances.

efforts to bond with [his] child." (*Id.* at ¶¶ 21-22.) Under electronic monitoring, Holland must wear a GPS tracking device around his ankle at all times, including within cord-length of an electrical outlet, while the ankle bracelet charges, for two hours each day. (*Id.* at ¶ 24.) Holland also avers that the ankle bracelet is "a source of public stigma and shame," and "is bulky, uncomfortable, restrictive, and makes it more difficult to live [his] life and do [his job]." (*Id.* at ¶¶ 25-26.) Finally, Holland explains that the bi-monthly, in-person reporting requirement "requires [him] to leave [his] job and travel to the pretrial services office, even if the trip would interfere with [his] work." (*Id.* at ¶ 28.) Collectively, Holland states, these conditions have "severely restricted [his] liberty, disrupted [his] family life, made [him] concerned about [his] job security, and made [him] feel that [his] life is up in the air." (*Id.* at ¶ 29.)

Holland has never sought a judicial determination of his conditions of release, nor has he sought modification in the Superior Court of the conditions to which he agreed.

E. Plaintiff Lexington

Lexington National Insurance Corporation is a Florida Corporation based in Maryland. (Wachinski Decl. at ¶¶ 3-4.) Lexington operates across the country, primarily for the purpose of underwriting bail bonds and acting as a surety of bail bonds. (*Id.* at ¶ 6.) In New Jersey, Lexington operates through independent insurance producers (bail bondsmen), who are licensed by the state's Department of Banking and Insurance and registered with the Superior Court Clerk. (*Id.* at ¶ 8.)

Lexington alleges that, as a result of the CJRA, its business has been "severely harmed." (*Id.* at ¶ 9.) According to Lexington, the CJRA "dramatically reduc[ed] the number of defendants given monetary bail and thus dramatically reduc[ed] [Lexington's] opportunity to act as surety on bail bonds." (*Id.*) That the CJRA has all but eliminated the use of money bail and bail bonds to secure pretrial release is indeed demonstrated by the data, as discussed above.

F. The State Defendants

Defendant Kelly Rosen is the Team Leader for Pretrial Services in the Criminal Division of the Superior Court of New Jersey. (Compl. at ¶ 18.) In this capacity, Defendant Rosen is responsible for enforcing the pretrial release conditions authorized by the CJRA and imposed on Holland. (*Id.*)

Defendant Mary Eva Colalillo is the Camden County Prosecutor. (*Id.* at ¶ 19.) As Camden County Prosecutor, Defendant Colalillo is responsible for enforcing New Jersey laws, including the CJRA, in Camden County. (*Id.*)

Defendant Christopher S. Porrino is the Attorney General of New Jersey. (*Id.* ¶ 20.) As Attorney General, Defendant Porrino is ultimately responsible for enforcing New Jersey's laws, including the CJRA, across the state. (*Id.*)

G. Procedural History

On June 14, 2017, Plaintiffs simultaneously filed a class action Complaint and a Motion for a Preliminary Injunction. [Docket Items 1, 3.] On July 28, 2017, the State Defendants filed an Opposition to Plaintiffs' Motion for a Preliminary Injunction.

[Docket Items 23, 24.][11] On August 7, 2017, Plaintiffs filed a Reply Brief to the State Defendants' Opposition. [Docket Item 29.]

On July 21, 2017, the American Civil Liberties Union ("ACLU"), on behalf of themselves and the ACLU of New Jersey, Drug Policy Alliance, Latino Action Network, and National Association for the Advancement of Colored People - New Jersey Conference, filed a motion for leave to appear as amicus curiae. [Docket Item 18.] On August 8, 2017, the Court granted the ACLU's request to submit a brief and participate as amicus curiae in oral argument with regard to Plaintiffs' Motion for a Preliminary Injunction. [Docket Item 31.]

On August 22, 2017, the Court convened the Preliminary Injunction Hearing. [Docket Item 42.]

III. STANDARD OF REVIEW

A preliminary injunction "is an extraordinary remedy . . . which should be granted only in limited circumstances." *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994) (citation omitted). A preliminary injunction "should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (internal quotations omitted; emphasis in original).

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[11] On July 28, 2017, the State Defendants also filed a Motion to Dismiss in lieu of an Answer. [Docket Item 24.] The briefing schedule was deferred pending a determination of this preliminary injunction motion. [Text Order of Sept. 5, 2017 at Docket Item 46.] The Court reserves judgment on the State Defendants' motion until briefing has been completed by both parties.

"[T]he requirement for substantial proof" is much higher for "a plaintiff's motion for preliminary injunctive relief" than it is for a "defendant's motion for summary judgment[,]" where "one would demand *some* evidence . . . in order to avoid a nonsuit." *Id.* (emphasis in original); *see also Schuchardt v. President of the U.S.*, 839 F.3d 336, 351 (3d Cir. 2016) (citing *Obama v. Klayman*, 800 F.3d 559, 568 (D.C. Cir. 2015) for proposition that "summary judgment imposes a lighter burden than the 'substantial likelihood of success' necessary to obtain a preliminary injunction").

To prevail on a motion for preliminary injunctive relief, the moving party must show as a prerequisite:

> (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted. . . . [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.

Reilly v. City of Harrisburg, 858 F.3d 173, 176 (3d Cir. 2017) (quoting *Del. River Port Auth. v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974) (further internal citations omitted)). "[A] district court—in its sound discretion—should balance th[e]se four factors so long as the party seeking the injunction meets the threshold on the first two." *Reilly*, 858 F.3d at 176.

In order to meet the threshold to establish the first factor, the moving party "must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not)." *Id.* at 179. However, "more than a mere possibility of relief is required" to make the required showing; the moving party must show "a reasonable probability of eventual success." *Id.* at 179 n.3 (internal quotations omitted).

To satisfy the second factor, the moving party "must demonstrate . . . the probability of irreparable harm if relief is not granted." *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988) (internal quotations omitted). "In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the only way of protecting the plaintiff from harm." *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989). The moving party must demonstrate that it is likely to suffer "actual or imminent harm which cannot otherwise be compensated by money damages," or it "fail[s] to sustain its substantial burden of showing irreparable harm." *Frank's GMC*, 847 F.2d at 103; *see also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.") (emphasis in original). In short, "a movant for preliminary equitable relief must . . . demonstrate . . . that it is more likely than not to suffer irreparable harm in the absence of

preliminary relief." *Reilly*, 858 F.3d at 179 (footnote omitted).

The third factor requires the court to "balance the parties' relative harms; that is, the potential injury to the plaintiffs without this injunction versus the potential injury to the defendant with it in place." *Issa v. School Dist. of Lancaster*, 847 F.3d 121, 143 (3d Cir. 2017). The court should also, at this stage, take into account "the possibility of harm to other interested persons from the grant or denial of the injunction." Reilly, 858 F.3d at 176 (quoting *Del. River Port Auth.*, 501 F.2d at 920 (further citations omitted)). "[W]hen considerable injury will result from either the grant or denial of a preliminary injunction, these factors to some extent cancel each other[.]" *Del. River Port Auth.*, 501 F.2d at 924.

Finally, the Supreme Court has noted that "parts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Instant Air Freight*, 882 F.2d at 803 (quoting *Virgininan Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 552 (1937)). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). While weighing whether the public interest favors a preliminary injunction "is often fairly routine," *Issa*, 847 F.3d at 143 (internal quotations omitted), "'where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond

cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.'" *Romero-Barcelo*, 456 U.S. at 312-13 (quoting *Yakus v. United States*, 321 U.S. 414, 440 (1944)).

IV. Discussion

A. Preliminary Issues

1. Standing

Defendants argue that a preliminary injunction should be denied because both Holland and Lexington lack standing under Article III. (Def. Opp. Br. at 2-23; Amici Br. at 10-19.) If standing is doubtful at this stage, and pending a final determination, this factor should weigh strongly against granting a preliminary injunction. Plaintiffs contest this, stating that Holland has first-party standing and Lexington has both standing in its own right and third-party standing to assert the constitutional rights of potential customers. (Pl. Rep. Br. at 2-5.)

In order to demonstrate that it has standing under Article III, a plaintiff must demonstrate: "(1) an injury-in-fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Finkelman v. Nat'l Football League*, 810 F.3d 187, 193 (3d Cir. 2016) (internal quotations omitted). These elements of constitutional standing may be referred to as injury (or injury-in-fact), traceability, and redressability, respectively. *See Toll Bros., Inc. v. Township of Readington*, 555 F.3d 131, 137-42 (3d Cir. 2009).

The Court will address the standing of each plaintiff in turn.

a. Plaintiff Holland

The State Defendants argue that Holland "lacks standing because he has failed to demonstrate that his alleged injury will be redressed by a favorable judicial decision. . . . [E]ven if the Court ruled in Holland's favor on his request for imposition of monetary bail to address flight, the challenged non-monetary conditions likely would still be imposed . . . . His alleged injury therefore would not be redressed." (Def. Opp. Br. at 21.)[12]

In response, Plaintiffs claim that the State Defendants' position that the same challenged conditions "likely would still be imposed" is "pure speculation and legally irrelevant." (Pl. Rep. Br. at 3.) Plaintiff claims that he has a constitutional right to "a process where [monetary] bail was considered on an equal footing with other options to secure his release. . . . [H]is injury would be redressed without regard to the outcome of a constitutionally-compliant process. That is enough to satisfy redressability. . . . [T]his Court certainly does not need to conduct the very bail proceeding Holland was denied to resolve the threshold question of standing." (*Id.*)

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[12] Defendants do not contest that Holland has adequately alleged an injury in fact and a sufficient causal connection between that injury and the conduct he alleges to have violated his constitutional rights, thereby satisfying the elements of injury-in-fact and traceability.

The Court is mindful of the requirement under Article III that as to redressability, the plaintiff must show that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted).

It is true that the ultimate outcome of any subsequent hearing that is or may be held in the state court with regard to Holland's conditions of pretrial release is, as yet, unknown. Any court holding such a hearing might continue the complained-of restrictions on his liberty, regardless of giving consideration to monetary bail. In other words, despite imposing monetary bail as a restriction addressing risk of flight, there could continue to be such non-monetary conditions as restrictions on associations, curfew, in-person reporting and the like that would still need to be considered to address the risk his release may pose to the community or to other persons.

However, Holland claims that his injury is not simply the restriction on his liberty, but rather the imposition of that restriction after a hearing that violated his rights under the Fourth, Eighth, and Fourteenth Amendments. He claims that such injury will be sufficiently redressed should the Court order that a hearing respecting those constitutional rights (as he understands them) be held, regardless of the ultimate outcome of such a hearing. Should the Court order such a hearing to be held, the relief then would not be speculative. He claims that he was injured by the holding of a hearing that did not afford him his constitutional rights, including the alleged right to have monetary bail considered as a primary condition

of release pending trial, and that ordering a new hearing that does afford him those rights will redress that injury. The Court finds that analysis persuasive to establish Holland's standing to assert his claims. The redress he seeks is a hearing to set conditions of release where monetary bail is given a primary consideration. Whether he is likely to accomplish his objectives at a Superior Court hearing is a question for the merits, not one of standing to assert the right to such a hearing. Accordingly, the Court finds that Holland has adequately pled the necessary elements of Article III standing, including redressability.

b. Plaintiff Lexington

Lexington's standing presents a more complex and closer question.[13] The parties first contest whether Lexington may assert first-party standing. (Def. Opp. Br. at 21-22; Pl. Rep. Br. at 3-4; Amici Br. at 11-12.) The parties then address whether Lexington may proceed with third-party standing under *Dep't of Labor v. Triplett*, 494 U.S. 715 (1990) (Def. Opp. Br. at 22-23; Pl. Rep. Br. at 4-5; Amici Br. at 12-19.) State Defendants and Plaintiffs also contest whether Lexington has prudential standing, *i.e.*, whether Lexington's interests are within the "zone of interests" intended to be protected by the statute at issue. (Def. Opp. Br. at 22; Pl. Rep. Br. at 4.)

The Court will address these in turn.

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[13] The Court notes, however, that the "presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement[.]" *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 52 n.2 (2006).

i. First-Party Standing of Lexington

Amici argue that Lexington does not, in Plaintiffs' Complaint, allege a violation of its own rights. (Amici Br. at 11.) Specifically, the Complaint alleges a violation of the right to monetary bail under the Eighth Amendment (as applied to the states through the Fourteenth Amendment), a violation of due process under the Fourteenth Amendment based on an alleged deprivation of liberty to criminal defendants, and a violation of the right against unreasonable seizures under the Fourth Amendment (as applied to the states through the Fourteenth Amendment). Amici urge that "none of those claims directly addresses the rights of Lexington National," as the Eighth Amendment's excessive bail clause protects the rights of criminal defendants, the Fourteenth Amendment's "liberty clause is likewise inapplicable to corporate sureties in this context," and the Fourth Amendment claim relates to the burden on Holland of wearing a GPS monitor. (*Id.* at 11-12.)

The State Defendants add that Lexington lacks first-party standing because its alleged injury is not concrete and particularized, but rather is generalized and abstract, which is an injury "shared by many others in the bail bonds industry that are similarly situated." (Def. Opp. Br. at 21.) Lexington, they note, does not assert that it had an agreement in place with Holland or any other criminal defendant to provide a bail bond, that it could not consummate due to the allegedly unlawful actions of Defendants; rather, it only asserts "that it 'likely' would have been able to

help Holland post money bail." (Def. Opp. Br. at 17, citing Compl. at ¶ 5.)

In response, Plaintiffs argue that "Lexington has standing in its own right," as it has "suffered a concrete and particularized injury—the 'collapse of [its] business,' a paradigmatic economic injury.' . . . That Lexington's injury is shared by others in the industry does not make it any less cognizable." (Pl. Rep. Br. at 3-4 (internal citation omitted).)

The Court agrees with Plaintiffs that Lexington has adequately alleged a concrete and particularized injury. Plaintiffs have submitted an affidavit of Nicholas J. Wachinski, the CEO of Lexington, wherein he avers that "[t]he . . . CJRA [] has severely harmed Lexington National's business by dramatically reducing the number of defendants given the option of monetary bail and thus dramatically reducing Lexington National's opportunity to act as surety on bail bonds." (Wachinski Decl. at ¶ 9.) The Court agrees that this injury is concrete and particularized enough to constitute an injury-in- fact. *See Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005) ("While it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms.").

However, the Court finds that Lexington does not, in fact, assert violations of its *own* constitutional rights that led to such an injury. The injury-in-fact requirement mandates that there be "an invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. *Cf. Danvers*, 432 F.3d at 292 ("The complaint is replete with assertions of cognizable harm . . . [describing] 'Ford dealers who have suffered economic injury-in-

fact as a result of . . . the invasion by Defendant . . . of its dealers' legally protected interests . . . ."'); *Out Front Productions, Inc. v. Magid*, 748 F.2d 166, 168 (3d Cir. 1984) (plaintiff "claims a direct economic injury traceable to defendants' actions that allegedly violated the antitrust laws."); *White v. United States*, 601 F.3d 545, 555 (plaintiffs "still must demonstrate an injury-in-fact to a legally protected interest"). This invasion is what must result in the injury to the plaintiff. Here, Lexington has alleged that it has been harmed. The Court nevertheless finds that the harm it has allegedly suffered is not alleged to be the result of an invasion of Lexington's legally protected interest. *See Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) ("Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights").

The Court is persuaded that the Eighth Amendment's bail clause protects the interests of criminal defendants, not corporations who seek to provide bail bonds to them. *See Johnson Bonding Co., Inc. v. Com. of Ky.*, 420 F. Supp. 331, 337 (E.D. Ky. 1976) (a bail bond company "does not seek to vindicate its right to be free from excessive bail. A corporation cannot go to jail. Rather, plaintiff seeks to continue in the bail bonding business") (citing *United States v. Raines*, 362 U.S. 17, 22 (1960) ("a litigant may only assert his own constitutional rights or immunities")); *United States v. Chaplin's, Inc.*, 646 F.3d 846, 851 n.15 (11th Cir. 2011) (where corporation claims a court order constitutes an excessive fine in violation of the Eighth Amendment, court "assumes, but does not hold, that the Eighth Amendment applies to corporations" as the "Supreme Court has never held

that this amendment applies to corporations"); *see also Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989) ("We think it clear . . . that the Eighth Amendment places limits on the steps a government may take against an *individual*, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments") (emphasis added). This is especially true where Lexington is not named as a criminal defendant, is not confined, and does not identify a constitutional right that it holds as a corporation that it seeks to vindicate.

Similarly, the Court does not see how the Due Process or Fourth Amendment claims in Plaintiffs' Complaint constitute an invasion of Lexington's legally-protected interests, despite the harms to Lexington's business that will allegedly result from the CJRA's application to Lexington's potential customers. The Court agrees with Amici that Lexington does not "assert[] its own constitutional rights." (Amici Br. at 12.) Accordingly, the Court finds that Lexington lacks first-party standing on the basis of an alleged violation of its constitutional rights.

ii. Third-Party Standing of Lexington

Defendants and Amici argue that Lexington also lacks third- party standing. (Def. Opp. Br. at 22-23; Amici Br. at 12-19.) Plaintiffs respond that Lexington "has third-party standing to assert the constitutional rights of potential customers denied bail under the CJRA." (Pl. Rep. Br. at 4-5.)

The parties agree that the Third Circuit recognizes third- party standing, *see Pa. Psychiatric*

Soc'y v. Green Spring Health Servs., Inc., 280 F.3d 278, 288 (3d Cir. 2002), and that *Triplett*, 494 U.S. at 720, provides an appropriate basis to assess whether Lexington has such standing in this case. However, the parties' argument primarily lies within the bounds of contesting whether or not Lexington meets the standard for third-party standing as described in *Triplett*, and does not fully address whether the other "preconditions" for third-party standing, as described in *Pa. Psychiatric Soc'y*, are met.

The Court notes at the outset that "[t]he restrictions against third-party standing do not stem from the Article III 'case or controversy' requirement, but rather from prudential concerns . . . which limit access to the federal courts to those litigants best suited to assert a particular claim." *Pa. Psychiatric Soc'y*, 280 F.3d at 287-88. "It is a well-established tenet of standing that a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Id.* at 288.

The Third Circuit has described third-party standing as an exception to this "well-established tenet":

> In particular, if a course of conduct prevents a third-party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement, third-party standing may be appropriate.

Pa. Psychiatric Soc'y, 280 F.3d at 288 (quoting *Triplett*, 494 U.S. at 720).

The parties' briefs devote substantial effort toward arguing about whether the CJRA and Defendants' alleged unlawful actions prevent criminal defendants (here, the third party) from entering into a contractual relationship with Lexington (here, the litigant), to which relationship the criminal defendants have a legal entitlement. A finding of that situation might satisfy *Triplett*, but it does not end the inquiry. As the Third Circuit has stated:

> The Supreme Court has found that the principles animating these prudential concerns [about third-party standing] are not subverted if the third party is hindered from asserting its own rights and shares an identity of interests with the plaintiff. . . . More specifically, third-party standing requires the satisfaction of three preconditions: 1) the plaintiff must suffer injury; 2) the plaintiff and the third party must have a "close relationship"; and 3) the third party must face some obstacles that prevent it from pursuing its own claims. It remains for courts to balance these factors to determine if third-party standing is warranted.

Pa. Psychiatric Soc'y, 280 F.3d at 288-89 (internal quotations omitted); *see also The Pitt News v. Fisher*, 215 F.3d 354, 362 (3d Cir. 2000) (if same three preconditions are met, "a plaintiff who meets all these criteria, but who would otherwise lack Article III standing to sue because his or her own legally protected rights were not injured, may assert the rights of a third party."); *Campbell v. Louisiana*, 523

U.S. 392, 397-98 (1998) (same "three preconditions" must be satisfied to assert the rights of a third party); *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (same "three important criteria" must be satisfied).

Assuming, without deciding, that criminal defendants (like Holland) are prevented from entering into a contractual relationship with a bail bonds company like Lexington, and that those defendants have a constitutional entitlement to that relationship and/or to monetary bail, thereby satisfying the dictates of *Triplett*, Lexington still does not articulate how it can satisfy the third necessary precondition to third-party standing under clear Third Circuit precedent.

As discussed above, the Court finds that Lexington has suffered an injury that gives it "a 'sufficiently concrete interest' in the outcome of the issue in dispute." *Powers*, 499 U.S. at 411. This satisfies the first precondition.

Whether Lexington satisfies the second precondition of a "close relationship" between the plaintiff and the third party whose rights it purports to assert is a closer question. The factual allegations here do not establish a "close relationship" in the colloquial or commonsense meaning of the phrase (as Lexington does not allege an existing contractual relationship with Holland or any criminal defendant whose rights have been violated, and avers only that it "would be ready, willing, and able to act as a bail bonds surety" for criminal defendants in New Jersey

if monetary bail "were again an option" for them).[14] However, the Third Circuit has stated that "[t]o meet this standard, this relationship must permit the [proposed plaintiff] to operate fully, or very nearly, as effective a proponent of [the third parties' rights] as the [third parties] themselves." *Pa. Psychiatric Soc'y*, 280 F.3d at 289. Here, the Court will assume that the relationship between Lexington and the criminal defendants is sufficiently close that Lexington "could efficaciously advocate their . . . interests." *Id.*

However, Plaintiffs do not contend, and the Court does not see how they can do so, that the criminal defendants "face some obstacles," *id.*, or that there is "some hindrance," *Campbell*, 523 U.S. at 397, in pursuing their own claims. It is undisputed that Holland is one such criminal defendant, and he has apparently faced no obstacle nor hindrance in asserting his claim that his rights were violated. Indeed, the Court has already found that Holland has standing under Article III. *See* Section IV.A.1.a, *supra.* Holland is a named plaintiff in this action and has been pursuing claims that his constitutional rights were violated with strength and vigor. The Court cannot discern a basis, then, to allow for third-party standing for Lexington (as a matter of prudential standing, rather than Article III standing), where the

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[14] The Court notes that Holland avers that "if offered the option of pre-trial release on monetary bail, [he] would have posted bail to obtain [his] pre-trial liberty" and "would have used resources of [his] own and of [his] family, and likely would have engaged a professional bondsman and insurance company." (Holland Decl. at ¶¶ 10-11.)

"third party" is actually a named plaintiff actively participating in the instant case.

Accordingly, the Court finds, at the present juncture, that it appears unlikely that Lexington has satisfied the necessary preconditions to establish third-party standing in this action.[15] However, as noted above, the Court may nevertheless proceed in its assessment of the arguments on the merits as the "presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement[.]" *Rumsfeld*, 547 U.S. at 52 n.2. Holland has such standing.

iii. Prudential Standing

Finally, the State Defendants urge that Lexington lacks prudential standing in another respect: namely, that the injury to Lexington "fall[s] well outside the zone of interests of the Eighth, Fourteenth, and Fourth Amendments[.]" (Def. Opp. Br. at 22.)

In response, Plaintiffs argue that "the Supreme Court recently disavowed the 'zone-of-interests test' as a prudential standing requirement, holding instead that a court must determine 'whether a legislatively conferred cause of action encompasses a particular plaintiff's claim.'" (Pl. Rep. Br. at 4, quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014).)

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[15] The Court expects that the parties will more completely address the issue of Lexington's third-party standing and the implications of the preconditions described in the Supreme Court's precedents in *Powers* and *Campbell* and the Third Circuit's precedent in *Pa. Psychiatric Soc'y* when briefing Defendants' Motion to Dismiss. *See* FN 11, *supra*.

"Unlike constitutional standing, which involves absolute and irrevocable justiciability requirements under Article III, prudential standing is a judicially created doctrine relied on as a tool of 'judicial self-governance.'" *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 349 (6th Cir. 2007) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

The Third Circuit has recently stated:

> We have previously categorized the zone-of-interests requirement as one of three components of prudential standing. . . . The other two components of prudential standing are that a plaintiff must first "assert his or her own legal interests rather than those of third parties," and second must not assert "generalized grievances" that require courts to "adjudicat[e] abstract questions."

Maher Terminals, LLC v. Port Auth. of N.Y. and N.J., 805 F.3d 98, 105, 105 n.5 (3d Cir. 2015) (internal citations omitted). The "zone-of-interests" test requires that "the plaintiff's complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question[,]" *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (internal quotations omitted), and the plaintiff "must show that his interests are more than 'marginally related to . . . the purposes implicit in the statute'" or law, *Programmers Guild, Inc. v. Chertoff*, 338 Fed. App'x 239, 242 (3d Cir. 2009) (citing *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987)).

In *Lexmark*, however, the Supreme Court stated: "Although we admittedly have placed [the zone-of-

interests] test under the 'prudential [standing]' rubric in the past, . . . it does not belong there . . . .Whether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." 134 S. Ct. at 1387 (internal quotations omitted). Interpreting *Lexmark*, the Court has recently stated:

> This Court has also referred to a plaintiff's need to satisfy "prudential" or "statutory" standing requirements. *See Lexmark*, . . . 134 S. Ct. at 1387 and n.4. In *Lexmark*, we said that the label "prudential standing" was misleading, for the requirement at issue is in reality tied to a particular statute. *Ibid.* The question is whether the statute grants the plaintiff the cause of action that he asserts. In answering that question, we presume that a statute ordinarily provides a cause of action "only to plaintiffs whose interests fall within the zone of interests protected by the *law* invoked." *Id.* at 1388.

Bank of Am. Corp v. City of Miami, 137 S. Ct. 1296, 1302 (2017) (emphasis added).

The Third Circuit has said that "*Lexmark* strongly suggests that courts shouldn't link the zone-of-interests test to the doctrine of standing," but has applied the zone-of-interests test to discern whether a plaintiff adequately states a claim under a particular statute. *See Maher*, 805 F.3d at 105-06, 110 ("[W]hile we hold that the District Court should not have couched its conclusion in terms of standing after

Lexmark, we agree with the District Court's essential holding: Maher, as a landside entity, is outside the Tonnage Clause's zone of interests. . . . Accordingly, Maher failed to state a Tonnage Clause claim.").

The Third Circuit has thus maintained that the zone-of- interests test has continued vitality, but with regard to whether a plaintiff states a claim, rather than whether that plaintiff has standing. *Id.* at 110. In light of that, the Court declines to find that Lexington lacks prudential standing under the "zone-of-interests" test.[16]

2. *Younger* Abstention

Defendants argue that the Court must abstain from interfering with Holland's ongoing state criminal prosecution, pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). (Def. Opp. Br. at 23.) In response, Plaintiffs argue that *Younger* abstention is inappropriate where a defendant in state court does not challenge the state prosecution as such, but rather pre-trial procedures, citing *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9. (Pl. Rep. Br. at 6.)

In *Younger*, the Supreme Court held that "settled doctrines . . . have always confined very narrowly the availability of injunctive relief against state criminal prosecutions." 401 U.S. at 53. It found that an injunction was inappropriate where the state-court defendant claimed that a statute on its face violated

[16] Defendants are, of course, free to re-assert this zone-of-interests argument as part of an argument that Lexington fails to state a claim. The Court expresses no opinion on the merits of such a potential issue.

his constitutional rights, but where "there [wa]s no suggestion that this single prosecution against Harris [wa]s brought in bad faith or [wa]s only one of a series of repeated prosecutions to which he [would have] be[en] subjected," which would constitute "extraordinary circumstances" and justify a departure from those "settled doctrines." *Id.* at 49, 53. Furthermore, "a proceeding was already pending in the state court, affording Harris an opportunity to raise his constitutional claims." *Id.* at 49. The Supreme Court has stated that "[t]he policy of equitable restraint expressed in *Younger v. Harris*, in short, is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler v. Helfant*, 421 U.S. 117, 124 (1975) (citing *Steffel v. Thompson*, 415 U.S. 452, 460 (1974)).

In *Gerstein v. Pugh*, 429 U.S. 103 (1975), however, the Supreme Court arguably narrowed the scope of *Younger* abstention. In that case, the state-court defendant Pugh requested injunctive relief from a federal district court, claiming a constitutional right to a judicial hearing on the issue of probable cause, and asking the court to order such a hearing. 420 U.S. at 106-07. "The District Court ordered the Dade County defendants to give the named plaintiffs an immediate preliminary hearing to determine probable cause for further detention." *Id.* at 107-08.

The Court then noted:

> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal

> intervention in state prosecutions, *Younger v. Harris*, 401 U.S. 37 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.

Id. at 108 n.9.

Other courts have since relied on the distinction articulated in *Gerstein* at Note 9 as to whether abstention pursuant to *Younger* is appropriate.

Shortly after *Gerstein* was decided, the Third Circuit found a district court's abstention pursuant to *Younger* to be appropriate, and directly addressed the applicability of Note 9 in *Gerstein*, where the state-court defendant sought a federal injunction prohibiting "sessions on Friday, the Islamic Sabbath of appellant, in a pending criminal trial in state court when available state procedures to remedy the alleged constitutional infringement have not been exhausted." *State of N.J. v. Chesimard*, 555 F.2d 63, 64 (3d Cir. 1977).

In that case, the state-court defendant's "free exercise right could not be asserted as a defense to the criminal prosecution[,]" but it was "equally true that the right could not be raised in the absence of a criminal prosecution" and was

> in fact . . . asserted as part of an ongoing criminal prosecution. Ms. Chesimard raised her free exercise claim by pre-trial motion in the state court. Although the state system

> provides for interlocutory review of the adverse ruling she received, Ms. Chesimard has chosen not to pursue her available state remedies to their fullest extent. Under these circumstances, we believe the federal hand must be stayed[, pursuant to *Younger* and . . .] *Huffman v. Pursue, Ltd.*, 420 U.S. [592,] 609 [(1975)].

Chesimard, 555 F.2d at 66-67. The court in *Chesimard* also noted that its decision does not

> under these circumstances do violence to the traditional notion that exhaustion of state judicial remedies is ordinarily not a prerequisite to relief sought under 42 U.S.C. § 1983 . . . . [The holding in *Monroe v. Pape*, 365 U.S. 167, 183 (1967), that] "one seeking redress under . . . § 1983 for a deprivation of federal rights need not first initiate state proceedings based on related state causes of action . . . ha[s] nothing to do with the problem presently before us, that of the deference to be accorded to state proceedings which already have been initiated and which afford a competent tribunal for the resolution of federal issues.

Chesimard, 555 F.2d at 67 (citing *Huffman*, 420 U.S. at 609 n.21).

Furthermore, the *Chesimard* Court found *Gerstein* inapposite; although "[p]ersuasive arguments can be made on either side" as to the issue it saw as dispositive under *Gerstein* of whether an order prohibiting trial on Fridays "would 'prejudice the conduct of the trial on the merits,' [*Gerstein*,] 420

U.S. at 108, n.9," the Third Circuit ruled that "to permit federal intervention here when state interlocutory appellate review remains available would unnecessarily displace the state's supreme court of its role in supervising the conduct of trials in state courts. . . . [T]he intervention here would deprive the New Jersey Supreme Court of an opportunity to review a discrete judicial ruling in a pending trial[,]" and found that *Younger* "is applicable in the present posture of the case." *Chesimard*, 555 F.2d at 68.[17]

In a different and more recent case, however, the Third Circuit has applied *Gerstein* and *Younger* and found abstention inappropriate in a case where "the equitable relief requested is not aimed at state prosecutions, but at the legality of the re- arrest policy and the pretrial detention of a class of criminal defendants. The issues here raised could not have been raised in defense of [the plaintiff's] criminal prosecution, and the injunction sought would not bar

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[17] *See also Wallace v. Kern*, 520 F.2d 400, 405-08 (2d Cir. 1975) (analyzing Note 9 of *Gerstein* in case where plaintiffs sought new bail procedures and finding that *Gerstein* was distinguishable because the *Gerstein* Court "emphasize[d]" that the plaintiffs there had effectively unavailable remedies under state law to press their constitutional claim and because the *Gerstein* plaintiffs' claims had been repeatedly rejected by Florida courts; and abstaining pursuant to *Younger*, stating that upholding the lower court's injunction would constitute "federal judicial legislation which is not only offensive to state sensibilities but is contrary to the admonition in *Gerstein* on this very point[, citing *Gerstein*, 420 U.S. at 123: '[W]e recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure . . . [and] we recognize the desirability of flexibility and experimentation by the States.']").

his prosecution." *Stewart v. Abraham*, 275 F.3d 220, 225 (3d Cir. 2001). The Third Circuit also cited *Moore v. Sims*, 442 U.S. 415 (1979), in which the Supreme Court "distinguished *Gerstein* from the case before it" on the basis that, in *Gerstein*, "the action was not barred by *Younger* because the injunction was not addressed to a state proceeding and therefore would not interfere with the criminal prosecutions themselves. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits." *Stewart*, 275 F.3d at 226 (quoting *Moore*, 442 U.S. at 431) (internal quotations omitted).[18]

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[18] *But see Moore*, 442 U.S. at 430 n.12 ("In sum, the only pertinent inquiry [as to whether a federal court ought interject itself into a constitutional dispute in state court regarding a state law] is whether the state proceedings afford an adequate opportunity to raise the constitutional claims, and Texas law appears to raise no procedural barriers. . . . The proposition that claims must be cognizable 'as a defense' in the ongoing state proceeding, as put forward by our dissenting Brethren . . . converts a doctrine with substantive content into a mere semantical joust. There is no magic in the term 'defense' when used in connection with the *Younger* doctrine if the word 'defense' is intended to be used as a term of art. We do not here deal with the long-past niceties which distinguished among 'defense,' 'counterclaims,' 'setoffs,' 'recoupments,' and the like. As we stated in *Juidice v. Vail*, 430 U.S. [327,] 337 [(1977)]: 'Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention. . . . Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings . . . and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate.'") (omissions and emphasis in original).

Younger abstention has been expanded over the years from its original context in criminal proceedings to apply in other types of proceedings. *See Huffman*, 420 U.S. at 604 (abstention under *Younger* appropriate in state civil proceeding that is "both in aid of and closely related to criminal statutes" and where state's interest "is likely to be every bit as great as it would be . . . [in] a criminal proceeding"); *Trainor v. Hernandez*, 431 U.S. 434, 441, 444 (1975) ("[T]he principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this [for the return of money obtained via alleged welfare fraud], brought by the State in its sovereign capacity[,]" for reasons of federalism and comity); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10-14 (1987) (abstention under *Younger* appropriate with regard to state civil proceedings that seek to enforce the orders and judgments of the state's courts).

In response to this, the Supreme Court has recently described at greater length the limited circumstances when it is appropriate for a lower court to invoke *Younger* abstention:

> In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction. Abstention is not in order simply because a pending state-court proceeding involves the same subject matter. . . . *Younger* exemplifies one class of cases in which federal-court abstention is required: When there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state

> prosecution. . . . Circumstances fitting within the *Younger* doctrine, we have stressed, are "exceptional"; they include, as catalogued in [*New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) ("NOPSI")], "state criminal prosecutions," "civil enforcement proceedings," and "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 367-68.

Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 588 (2013).

The Third Circuit has stated that "*Sprint* offers a forceful reminder of the longstanding principle that federal courts have a 'virtually unflagging' obligations to hear and decide cases within their jurisdiction." *ACRA Turf Club, LLC v. Zanzucchi*, 748 F.3d 127, 138 (3d Cir. 2014) (quoting *Sprint*, 134 S.Ct. at 591, and *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

The Third Circuit has also stated:

> In *Middlesex*[*Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982)], the Court noted that abstention is appropriate where there is an ongoing state proceeding that (1) is judicial in nature, (2) implicates important state interests, and (3) provides an adequate opportunity to raise federal challenges. *Middlesex*, 457 U.S. at 432. . . .
>
> In *Sprint*, the Court repudiated th[e] practice [in subsequent decisions of lower courts of "exclusively applying these three factors as if

> they were the alpha and omega of the abstention inquiry"], explaining that the *Middlesex* conditions were never intended to be independently dispositive, but "were, instead, *additional* factors appropriately considered by the federal courts before invoking *Younger*." *Sprint*, 134 S. Ct. at 593 (emphasis in original).

Gonzalez v. Waterfront Comm'n of N.Y. Harbor, 755 F.3d 176, 181 (3d Cir. 2014).[19] Thus, *Gonzalez* ratifies the continuing validity of *Younger* abstention in the context of an ongoing criminal prosecution where there is no barrier to raising the issue in the state court proceeding, suggesting also the continuing validity of the *Middlesex* analysis.

No Third Circuit case of which this Court is aware has directly addressed the issue of whether *Younger* abstention is appropriate with regard to ancillary or collateral proceedings in a pending criminal case since *Sprint* was decided. Other federal courts, in cases both

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[19] In *Gonzalez*, the Third Circuit found that abstention was appropriate in part because, having found that the proceeding at issue was quasi-criminal under *Sprint*, the third *Middlesex* factor was also satisfied:

> In determining whether a federal plaintiff has an adequate opportunity to raise his constitutional claims during state-court judicial review of the administrative decision, we ask whether "state law *clearly bars* the interposition of the constitutional claims." *Moore v. Sims*, 442 U.S. 415, 425-26 (1979) (emphasis added [in *Gonzalez*]). In making this determination, we consider whether state law raises procedural barriers to the presentation of the federal challenges.

Gonzalez, 755 F.3d at 184.

before and after *Sprint*, have ruled that abstention is inappropriate in cases challenging bail or other pretrial release conditions. *See Hunt v. Roth*, 648 F.2d 1148, 1154 (8th Cir. 1981) (rev'd on other grounds) (abstention inappropriate where declaratory judgment sought regarding non- bailable status of certain offenses did "not interfere with the state's orderly criminal prosecution" of plaintiff, plaintiff's claim that "bail has been unconstitutionally denied [wa]s no defense to the criminal charge[,]" and plaintiff had effectively no remedy in state court); *Odonnell v. Harris Cty., Texas*, 227 F. Supp. 3d 706, 734-35 (S.D. Tex. 2016) ("Resolving [the legality of the challenged pre-trial detention] does not affect the merits of subsequent criminal prosecutions. The inability to pay bail cannot be raised as a defense in a subsequent criminal prosecution. . . . Even if *Younger* applied to a case challenging pretrial detention, this case would fail *Younger's* conditions for abstention [under *Middlesex*, 457 U.S. at 432 and subsequent caselaw.]"); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 765-66 (M.D. Tenn. 2015) (noting that the "Sixth Circuit has read *Gerstein* to require federal courts to ask 'whether the issue raised is collateral to the principal state proceeding' before invoking *Younger* abstention") (quoting *Parker v. Turner*, 626 F.2d 1, 8 (6th Cir. 1980)).

Ultimately, the Court is not persuaded that *Younger* abstention is warranted in the instant case. As the *Sprint* Court stated: "When there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution." 134 S. Ct. at 588. Plaintiffs, here, do not seek to enjoin the state prosecution against Holland; instead, they

challenge the procedure by which the conditions of pre-trial release during that prosecution was decided and seek an injunction ordering a different procedure. An injunction containing an order for such a procedure to take place "could not prejudice the conduct of the trial on the merits." *Gerstein*, 420 U.S. at 108 n.9.

The Court believes that *Gerstein's* explication of when *Younger* abstention is inappropriate is as applicable to the instant case as it was to the claims in *Stewart*. In that case, the petitioners' claims were regarding a policy of the Philadelphia District Attorney's Office re-initiating felony charges that had been dismissed by a judge for lack of a prima facie showing of probable cause, such policy alleged to have been in violation of the petitioners' Fourth Amendment rights against unreasonable seizures. *Stewart*, 275 F.3d at 225-26. Just as the federal court addressing the challenged procedure in *Stewart* "would not interfere with the criminal prosecutions themselves" as the claims there "involved a challenge to pretrial restraint," *id.* at 226 (internal quotations omitted), the Court here likewise finds that *Gerstein* is applicable and it is likely that abstention pursuant to *Younger* is not warranted.[20] The matter of *Younger*

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[20] *But see McWhite v. Cohen*, No. 15-6702, 2015 WL 5996296, *3 (D.N.J. Oct. 14, 2015) ("Petitioner has the opportunity to raise his constitutional claims in pre-trial motions, and in a direct appeal and/or a post-conviction relief petition should the need arise. Petitioner therefore has ample opportunity to present his federal constitutional claims [including his excessive bail complaint] to the state courts. Accordingly, the Court must abstain from interfering with the ongoing state proceedings under *Younger*.")

abstention's propriety, however, is not well-settled, even after *Sprint*, in light of *Gonzalez* and cases discussed above. While the relief sought would not restrain the state's prosecution of Holland, it is nonetheless troubling that Holland continues to have an unused remedy to present these issues in an effort to challenge the conditions of release in his case, and further, that the Plaintiffs are asking this federal court to rearrange the state's statutory (and to some extent, constitutional) considerations in the determination of conditions of release having broad application across all criminal cases, which invades important state interests concerning release and detention.

3. Habeas vs. 1983

The parties have also addressed whether the claims of Holland are appropriately presented under 42 U.S.C. § 1983, rather than 28 U.S.C. § 2241. The most salient difference is that relief under § 2241 requires a plaintiff to have exhausted state remedies before seeking federal relief, while § 1983 has no such exhaustion requirement. Plaintiffs argue that § 1983 is the proper basis for this action because here, Holland does not seek "an injunction ordering his immediate or speedier release into the community." (Pl. Rep. Br. at 7-8.) Defendants argue that inasmuch as the restrictions on Holland's pre-trial release either constitute or are viewed by him as "a form of pretrial custody or confinement," a petition for a writ of habeas corpus is the only avenue for him to seek relief. (Def. Opp. Br. at 25- 26.)

The Court finds that § 1983 is an appropriate basis for this action. In *Preiser v. Rodriguez*, the Court

found that a plaintiff could only seek a federal remedy via the writ of habeas corpus, and not § 1983, when that person "is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment." 411 U.S. 475, 500 (1973); *see also Wallace v. Fegan*, 455 Fed. App'x 137, 140 (3d Cir. 2011) (plaintiff's "seeming challenge to pretrial incarceration seeks a remedy available only in habeas").

While the Supreme Court has previously held that a petitioner is sufficiently "in custody" for purposes of habeas corpus even when released on his or her own recognizance, *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 300-01 (1984), the availability of § 1983 as a vehicle to seek relief for an alleged violation of a constitutional right depends, primarily, on the relief sought.

As the Third Circuit has stated:

> The Court has been careful to distinguish cases seeking release, which must be brought by writ of habeas corpus, from those challenging procedures, which may go forward under § 1983. Thus, in *Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974), the Court held that although an action seeking restoration of good time credits could be brought only as a petition for habeas corpus, a litigant could sue for damages and injunction under § 1983 based on a claim that good time credits were lost without proper procedural protections. In *Gerstein v. Pugh*, 420 U.S. 103, 107 n.6 (1975), the Court noted

> that where the relief sought was a hearing, not release from confinement, the action need not be brought as a habeas corpus petition."

Georgevich v. Strauss, 772 F.2d 1078, 1086 (3d Cir. 1985). The Third Circuit, further discussing the posture of *Gerstein*, stated:

> It is also well-established that some kinds of procedural challenges in criminal cases can be asserted in a § 1983 action where release from custody is not the relief sought. Thus, in *Gerstein* . . . , the Court approved extensive declaratory and injunctive relief in a § 1983 class action challenging the constitutionality of state statutes and procedural rules which permitted pre-trial detention of arrestees without any probable-cause determination by a neutral and detached magistrate. . . . [In that case,] the constitutional validity of a method of pretrial procedure, rather than its application to any particular case, was the focus of the challenge. . . . [I]n any event, the validity of the criminal convictions (of those members of the class who were thereafter convicted), would not be affected by the unconstitutionality of the pretrial procedure in question.

Tedford v. Hepting, 990 F.2d 745, 748-49 (3d Cir. 1993).

The Supreme Court has recently stated that where a petitioner does not seek an "injunction ordering . . . immediate or speedier release into the community . . . and a favorable judgment would not necessarily imply the invalidity of their convictions or

sentences," he or she may "properly invoke[] § 1983." *Skinner v. Switzer*, 562 U.S. 521, 533-34 (2011) (citing *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) and *Heck v. Humphrey*, 512 U.S. 477, 487 (1994)) (internal quotations omitted).

The Court finds that Holland does not seek an injunction ordering his immediate or speedier release into the community, but rather an injunction ordering a hearing that conforms to his conception of his constitutional rights under the Fourth, Eighth, and Fourteenth Amendments. Nor would a favorable judgment necessarily (or in any way, in fact) imply the invalidity of any subsequent conviction or sentence to which Holland may one day be subjected. For this reason, the Court finds that Plaintiffs have properly invoked § 1983 and need not proceed exclusively through a petition for a writ of habeas corpus, and declines to dismiss their claims on that ground.

4. Summary of Preliminary Issues

At this stage, as discussed above, Holland has standing to raise these constitutional challenges while Lexington lacks first-party standing and it is unlikely Lexington has third- party standing. Similarly, it appears *Younger* abstention would not be warranted as to either Plaintiff, although the issue presents a closer call in Holland's case because his criminal case remains pending and he has an available state court forum to raise challenges to his conditions of release and the CJRA, but the relief he seeks in federal court would not block or call into question the state's prosecution. Finally, the Court does not find that it should exercise habeas corpus jurisdiction under 28 U.S.C. § 2241 rather than

federal civil rights jurisdiction under 28 U.S.C. §§ 1343 & 1983. Doubt as to Lexington's standing suggests further caution in considering Lexington's prospects of success on the merits of its claims.

B. Likelihood of Success on the Merits

With respect to the first factor in obtaining a preliminary injunction, Plaintiffs must demonstrate a likelihood of success on the merits of their Eighth Amendment, Fourteenth Amendment, and Fourth Amendment claims. The Court addresses each in turn.[21]

1. Eighth Amendment

Plaintiffs first ask the Court to declare that the CJRA violates the Eighth Amendment rights of Holland and other presumptively innocent criminal defendants. Plaintiffs argue that the CJRA's hierarchical structure violates the Eighth Amendment because it essentially "single[s] out" monetary bail "as a disfavored option of last resort."

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[21] Plaintiffs attack the CJRA in the form of both a facial and an as-applied challenge. A party asserting a facial challenge "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). That is, Holland would have to show that the "[statute] is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citing *Salerno*, 481 U.S. at 745). This is the "most difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745. On the other hand, "[a]n as-applied attack . . . does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010).

(Pl. Rep. Br. at 1.) As the CJRA currently stands, Plaintiffs argue, defendants in New Jersey are left without the "liberty-preserving option" of paying monetary bail, since a judge cannot advance to the monetary bail step without first finding that the enumerated non-monetary conditions would not "reasonably assure the eligible defendant's appearance in court when required." N.J.S.A. 2A:162-17(c)(1). To remedy this alleged constitutional defect, Plaintiffs ask the Court to elevate the third level ("release on monetary bail—but only to reasonably assure the defendant's appearance in court," N.J.S.A. 2A:162-16(b)(2)(c), -17(c), up to the second level (release on non-monetary conditions that are the least restrictive conditions necessary, N.J.S.A. 2A:162-16(b)(2)(c), -17(b)), so that a judge can consider both monetary and non-monetary options at the same time. In simple terms, Holland believes he is entitled under the Eighth Amendment to have *monetary* bail be considered as part of the mix of the judge's pretrial release decision.

In relevant part, the Eighth Amendment of the U.S. Constitution provides that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII [hereinafter, "Excessive Bail Clause"]. The Eighth Amendment's prohibition against excessive bail is applicable to the states through the due process clause of the Fourteenth Amendment. *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008); *Sistrunk v. Lyons*, 646 F.2d 64, 70 (3d Cir. 1981).

Plaintiffs argue that the Eighth Amendment's prohibition of "[e]xcessive bail" presupposes a right to

bail as an alternative to pretrial deprivation of liberty for bailable offenses, and the CJRA impermissibly forecloses monetary bail as an option. (Pl. Br. at 21.) In other words, if the Bail Clause of the Eighth Amendment is to have any meaning, it must create a constitutional right to bail. Defendants respond that Plaintiffs improperly "transmogrify a prohibition on imposing excessive bail into a generalized right to monetary bail as an alternative to pre-trial deprivation of liberty for bailable offenses." (Def. Opp. Br. at 28) (internal references omitted).

At the outset, the Court finds that Plaintiffs' argument that the Eighth Amendment implies and safeguards the right to monetary bail is unlikely to succeed on the merits.

The history of the Excessive Bail Clause demonstrates Plaintiffs are unlikely to succeed on the merits of their Eighth Amendment claim. The Excessive Bail Clause was derived from the English Bill of Rights of 1688 and the 39th chapter of the Magna Carta, which required that "no freeman shall be arrested, or detained in prison . . . unless . . . by the law of the land." *Cobb v. Aytch*, 643 F.2d 946, 959 n.7 (3d Cir. 1981). When Congress considered adoption of the Bill of Rights in 1789, the Excessive Bail Clause "was a noncontroversial provision that provoked very little discussion." *United States v. Edwards*, 430 A.2d 1321, 1328 (D.C. 1980) (en banc), *cert. denied*, 455 U.S. 1022 (1982). As the *Edwards* Court found, "neither the historical evidence nor contemporary fundamental values implicit in the criminal justice system requires recognition of the right to bail as a 'basic human right,' which must then be construed to be of constitutional

dimensions." *Id.* at 1331 (citations omitted). However, "[t]he specific intent of the Framers simply cannot be divined from the historical evidence of the pre-1789 period," as "the only reasonable conclusion that can be drawn . . . is that the Framers did not consider the parameters of a right to bail at all when they passed the [E]ighth [A]mendment." Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 Colum. L. Rev. 328, 350 (1982). Indeed, many states, including New Jersey, added an affirmative right to bail clause to their constitutions after 1789. *See, e.g.*, *N.J. Const. of 1844*, art. I, ¶ 10.

Plaintiffs provide a robust history outlining the importance of a criminal defendant's right to bail. Notably, they fail to explain why the Court should find an implied right to *monetary* bail in the Eighth Amendment, as opposed to a general right to be free from unwarranted custody pending trial. In fact, bail has traditionally been defined in a multitude of ways, including:

(1) a security such as cash, a bond, or property; esp., security required by a court for the release of a criminal defendant who must appear in court at a future time;

(2) **the process by which a person is released from custody either on the undertaking of a surety or on his or her own recognizance**;

(3) release of a criminal defendant on security for a future court appearance; esp., the delivery of a person in custody to a surety; and

(4) one or more sureties for a criminal defendant.

Bail, Black's Law Dictionary (9th ed. 2009) (emphasis added). While some of these definitions involve money, others (notably the second definition) do not.

The Third Circuit has addressed the availability of bail in the context of the Eighth Amendment, but all before the landmark case of *United States v. Salerno*, 481 U.S. 739 (1987), and in slightly different contexts than the present case.[22] To the extent Plaintiffs rely upon these cases for the proposition that there is an implied right to money bail under the Eighth Amendment, the Court finds that *Salerno* is the best indication of how the Supreme Court currently views the issue of bail. In *Salerno*, the Supreme Court held that the Eighth Amendment "says nothing about whether bail shall be available at all." *Salerno*, 481 U.S. at 752. And the Third Circuit has not reached the issue since. Accordingly, the Court

[22] *See e.g.*, *United States v. Perry*, 788 F.2d 100, 111 (3d. Cir. 1986) (finding that, in the civil, preventative-detention context, "[i]t seems more reasonable . . . to consider the bail clause to be applicable solely to the problem it most clearly addresses: conditions of release or detention designed to assure a criminal defendant's appearance at trial and availability for sentence.") *Sistrunk v. Lyons*, 646 F.2d 64, 65 (3d Cir. 1981) (recognizing in a capital murder case that, while "bail constitutes a fundament of liberty underpinning our criminal proceedings" and "has been regarded as elemental to the American system of jurisprudence[,] . . . the Constitution does not provide a right to bail per se to which the states must conform, it only sets a ceiling on its employment").

declines plaintiff's invitation to find that a right to money bail is implied within the Eighth Amendment.

Plaintiffs further argue that the CJRA violates the Eighth Amendment because New Jersey cannot impose "severe" deprivations of liberty, like home detention and electronic monitoring, without offering the possibility of money bail. (Pl. Rep. Br. at 20.)[23] In other words, they argue, the state cannot put monetary bail "behind an emergency glass," unable to be employed until all other non-monetary options are exhausted. Defendants respond that conditions like home detention and electronic monitoring are not "severe," since such conditions are less restrictive than jail and are "commonly imposed in the federal bail system." (Def. Opp. Br. at 32.)

Salerno articulates the constitutional principles governing the use of preventive detention in the pretrial context, and provides support for the constitutionality of the CJRA. 481 U.S. at 739. *Salerno* concerned a facial attack on the federal Bail Reform Act of 1984, which requires courts to detain arrestees charged with certain serious felonies prior to trial, if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure the appearance of the person as required and the safety of any other

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[23] Plaintiffs conceded at oral argument that they would have a "weaker argument" if the issue was a right to a commercial bond versus the availability of a bond generally. [Docket Item 42.] Thus, it appears that Plaintiffs do not quibble with the way that money bail would be provided, just that some monetary condition will be in the mix and be part of a state court judge's analysis and determination of appropriate conditions of pretrial release.

person and the community." 18 U.S.C. § 3142(e). In upholding the constitutionality of the Bail Reform Act, the *Salerno* Court emphasized that preventative detention that is "regulatory, not penal" does not constitute "impermissible punishment before trial." *Id.* at 746-47. The test for determining whether a preventive detention policy is regulatory or punitive depends, first, on whether there was an express legislative intent to punish; if not, the inquiry turns to whether there is a rational connection between the policy and a non-punitive justification, and then, whether the policy is proportional to that justification. *Id.* at 747. The Court found that the Bail Reform Act was more regulatory in nature, as it "carefully limits the circumstances under which detention may be sought to the most serious of crimes." *Id.* at 739-40. The Court then decided that the restrictions the statute imposed on pretrial liberty could be adequately justified by the compelling government interest in preventing danger to the community. *Id.* at 747.

Notably, the Court "reject[ed] the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly-compelling interests through regulation of pretrial release." *Id.* at 753. The Court explained that "[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal." *Id.* at 747. Additionally, "[n]othing in the text of the Bail Clause limits permissible considerations solely to questions of flight." *Id.* at 754. Importantly, the Supreme Court in *Salerno* thus recognized that the legislature can identify interests, such as assuring the safety of the community and persons, including victims or

witnesses, which are considered in determining conditions of release aside from the setting a monetary bail.

Plaintiffs argue that "nothing in *Salerno* provides any support for the CJRA's sweeping provisions authorizing severe liberty restrictions of *non-dangerous* defendants—*i.e.*, anyone charged with a covered crime whose risk of flight can be negated through house arrest and an ankle monitor." (Pl. Rep. Br. at 14.) But Plaintiffs have not cited a single post-*Salerno* bail case mandating monetary bail, let alone one finding that non- monetary conditions cannot be utilized by a judge when considering the pretrial release of a criminal defendant. This is not surprising; if absolute pretrial detention is constitutionally permissible to address risk of flight and safety of persons and community, then so too are lesser conditions imposing restrictions on pre-trial liberty.

Further, the Court has serious doubts that Holland is the appropriate plaintiff to advance such an argument, as he appears to be a far cry from the hypothetical non-violent defendant to whom Plaintiffs allude. Holland was arrested after a serious bloody assault in which he allegedly inflicted multiple facial fractures upon the victim, then fled the scene before police arrived, and was charged with second-degree aggravated assault. As a result of this violent criminal charge and a prior simple assault conviction, the DMF generated by the Pretrial Services Program recommended that Holland be detained pending trial. Only after negotiations between the prosecutor and Holland's court-appointed attorney was the judge willing to release Holland subject to house arrest,

electronic monitoring, and weekly reporting. It therefore appears that flight risk was not a primary consideration for Holland's conditions of pretrial release. Rather, Holland was considered to be a potentially-dangerous defendant from whom the community deserved some degree of protection by certain non-monetary conditions of release or, indeed, by his detention.

More importantly, Holland waived his claims to have money bail be considered as one possible condition for his pretrial release when he agreed to accept PML Level 3+ monitoring in exchange for the prosecution dropping its request for detention. Holland argues that he and his attorney made this agreement before his pretrial detention hearing because he had no other choice given the unconstitutional system. This rings hollow. Holland had a full opportunity to dispute the PSA's recommendation of pretrial detention, including the NVCA flag he received. Indeed, the Pretrial Services Program's recommendation is one of several factors a court *may* consider at the pretrial detention hearing. *See* N.J.S.A. 2A:162-20. Holland and his attorney had the opportunity to argue against the prosecutor's motion, to point out why detention or home confinement with electronic monitoring was too restrictive, and why lesser conditions would suffice. Holland did none of that in the Superior Court.

A judge has wide discretion under the CJRA framework to impose the least-restrictive, non-monetary condition warranted under the circumstances. While Holland agreed to electronic monitoring and home detention in this instance, if he

had proceeded with his pretrial detention hearing, he may well have received non-monetary conditions that were less stringent than those he agreed to. This could have included phone reporting at PML 1, or reporting once a month in person or telephone and some monitored conditions, such as curfew, at PML 2. In fact, given Holland's initial PSA score of 2/6 for failure to appear and 2/6 for new criminal activity, it is possible that Holland could have been released on his own recognizance with lesser restrictions if he had been able to successfully challenge the NVCA flag he received in his PSA.

Holland had a right to be released from jail under conditions that were not excessive. Nothing in the record suggests that Holland waived his right to a pretrial detention hearing because he was proffering a money bail as an alternative to home confinement or electronic monitoring; instead, it appears he waived it because he faced the very real possibility of going to jail as a pretrial detainee otherwise, given the state's allegations of dangerousness. For all these reasons, the Court finds that Plaintiffs are unlikely to succeed on the merits of their Eighth Amendment claim.

2. Fourteenth Amendment

In the alternative, Plaintiffs ask the Court to declare that the CJRA violates the procedural and substantive due process rights of Holland and other presumptively innocent criminal defendants by denying these individuals the option of monetary bail as a means to assure their appearance at trial before subjecting them to "severe" restrictions of their pretrial liberty.

a. Procedural Due Process

Holland argues that his procedural due process rights have been violated because home detention and the wearing of an electronic bracelet are liberty-restricting conditions. (Pl. Br. at 27.)

Pretrial detention implicates a liberty interest entitled to due process protections. *United States v. Dekker*, 757 F.2d 1390, 1397 (3d Cir. 1985). Procedural due process requires the balancing of three familiar factors:

> (1) [T]he private interest that will be affected by the official action;
>
> (2) [T]he risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and
>
> (3) [T]he government's interest, including the function involved and the fiscal administrative burdens that the additional or substantive procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 325 (1976).

For any preventive detention decision, the procedural due process inquiry turns on whether a criminal defendant enjoys "procedures by which a judicial officer evaluates the likelihood of future dangerousness [that] are specifically designed to further the accuracy of that determination." *Salerno*, 481 U.S. at 751. Under the CJRA, a criminal defendant must therefore have some opportunity to contest potentially-inaccurate or substantively-unfair PSA or DMF procedures.

The CJRA specifically states that when, as here, the prosecutor seeks pretrial detention, the defendant is entitled to a pretrial detention hearing. N.J.S.A. 2A:162-18. At this hearing, the defendant has the right:

> to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The eligible defendant shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise.

N.J.S.A. 2A:162-19(e)(1). Further, if the court orders a defendant to be held in custody pending trial, the defendant may appeal that decision and have it heard on an expedited basis. N.J.S.A. 2A:162-18(c). A criminal defendant may also file a motion to reconsider his conditions of release at any time, based on "a material change in circumstances." N.J.S.A. 3:26-2(c)(2).

Here, Holland actually had a pretrial detention hearing on April 11, 2017 before the Hon. Kathleen Delaney, J.S.C., with the opportunity to afford himself of all the protections outlined in N.J.S.A. 2A:162-19(e)(1). (Feldman Decl. ¶ 14.) Instead of going forward with the pretrial detention hearing, however, Holland's counsel informed Judge Delaney that the parties had agreed to Level 3+ monitoring. (*Id.* at ¶ 12.) And Holland consented, on the record, to these conditions. (*Id.* at ¶ 17.) Moreover, Holland can *still* file a motion in state court under N.J.S.A. 3:26-2(c)(2), arguing that changed circumstances warrant less-

restrictive conditions of his pretrial release. Indeed, "changed circumstances" may well include the passage of time itself, rendering his allegedly violent behavior less recent, coupled with good behavior while under pretrial supervision, if such be the case.

On this record, the Court finds it is likely that Holland voluntarily and knowingly waived his right to a pretrial detention hearing when he agreed to be released subject to the previously-described, non-monetary conditions in exchange for his release from jail. One who waives the judicial process may not claim due process is denied. *See Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000)("In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her."). Further, even if one assumes for the sake of argument that Holland and his counsel did not waive the detention hearing rights, the process of appellate review in the Superior Court's Appellate Division would be open to him, of which he has also not availed himself. Thus, the Court finds that Plaintiffs are unlikely to succeed on the merits of their procedural due process claim.

b. Substantive Due Process

Plaintiffs also raise a substantive due process challenge to the CJRA. "The substantive component of the Due Process Clause limits what government may do regardless of the fairness of procedures that it employs," *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 399 (3d Cir. 2000), in order to "guarantee protect[ion] against government power arbitrarily and oppressively exercised," *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citing

Daniels v. Williams, 474 U.S. 327, 331, (1986)). Substantive due process "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *Salerno*, 481 U.S. at 746. "[T]here is a substantive liberty interest in freedom from confinement." *United States v. Perry*, 788 F.2d 100, 112 (3d Cir. 1986). "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755.

At the outset, the Court declines the State Defendants' invitation to deny Plaintiffs' substantive due process claim where a particular amendment provides an explicit textual source of constitutional protection. (Def. Opp. Br. at 38.) At this preliminary stage, the Court has not identified protections under the Eighth Amendment, *see* Section IV.B.1, *supra*, or the Fourth Amendment, *see* Section IV.B.3, *infra*, that protect the interest Plaintiffs seek to identify. The Court thus proceeds to the merits of Plaintiffs' claim of denial of substantive due process.

Holland argues that his substantive due process rights have been violated because the CJRA prevents him from having the option of posting monetary bail sufficient to ensure his future appearance before being subjected to severe deprivations of pretrial liberty. (Pl. Br. at 28.) As a result, Plaintiffs argue, the CJRA "replaces the liberty-preserving option of bail with liberty-restricting conditions of release." (*Id.* at 32.) The State Defendants respond that having the option of monetary bail is not a "fundamental" right and need not be considered before non-monetary conditions of

pretrial release are implemented. (Def. Opp. Br. at 41.)

Plaintiffs claim that the right to have "bail" (*i.e.*, money bail) be considered as an option is "fundamental to [our] scheme of ordered liberty." (Pl. Rep. Br. at 29) (quoting *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767 2010).) To that end, Plaintiffs repeat the uncontroversial position that "bail is the mechanism employed for centuries by our legal system to preserve the 'axiomatic and elementary' presumption that a person accused but unconvicted of a crime is innocent until proven guilty." (Pl. Br. at 29-30) (quoting *Coffin*, 156 U.S. at 453).

The Court finds Plaintiffs' argument that the option to money bail is a "fundamental" right to be unpersuasive. First, *McDonald* is a Second Amendment case which does not directly address the issue of bail, except to the extent that the Court recognized the Eighth Amendment's protection against excessive bail had previously been incorporated vis-à-vis the states in *Schilb v. Kuebel*, 404 U.S. 357 (1971). *McDonald*, 561 U.S. at 764 n.12. Second, as discussed in Section IV.B.1, *supra*, Plaintiffs' argument fails to distinguish between money bail and non- monetary conditions of bail, especially in light of *Salerno*. Again, Plaintiffs have not cited a single post-*Salerno* bail cases, let alone one describing *monetary* bail as a "fundamental" right. Accordingly, the Court will again look to *Salerno* for guidance.

In *Salerno*, the Court discussed due process considerations within the context of setting a criminal defendant's bail conditions. The *Salerno* Court upheld

the constitutionality of the statute's provision permitting "pretrial detention on the ground that the arrestee is likely to commit future crimes." 481 U.S. at 744, 750. The Court noted that the Act "operates only on individuals who have been arrested for . . . extremely serious offenses." *Id.* at 749. The provision withstood constitutional scrutiny precisely because it included procedural protections—including an individualized finding of risk to the public from failure to impose a specific requirement.

Holland argues that the CJRA system unfairly predicts his future dangerousness, essentially eliminating the possibility of money bail for his release. That the CJRA process resulted in Holland's release from pretrial detention on conditions of home confinement (with permission to maintain full-time employment), electronic monitoring (financed by the state due to Holland's indigency), and occasional reporting to a pretrial services officer does not shock the Court's conscience, nor does the absence of a monetary bail option in lieu of, or in addition to, restrictions that are aimed at deterring dangerousness. Moreover, Holland failed to challenge his PSA scores or DMF recommendation when he had the opportunity to do so. Either way, Plaintiffs present no grounds for finding that a criminal defendant's option to obtain monetary bail is a fundamental right or implicit in the concept of ordered liberty. The Court therefore finds that Plaintiffs are unlikely to succeed on the merits of their substantive due process claim.

3. Fourth Amendment

Finally, Plaintiffs ask the Court to declare that the CJRA violates the Fourth Amendment rights of

Holland and other presumptively innocent criminal defendants to be free from unreasonable searches and seizures. Specifically, Holland argues that the electronic location monitoring is a "severe" intrusion of his privacy and constitutes an unreasonable search under the Fourth Amendment, while home detention constitutes an unreasonable seizure. (Pl. Rep. Br. at 34.) To that end, Plaintiffs argue that electronic monitoring and home detention are not "needed" to promote the government's interest in securing Holland's appearance for trial when they could have easily offered money bail. (*Id.* at 35.) The State Defendants reply that the balance of reasonableness "undoubtedly favors the legitimate governmental needs of the State of New Jersey" because, here, Holland was charged with a serious crime, second-degree aggravated assault, and he knowingly agreed to electronic monitoring and home detention as a condition to his pretrial release. (Def. Opp. Br. at 43-44.)

The Fourth Amendment mandates that

> [t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Accordingly, the Fourth Amendment only prohibits "unreasonable" searches and seizures. *United States v. Katzin*, 769 F.3d 163, 169 (3d Cir. 2014). "Reasonableness" is analyzed by a

"totality of the circumstances" test, "assessing on the one hand, the degree to which [the search or seizure] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Samson v. California*, 547 U.S. 843, 848 (2006) (citations and internal quotation marks omitted).

The Court agrees that, under normal circumstances, 24-hour electronic monitoring would likely constitute an intrusion upon an individual's reasonable expectation to privacy. However, as the Supreme Court has explained, "[o]nce an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, his or her expectations of privacy . . . are reduced." *Maryland v. King*, 133 S. Ct. 1958, 1978 (2013). Moreover, the state's interest in ensuring a potentially-dangerous defendant's appearance at trial is strong. *Salerno*, 481 U.S. at 749 ("The government's interest in preventing crime by arrestees is both legitimate and compelling."). Thus, in the pretrial-release context, electronic monitoring and home arrest may be well "reasonable."

The Fourth Amendment generally interposes the determination of a judicial officer in determining the reasonableness of significant intrusions into the liberty or property of an individual. Thus, absent exigent circumstances or other limited exceptions, a judicial officer must determine whether probable cause exists to search a home under a search warrant or to arrest a suspect under an arrest warrant. Likewise, cases too numerous to fully list have held that the judicial officer's determination of

reasonableness under all the circumstances is deemed to protect the right to be free of unreasonable searches and seizures that the Fourth Amendment protects. *See, e.g.*, *Michigan v. Summers*, 452 U.S. 692, 704-05 (1981); *Johnson v. United States*, 333 U.S. 10, 15 (1948).

Likewise, where conditions of pretrial release in a criminal case restrict freedom of movement and can be regarded to that extent as a seizure of the individual, the safeguard of a judicial determination upon the record protects against unreasonable seizures by examining the totality of the relevant circumstances. The careful process of gathering reliable information and risk assessments, such as New Jersey's Public Safety Assessment, appears to provide a valuable tool for the judge in determining the issue of detention and release, including the stringency of conditions of release. The use of such a tool further supports the likelihood of a reasonable level of detention or release upon a spectrum of intrusion on freedom while awaiting trial.

Again, the Court cannot overlook the fact that Holland waived the opportunity to have a pretrial detention hearing with counsel, witnesses, and cross-examination. Instead, he agreed to the electronic monitoring and home detention conditions. Holland might have avoided these "severe" restrictions of his liberty had he proceeded with his pretrial detention hearing and argued for the removal of the NVCA flag he was assigned. He also could have argued for other non-monetary conditions, as enumerated in the CJRA, which are less severe than home detention or electronic monitoring. *See* N.J.S.A. 2A:162-17. But,

faced with the risk of pretrial detention, Holland chose instead to be released under partial home confinement and electronic location monitoring. Within this context, the Court does not find the pretrial conditions imposed on Holland to be unreasonable. *Cf. Belleau v. Wall*, 811 F.3d 929, 932 (7th Cir. 2016) (Posner, J.) ("Having to wear a GPS anklet monitor is less restrictive, and less invasive of privacy, than being in jail or prison.")[24] As a result, the Court finds that Holland's Fourth Amendment claim is unlikely to succeed on the merits.

4. Summary of Likelihood of Success Prong

In summary, neither Holland nor Lexington has shown likelihood of success on the merits of their Eighth Amendment, Fourteenth Amendment, and Fourth Amendment claims. Neither plaintiff has made a showing of a reasonable probability of eventual success on any claim examined above. The Court now turns to examine the remaining factors for preliminary injunctive relief.

C. Probability of Irreparable Harm

Plaintiffs have the burden of demonstrating "potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the only way of protecting the plaintiff from harm." *Instant Air Freight*, 882 F.2d at 801. This requires demonstration

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[24] As State Defendants correctly argue, if Holland had not consented to non-monetary conditions, the judge could have ordered pretrial detention given the violent nature of the crime charged. (Def. Opp. Br. at 44.)

of "actual or imminent harm which cannot otherwise be compensated by money damages." *Frank's GMC*, 847 F.2d at 103.

Plaintiffs argue that the irreparable harm to Holland and Lexington lies in the continuing constitutional infringement resulting in restrictions of liberty of Holland (and of Lexington's clients). (Pl. Br. at 35-36.) Plaintiffs claim that Holland is harmed by being "subjected to severe restrictions of liberty without being offered the constitutionally required alternative of monetary bail." (*Id.* at 36.) Lexington, on the other hand, appears to make no argument for its own irreparable injury. (*See id.* at 35-37, Pl. Reply Br. at 19-20.) To the extent Lexington suggests it is suffering economic harm from loss of opportunities to underwrite bail bonds, such harm may be tangible and ongoing but there is no showing that it is probably caused by a violation of Lexington's rights, since there is no right to engage in bail bonding implied or expressed in the Constitution, as discussed above.

The Court acknowledges that where probable success on the merits of a constitutional claim is shown, and such violation will continue unless enjoined, the continuing constitutional violation can constitute irreparable harm. *See, e.g.*, *Stilp v. Contino*, 613 F.3d 405, 409 (3d Cir. 2010) (noting that First Amendment violation satisfies irreparable injury requirement); *Forchion v. Intensive Supervised Parole*, 240 F. Supp. 2d 302, 310 (D.N.J. 2003) (addressing continued incarceration). In the present case, lacking a showing of likely success on the merits of the claimed constitutional violations, the Court finds scant

likelihood of irreparable harm if an injunction is denied.

Holland's harm is also not irreparable because he has a possible remedy available to him ameliorating the so-called "severe" conditions of partial home confinement with electronic monitoring; namely, as discussed above, he can seek a modification of his restrictions, and appeal any denial to the Appellate Division and New Jersey Supreme Court. A federal court injunction is not a necessary remedy where the prospect of a state remedy is available.

For these reasons, the Court finds Plaintiffs have failed to demonstrate likelihood of irreparable harm if Defendants are not enjoined.

D. Balance of Harms

Granting the preliminary injunction would pose a high risk of harm to other interested persons. *See Reilly*, 858 F.3d at 176. An injunction mandating consideration of monetary bail may reinstall the system of financial requirements that, prior to the CJRA and the new procedures for pretrial release, resulted in the jail detention of persons unable to meet even modest financial conditions, as discussed above. Rolling back the measurable gains brought about under the CJRA since January 2017 by reinstating the primacy of money bail may also harm the general community by displacing pretrial restrictions meant to protect the community and individual victims and witnesses from risk of harm. These concerns of protecting against risk of danger to the community are not generally mitigated with the posting of money bail.

Against such possible harms to other defendants in the criminal justice system who are unable to afford

money bail and the risk of harms to the community and specific persons, the harm to Holland if the preliminary injunctive relief is denied is minimal. During this interval before his trial, he will be under the pretrial regime of electronic location monitoring and partial home confinement with exceptions for employment. Moreover, the opportunity he seeks to rid himself of these restrictions through injunctive relief would itself come at a cost of posting cash or paying a bail bond premium, the latter which he would not get back even if he faithfully performs his pretrial obligations. Although the amount of monetary bail that might be set is unknown, he currently is not being charged a bail bond premium (customarily 10% of the monetary bail amount). That cost of monetary bail to Holland and other persons accused of crimes and awaiting trial would thus be a negative consequence to Holland and others if this injunction were granted.[25]

Thus, the balance of harms tips decidedly against granting the preliminary injunction.

E. Considerations of the Public Interest

The three branches of New Jersey's government—the Executive, Legislative, and Judicial—enabled by a strong public vote in the 2014 referendum have put considerable effort into reforming a monetary-based bail system that resulted in excessive detentions for mere financial inability and failed to assess risks of danger. They have collaborated, as described in

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[25] It follows that the non-refundable cost of a bail bond to Holland would be a financial gain to a bonding surety like Lexington, placing the two plaintiffs in some degree of conflict.

Section II.A, *supra*, to put into place a framework for determining conditions of pretrial release that considers not only risk of flight but also risk of harm to the community and to specific persons, as well as risk of obstruction of justice. There is an undeniably strong public interest in maintaining such a reform, provided that it is constitutional. On the other hand, the shortcomings of a system that elevated monetary bail as the principal (or only) condition of pretrial release were well-documented in the *VanNostrand Report* and *Report of the Joint Committee on Criminal Justice*, discussed in Section II.A, *supra*. This accomplishment, moving from "a largely 'resource-based' system of pretrial release to a 'risk-based' system of pretrial release," *Report of the Joint Committee on Criminal Justice* at 8, should not be set aside absent a clear demonstration of its unconstitutionality.

The strength of the public interest, expressed in the state's reform efforts pursued between 2012 and 2017, is another weighty consideration why the preliminary injunctive relief should be denied.

F. Summary of Preliminary Injunction Factors

This Court, in accordance with *Reilly*, *Issa*, and other recent Third Circuit precedent discussed in Part III above, must determine whether the movants have shown a reasonable probability of eventual success in the litigation and that they will likely be irreparably injured; those two prerequisites are required showings, in addition to which the court should take into account, when relevant, the possibility of harm to other interested persons from the grant or denial of

the injunction, and the public interest served by grant or denial of the injunction.

In the present matter, Plaintiffs have not made a substantial showing of possibility of success nor of irreparable harm stemming from unconstitutional conduct under the CJRA, either on the face of the statute or as applied. Additionally, the balance of risk of harm to others if the injunction is granted substantially outweighs the harms to Plaintiffs if the injunction is denied. Moreover, the public interest in the success of the risk-based release system exceeds the private interests of Holland and Lexington National if the present situation continues as the litigation unfolds.

Finally, if these considerations were a close call—which the Court does not find them to be—then the balance would even further tip in favor of denying the injunction because of doubts about Lexington's standing and the arguments favoring *Younger* abstention, to be considered further by the Court in upcoming dispositive motion practice.

For all these reasons, Plaintiffs' motion for preliminary injunctive relief will be denied. The accompanying Order will be entered.

September 21, 2017	s/ Jerome B. Simandle
Date	Jerome B. Simandle
	U.S. District Judge

Appendix C

SUPERIOR COURT OF NEW JERSEY

No. W-2017-000390-0436

STATE OF NEW JERSEY,

v.

BRITTAN B. HOLLAND,

Defendants.

PRETRIAL RELEASE ORDER

Findings

The Court finds that releasing the defendant on his/her own recognizance or on an execution of an unsecured appearance bond would not reasonably assure the defendant's appearance in court when required, the protection of the safety of any other person or the community and that the defendant will not obstruct or attempt to obstruct the criminal justice process AND THEREFORE is ordering the defendant.

RELEASED SUBJECT TO NON-MONETARY CONDITION(S) set forth below

Non-Monetary Conditions for Pretrial Release

The defendant:

- Shall avoid all contact with an alleged victim of the crime.
- Shall not commit any offense during the period of release.

• Shall report to Pretrial Services as follows: telephonically once every other week and in person once every other week

• Shall be placed in a pretrial home supervision capacity with the use of an approved electronic monitoring device. You are further not ordered to pay all the costs of the electronic monitoring or a portion of the costs of the electronic monitoring.

• Shall maintain or actively seek employment.

• You must appear for all scheduled court proceedings.

• You must immediately notify Pretrial Services of any change of address, telephone number, or other contact information.

Reasons for Departure from Pretrial Services Recommendation

• Other relevant evidence presented to the court

Consent of both parties.

Date: 04/11/2017 s/ Kathleen M Delaney

Appendix D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

N.J. Stat. Ann. § 2A:162-15

The provisions of sections 1 through 11 of P.L.2014, c. 31 (C.2A:162-15 et seq.) shall be liberally construed to effectuate the purpose of primarily relying upon pretrial release by non-monetary means to reasonably assure an eligible defendant's appearance in court

when required, the protection of the safety of any other person or the community, that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, and that the eligible defendant will comply with all conditions of release, while authorizing the court, upon motion of a prosecutor, to order pretrial detention of the eligible defendant when it finds clear and convincing evidence that no condition or combination of conditions can reasonably assure the effectuation of these goals. Monetary bail may be set for an eligible defendant only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required.

For the purposes of sections 1 through 11 of P.L.2014, c. 31 (C.2A:162-15 et seq.), "eligible defendant" shall mean a person for whom a complaint-warrant is issued for an initial charge involving an indictable offense or a disorderly persons offense unless otherwise provided in sections 1 through 11 of P.L.2014, c.31 (C.2A:162-15 et seq.).

N.J. Stat. Ann. § 2A:162-16

a. An eligible defendant, following the issuance of a complaint-warrant pursuant to the conditions set forth under subsection c. of this section, shall be temporarily detained to allow the Pretrial Services Program to prepare a risk assessment with recommendations on conditions of release pursuant to section 11 of P.L.2014, c.31 (C.2A:162-25) and for the court to issue a pretrial release decision.

b. (1) Except as otherwise provided under sections 4 and 5 of P.L.2014, c.31 (C.2A:162-18 and C.2A:162-19), the court, pursuant to section 3 of

P.L.2014, c.31 (C.2A:162-17), shall 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 court shall consider the Pretrial Services Program's risk assessment and recommendations on conditions of release before making any pretrial release decision for the eligible defendant.

(2) After considering all the circumstances, the Pretrial Services Program's risk assessment and recommendations on conditions of release, and any information that may be provided by a prosecutor or the eligible defendant, the court shall order that the eligible defendant be:

(a) released on the eligible defendant's own recognizance or on execution of an unsecured appearance bond; or

(b) released on a non-monetary condition or conditions, with the condition or conditions being the least restrictive condition or combination of conditions that the court determines will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process; or

(c) released on monetary bail, other than an unsecured appearance bond, to reasonably assure the eligible defendant's appearance in court when required, or a combination of

monetary bail and non-monetary conditions, to reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process; or

(d) detained in jail, upon motion of the prosecutor, pending a pretrial detention hearing pursuant to sections 4 and 5 of P.L.2014, c.31 (C.2A:162-18 and C.2A:162-19).

c. A law enforcement officer shall not apply for a complaint-warrant except in accordance with guidelines issued by the Attorney General, and a court may not issue a complaint-warrant except as may be authorized by the Rules of Court.

d. (1) A defendant who is charged on a complaint-summons shall be released from custody and shall not be subject to the provisions of sections 1 through 11 of P.L.2014, c.31 (C.2A:162-15 et seq.).

(2) (a) If a defendant who was released from custody after being charged on a complaint-summons pursuant to paragraph (1) of this subsection is subsequently arrested on a warrant for failure to appear in court when required, that defendant shall be eligible for release on personal recognizance or release on bail by sufficient sureties at the discretion of the court. If monetary bail was not set when an arrest warrant for the defendant was issued, the defendant shall have monetary bail set without unnecessary delay, but in no

> case later than 12 hours after arrest. Pursuant to the Rules of Court, if the defendant is unable to post monetary bail, the defendant shall have that bail reviewed promptly and may file an application with the court seeking a bail reduction, which shall be heard in an expedited manner.
> (b) If the defendant fails to post the required monetary bail set by the court pursuant to this paragraph, the defendant may not be detained on the charge or charges contained in the complaint-summons beyond the maximum term of incarceration or term of probation supervision for the offense or offenses charged.

N.J. Stat. Ann. § 2A:162-17

Except as otherwise provided under sections 4 and 5 of P.L.2014, c. 31 (C.2A:162-18 and C.2A:162-19) concerning a hearing on pretrial detention, a court shall make, pursuant to this section, a pretrial release decision for an eligible defendant without unnecessary delay, but in no case later than 48 hours after the eligible defendant's commitment to jail.

> a. The court shall order the pretrial release of the eligible defendant on personal recognizance or on the execution of an unsecured appearance bond when, after considering all the circumstances, the Pretrial Services Program's risk assessment and recommendations on conditions of release prepared pursuant to section 11 of P.L.2014, c.31 (C.2A:162-25), and any information that may be provided by a prosecutor or the eligible defendant, the court finds that the release would reasonably

assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

b. (1) If the court does not find, after consideration, that the release described in subsection a. of this section will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, the court may order the pretrial release of the eligible defendant subject to the following:

(a) the eligible defendant shall not commit any offense during the period of release;

(b) the eligible defendant shall avoid all contact with an alleged victim of the crime;

(c) the eligible defendant shall avoid all contact with all witnesses who may testify concerning the offense that are named in the document authorizing the eligible defendant's release or in a subsequent court order; and

(d) any one or more non-monetary conditions as set forth in paragraph (2) of this subsection.

(2) The non-monetary condition or conditions of a pretrial release ordered by the court pursuant to this paragraph shall be the least restrictive condition, or combination of conditions, that the court determines will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, which may include that the eligible defendant:

(a) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able to reasonably assure the court that the eligible defendant will appear in court when required, will not pose a danger to the safety of any other person or the community, and will not obstruct or attempt to obstruct the criminal justice process;

(b) maintain employment, or, if unemployed, actively seek employment;

(c) maintain or commence an educational program;

(d) abide by specified restrictions on personal associations, place of abode, or travel;

(e) report on a regular basis to a designated law enforcement agency, or

other agency, or pretrial services program;

(f) comply with a specified curfew;

(g) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(h) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;

(i) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(j) return to custody for specified hours following release for employment, schooling, or other limited purposes;

(k) be placed in a pretrial home supervision capacity with or without the use of an approved electronic monitoring device. The court may order the eligible defendant to pay all or a portion of the costs of the electronic monitoring, but the court may waive the payment for an eligible defendant who is indigent and who has demonstrated to the court an inability to pay all or a portion of the costs; or

(l) satisfy any other condition that is necessary to reasonably assure the

eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

c. (1) If the court does not find, after consideration, that the release described in subsection a. or b. of this section will reasonably assure the eligible defendant's appearance in court when required, the court may order the pretrial release of the eligible defendant on monetary bail, other than an unsecured appearance bond. The court may only impose monetary bail pursuant to this subsection to reasonably assure the eligible defendant's appearance. The court shall not impose the monetary bail to reasonably assure the protection of the safety of any other person or the community or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, or for the purpose of preventing the release of the eligible defendant.

(2) If the eligible defendant is unable to post the monetary bail imposed by the court pursuant to this subsection, and for that reason remains detained in jail, the provisions of section 8 of P.L.2014, c.31 (C.2A:162-22) shall apply to the eligible defendant.

d. (1) If the court does not find, after consideration, that the release described in

subsection a., b., or c. will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, the court may order the pretrial release of the eligible defendant using a combination of non-monetary conditions as set forth in subsection b. of this section, and monetary bail as set forth in subsection c. of this section.

(2) If the eligible defendant is unable to post the monetary bail imposed by the court in combination with non-monetary conditions pursuant to this subsection, and for that reason remains detained in jail, the provisions of section 8 of P.L.2014, c.31 (C.2A:162-22) shall apply to the eligible defendant.

e. For purposes of the court's consideration for pretrial release described in this section, with respect to whether the particular method of release will reasonably assure that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, this reasonable assurance may be deemed to exist if the prosecutor does not provide the court with information relevant to the risk of whether the eligible defendant will obstruct or attempt to obstruct the criminal justice process.

N.J. Stat. Ann. § 2A:162-18

a. (1) The court may order, before trial, the detention of an eligible defendant charged with any crime, or any offense involving domestic violence as defined in subsection a. of section 3 of P.L.1991, c.261 (C.2C:25-19), enumerated in subsection a. of section 5 of P.L.2014, c.31 (C.2A:162-19), if the prosecutor seeks the pretrial detention of the eligible defendant under section 5 of P.L.2014, c.31 (C.2A:162-19) and after a hearing pursuant to that section the court finds clear and convincing evidence that no amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process. The court may also order the pretrial detention of an eligible defendant when the prosecutor moves for a pretrial detention hearing and the eligible defendant fails to rebut a presumption of pretrial detention that may be established for the crimes enumerated under subsection b. of section 5 of P.L.2014, c.31 (C.2A:162-19).

(2) For purposes of ordering the pretrial detention of an eligible defendant pursuant to this section and section 5 of P.L.2014, c.31 (C.2A:162-19) or pursuant to section 10 of P.L.2014, c.31 (C.2A:162-24), when determining whether no amount of monetary bail, non-monetary

conditions or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, the court may consider the amount of monetary bail only with respect to whether it will, by itself or in combination with non-monetary conditions, reasonably assure the eligible defendant's appearance in court when required.

b. Regarding the pretrial detention hearing moved for by the prosecutor, except for when an eligible defendant is charged with a crime set forth under paragraph (1) or (2) of subsection b. of section 5 of P.L.2014, c.31 (C.2A:162-19), there shall be a rebuttable presumption that some amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

c. An eligible defendant may appeal an order of pretrial detention pursuant to the Rules of Court. The appeal shall be heard in an expedited manner. The eligible defendant shall be detained pending the disposition of the appeal.

d. If the court does not order the pretrial detention of an eligible defendant at the conclusion of the pretrial detention hearing under this section and section 5 of

P.L.2014, c.31 (C.2A:162-19), the court shall order the release of the eligible defendant pursuant to section 3 of P.L.2014, c.31 (C.2A:162-17).

N.J. Stat. Ann. § 2A:162-19

a. A prosecutor may file a motion with the court at any time, including any time before or after an eligible defendant's release pursuant to section 3 of P.L.2014, c.31 (C.2A:162-17), seeking the pretrial detention of an eligible defendant for:

(1) any crime of the first or second degree enumerated under subsection d. of section 2 of P.L.1997, c.117 (C.2C:43-7.2);

(2) any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment;

(3) any crime if the eligible defendant has been convicted of two or more offenses under paragraph (1) or (2) of this subsection;

(4) any crime enumerated under paragraph (2) of subsection b. of section 2 of P.L.1994, c.133 (C.2C:7-2) or crime involving human trafficking pursuant to section 1 of P.L.2005, c.77 (C.2C:13-8) or P.L.2013, c.51 (C.52:17B-237 et al.) when the victim is a minor, or the crime of endangering the welfare of a child under N.J.S.2C:24-4;

(5) any crime enumerated under subsection c. of N.J.S.2C:43-6;

(6) any crime or offense involving domestic violence as defined in subsection a. of section 3 of P.L.1991, c.261 (C.2C:25-19); or

(7) any other crime for which the prosecutor believes there is a serious risk that:

(a) the eligible defendant will not appear in court as required;

(b) the eligible defendant will pose a danger to any other person or the community; or

(c) the eligible defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure or intimidate, a prospective witness or juror.

b. When a motion for pretrial detention is filed pursuant to subsection a. of this section, there shall be a rebuttable presumption that the eligible defendant shall be detained pending trial because no amount of monetary bail, non-monetary condition or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, if the court finds probable cause that the eligible defendant:

(1) committed murder pursuant to N.J.S.2C:11-3; or

(2) committed any crime for which the eligible defendant would be subject to an ordinary or extended term of life imprisonment.

c. A court shall hold a hearing to determine whether any amount of monetary bail or non-monetary conditions or combination of monetary bail and conditions, including those set forth under subsection

b. of section 3 of P.L.2014, c.31 (C.2A:162-17) will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

d. (1) Except as otherwise provided in this subsection, the pretrial detention hearing shall be held no later than the eligible defendant's first appearance unless the eligible defendant, or the prosecutor, seeks a continuance. If a prosecutor files a motion for pretrial detention after the eligible defendant's first appearance has taken place or if no first appearance is required, the court shall schedule the pretrial detention hearing to take place within three working days of the date on which the prosecutor's motion was filed, unless the prosecutor or the eligible defendant seeks a continuance. Except for good cause, a continuance on motion of the eligible defendant may not exceed five days, not including any intermediate Saturday, Sunday, or legal holiday. Except for good cause, a continuance on motion of the prosecutor may not exceed three days, not including any intermediate Saturday, Sunday, or legal holiday.

(2) Upon the filing of a motion by the prosecutor seeking the pretrial detention of the eligible defendant and during any continuance that may be granted by the court, the eligible defendant shall be detained in jail, unless the eligible defendant was previously released from custody before trial, in which case the court shall issue a

notice to appear to compel the appearance of the eligible defendant at the detention hearing. The court, on motion of the prosecutor or sua sponte, may order that, while in custody, an eligible defendant who appears to be a drug dependent person receive an assessment to determine whether that eligible defendant is drug dependent.

e. (1) At the pretrial detention hearing, the eligible defendant has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The eligible defendant shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing.

(2) In pretrial detention proceedings for which there is no indictment, the prosecutor shall establish probable cause that the eligible defendant committed the predicate offense. A presumption of pretrial detention as provided in subsection b. of this section may be rebutted by proof provided by the eligible defendant, the prosecutor, or from other materials submitted to the court. The standard of proof for a rebuttal of the presumption of pretrial detention shall be a preponderance of the evidence. If proof cannot be established to rebut the presumption, the court may order the eligible defendant's pretrial

detention. If the presumption is rebutted by sufficient proof, the prosecutor shall have the opportunity to establish that the grounds for pretrial detention exist pursuant to this section.

(3) Except when an eligible defendant has failed to rebut a presumption of pretrial detention pursuant to subsection b. of this section, the court's finding to support an order of pretrial detention pursuant to section 4 of P.L.2014, c.31 (C.2A:162-18) that no amount of monetary bail, non-monetary conditions or combination of monetary bail and conditions will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process shall be supported by clear and convincing evidence.

f. The hearing may be reopened, before or after a determination by the court, at any time before trial, if the court finds that information exists that was not known to the prosecutor or the eligible defendant at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

N.J. Stat. Ann. § 2A:162-20

In determining in a pretrial detention hearing whether no amount of monetary bail, non-monetary

conditions or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, the court may take into account information concerning:

a. The nature and circumstances of the offense charged;

b. The weight of the evidence against the eligible defendant, except that the court may consider the admissibility of any evidence sought to be excluded;

c. The history and characteristics of the eligible defendant, including:

(1) the eligible defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(2) whether, at the time of the current offense or arrest, the eligible defendant was on probation, parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal law, or the law of this or any other state;

d. The nature and seriousness of the danger to any other person or the community that would be

posed by the eligible defendant's release, if applicable;

e. The nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the eligible defendant's release, if applicable; and

f. The release recommendation of the pretrial services program obtained using a risk assessment instrument under section 11 of P.L.2014, c.31 (C.2A:162-25).

N.J. Stat. Ann. § 2A:162-21

a. In a pretrial detention order issued pursuant to sections 4 and 5 of P.L.2014, c.31 (C.2A:162-18 and C.2A:162-19), the court shall:

(1) include written findings of fact and a written statement of the reasons for the detention; and

(2) direct that the eligible defendant be afforded reasonable opportunity for private consultation with counsel.

b. The court may, by subsequent order, permit the temporary release of the eligible defendant subject to appropriate restrictive conditions, which may include but shall not be limited to pretrial supervision, to the extent that the court determines the release to be necessary for preparation of the eligible defendant's defense or for another compelling reason.

N.J. Stat. Ann. § 2A:162-22

a. Concerning an eligible defendant subject to pretrial detention as ordered by a court pursuant to sections 4 and 5 of P.L.2014, c.31 (C.2A:162-18 and C.2A:162-19) or an eligible defendant who is detained in jail due to

the inability to post the monetary bail imposed by the court pursuant to subsection c. or d. of section 3 of P.L.2014, c.31 (C.2A:162-17):

(1) (a) The eligible defendant shall not remain detained in jail for more than 90 days, not counting excludable time for reasonable delays as set forth in subsection b. of this section, prior to the return of an indictment. If the eligible defendant is not indicted within that period of time, the eligible defendant shall be released from jail unless, on motion of the prosecutor, the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result from the eligible defendant's release from custody, so that no appropriate conditions for the eligible defendant's release could reasonably address that risk, and also finds that the failure to indict the eligible defendant in accordance with the time requirement set forth in this subparagraph was not due to unreasonable delay by the prosecutor. If the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result, and also finds that the failure to indict the eligible defendant in accordance with the time requirement set forth in this subparagraph was not due to unreasonable delay by the prosecutor, the court may allocate an additional period of time, not to exceed 45

days, in which the return of an indictment shall occur. Notwithstanding the court's previous findings for ordering the eligible defendant's pretrial detention, or if the court currently does not find a substantial and unjustifiable risk or finds unreasonable delay by the prosecutor as described in this subparagraph, the court shall order the release of the eligible defendant pursuant to section 3 of P.L.2014, c.31 (C.2A:162-17).

(b) If the eligible defendant is charged or indicted on another matter resulting in the eligible defendant's pretrial detention, the time calculations set forth in subparagraph (a) of this paragraph for each matter shall run independently.

(2) (a) An eligible defendant who has been indicted shall not remain detained in jail for more than 180 days on that charge following the return or unsealing of the indictment, whichever is later, not counting excludable time for reasonable delays as set forth in subsection b. of this section, before commencement of the trial. If the trial does not commence within that period of time, the eligible defendant shall be released from jail unless, on motion of the prosecutor, the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result from the eligible defendant's release from custody, so that no appropriate conditions for the eligible

defendant's release could reasonably address that risk, and also finds that the failure to commence trial in accordance with the time requirement set forth in this subparagraph was not due to unreasonable delay by the prosecutor. If the court finds that a substantial and unjustifiable risk to the safety of any other person or the community or the obstruction of the criminal justice process would result, and also finds that the failure to commence trial in accordance with the time requirement set forth in this subparagraph was not due to unreasonable delay by the prosecutor, the court may allocate an additional period of time in which the eligible defendant's trial shall commence. Notwithstanding the court's previous findings for ordering the eligible defendant's pretrial detention, or if the court currently does not find a substantial and unjustifiable risk or finds unreasonable delay by the prosecutor as described in this subparagraph, the court shall order the release of the eligible defendant pursuant to section 3 of P.L.2014, c.31 (C.2A:162-17). Notwithstanding any other provision of this section, an eligible defendant shall be released from jail pursuant to section 3 of P.L.2014, c.31 (C.2A:162-17) after a release hearing if, two years after the court's issuance of the pretrial detention order for the eligible defendant, excluding any delays attributable to the eligible defendant, the prosecutor is not ready to proceed to voir dire or to opening

argument, or to the hearing of any motions that had been reserved for the time of trial.

(b) (i) For the purposes of this paragraph, a trial is considered to have commenced when the court determines that the parties are present and directs them to proceed to voir dire or to opening argument, or to the hearing of any motions that had been reserved for the time of trial.

(ii) The return of a superseding indictment against the eligible defendant shall extend the time for the trial to commence.

(iii) If an indictment is dismissed without prejudice upon motion of the eligible defendant for any reason, and a subsequent indictment is returned, the time for trial shall begin running from the date of the return of the subsequent indictment.

(iv) A trial ordered after a mistrial or upon a motion for a new trial shall commence within 120 days of the entry of the order of the court. A trial ordered upon the reversal of a judgment by any appellate court shall commence within 120 days of the service of that court's trial mandate.

(c) If the eligible defendant is indicted on another matter resulting in the eligible defendant's pretrial detention, the time

calculations set forth in this paragraph for each matter shall run independently.

b. (1) The following periods shall be excluded in computing the time in which a case shall be indicted or tried:

(a) The time resulting from an examination and hearing on competency and the period during which the eligible defendant is incompetent to stand trial or incapacitated;

(b) The time from the filing to the disposition of an eligible defendant's application for supervisory treatment pursuant to N.J.S.2C:36A-1 or N.J.S.2C:43-12 et seq., special probation pursuant to N.J.S.2C:35-14, drug or alcohol treatment as a condition of probation pursuant to N.J.S.2C:45-1, or other pretrial treatment or supervisory program;

(c) The time from the filing to the final disposition of a motion made before trial by the prosecutor or the eligible defendant;

(d) The time resulting from a continuance granted, in the court's discretion, at the eligible defendant's request or at the request of both the eligible defendant and the prosecutor;

(e) The time resulting from the detention of an eligible defendant in another jurisdiction provided the prosecutor has been diligent and has made reasonable efforts to obtain the eligible defendant's presence;

(f) The time resulting from exceptional circumstances including, but not limited to, a

natural disaster, the unavoidable unavailability of an eligible defendant, material witness or other evidence, when there is a reasonable expectation that the eligible defendant, witness or evidence will become available in the near future;

(g) On motion of the prosecutor, the delay resulting when the court finds that the case is complex due to the number of defendants or the nature of the prosecution;

(h) The time resulting from a severance of codefendants when that severance permits only one trial to commence within the time period for trial set forth in this section;

(i) The time resulting from an eligible defendant's failure to appear for a court proceeding;

(j) The time resulting from a disqualification or recusal of a judge;

(k) The time resulting from a failure by the eligible defendant to provide timely and complete discovery;

(l) The time for other periods of delay not specifically enumerated if the court finds good cause for the delay; and

(m) Any other time otherwise required by statute.

(2) The failure by the prosecutor to provide timely and complete discovery shall not be considered excludable time unless the discovery only became available after the time set for discovery.

N.J. Stat. Ann. § 2A:162-23

a. (1) If an eligible defendant is released from jail pursuant to section 3 or 8 of P.L.2014, c.31 (C.2A:162-17 or C.2A:162-22), the court shall, in the document authorizing the eligible defendant's release, notify the eligible defendant of:

(a) all the conditions, if any, to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the eligible defendant's conduct; and

(b) the penalties for and other consequences of violating a condition of release, which may include the immediate issuance of a warrant for the eligible defendant's arrest.

The failure of the court to notify the eligible defendant of any penalty or consequence for violating a condition of release as required by this subparagraph shall not preclude any remedy authorized under the law for any violation committed by the eligible defendant.

(2) If the court enters an order that is contrary to a recommendation made in a risk assessment when determining a method of release or setting release conditions, the court shall provide an explanation in the document that authorizes the eligible defendant's release.

b. Notwithstanding any law to the contrary, an eligible defendant who is released from jail on personal recognizance or subject only to non-monetary conditions pursuant to section 3 or 8 of P.L.2014, c.31 (C.2A:162-17 or C.2A:162-22) shall not be assessed any fee or other monetary assessment related to processing the eligible defendant's release.

N.J. Stat. Ann. § 2A:162-24

Upon motion of a prosecutor, when an eligible defendant is released from custody before trial pursuant to section 3 or 8 of P.L.2014, c.31 (C.2A:162-17 or C.2A:162-22), the court, upon a finding that the eligible defendant while on release has violated a restraining order or condition of release, or upon a finding of probable cause to believe that the eligible defendant has committed a new crime while on release, may not revoke the eligible defendant's release and order that the eligible defendant be detained pending trial unless the court, after considering all relevant circumstances including but not limited to the nature and seriousness of the violation or criminal act committed, finds clear and convincing evidence that no monetary bail, non-monetary conditions of release or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.

N.J. Stat. Ann. § 2A:162-25

a. The Administrative Director of the Courts shall establish and maintain a Statewide Pretrial Services Program which shall provide pretrial services to effectuate the purposes of sections 1 through 11 of P.L.2014, c.31 (C.2A:162-15 et seq.).

b. The Pretrial Services Program shall, after an eligible defendant is temporarily detained pursuant to subsection a. of section 2 of P.L.2014, c.31 (C.2A:162-16) following the issuance of a complaint-warrant,

conduct a risk assessment on that eligible defendant for the purpose of making recommendations to the court concerning an appropriate pretrial release decision, including whether the eligible defendant shall be: released on the eligible defendant's own personal recognizance or on execution of an unsecured appearance bond; released on a non-monetary condition or conditions as set forth under subsection b. of section 3 of P.L.2014, c.31 (C.2A:162-17); released on monetary bail, other than an unsecured appearance bond; released on a combination of monetary bail and non-monetary conditions set forth under section 3 of P.L.2014, c.31 (C.2A:162-17); or any other conditions necessary to effectuate the purposes of sections 1 through 11 of P.L.2014, c.31 (C.2A:162-15 et seq.). The risk assessment shall be completed and presented to the court so that the court can, without unnecessary delay, but in no case later than 48 hours after the eligible defendant's commitment to jail, make a pretrial release decision on the eligible defendant pursuant to section 3 of P.L.2014, c.31 (C.2A:162-17).

c. The pretrial risk assessment shall be conducted using a risk assessment instrument approved by the Administrative Director of the Courts that meets the requirements of this subsection.

(1) The approved risk assessment instrument shall be objective, standardized, and developed based on analysis of empirical data and risk factors relevant to the risk of failure to appear in court when required and the danger to the community while on pretrial release. The risk assessment instrument shall not be required to

include factors specifically pertaining to the risk for obstructing or attempting to obstruct the criminal justice process.

(2) The approved risk assessment instrument shall gather demographic information about the eligible defendant including, but not limited to, race, ethnicity, gender, financial resources, and socio-economic status. Recommendations for pretrial release shall not be discriminatory based on race, ethnicity, gender, or socio-economic status.

d. In addition to the pretrial risk assessments made pursuant to this section, the Pretrial Services Program shall monitor appropriate eligible defendants released on conditions as ordered by the court.

N.J. Stat. Ann. § 2A:162-26

a. There is hereby created, in but not of the Department of Law and Public Safety, a commission to be known as the Pretrial Services Program Review Commission, consisting of 17 members as follows: the Attorney General, or his designee; two members of the Senate, who shall each be of different political parties, appointed by the Senate President; two members of the General Assembly, who shall each be of different political parties, appointed by the Speaker of the General Assembly; the Administrative Director of the Courts, or his designee; two county prosecutors, appointed by the Governor based upon the recommendation of the County Prosecutors Association of the State of New Jersey; the Public Defender, or his designee; the following ex-officio public members: the President of the New Jersey

State Conference of the National Association for the Advancement of Colored People, the President of the Latino Action Network, the Executive Director of the American Civil Liberties Union of New Jersey, the New Jersey State Director of the Drug Policy Alliance, and the President and Chief Executive Officer of the New Jersey Institute for Social Justice; and the following appointed public members: a county or municipal law enforcement officer appointed by the Governor, and two additional members having experience with, possessing a background in, or demonstrating a specialized knowledge of, the legal, policy, or social aspects of criminal justice pretrial release and detention programs, one appointed by the Governor upon the recommendation of the President of the Senate, and one appointed by the Governor upon the recommendation of the Speaker of the General Assembly.

b. (1) The members' terms shall be as follows:

(a) The State and county ex-officio members shall serve during their elective or appointed term of office;

(b) The ex-officio public members shall serve during their term of office; and

(c) (i) The appointed public members shall each be appointed for a term of three years, except that of the two members with experience, background, or specialized knowledge of criminal justice pretrial release and detention programs first appointed, the member appointed by the Governor upon the recommendation of the Speaker of the General Assembly

shall serve for a term of two years, and the member appointed by the Governor upon the recommendation of the Senate President shall serve for a term of three years.

(ii) Each member appointed shall hold office for the term of appointment and until a successor shall have been appointed and qualified.

(iii) Any vacancy in the appointed membership of the commission shall be filled by appointment in the same manner as the original appointment was made.

c. (1) The commission shall organize as soon as may be practicable upon the ex-officio designation and appointment of a majority of its authorized membership. The members shall elect one of the members to serve as chair, and one to serve as vice-chair, and the chair may appoint a secretary, who need not be a member of the commission.

(2) The commission shall meet at the call of the chair, or when requested by a majority of its members, at those times and places within the State of New Jersey as the chair shall determine. A majority of the commission's authorized membership shall constitute a quorum for the transaction of any business, including the adoption of any commission recommendations.

d. The members of the commission shall serve without compensation, but shall be eligible for reimbursement for necessary and reasonable expenses incurred in the performance of their official duties within the limits of

funds appropriated or otherwise made available to the commission for its purposes.

e. The Division of Criminal Justice in the Department of Law and Public Safety shall, at the direction of the Attorney General, provide legal, stenographic, technical, clerical, and other staff and resource assistance to the commission, and additionally the commission may incur expenses as may be necessary in order to perform its duties within the limits of funds appropriated or otherwise made available to it for its purposes.

f. It shall be the duty of the commission to:

(1) Review the annual report of the Administrative Director of the Courts concerning the development and administration of the Statewide Pretrial Services Program that is submitted to the commission pursuant to subsection b. of section 17 of P.L.2014, c.31 (C.2B:1-11);

(2) Examine the existing law concerning pretrial release and detention established by sections 1 through 11 of P.L.2014, c.31 (C.2A:162-15 et seq.);

(3) Research criminal justice pretrial release and detention programs from other states and jurisdictions; and

(4) Make recommendations for legislation related to paragraphs (1) through (3) of this subsection.

g. The commission shall report annually to the Governor, to the Legislature pursuant to section 2 of P.L.1991, c.164 (C.52:14-19.1), and to the Supreme Court, its activities, as well as its findings and recommendations, if any, for legislation.