916 F.3d 1302
United States Court of Appeals, Tenth Circuit.

Darlene COLLINS; Bail Bond Association of New Mexico; Richard Martinez; Bill Sharer; Craig Brandt; Carl Trujillo, Plaintiffs-Appellants,

v.

Charles W. DANIELS; Edward L. Chavez; Petra Jimenez Maez; Barbara J. Vigil; Judith K. Nakamura; New Mexico Supreme Court; Nan Nash; The Second Judicial Court; Henry A. Alainz; Robert L. Padilla; Bernalillo County Metropolitan Court; James Noel; Bernalillo County; Board of County Commissioners, County of Bernalillo, Defendants-Appellees.

Nos. 17-2217 and 18-2045

FILED February 25, 2019

Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:17-CV-00776-RJ-KK)

Attorneys and Law Firms

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Ari Biernoff, Office of the New Mexico Attorney General, Santa Fe, New Mexico, appearing for Appellees Charles W. Daniels, Edward L. Chavez, Petra Jimenez Maez, Barbara J. Vigil, Judith K. Nakamura, the New Mexico Supreme Court, Nan Nash,

the Second Judicial Court, Henry Alainz, Robert Padilla, the Bernalillo County Metropolitan Court, and James Noel.

Brandon Huss, The New Mexico Association of Counties, Santa Fe, New Mexico, on the brief for Appellee County Commissioners of the County of Bernalillo.

Before BRISCOE, MATHESON, and BACHARACH, Circuit Judges.

Opinion

BRISCOE, Circuit Judge.

This is a § 1983 case that challenges the constitutionality of New Mexico's system of bail. Plaintiffs-Appellants Darlene Collins, the Bail Bond Association of New Mexico ("BBANM"), and five New Mexico state legislators (the "Legislator Plaintiffs") allege that New Mexico's system of bail violates the Excessive Bail Clause of the Eighth Amendment, as well as the procedural and substantive components of the Due Process Clause of the Fourteenth Amendment.[1] Plaintiffs further allege that the rules governing New Mexico's system of bail were promulgated by the New Mexico Supreme Court in violation of the New Mexico Constitution. Defendants-Appellees are the New Mexico Supreme Court and its justices; the Second Judicial District Court of New Mexico, its chief judge, and its court executive officer; and the Bernalillo County Metropolitan Court, its chief judge, and its court executive officer.[2]

Defendants moved to dismiss, arguing that Plaintiffs lack standing, Defendants are immune from suit, and Plaintiffs have failed to state a claim.

Defendants also moved for Rule 11 sanctions on the basis that Plaintiffs' attorneys filed suit without adequately researching the viability of Plaintiffs' claims. Plaintiffs then moved for leave to amend their complaint to add a claim that Defendants' Rule 11 motion violated Plaintiffs' First Amendment rights.

The district court granted Defendants' motion to dismiss because it found that BBANM and the Legislator Plaintiffs lack standing, Defendants are immune from suit, and Plaintiffs failed to state a claim. The district court also granted Defendants' motion for sanctions and denied Plaintiffs' motion to amend. Plaintiffs timely appealed.[3] Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we AFFIRM.

I

A. Legal Background

As of 2014, when bail hearings were held in New Mexico, judges commonly set the amount of any secured bail bond based "solely on the nature of [a defendant's] charged offense without regard to individual determinations of flight risk or continued danger to the community." *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014). The New Mexico Supreme Court held that this practice was impermissible because "[n]either the [New Mexico] Constitution nor [New Mexico's] rules of criminal procedure permit[ted] a judge to base a pretrial release decision solely on the severity of the charged offense." *Id.* The Court explained that "[s]etting money bail based on the severity of the crime leads to either release or detention, determined by a defendant's wealth alone instead of being based on the factors relevant to a

particular defendant's risk of nonappearance or reoffense in a particular case." *Id.*

In March 2016, the New Mexico legislature proposed amending the state constitution to change how the state administers bail. S.J. Res. 1, 52d Leg., 2d Sess. (N.M. 2016). The amendment was ratified by popular referendum in November 2016. The relevant provision now reads:

> All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.
>
> Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.
>
> A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement

> to post bond. The court shall rule on the motion in an expedited manner.

N.M. Const. art. II, § 13.

In July 2017, the Supreme Court of New Mexico revised the state's Rules of Criminal Procedure to implement the recent constitutional amendment (the "2017 Rules"). The relevant provisions state:

> Pending trial, any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the defendant's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose non-monetary conditions of release ..., but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

N.M. R. Crim. P. 5-401(B).

> If the court makes findings of the reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

N.M. R. Crim. P. 5-401(E).

The 2017 Rules were meant to "clarify that the amount of [a] secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge." N.M. R. Crim. P. 5-401 cmt. (referring to N.M. R. Crim. P. 5-401(E)(1)(d)). "Instead, [a] court must consider [each] individual defendant's financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant's appearance in court after the defendant is released." *Id.* (referring to N.M. R. Crim. P. 5-401(E)(1)(a)–(c)).

Depending on a defendant's custodial status, a "district court shall conduct a hearing ... and issue an order setting the conditions of release as soon as practicable, but in no event later than" three to five "days after the date of arrest." N.M. R. Crim. P. 5-401(A)(1). "The chief judge of [each] district court may [also] designate by written court order responsible persons to implement ... pretrial release procedures...." N.M. R. Crim. P. 5-401(N). Per these procedures, "[a] designee shall release a defendant from custody prior to the defendant's first appearance before a judge if the defendant," *id.*, (1) "has been arrested and detained for [most] ... misdemeanor[s]" and other "[m]inor offenses," (2) "qualifies for pretrial release based on a risk assessment and a pretrial release schedule approved by the Supreme Court," or (3) "qualifies for pretrial release under a local release on recognizance program that relies on individualized assessments of arrestees and has been approved by order of the Supreme Court," N.M. R. Crim. P. 5-408(B)–(D). When a defendant is released pursuant to Rule 5-408, he is "released on personal recognizance on [his] ... promise

to appear and subject to ... standard conditions of release." N.M. R. Crim. P. Form 9-302.

B. Factual Background

Two additional events underlie Plaintiffs' claims. First, in late 2016, the Second Judicial District Court of New Mexico and the Bernalillo County Metropolitan Court—acting through their chief judges and court executive officers—signed a memorandum of understanding with the Laura and John Arnold Foundation, allowing the courts to use the Arnold Tool to perform risk assessments of criminal defendants prior to their bail hearings. App. Vol. I at 29, 65–72. The Arnold Tool, formally known as the Public Safety Assessment, "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." *Holland v. Rosen*, 895 F.3d 272, 281 (3d Cir. 2018); *see also* Laura and John Arnold Foundation, *Public Safety Assessment - What is the PSA*, https://www.psapretrial.org/about/what-is-psa (last visited February 4, 2019). Plaintiffs allege that "[t]he use of the Arnold Tool result[s] in persons accused of a crime being denied the opportunity to secure their pre-trial release through a secured bond as the tool requires the court[,] thr[ough] an entirely opaque program[,] to assess non-monetary conditions of release that infringe upon a person's pretrial liberty." App. Vol. I at 29.

Second, on Saturday, July 1, 2017—the first day when the 2017 Rules were in effect—Plaintiff Darlene Collins was arrested for "aggravated assault arising out of a domestic dispute," *id.* at 32, a fourth degree felony, N.M. Stat. § 30-3-2. Plaintiffs allege that, prior to the effective date of the 2017 Rules, "the jailhouse could

have set a reasonable, non-excessive, monetary bail to ensure ... Collin's [sic] appearance at arraignment and then for trial." App. Vol. I at 33. But the jailhouse "could not, under the new Supreme Court Rules[,] consider releasing ... Collins subject to monetary bail," even though Collins's "family was prepared to use their own financial resources with the assistance of a member of ... BBANM to pay the required amount for pre-arraignment release." *Id.* Instead, "Collins was incarcerated for almost 5 full days" before her arraignment in Bernalillo County Metropolitan Court on July 5, 2017. *Id.* at 33, 272–75. "[N]o conditions were [ultimately] imposed upon her release post-arraignment and pre-trial other than a verbal order from the Court that she was being released, but she was not allowed to return to her home."[4] *Id.* at 33.

C. Procedural Background

Plaintiffs Collins, BBANM,[5] and the Legislator Plaintiffs brought this case as a putative class action on behalf of all New Mexico criminal defendants whose bail hearings have been or will be conducted using the 2017 Rules or the Arnold Tool. *Id.* at 36. Plaintiffs allege that the 2017 Rules and the Arnold Tool violate the Excessive Bail Clause of the Eighth Amendment "by permitting judges to consider secured bond only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required." *Id.* at 42. According to Plaintiffs, this "subordinat[ion] [of] secured bond" "effectively takes secured bonds off the table as an option" for courts deciding whether to release a defendant pending trial. *Id.*

Plaintiffs further allege that "Defendants violate the procedural component of the Due Process Clause" of the Fourteenth Amendment "[b]y imposing liberty-restricting conditions on ... Collins and other presumptively innocent criminal defendants without offering them the historically-required option of non-excessive monetary bail." *Id.* at 44. Plaintiffs also allege that "Defendants ... violate Plaintiffs' substantive rights under the Due Process Clause [of the Fourteenth Amendment] because the option of non-excessive bail for a bailable offense is fundamental to our scheme of ordered liberty and deeply rooted in this Nation's history and tradition." *Id.* (quotation marks and emphasis omitted). Finally, Plaintiffs allege that the New Mexico Supreme Court exceeded its authority, under the New Mexico Constitution, when promulgating the 2017 Rules.[6] *Id.* at 34–35.

Plaintiffs seek damages, a declaration that the 2017 Rules and use of the Arnold Tool are unconstitutional, and an injunction against future use of the 2017 Rules and the Arnold Tool. *Id.* at 47–48. Plaintiffs sued the New Mexico Supreme Court, the Second Judicial District Court, and the Bernalillo County Metropolitan Court for declaratory and injunctive relief. *Id.* at 24–26. Plaintiffs also sued the justices of the New Mexico Supreme Court, as well as the chief judges and court executive officers of the Second Judicial District Court of New Mexico and the Bernalillo County Metropolitan Court. *Id.* Plaintiffs sued these defendants in their individual capacities for damages and in their official capacities for declaratory and injunctive relief. *Id.*

Defendants moved to dismiss, arguing that Plaintiffs lack standing; sovereign immunity bars Plaintiffs' claims against the courts themselves and the

state officials in their official capacities; legislative immunity bars Plaintiffs' claims against the supreme court justices; judicial immunity bars Plaintiffs' claims against the state court judges and court executive officers; and Plaintiffs have failed to state a claim. *Id.* 171–99. While their motion to dismiss was pending, Defendants moved for Rule 11 sanctions. App. Vol. II at 445–58. Defendants argued that they were entitled to sanctions because Plaintiffs' counsel pursued unwarranted claims without offering a reasonable argument to modify existing law on standing or immunity. After being served with Defendants' motion for sanctions, Plaintiffs moved to amend their complaint to add a claim for "violations of the First Amendment [from the] vindictive prosecution undertaken by" Defendants. *Id.* at 362. Plaintiffs argued that "Defendants undertook to threaten and intimidate Plaintiffs into abandoning their Free Speech and their right of access to the Courts through the service of a defamatory Rule 11 [m]otion directed personally at Plaintiffs' counsel." *Id.* at 361–62.

The district court granted the motion to dismiss after finding that BBANM and the Legislator Plaintiffs lacked standing; that Plaintiffs' claims against the state courts and individual defendants, in their official capacities, are barred by sovereign immunity; that Plaintiffs' claims against the state court judges and court executives, in their individual capacities, are barred by judicial immunity; that Plaintiffs' claims against the state supreme court justices, in their individual capacities, are barred by legislative immunity; and that Plaintiffs failed to state a claim. The district court granted the motion for sanctions because it found that there was no objectively reasonable basis for Plaintiffs to think that BBANM or the Legislator

Plaintiffs had standing, or that Plaintiffs could overcome Defendants' immunities. The district court also found that BBANM and the Legislator Plaintiffs were named as plaintiffs for an improper purpose. Finally, the district court denied the motion to amend as futile. Plaintiffs timely appealed all three rulings.

II

12We review de novo whether Plaintiffs have standing. *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013). "Each plaintiff must have standing to seek each form of relief in each claim." *Am. Humanist Ass'n, Inc. v. Douglas Cty. Sch. Dist. RE-1*, 859 F.3d 1243, 1250 (10th Cir. 2017) (quoting *Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007)).

"[S]tanding 'is an essential and unchanging part of the case-or-controversy requirement of Article III.' " *S. Utah Wilderness All.*, 707 F.3d at 1153 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

> To satisfy Article III's standing requirements, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Id. (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)).

A. BBANM

Plaintiffs argue that BBANM has standing because it (1) "has associational standing," Aplt. Br. at 30, and (2) "has third-party standing to assert the constitutional rights of potential customers [who will be] denied bail," *id.* at 32.[7] In reality, whether BBANM has standing is only a question of third-party standing. "An association has ... standing" "to raise [the] claims of [its] members" "only if: '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' " *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 756 (10th Cir. 2010) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)). We need only consider the first prong of associational standing. Because BBANM's members are not criminal defendants, they do not possess the Eighth and Fourteenth Amendment rights asserted in Plaintiffs' complaint. Therefore, like BBANM itself, BBANM's members only have standing if they can assert the constitutional rights of criminal defendants.

"Ordinarily, a party 'must assert his own legal rights' and 'cannot rest his claim to relief on the legal rights ... of third parties.' " *Sessions v. Morales-Santana*, ___ U.S. ____, 137 S.Ct. 1678, 1689, 198 L.Ed.2d 150 (2017) (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). "But we recognize an exception where ... 'the party asserting the right has a close relationship with the person who possesses the right and there is a hindrance to the

possessor's ability to protect his own interests.' " *Id.* (alteration omitted) (quoting *Kowalski*, 543 U.S. at 130, 125 S.Ct. 564). Neither BBANM nor its members are eligible for this exception to the rule against third-party standing.

In *Kowalski*, two attorneys challenged a state statute that generally prohibited the "appointment of appellate counsel for indigents who plead guilty." 543 U.S. at 128, 125 S.Ct. 564. The plaintiffs alleged that the "statute denied indigents their federal constitutional rights to due process and equal protection." *Id.* The Supreme Court held that "the attorneys [did] not have third-party standing to assert the rights of ... indigent defendants denied appellate counsel." *Id.* at 134, 125 S.Ct. 564. First, the Court reasoned that, because the attorneys sought to assert the rights of "as yet unascertained ... criminal defendants" whose rights would be violated, "[t]he attorneys ... [did] not have a close relationship with their alleged clients; indeed, they [had] no relationship at all." *Id.* at 130–31, 125 S.Ct. 564 (quotation marks omitted). Next, the Court explained "that the lack of an attorney ... is [not] the type of hindrance necessary to allow another to assert the indigent defendants' rights." *Id.* at 132, 125 S.Ct. 564. Proceeding pro se, the indigent defendants could assert their constitutional rights on direct appeal and in collateral proceedings. *Id.* at 131–32, 125 S.Ct. 564.

Like the attorneys in *Kowalski*, BBANM and its members lack third-party standing. First, BBANM and its members have "no relationship at all," *id.* at 131, 125 S.Ct. 564, with "potential customers denied bail under" the 2017 Rules and the Arnold Tool, Aplt. Br. at 32. Second, criminal defendants in New Mexico are not hindered in asserting their own constitutional rights in their own criminal proceedings or in a § 1983 suit, as

Collins has done here. Plaintiffs argue that criminal defendants are hindered in asserting their own rights because they need "a third-party willing to expend funds to challenge the constitutionality of the" 2017 Rules, especially because criminal defendants subject to pretrial conditions of release "need to prepare for their criminal trial[s]." Aplt. Br. at 33–34. But the criminal defendants in *Kowalski* were not hindered in asserting their constitutional rights even though they were proceeding pro se and needed to prepare for their criminal appeals, likely while in custody. 543 U.S. at 131–32, 125 S.Ct. 564.

B. The Legislator Plaintiffs

"[A] threshold question in the legislator standing inquiry is whether the legislator-plaintiffs assert an institutional injury." *Kerr v. Hickenlooper* (*Kerr II*), 824 F.3d 1207, 1214 (10th Cir. 2016). "[I]ndividual legislators may not support standing by alleging only an institutional injury." *Id.* "[A]n institutional injury constitutes some injury to the power of the legislature as a whole rather than harm to an individual legislator." *Id.* "[I]nstitutional injuries ... do not 'zero in on any individual' " legislator and are " 'widely dispersed' and 'necessarily impact all members of a legislature equally.' " *Id.* (alterations omitted) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, —— U.S. ——, 135 S.Ct. 2652, 2664, 192 L.Ed.2d 704 (2015)).

Plaintiffs suggest that the Legislator Plaintiffs have standing to challenge the 2017 Rules because the rules represent "an unconstitutional usurpation of [legislative] power by" the New Mexico Supreme Court.[8] Aplt. Br. at 36. In our view, it is difficult to conceive of a better example of an institutional injury.

The injury alleged by Plaintiffs "is based on [a] loss of legislative power that necessarily impacts all members of the [New Mexico Legislature] equally." *Kerr II*, 824 F.3d at 1215. Therefore, the Legislator Plaintiffs lack standing. *Id.* at 1217.

In an attempt to evade our holding in *Kerr II*, Plaintiffs contend that their situation is "*sui generis*" because the Legislator Plaintiffs' claim involves a "separation-of-powers component." Aplt. Reply Br. at 22–23. Notwithstanding that Plaintiffs waive this argument by first raising it in their Reply Brief, *In re Motor Fuel Temperature Sales Practices Litigation*, 872 F.3d 1094, 1105 n.2 (10th Cir. 2017), a "case [that] presents separation of powers concerns" merits a rigorous standing inquiry, *Kerr II*, 824 F.3d at 1215 (citing *Ariz. State Legislature*, 135 S.Ct. at 2665 n.12). Rather than advance their standing argument, Plaintiffs have highlighted a facet of their case that weighs against concluding that the Legislator Plaintiffs have standing.

C. Darlene Collins

Defendants do not challenge Collins's standing on appeal, though they did unsuccessfully raise the issue before the district court in their motion to dismiss. We can raise issues of standing and mootness *sua sponte* because we "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). "Plaintiffs have the burden to demonstrate standing for each form of relief sought." *Lippoldt v. Cole*, 468 F.3d 1204, 1216 (10th Cir. 2006). This burden exists "at all times throughout the

litigation," *id.*, though our terminology changes depending on the stage of litigation. "[M]ootness '[is] the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' " *Brown v. Buhman*, 822 F.3d 1151, 1164 (10th Cir. 2016) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997)).

Collins seeks damages, as well as declaratory and injunctive relief. App. Vol. I at 47–48. When Collins filed suit, she had standing to seek damages for the alleged deprivation of her constitutional rights.[9] *See Faustin v. City, Cty. of Denver*, 268 F.3d 942, 948 (10th Cir. 2001). Her claim for damages is not moot; a damages award would still compensate Collins for her alleged injury. *Lippoldt*, 468 F.3d at 1216–17. The same is true insofar as Collins seeks a retrospective declaratory judgment that her constitutional rights were violated in July 2017. *Id.* at 1217.

But Collins also seeks prospective relief, in the form of a declaratory judgment and a permanent injunction. App. Vol. I at 47–48. Assuming that Collins had standing to seek prospective relief when she filed suit, Collins's claims for prospective relief are now moot because she is no longer subject to pretrial supervision. *Lippoldt*, 468 F.3d at 1217–19; Oral Argument at 5:35–5:45 (representation by Plaintiffs' counsel that New Mexico is not pursuing criminal charges against Collins).

Moreover, a plaintiff cannot sustain a claim for prospective injunctive relief that is based on "speculative future harm." *Lippoldt*, 468 F.3d at 1218. Plaintiffs have never suggested that Collins faces an

appreciable risk of future arrest and subsequent arraignment using the 2017 Rules and the Arnold Tool. "[T]o establish an actual controversy ..., [Collins] would [need] ... to allege that [she will] ... have another encounter with the police." *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *see also O'Shea v. Littleton*, 414 U.S. 488, 497, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) ("We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners."). "Absent a sufficient likelihood that [she] will again be wronged in a similar way, [Collins] is no more entitled to an injunction than any other citizen of [New Mexico]; and a federal court may not entertain a claim by any or all citizens who no more than assert that [a state's laws] ... are unconstitutional." *Lyons*, 461 U.S. at 111, 103 S.Ct. 1660.

In summary, BBANM and the Legislator Plaintiffs lack standing to assert the claims raised in this case; Collins has standing to seek damages and retrospective declaratory relief based on the alleged violation of her Eighth and Fourteenth Amendment rights; but Collins's claims for prospective declaratory and injunctive relief are moot. Therefore, we turn to the question of whether Defendants are immune to Collins's claims for damages and retrospective declaratory relief.

III

We review de novo whether Defendants are immune from suit. *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 (10th Cir. 2010)

(sovereign immunity); *Lundahl v. Zimmer*, 296 F.3d 936, 938 (10th Cir. 2002) (judicial immunity); *Kamplain v. Curry Cty. Bd. of Comm'rs*, 159 F.3d 1248, 1250 (10th Cir. 1998) (legislative immunity). "The proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432, 113 S.Ct. 2167, 124 L.Ed.2d 391 (1993). Three immunity doctrines are at issue in this case—sovereign immunity, judicial immunity, and legislative immunity. We address each in turn.

A. Sovereign Immunity

Per the Eleventh Amendment, "[s]tates may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity." *Muscogee (Creek) Nation*, 611 F.3d at 1227 (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985)). "This prohibition encompasses suits against state agencies[and] [s]uits against state officials acting in their official capacities." *Id.* (citations omitted). But, "[u]nder *Ex parte Young*[, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)], a plaintiff may avoid the Eleventh Amendment's prohibition on suits against states in federal court by seeking to enjoin a state official from enforcing an unconstitutional statute." *Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013) (quotation marks omitted). Collins has sued three New Mexico courts and various state officials in their official capacities to obtain declaratory and injunctive relief. New Mexico has not consented to this suit and Congress has not abrogated New Mexico's immunity

from Plaintiffs' § 1983 claims. *Muscogee (Creek) Nation*, 611 F.3d at 1227. Therefore, we must decide whether the New Mexico courts named as defendants are entitled to sovereign immunity and whether *Ex parte Young* allows Collins to proceed against the state officials in their official capacities. Plaintiffs' discussion of sovereign immunity is limited to a single sentence in their Opening Brief. *See* Aplt. Br. at 48. Plaintiffs' "conclusory assertion[ ] ... do[es] not adequately present us with an argument ..., so we [could] consider [the point] abandoned." *Stender v. Archstone-Smith Operating Tr.*, 910 F.3d 1107, 1117 (10th Cir. 2018). We briefly address sovereign immunity to more clearly explain our disposition of Collins's claims.

"As a general matter, state courts are considered arms of the state" and are entitled to sovereign immunity. 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3524.2 (3d ed. 2018). The general rule holds true in this case. The New Mexico Supreme Court, the Second Judicial District Court, and the Bernalillo County Metropolitan Court are state agencies. N.M. Const. art. VI, § 1 ("The judicial power of the state shall be vested in ... a supreme court, a court of appeals, district courts; ... and such other courts inferior to the district courts as may be established by law from time to time in any district, county or municipality of the state."); N.M. Stat. § 34-6-21 ("The district courts are agencies of the judicial department of the state government."); N.M. Stat. § 34-8a-8 ("The metropolitan court is an agency of the judicial department of state government."). Therefore, sovereign immunity bars Collins's claims against the New Mexico Supreme Court, the Second Judicial District Court, and the Bernalillo County Metropolitan Court.

Collins's claims against the state officials in their official capacities also fail. Collins cannot proceed under *Ex parte Young* because she only has standing to seek retrospective declaratory relief.[10] *Ex parte Young* "may not be used to obtain a declaration that a state officer has violated a plaintiff's federal rights in the past." *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 495 (10th Cir. 1998) (citing *Puerto Rico Aqueduct v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993)). Therefore, sovereign immunity also bars Collins's claims against the individual defendants in their official capacities.

B. Judicial Immunity

"Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9, 11, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991) (per curiam) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). The "immunity applies only to personal capacity claims." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011). At issue here is whether the chief judges and court executive officers of the Second Judicial District Court and the Bernalillo County Metropolitan Court are immune from Collins's claims for damages.

In two sentences of their complaint, Plaintiffs allege that the Second Judicial District Court and the Bernalillo County Metropolitan Court "adopted and implemented the" Arnold Tool.[11] App. Vol. I at 20; *see also id.* at 29. In the district court, Plaintiffs argued that these were "administrative," not judicial, acts. App. Vol. II at 298. The district court found that judicial immunity barred Plaintiffs' claims against the

chief judges and court executive officers, in their individual capacities, because Plaintiffs' claims targeted the judicial act of "implement[ing] [ ] the 2017 Rules." App. Vol. III at 670. In their briefing on appeal, Plaintiffs never discuss how the district court erred when analyzing judicial immunity. In a single clause from the section of their Opening Brief discussing Rule 11 sanctions, Plaintiffs passingly characterize adoption of the Arnold Tool as a "ministerial decision[ ]." Aplt. Br. at 46. Plaintiffs have abandoned their argument regarding judicial immunity by failing to address the district court's analysis or cite authority for their position. *Stender*, 910 F.3d at 1117; *see also, e.g.*, *Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1276 (10th Cir. 2018) (concluding that appellant waived argument "by inadequately briefing the issue"). "[T]he court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (describing limits of our role when litigants proceed pro se; Plaintiffs are represented by counsel).

C. Legislative Immunity

"Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.' " *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)). "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.* A state "[c]ourt and its members are immune from suit when acting in their legislative capacity," such as by promulgating "rules of

general application [that] are statutory in character." *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 731–34, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). Plaintiffs do not dispute that New Mexico's Rules of Criminal Procedure are "rules of general application."[12] *Id.* at 731, 100 S.Ct. 1967. Therefore, the justices of the Supreme Court of New Mexico "act[ed] in their legislative capacity" when they amended the state's rules of criminal procedure in 2017. *Id.* at 734, 100 S.Ct. 1967.

Instead, Plaintiffs focus on whether the 2017 Rules are the result of "legitimate" legislative activity. They argue that the New Mexico legislature retains legislative power over criminal defendants' substantive right to bail, such that the New Mexico Supreme Court exceeded its legislative power when promulgating the 2017 Rules. Aplt. Br. at 18–20, 49–51; Aplt. Reply Br. at 14–19. "To find that [an action] has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in" another branch of government. *Tenney*, 341 U.S. at 378, 71 S.Ct. 783. That is not the case here. The New Mexico legislature has given the New Mexico Supreme Court the power to promulgate rules of criminal procedure.

> The supreme court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico for the purpose of simplifying and promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant.

N.M. Stat. § 38-1-1. The delegated authority is not unlimited, but Plaintiffs have not pointed to anything suggesting that the New Mexico legislature exercises exclusive legislative authority over bail.[13] Therefore, it is not "obvious" that the New Mexico Supreme Court justices have exceeded the legislative authority vested in them by N.M. Stat. § 38-1-1, which means that the justices are entitled to legislative immunity for claims arising from their promulgation of the 2017 Rules. *Tenney*, 341 U.S. at 378–79, 71 S.Ct. 783; *see also* *Sable v. Myers*, 563 F.3d 1120, 1126 (10th Cir. 2009) (refusing to "adopt a very restrictive view of what is legitimate legislative activity" (quotation marks omitted)).

In summary, sovereign immunity bars Collins's claims against the state courts and state officials in their official capacities; Plaintiffs have abandoned their argument regarding judicial immunity, which disposes of Collins's claims against the state court chief judges and court executive officers in their individual capacities; and legislative immunity bars Collin's claims against the supreme court justices in their individual capacities.

"Absolute immunity [undoubtedly] has its costs" for plaintiffs like Collins who seek to vindicate their constitutional rights. *Snell v. Tunnell*, 920 F.2d 673, 687 (10th Cir. 1990). "The rationale for according absolute immunity in the civil rights context is to incorporate traditional common law immunities and to allow functionaries in the judicial system the latitude to perform their tasks absent the threat of retaliatory § 1983 litigation." *Id.* at 686–87 (footnote omitted). "Though such suits might be satisfying personally for a plaintiff, they could jeopardize the judicial system's ability to function." *Id.* at 687. "[S]uits against judges

[are not] the only available means through which litigants can protect themselves from the consequences of judicial error." *Forrester*, 484 U.S. at 227, 108 S.Ct. 538. Collins could have raised the alleged error in her criminal proceedings. *See id.* Collins could have also named defendants who caused her pretrial detention and supervision but are not members of the state judiciary. *See, e.g.*, *Holland v. Rosen*, 277 F.Supp.3d 707, 723 (D.N.J. 2017), *aff'd* 895 F.3d 272 (3d Cir. 2018) (naming as a defendant the person who "enforce[ed] the pretrial release conditions").

To bring it all together, Collins is the only Plaintiff with standing, but Defendants are immune to her claims, so we do not address the merits of Collins's claims that the 2017 Rules and the Arnold Tool violate the Eighth and Fourteenth Amendments.[14] Rather, we turn to the issue of sanctions.

IV

Before discussing the district court's imposition of Rule 11 sanctions, we briefly address appellate jurisdiction. We ordered briefing on the question of whether there is a final appealable order because the sanctions order contemplates a "future final award" of attorney's fees and does not define the amount of interest applicable to the sanctions award. Dkt. No. 10550099 at 3–4. "[I]n considering whether a judgment is 'final' under § 1291, the 'label used to describe the judicial demand is not controlling,' meaning we 'analyze the substance of the district court's decision, not its label or form.' " *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1221 (10th Cir. 2003) (quoting *Albright v. UNUM Life Ins. Co.*, 59 F.3d 1089, 1092 (10th Cir. 1995)).

"[A] sanction order against an attorney currently of record is not a final decision for purposes of a § 1291 appeal where the underlying controversy remains unresolved." *Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 435 (10th Cir. 1996). Even once the merits of a case have been resolved, "an appeal from the award of sanctions may not be taken until the amount has been determined." *Turnbull v. Wilcken*, 893 F.2d 256, 258 (10th Cir. 1990) (per curiam) (citing *Phelps v. Washburn Univ. of Topeka*, 807 F.2d 153, 154 (10th Cir. 1986)). Here, the district court's order imposing Rule 11 sanctions is a final appealable order because the substance of the case has been resolved and the parties have stipulated that the sanction is $ 14,868.00. App. Vol. III at 636–77, 678–79, 732–33. The funds have been deposited in the registry of the district court, where they are earning interest. *Id.* at 732–33.

Turning to the substance of the issue, "[w]e review for an abuse of discretion the district court's ... imposition of Rule 11 sanctions." *King v. Fleming*, 899 F.3d 1140, 1147 (10th Cir. 2018). "Under this standard, we will reverse a district court only 'if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.' " *Id.* (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)). "[T]he award of Rule 11 sanctions involves two steps. The district court first must find that a pleading violates Rule 11." *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988). "The second step is for the district court to impose an appropriate sanction." *Id.*

Rule 11 states:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney ... certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; [and] (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law....

Fed. R. Civ. P. 11(b). Rule 11 "imposes ... an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 551, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991). We "evaluate [an attorney's] conduct under a standard of 'objective reasonableness—whether a reasonable attorney admitted to practice before the district court would file such a document.' " *Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1182 (10th Cir. 2015) (quoting *Adamson*, 855 F.2d at 673). "Because our adversary system expects lawyers to zealously represent their clients, [the Rule 11] standard is a tough one to satisfy; an attorney can be rather aggressive and still be reasonable." *Id.*

When, as here, a pleading contains allegations that are not warranted by existing law, we examine whether they are "warranted 'by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.' " *Id.* (quoting

Fed. R. Civ. P. 11(b)). Again, we employ an objective standard "intended to eliminate any 'empty-head pure-heart' justification for patently frivolous arguments." Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment. But, when we analyze the frivolity of an attorney's arguments, "it is not sufficient for an offending attorney to allege that a competent attorney could have made a colorable claim based on the facts and law at issue; the offending attorney must actually present a colorable claim." *White v. Gen. Motors Corp.*, 908 F.2d 675, 680 (10th Cir. 1990) "[P]laintiffs may not shield their own incompetence by arguing that, while they failed to make a colorable argument, a competent attorney would have done so." *Id.*

After holding a hearing, the district court granted the motion for sanctions because (1) the Legislator Plaintiffs and BBANM "ha[d] no objectively reasonable basis for asserting standing to sue" and (2) "Plaintiffs' claims for money damages against ... Defendants are frivolous because ... Defendants are protected by well-established immunity doctrines."[15] App. Vol. III at 687–90. The district court also found that "Plaintiffs' counsel added the [L]egislator Plaintiffs and [BBANM] as parties to this case for [an] improper purpose—namely, for political reasons to express their opposition to lawful bail reforms in the State of New Mexico rather than to advance colorable claims for judicial relief." *Id.* at 687. The district court ordered A. Blair Dunn, one of Plaintiffs' attorneys, to pay the attorney's fees and costs incurred by Defendants because of the Rule 11 violation; the sanction amounted to $ 14,868.00. *Id.* at 692, 732–34.

The district court followed the correct two-step process for imposing a Rule 11 sanction. *Adamson*, 855 F.2d at 672. As we explain below, the district court's

analysis of the evidence was not clearly erroneous. Therefore, the district court did not abuse its discretion when it granted Defendants' motion for Rule 11 sanctions.[16] *Roth v. Green*, 466 F.3d 1179, 1188–90 (10th Cir. 2006) (holding that district court did not abuse its discretion when finding that plaintiffs' attorney violated Rule 11 because there were "a host of legal impediments to [plaintiffs] prevailing on their claims," including that "the majority of the defendants had, at best, only tangential relationships to" plaintiffs' claims and plaintiffs' counsel ignored controlling precedent).

Plaintiffs' standing arguments ignored controlling precedent. Under *Kowalski*, 543 U.S. at 131–34, 125 S.Ct. 564, BBANM and its members lack standing to assert the constitutional rights of criminal defendants. Under *Kerr II*, 824 F.3d at 1214–17, the Legislator Plaintiffs lack standing to assert an institutional injury. When Plaintiffs were confronted with these binding authorities in Defendants' motion to dismiss and motion for Rule 11 sanctions, Plaintiffs unreasonably attempted to distinguish themselves from the plaintiffs in *Kowalski* and *Kerr II*. App. Vol. II at 300–11, 551.

For example, without acknowledging that pro se criminal defendants in *Kowalski* were able to assert their own constitutional rights, Plaintiffs argued that criminal defendants in New Mexico cannot assert their own constitutional rights because they lack "funds to ... retain counsel." *Id.* at 307. Plaintiffs then asserted that BBANM and its members have a close relationship with every criminal defendant arrested in New Mexico since July 2017 because these defendants "already exist," notwithstanding that the Supreme Court reached the opposite conclusion in *Kowalski* under a materially similar set of facts. *Id.* at 308. When

attempting to evade *Kerr II*, Plaintiffs paradoxically claimed that the alleged loss of "the right of the legislature to pass laws" was not "an institutional injury." *Id.* at 310.

Plaintiffs' arguments regarding immunity suffer from similar infirmities.[17] Most glaringly, Plaintiffs maintained that "any argument regarding sovereign immunity ... [was] just not applicable" in this case because "Congress waived ... sovereign immunity for individual state actors [by enacting] ... § 1983." App. Vol. II at 547. This statement is inaccurate. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63–71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). It also offers no explanation why Plaintiffs thought the New Mexico Supreme Court, the Second Judicial District Court, and the Bernalillo County Metropolitan Court were proper defendants.[18] Plaintiffs' arguments regarding judicial and legislative immunity fare little better.

As discussed previously, Plaintiffs abandoned their arguments about judicial immunity by failing to adequately brief them on appeal. *Stender*, 910 F.3d at 1117. Accordingly, Plaintiffs have not shown how the district court abused its discretion when finding that Plaintiffs' arguments regarding judicial immunity were not supported by existing law.

Plaintiffs then argued that legislative immunity was unavailable to New Mexico's supreme court justices because the New Mexico legislature "has never delegated exclusive legislative authority to the New Mexico Supreme Court." App. Vol. II at 549. But the New Mexico legislature *has* empowered the New Mexico Supreme Court to promulgate rules of criminal procedure. N.M. Stat. § 38-1-1. When exercising that delegated legislative authority to promulgate generally applicable rules, the court and its justices are entitled

to legislative immunity. *Consumers Union*, 446 U.S. at 731–34, 100 S.Ct. 1967.

We now turn to the district court's finding that Plaintiffs included BBANM and the Legislator Plaintiffs for an improper purpose—to express political opposition to the 2017 Rules. Plaintiffs argue that "improper motivation does not warrant sanction when there is [an] objective basis for filing suit." Aplt. Br. at 58–59; *see also* *Burkhart ex rel. Meeks v. Kinsley Bank*, 852 F.2d 512, 515 (10th Cir. 1988) (reasoning that an attorney who filed a harassing complaint could not be sanctioned under Rule 11 if the complaint's allegations were legally and factually warranted). But, as just discussed, there was no reasonable basis for including BBANM and the Legislator Plaintiffs in this case. Therefore, this is not a situation in which the district court awarded sanctions based on a finding of improper purpose even though there was an objective basis for filing suit. The district court could have concluded that Rule 11 sanctions were warranted without relying on any potential political purpose behind the suit, and we affirm on that basis.

Plaintiffs also argue that evidence of Dunn's letter to the New Mexico legislature about this lawsuit cannot support the district court's finding of political motivation because Dunn's letter is protected by the First Amendment. Aplt. Br. at 55; Aplt. Reply Br. at 25–26. The district court did not sanction Dunn for his letter to the state legislature. App. Vol. III at 687–88 ("While Plaintiffs' counsel is entitled to express opinions regarding bail reform in New Mexico, Plaintiffs are not entitled to file claims in a federal court without standing solely to achieve political objectives."). For the district court, Dunn's letter supported its finding that Dunn's choice to name

BBANM and the Legislator Plaintiffs as plaintiffs was not motivated by a reasonable belief that they had standing.

Before moving on from the issue of Rule 11 sanctions, we emphasize that "the central purpose of Rule 11 is to deter baseless filings in district court and thus ... streamline the administration and procedure of the federal courts." *Cooter & Gell*, 496 U.S. at 393, 110 S.Ct. 2447. "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay." *Id.* at 398, 110 S.Ct. 2447. This case is a prime example of the waste and distraction that result when attorneys disregard Rule 11's certifications. At the heart of this case lies Darlene Collins's allegation that her constitutional rights were violated when she was detained by the state of New Mexico. But because of the various parties unreasonably named in the complaint by Plaintiffs' attorneys, this case instead was broadly pled to include entities and individuals whose standing to sue, or whose immunity from suit, became the main focus of the litigation.

V

"We ordinarily review a denial of a motion to amend a pleading for abuse of discretion." *Miller ex rel. S.M. v. Bd. of Educ.*, 565 F.3d 1232, 1249 (10th Cir. 2009). "However, when denial is based on a determination that amendment would be futile, our review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Id.* at 1249.

While Defendants' motion to dismiss and motion for Rule 11 sanctions were pending, Plaintiffs sought leave to amend their complaint to add a new claim: that

Defendants violated Plaintiffs' First Amendment right to freedom of speech by moving for sanctions. App. Vol. II at 397. The district court denied the motion to amend as futile because "[t]he First Amendment does not protect frivolous claims," so the "Rule 11 Motion was not a retaliatory act to punish Plaintiffs, but rather, an acceptable pleading expressly allowed by the Federal Rules of Civil Procedure." App. Vol. III at 673–74.

"[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983). But "[t]he [F]irst [A]mendment interests involved in private litigation ... are not advanced when the litigation is based on ... knowingly frivolous claims." *United States v. Ambort*, 405 F.3d 1109, 1117 (10th Cir. 2005) (quoting *Bill Johnson's Rests.*, 461 U.S. at 743, 103 S.Ct. 2161); *see also In re Harper*, 725 F.3d 1253, 1261 (10th Cir. 2013) ("[T]he First Amendment does not protect the filing of frivolous motions."). As discussed when affirming the district court's imposition of Rule 11 sanctions, Plaintiffs' arguments regarding standing and immunity were baseless. Therefore, the district court correctly found that Plaintiffs' motion to amend was futile; Defendants' motion for Rule 11 sanctions did not interfere with Plaintiffs' First Amendment rights. *See King*, 899 F.3d at 1151 n.17 ("[T]he First Amendment is in no way a defense to Rule 11 violations.").

VI

We AFFIRM.

Footnotes

1Plaintiffs have withdrawn their claim that New Mexico's system of bail violates the Fourth Amendment's prohibitions against unreasonable search and seizure. Aplt. Reply. Br. at 14.

2Plaintiffs have withdrawn their appeal from the dismissal of their claims against the Board of County Commissioners of the County of Bernalillo. Aplt. Reply. Br. at 19 n.10.

3Appeal No. 17-2217 concerns the dismissal of Plaintiffs' case and denial of Plaintiffs' motion for leave to amend. Appeal No. 18-2045 concerns the imposition of Rule 11 sanctions. The appeals have been consolidated for procedural purposes. Dkt. No. 10546176.

4Plaintiffs' allegation that Collins was not allowed to return home is not fully supported by documents attached to their motion for a preliminary injunction. In a sworn declaration, Collins stated that she "was released on [her] own recognizance with *no* conditions...." App. Vol. I at 122–23 (emphasis added). Moreover, the order setting Collins's conditions of release does not prohibit Collins from returning home. *Id.* at 274–75.

5BBANM "is a professional membership organization comprised of bail bond businesses licensed to do business and operating throughout New Mexico." App. Vol. I at 23.

6Plaintiffs' allegation that the New Mexico Supreme Court violated the New Mexico Constitution when it promulgated the 2017 Rules is not enumerated as a claim in the complaint. *See* App. Vol. I at 34–35. Nevertheless, the parties and the district court treated it as a claim.

7Plaintiffs further allege that BBANM's member companies "have been severely [financially] harmed by

the drastic reduction in the number of defendants given the option of jailhouse bonds or secured bonds." App. Vol. I at 32. This echoes Plaintiffs' argument in district court that the 2017 Rules deprive BBANM's members of a "constitutionally protected property interest in engaging in one's chosen profession." App. Vol. II at 302. But Plaintiffs do not allege a deprivation of a protected property interest in their First Amended Complaint. Plaintiffs only allege violations of criminal defendants' rights under the Fourth, Eighth, and Fourteenth Amendments. App. Vol. I at 40–47. Therefore, even assuming that BBANM can satisfy Article III's standing requirements based on its members' economic injury, we must still examine whether BBANM has standing to assert the constitutional rights of criminal defendants. *Kowalski v. Tesmer*, 543 U.S. 125, 128–29 & n.2, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004).

BBANM does not argue that it has standing to assert the claim that the 2017 Rules "infringe[ ] upon the power of the [New Mexico] Legislature to make law." App. Vol. I at 35.

8The Legislator Plaintiffs do not argue that they have standing to assert the Eighth and Fourteenth Amendment rights of criminal defendants.

9Collins does not have standing to pursue the claim that the 2017 Rules "infringe[ ] upon the power of the [New Mexico] Legislature to make law," App. Vol. I at 35. Collins cannot assert the state legislature's legislative power. *Sessions*, 137 S.Ct. at 1689.

10The district court, when analyzing Collins's demand for prospective declaratory and injunctive relief, found that Collins could not proceed under *Ex parte Young*. App. Vol. III at 667–68. The district court reasoned that *Ex parte Young* was inapplicable because "Plaintiffs

fail[ed] to state a claim for an ongoing violation of federal law." *Id.* at 668. "But the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 646, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002). "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 645, 122 S.Ct. 1753 (alterations and quotation marks omitted). Collins does not raise this error in the district court's reasoning.

11Chief Judge Nash, Chief Judge Alaniz, Court Executive Officer Noel, and Court Executive Officer Padilla are only mentioned in the caption of the complaint and in the list of parties. App. Vol. I at 17, 25–26. Their names also appear in an attachment to the complaint. *Id.* at 66, 71. "[I]n a § 1983 action it is 'particularly important' that '[a] complaint make clear exactly who is alleged to have done what to whom, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state.' " *Brown v. Montoya*, 662 F.3d 1152, 1163 (10th Cir. 2011) (quoting *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2015)). Here, Collins's allegations are so sparse that it is difficult to identify the factual basis for her claims against the state court judges and court executive officers.

12Plaintiffs repeatedly suggest that promulgating the 2017 Rules was an enforcement action, such that legislative immunity would not apply. Aplt. Br. at 46, 50. Plaintiffs cite *Consumers Union* for the proposition

that legislative immunity does not bar a suit for declaratory and injunctive relief against a state supreme court and its justices when the defendants exercised their own "authority ... to initiate [disciplinary] proceedings against attorneys." 446 U.S. at 736, 100 S.Ct. 1967. This analysis does not apply here because Plaintiffs have not sued the justices of the New Mexico Supreme Court for enforcing the 2017 Rules. *See* App. Vol. I at 19–20. As explained in *Consumers Union*, legislative immunity applies when a case arises from a court's promulgation of generally applicable rules. 446 U.S. at 731–34, 100 S.Ct. 1967.

13We have identified two statutes that substantively discuss bail. Both envision a necessary role for the New Mexico Supreme Court, further demonstrating that the Court has legislative authority over the procedural aspects of bail. *See* N.M. Stat. § 31-3-1 ("Any statutory provision or rule of court governing the release of an accused may be carried out by a responsible person designated by the court."); N.M. Stat. § 31-3-5 ("No bond shall be accepted from a paid surety ... by a ... district court unless executed on a form which has been approved by the supreme court.").

14As explained throughout this Opinion, no Plaintiff has standing to pursue the claim that the New Mexico supreme court justices violated the New Mexico Constitution by promulgating the 2017 Rules. Therefore, we need not discuss that claim further.

15Plaintiffs argue that the Rule 11 hearing was deficient because Plaintiffs should have been allowed to produce evidence. Aplt. Br. at 54. The hearing was not deficient. "Although a party must receive notice and an opportunity to respond before being sanctioned under Rule 11, '[t]he opportunity to fully brief the issue is sufficient to satisfy due process requirements.' " *Dodd*

Ins. Servs., Inc. v. Royal Ins. Co. of Am., 935 F.2d 1152, 1160 (10th Cir. 1991) (internal citations omitted) (quoting *White*, 908 F.2d at 686).

16Plaintiffs argue that sanctions were inappropriate because Collins's constitutional claims were not frivolous. Aplt. Br. at 44. But the relative quality of Collins's constitutional claims is not dispositive because "a pleading containing both frivolous and nonfrivolous claims may violate Rule 11." *Dodd Ins. Servs.*, 935 F.2d at 1158. This is not a case in which "a single frivolous or groundless claim" was "easily disposed of by the opposing part[ies]." *Id.* Rather, Plaintiffs' arguments regarding standing and immunity materially increased the complexity of the case by involving improper parties.

17Plaintiffs argue that "[j]udicial immunity principles are a developing area of the law, warranting litigation and clarification." Aplt. Br. at 45. The district court found that "Plaintiffs [did] not make any argument for extending, modifying, or reversing existing law or for establishing new law" on judicial immunity. App. Vol. III at 690 (quotation marks omitted). Plaintiffs do not challenge this finding, which forecloses their attempt to now argue for "clarification." *White*, 908 F.2d at 680.

18If Collins had standing to seek prospective relief, her claims for prospective declaratory and injunctive relief could have proceeded, under *Ex parte Young*, against the state officials in their official capacities. *Verizon*, 535 U.S. at 645–46, 122 S.Ct. 1753. But, Plaintiffs have never raised *Ex parte Young* themselves, choosing instead to deny that sovereign immunity is even applicable. Therefore, the fact that Plaintiffs might have relied on *Ex parte Young* when discussing sovereign immunity does not weigh against the district court's imposition of sanctions. *White*, 908 F.2d at 680.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DARLENE COLLINS; BAIL BOND ASSOCIATION OF NEW MEXICO; RICHARD MARTINEZ; BILL SHARER; CRAIG BRANDT; CARL TRUJILLO, Plaintiffs - Appellants, v. CHARLES W. DANIELS; EDWARD L. CHAVEZ; PETRA JIMENEZ MAEZ; BARBARA J. VIGIL; JUDITH K. NAKAMURA; NEW MEXICO SUPREME COURT; NAN NASH; THE SECOND JUDICIAL COURT; HENRY A. ALAINZ; ROBERT L. PADILLA; BERNALILLO COUNTY METROPOLITAN COURT; JAMES NOEL; BERNALILLO COUNTY; BOARD OF COUNTY COMMISSIONERS, COUNTY OF BERNALILLO,	Nos. 17-2217 & 18-2045 (D.C. No. 1:17-CV-00776-RJ-KK) (D. N.M.)

Defendants - Appellees.

JUDGMENT

Before **BRISCOE**, **MATHESON**, and **BACHARACH**, Circuit Judges.

This case originated in the District of New Mexico and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

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United States District Court, D. New Mexico.

Darlene COLLINS, et al., Plaintiffs,

v.

Charles W. DANIELS,[1] et al., Defendants.

No. 1:17-CV-00776-RJ

Signed 01/04/2018

Attorneys and Law Firms

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Ari Biernoff, Office of the Attorney General, Brandon Huss, New Mexico Association of Counties, Santa Fe, NM, Patrick F. Trujillo, Sandoval County, Bernalillo, NM, for Defendants.

ORDER GRANTING JUDICIAL DEFENDANTS' RULE 11 MOTION FOR SANCTIONS

ROBERT A. JUNELL, Senior United States District Judge

BEFORE THE COURT is Defendants Charles W. Daniels, Edward L. Chavez, Petra Jimenez Maez, Barbara J. Vigil, Judith K. Nakamura, the New Mexico Supreme Court, Nan Nash, James Noel, the Second Judicial District Court, Henry A. Alaniz, Robert L.

Padilla, and Bernalillo County Metropolitan Court's (collectively, "Judicial Defendants") Motion for Sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure against Plaintiffs Darlene Collins, Bail Bond Association of New Mexico, Richard Martinez, Bill Sharer, Craig Brandt, and Carl Trujillo's (collectively, "Plaintiffs"). (Doc. 33). After due consideration, Judicial Defendants' Rule 11 Motion for Sanctions shall be **GRANTED.**

I. Background

This dispute centers on the constitutionality of the New Mexico Supreme Court Rules regarding pretrial release and detention in criminal proceedings adopted pursuant to Supreme Court Order No. 17-8300-005 effective on July 1, 2017 ("2017 Rules"). Plaintiffs are the Bail Bond Association of New Mexico, three New Mexico Senators, one member of the New Mexico House of Representatives, and Darlene Collins, a criminal defendant who has been charged in New Mexico state court with aggravated assault, a fourth-degree felony, and released on nonmonetary conditions pending trial after her first appearance before a Bernalillo County Metropolitan Court judge. (Doc. 56 at ¶ 18). Defendants are the New Mexico Supreme Court and all of its Justices, the Second Judicial District Court and its Chief Judge and Court Executive Officer, the Bernalillo County Metropolitan Court and its former Chief Judge and Court Executive Officer, and the Board of County Commissioners of the County of Bernalillo.[2] (*Id.*).

Plaintiffs allege that in promulgating the 2017 Rules, the New Mexico Supreme Court violated the Eighth

Amendment's guarantee against excessive bail, Fourth Amendment protections against unreasonable searches and seizures, and the Due Process Clause of the Fourteenth Amendment. (*Id.* at ¶¶ 119-29, 131-47, 149-61). In addition, Plaintiffs assert that the implementation of a pretrial release risk assessment tool in Bernalillo County which was authorized by the New Mexico Supreme Court violates the Eighth Amendment by prioritizing nonmonetary conditions of release. (*Id.* at ¶ 126). Plaintiffs ask the Court to declare the 2017 Rules unconstitutional and enjoin enforcement of the 2017 Rules, to award Plaintiffs monetary damages against all Defendants individually pursuant to 42 U.S.C. § 1983, along with attorney's fees under 42 U.S.C. § 1988, and to certify this lawsuit as a class action on behalf of "[a]ll New Mexico criminal defendants who are or will be subject to the liberty-restricting conditions of pre-trial release permitted by the [2017] Rules ... without having the opportunity to be considered for release on secured bond." (*Id.* at ¶ 86).

On August 18, 2017, Judicial Defendants (all defendants except Bernalillo County) filed their Rule 12 Motion to Dismiss. (Doc. 14). On August 28, 2017, Bernalillo County adopted the Motion to Dismiss filed by the New Mexico Judicial Defendants. (Docs. 18, 59). On September 19, 2017, Plaintiffs filed their Opposed Motion to Amend Complaint. (Doc. 31). On December 11, 2017, this Court granted Defendants' Motions to Dismiss and denied Plaintiffs' Motion to Amend. (Doc. 67).

Specifically, the Court found that Plaintiffs Bail Bond Association of New Mexico, Senator Richard Martinez, Senator Bill Sharer, Senator Craig Brandt, and Representative Carl Trujillo lacked standing and dismissed their claims against Defendants with prejudice for lack of subject matter jurisdiction. (*Id.*). Further, the Court found that Plaintiff Darlene Collins failed to state a claim under the Fourth, Eighth, and Fourteenth Amendments and dismissed Plaintiff Collins's claims against Defendants with prejudice. (*Id.*). In addition, the Court found that Judicial Defendants are immune from suit. (*Id.*). Finally, the Court denied Plaintiffs' Motion to Amend as futile. (*Id.*).

On September 22, 2017, Judicial Defendants filed their Motion for Sanctions under Rule 11. (Doc. 33). On October 17, 2017, Plaintiffs filed their Response to the Motion for Sanctions. (Doc. 45). On October 31, 2017, Judicial Defendants filed their Reply in support of the Motion for Sanctions. (Doc. 58). The Court heard oral argument at a hearing held on November 27, 2017. This matter is now ready for disposition.

II. Legal Standard

Pursuant to Fed. R. Civ. P. 11(a), "[e]very pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented." Rule 11(b) of the Federal Rules of Civil Procedure provides in relevant part:

> By presenting to the court a pleading, written motion, or other paper—whether by signing,

> filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Civ. P. 11(b). "[T]he award of Rule 11 sanctions involves two steps." *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988). First, the Court must find that a pleading violates Rule 11, which "typically involves subsidiary findings, such as the current state of the law or the parties' and attorneys' behavior and motives within the context of the entire litigation." *Id.* Second, the Court imposes an "appropriate sanction." *Id.*

"The standard by which courts evaluate the conduct of litigation is objective reasonableness—whether a reasonable attorney admitted to practice before the

district court would file such a document." *Id.* Accordingly, "[i]f, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law, then such conduct is sanctionable under Rule 11." *Id.* (citation omitted). The language of Rule 11 "stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule." Fed. R. Civ. P. 11 Advisory Committee Notes (1993 Amendment). In determining whether the signer's conduct is reasonable, "the court is expected to avoid using the wisdom of hindsight" and inquire only as to "what was reasonable to believe at the time the pleading, motion, or other paper was submitted." *Id.*

"The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities." *Id.* The Court may consider the following factors: (1) whether the improper conduct was willful, or negligent; (2) whether it was part of a pattern of activity, or an isolated event; (3) whether it infected the entire pleading, or only one particular count or defense; (4) whether the person has engaged in similar conduct in other litigation; (5) whether it was intended to injure; (6) what effect it had on the litigation process in time or expense; (7) whether the responsible person is trained in the law; (8) what amount, given the financial resources of the responsible person, is needed to deter

that person from repetition in the same case; and (9) what amount is needed to deter similar activity by other litigants. *Id.* The Court has discretion to determine what sanctions, if any, should be imposed for a violation, but "sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons." *Id.*

III. Discussion

Judicial Defendants move the Court to impose sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure because "Plaintiffs' attorneys ignore and actively misrepresent controlling law in their Amended Complaint and other pleadings, and they have filed this federal lawsuit against Judicial Defendants not with any colorable prospect of obtaining a ruling in their favor, but for the improper purpose of advancing a local and national public relations campaign on behalf of the money bail industry against bail reforms in New Mexico and throughout the United States." (Doc. 33 at 2). Judicial Defendants contend that "[a]ny minimally qualified attorney conducting the most rudimentary research would have to be aware that Plaintiffs' claims under the Fourth, Eighth and Fourteenth Amendments to the United States Constitution are both utterly unsupported and filed in direct contravention of governing law." (*Id.*). Further, Judicial Defendants assert that "any minimally qualified attorney would have to be aware that there is no legal basis for Plaintiffs' claims for money damages against any of the Judicial Defendants." (*Id.*).

Judicial Defendants' Motion for Sanctions was served on August 30, 2017, giving Plaintiffs' counsel the 21-day safe harbor required by Rule 11 to withdraw any untenable claims without incurring sanctions. In addition, Judicial Defendants consented to a 10-day extension of time for Plaintiffs to respond to the Motion to Dismiss, allowing them ample time to conduct any inquiry into the law that they may have omitted prior to filing suit. Yet, Plaintiffs did not voluntarily dismiss any parties or claims. Instead, Plaintiffs filed a Motion to Amend Complaint seeking to add additional parties and claims, which this Court subsequently denied as futile.

A. Constitutional Claims

First, Judicial Defendants contend that Plaintiffs' counsel violated Rule 11 by ignoring controlling law that bars their constitutional claims. In their Complaint, Plaintiffs allege that Judicial Defendants violated the rights of Plaintiffs under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution, In its Order Granting Defendants' Motion to Dismiss, this Court found that "there is no provision in the 1972 Rules, or any other source of law, guaranteeing the option of money bail to criminal defendants in New Mexico." (Doc, 67 at 23). As a result, the Court determined that Plaintiffs failed to state a claim for any violation of the Eighth Amendment.

In addition, the Court held that "[s]ince Collins had a pretrial detention hearing on July 5, 2017, with the opportunity to afford herself all of the protections under New Mexico law and the Constitution, and

Collins consented on the record to the nonmonetary conditions in exchange for her release from jail, the Court finds that Plaintiffs fall to state a claim for any violation of procedural due process." (*Id.* at 25). In addition, the Court determined that "the fact that Collins was released on her own recognizance with minimal conditions does not shock the Court's conscience, nor does the absence of a monetary bail option in lieu of, or in addition to, any potential restrictions that are aimed at deterring dangerousness." (*Id.* at 26). Because "Collins failed to challenge any nonmonetary conditions of release when she had the opportunity to do so at her pretrial detention hearing" and "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 concluded that "Plaintiffs fail to state a claim for any violation of substantive due process." (*Id.* at 27).

The Court also found that "the pretrial conditions imposed on Collins" were not unreasonable considering that "Collins has not been subjected to any severe restrictions of her liberty as a result of the 2017 Rules" and "Collins was released on her own recognizance with minimal conditions." (*Id.* at 28). In addition, the Court noted that the United States Court of Appeals for the Tenth Circuit "has expressly declined to adopt a 'continuing seizure' analysis that would deem pretrial release conditions a 'seizure' under the Fourth Amendment." (*Id.*). As a result, the Court determined that "Plaintiffs fail to state a claim for any violation of the Fourth Amendment." (*Id.* at 29).

Moreover, the Court found Plaintiffs' claims that Judicial Defendants modified statutory law without legislative authority to be meritless since the "New Mexico Legislature has long recognized the New Mexico Supreme Court's rule-making authority, which encompasses the authority to promulgate rules of criminal procedure." (*Id.* at 30). The Court also determined "Plaintiffs fail to state a claim that the Public Safety Assessment Tool in Bernalillo County is unconstitutional" because the Public Safety Assessment Tool "does not displace the discretion of judges." (*Id.* at 31). Lastly, the Court concluded that "Plaintiffs fail to state a claim for money damages" since "Plaintiffs cannot state a claim for any violation of Collins's Eighth, Fourth, or Fourteenth Amendment rights." (*Id.*).

Although Plaintiffs fail to state a claim for any constitutional violation, the Court is of the opinion that Plaintiffs' constitutional claims are not frivolous. The Court finds that Plaintiffs bring their constitutional claims seeking to change or clarify the law regarding monetary bail. While the Court disagrees with Plaintiffs' interpretation of the cases relied upon, their interpretation is not untenable as a matter of law as to necessitate sanctions. Because there is some legal basis for Plaintiffs' constitutional claims, the Court finds no violation of Rule 11.

B. Standing

Judicial Defendants argue that Plaintiffs' counsel violated Rule 11 by either not researching or intentionally ignoring legal requirements of standing.

(Doc. 33 at 9). In its Order Granting Defendants' Motions to Dismiss, the Court found that the Bail Bond Association of New Mexico did not have first-party standing because it was not asserting its own constitutional rights. (Doc. 67 at 15). In addition, the Court found that the Bail Bond Association of New Mexico lacked third-party standing because criminal defendants faced no obstacles or hindrances in asserting claims that their constitutional rights were violated. (*Id.* at 16).

Likewise, the Court found that the New Mexico State Legislators lacked standing because "a single legislator, acting individually, does not have standing to prosecute an injury to the entire legislature." (*Id.* at 18). Accordingly, the Court dismissed the Bail Bond Association of New Mexico and the legislator Plaintiffs' claims against Defendants, However, the Court found that Plaintiff Darlene Collins has standing to challenge the constitutionality of her arraignment hearing under the Fourth, Eighth, and Fourteenth Amendments.

While Plaintiff Collins has standing to assert that she was injured by the holding of a hearing that allegedly did not afford her constitutional rights, the legislator Plaintiffs unquestionably lack standing because they assert only an institutional injury. Moreover, there is no basis for the Bail Bond Association of New Mexico to assert the rights of a criminal defendant who is fully capable of asserting her own rights, and is in fact, a named party in this lawsuit. As a result, Rule 11 sanctions are appropriate because the legislator Plaintiffs and the Bail Bond Association of New Mexico

have no objectively reasonable basis for asserting standing to sue. *Searcy v. Hons. Lighting & Power Co.*, 907 F.2d 562, 565 (5th Cir. 1990) (finding that Rule 11 sanctions were proper where the plaintiff lacked standing to sue); *Kunimoto v. Fidell*, 26 Fed.Appx. 630, 631-32 (9th Cir. 2001) (unpublished) (determining that Rule 11 sanctions were properly imposed where the plaintiffs failed to offer colorable arguments in support of standing).

The failure of Plaintiffs' counsel to identify a reasonable basis for standing of the legislator Plaintiffs and the Bail Bond Association of New Mexico prior to filing suit justifies the imposition of sanctions pursuant to Rule 11. Further, the Court finds that Plaintiffs' counsel added the legislator Plaintiffs and the Bail Bond Association of New Mexico as parties to this case for in improper purpose—namely, for political reasons to express their opposition to lawful bail reforms in the State of New Mexico rather than to advance colorable claims for judicial relief. (Doc. 33 at 15-16) (letter from Plaintiffs' counsel dated August 10, 2017, to New Mexico Legislative Council Service promoting this lawsuit and making unsolicited offer to appear before the New Mexico Legislature to "answer questions"). While Plaintiffs' counsel is entitled to express opinions regarding bail reform in New Mexico, Plaintiffs are not entitled to file claims in a federal court without standing solely to achieve political objectives. *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 665-66 (11th Cir. 2010) (holding that improper purpose under Rule 11 may be "inferred from an attorney's

filing of factually or legally frivolous claims") (internal citations and quotation marks omitted).

C. Immunity and Money Damages Against Judicial Defendants

In the present case, Plaintiffs not only seek prospective relief in the form of an injunction, but they bring claims for money damages against Judicial Defendants in their official and individual capacities. The Court finds Plaintiffs' claims for money damages against Judicial Defendants to be groundless. Plaintiffs' counsel has a continual obligation "to refrain from pursuing meritless or frivolous claims at any stage of the proceeding." *Merritt v. Int'l Ass'n of Machinists and Aerospace Workers*, 613 F.3d 609, 628 (6th Cir. 2010). At oral argument on the Motion for Sanctions, Plaintiffs' counsel argued that they should not be penalized for pursuing money damages as a form of relief. However, the Court finds that Rule 11 sanctions are proper since Plaintiffs' counsel was presented with a motion to dismiss and motion for sanctions raising immunity defenses to Plaintiffs' claim for money damages and Plaintiffs' counsel refused to withdraw these frivolous claims. *Hernandez v. Joliet Police Dep't*, 197 F.3d 256, 264 (7th Cir. 1999).

As explained in the Court's Order Granting Defendants' Motion to Dismiss, the "New Mexico Supreme Court is a component part of the State of New Mexico, and therefore immunized from any suit for damages." (Doc. 67 at 32). In addition, the Court explained that "State officials and employees, like the judges and court administrators sued here," are

likewise provided immunity as "an arm of the state," (*Id.*). The Court concluded that "[b]ecause Plaintiffs' claims for damages against [the Judicial Defendants] are barred by sovereign immunity, Plaintiffs fail to state a claim for 'damages to compensate for the injuries they have suffered as a result of Defendants' unconstitutional conduct.' " (*Id.* at 33).

If Plaintiffs' counsel had performed a reasonable inquiry into Judicial Defendants' immunity defenses, they would have discovered that state officials, such as Judicial Defendants, sued in their official capacities are immune from suit under the Eleventh Amendment. *See* *Hatten v. White*, 275 F.3d 1208, 1210 (10th Cir. 2002). The law is clear that the Eleventh Amendment bars Plaintiffs' monetary damages claims against Judicial Defendants in their official capacities. Therefore, Plaintiffs' counsel should have limited their claims against Judicial Defendants in their official capacities to equitable claims that are not subject to the Eleventh Amendment bar. *See* *Hatten v. White*, 275 F.3d 1208, 1210 (10th Cir. 2002).

Under *Ex parte Young*, 209 U.S. 123 (1908) "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan*, 440 U.S. 332, 337 (1979). As explained in the Court's Order Granting Motions to Dismiss, Plaintiffs fail to state a claim for an ongoing violation of federal law under the Fourth Amendment, Eighth Amendment, or Fourteenth Amendment. (Doc. 67 at 33). Therefore, the *Ex parte Young* exception to Eleventh Amendment

immunity does not apply and Plaintiffs fail to state official-capacity claims against Judicial Defendants.

Furthermore, the Complaint alleges wrongdoing by the New Mexico Supreme Court Justices in their rule-making capacity. (Doc. 56 ¶ 9). As a result, legislative immunity protects the state court justices from suit. (Doc. 67 at 35). In addition, Plaintiffs sue the Second Judicial District Court, Bernalillo County Metropolitan Court and those courts' chief judges and court executive officers on the basis that they "adopted and implemented the Public Safety Assessment court-based pretrial risk assessment tool." (Doc. 56 ¶ 5). This Court ruled that Judge Nash and Judge Alaniz are protected by judicial immunity in connection with their implementation of the 2017 Rules. Similarly, Mr. Noel and Mr. Padilla "are likewise protected by quasi-judicial immunity." (Doc. 67 at 35). Plaintiffs sued the court staff defendants only because they implemented court rules and orders, and thus, they are protected from suit. (*Id.*). Accordingly, this Court held that "Plaintiffs fail to state individual-capacity claims against the Judicial Defendants." (*Id.*).

In sum, the Court finds that Plaintiffs' claims for money damages against Judicial Defendants are frivolous because Judicial Defendants are protected by well-established immunity doctrines. *Bethesda Lutheran Homes and Servs., Inc. v. Born*, 238 F.3d 853, 859 (7th Cir. 2001) (reversing district court's denial of Rule 11 sanctions in a case where "it should have been obvious to any lawyer that relief was barred on multiple grounds, including ... the Eleventh Amendment ... and

qualified immunity."). Judicial Defendants made Plaintiffs aware of the law regarding their claims for money damages; yet, Plaintiffs' counsel forged ahead with these groundless claims. As a result, Rule 11 sanctions are appropriate, *Marley v. Wright*, 137 F.R.D. 359, 363-64 (W.D. Okla. 1991), *aff'd*, 968 F.2d 20 (10th Cir. 1992) (imposing Rule 11 sanctions against attorney for filing claims against state court judges and court staff clearly barred by absolute immunity); *Hernandez*, 197 F.3d at 264-65 (affirming Rule 11 sanctions where plaintiff's attorney overlooked defendant's "obvious" Eleventh Amendment defense and failed to voluntarily dismiss after it was brought to his attention); *Sveeggen v. United States*, 988 F.2d 829, 830-31 (8th Cir. 1993) (affirming dismissal of suit and award of Rule 11 sanctions because judges have absolute judicial immunity for acts taken in the course of fulfilling their judicial duties); *Bullard v. Downs*, 161 Fed.Appx. 886, 887 (11th Cir. 2006) (unpublished) (imposing Rule 11 sanctions where judicial immunity clearly applied to bar plaintiffs' claims); *DeSisto College, Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989) (determining that Plaintiffs' counsel was properly sanctioned for failing to sufficiently research precedent on legislative immunity and failing to acknowledge that such precedent foreclosed their position).

In conclusion, Plaintiffs' claims for money damages against Judicial Defendants are not supported by existing law and Plaintiffs do not make any argument "for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2). Therefore, the Court finds that Plaintiffs' counsel

violated Rule 11 and is subject to sanctions because they either failed to make a reasonable inquiry into or disregarded the relevant law.

D. Sanctions for Violation of Rule 11

The Court has considered the relevant factors set forth in the Advisory Committee Notes to the 1993 Amendment to Rule 11. First, the Court finds that the conduct of Plaintiffs' counsel was willful in failing to make a reasonable inquiry into any legal basis to assert (1) standing of the legislator Plaintiffs and the Bail Bond Association of New Mexico, and (2) claims for monetary damages against Judicial Defendants in the face of their immunity defenses. Second, the conduct of Plaintiffs' counsel infected the entire pleading because the claims of the legislator Plaintiffs and the Bail Bond Association of New Mexico are intertwined with and dependent upon the claims of the only plaintiff with standing, Darlene Collins. In addition, Plaintiffs' counsel sought money damages against Judicial Defendants in their individual and official capacities for each alleged constitutional violation asserted. Third, the conduct of Plaintiffs' counsel substantially increased the time and expense of the litigation because Judicial Defendants were required to raise their immunity defenses to every claim (including Plaintiffs' frivolous claims for money damages) made by each Plaintiff (including those without standing). Fourth, Plaintiffs' counsel is trained in the law.

"A pleading containing both frivolous and nonfrivolous claims may violate Rule 11." *Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1158 (10th Cir.

1991). Even though the Court concludes that Plaintiff Darlene Collins's constitutional claims were not frivolous, sanctions remain appropriate. *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 664 (11th Cir. 2004) ("[I]n the ordinary Rule 11 context, where a complaint contains multiple claims, one nonfrivolous claim will not preclude sanctions for frivolous claims."); *Holgate v. Baldwin*, 425 F.3d 671, 677 (9th Cir. 2005) (same). Here, Plaintiffs' Complaint contains groundless claims asserted by Plaintiffs without standing, including the legislator Plaintiffs and the Bail Bond Association of New Mexico, as well as frivolous claims for money damages against Judicial Defendants despite their immunity defenses. Therefore, sanctions are appropriate to deter Plaintiffs' counsel from filing unsupportable lawsuits for political reasons.

The Court further finds that imposing attorney's fees and costs is an appropriate sanction in this case, The legislator Plaintiffs and the Bail Bond Association of New Mexico's filing of their claims without standing as well as Plaintiffs' claims for money damages against Judicial Defendants in spite of their immunity defenses has prejudiced Judicial Defendants in that they have been required to defend against frivolous claims with no basis in law. Therefore, the Court orders Plaintiffs' counsel Blair Dunn to pay to Judicial Defendants "all of the reasonable attorney's fees and other expenses directly resulting from the violation." Fed. R. Civ. P. 11(c)(4).[3]

The Tenth Circuit has explained that district courts must consider at least the following circumstances in

determining the amount of monetary sanctions to impose pursuant to Rule 11: (1) the reasonableness (lodestar calculation) of the requested fees; (2) the minimum amount necessary to deter; (3) the sanctioned party's ability to pay; and (4) other factors, such as the offending party's history, experience, ability, the severity of the violation, and the risk of chilling effects on zealous advocacy. *White v. Gen. Motors Corp.*, 908 F.2d 675, 684-85 (10th Cir. 1990). In briefing the Motion for Sanctions, Judicial Defendants did not address the amount of any potential attorney's fees and costs and did not state whether they had consulted with the opposing party regarding attorney's fees and costs. The Court therefore directs Judicial Defendants to initiate a consultation with Plaintiffs' counsel Blair Dunn regarding the amount of attorney's fees and costs to be awarded. If the parties reach an agreement, they shall file a stipulation and request for an order setting forth the amount of fees and costs to be awarded. If the parties cannot agree, Judicial Defendants shall, within **thirty (30) days** of the date of this Order, file a statement that the parties have been unable to reach an agreement with regard to the fee award and a memorandum setting forth the factual basis for each criterion that the court is asked to consider in making an award.

IV. Conclusion

For the foregoing reasons, the Court is of the opinion that Plaintiffs' counsel violated Rule 11(b)(2) by not making a sufficient inquiry into the legal basis for the legislator Plaintiffs' standing and the Bail Bond

Association of New Mexico's standing as well as Plaintiffs' claims for money damages against Judicial Defendants regardless of their immunity defenses. The Court finds that sanctions are necessary to deter Plaintiffs' counsel and other similarly situated individuals from repeating this sort of conduct. Further, the Court finds that requiring Plaintiffs' counsel Blair Dunn to pay reasonable attorney's fees and costs associated with defending this litigation to Judicial Defendants is warranted in this case because of the prejudice caused to Judicial Defendants and to further deter Plaintiffs' counsel Blair Dunn and others similarly situated. The Court limits the sanctions imposed here to reasonable attorney's fees and costs because the Court is convinced these sanctions will sufficiently deter the violations outlined in this ruling.

It is therefore **ORDERED** that Judicial Defendants' Motion for Sanctions pursuant to Fed. R. Civ. P. 11 is **GRANTED**. (Doc. 33). Plaintiffs' counsel Blair Dunn shall pay the reasonable attorney's fees and costs directly resulting from the Rule 11 violation. Judicial Defendants shall promptly initiate consultation with Plaintiffs' counsel Blair Dunn regarding the amount of attorney's fees and costs to be awarded. If the parties reach an agreement, they shall file a stipulation and request for an order setting forth the amount of fees and costs to be awarded. If the parties cannot agree, Judicial Defendants shall, within **thirty (30) days** of the date of this Order, file a statement that the parties have been unable to reach an agreement with regard to the fee award and a memorandum setting forth the factual

basis for each criterion that the court is asked to consider in making an awards.

It is further **ORDERED** that Judicial Defendants shall submit an affidavit detailing their reasonable costs and attorney's fees incurred in defending this action within **thirty (30) days** of the date of this Order. Upon submission of the stipulation or statement that the parties have been unable to reach an agreement, the Court will consider the relevant factors and make a determination as to the amount of attorney's fees and costs to impose.

It is so **ORDERED.**

All Citations

Not Reported in Fed. Supp., 2018 WL 1671599

Footnotes

1Plaintiffs incorrectly identify Justice Charles Daniels of the New Mexico Supreme Court as "Charles W. Daniel" in the caption of their Complaint. (Doc. 56 at 1).

2The Court previously granted Defendant Julie Morgas Baca's Rule 12(b)(6) Motion to Dismiss (Doc. 54) on October 25, 2017, and ordered Plaintiffs to properly name the Board of County Commissioners of the County of Bernalillo as a Defendant in this case (Doc. 53).

3Although the Court previously dismissed this case, the Court finds that it retains jurisdiction to impose monetary sanctions against Plaintiffs' counsel Blah Dunn. *Doha v. Class Action Servs., LLC*, 261 F.R.D.

678, 684 (S.D. Fla. 2009) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395–96 (1990)) ("district courts may enforce Rule 11 even after the case is dismissed, as a district court's jurisdiction is invoked by the filing of the underlying complaint, which 'supports consideration of both the merits of the action and the motion for Rule 11 sanctions arising from that filing.' "); *Bryant v. Brooklyn Barbecue Corp.*, 932 F.2d 697, 699 (8th Cir. 1991) (holding that district court had jurisdiction to impose Rule 11 sanctions on plaintiff's counsel, even though original complaint was dismissed prior to service on defendants, where violation occurred when original complaint was filed for an improper purpose and without the "reasonable inquiry" required by Rule 11)

12/11/17

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DARLENE COLLINS, *et al.*,	§	
***Plaintiffs*,**	§	
	§	**No. 1:17-CV-00776-RJ**
v.	§	
	§	
CHARLES W. DANIEL,[1] *et al.*	§	
Defendants.	§	

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

BEFORE THE COURT are Defendants Charles W. Daniels, Edward L. Chavez, Petra Jimenez Maez, Barbara J. Vigil, Judith K, Nakamura, the New Mexico Supreme Court, Nan Nash, James Noel, the Second Judicial District Court, Henry A. Alaniz, Robert L. Padilla, Bernalillo County Metropolitan Court, and Board of County Commissioners of the County of Bernalillo's (collectively, "Defendants") Motions to Dismiss (Does. 14, 59), and Plaintiffs Darlene Collins, Bail Bond Association of New Mexico, Richard Martinez, Bill Sharer, Craig Brandt, and Carl Trujillo's (collectively, "Plaintiffs") Opposed Motion to Amend Complaint (Doc. 31). After due consideration, Defendants' Motions to Dismiss shall be **GRANTED**

1 Plaintiffs incorrectly identify Justice Charles Daniels of the New Mexico Supreme Court as "Charles W. Daniel" in the caption of then Complaint. (Doc. 56 at 1).

(Docs. 14, 59), and Plaintiffs' Motion to Amend shall be **DENIED** (Doc. 31).

I. Background

This dispute centers on the constitutionality of the New Mexico Supreme Court Rules regarding pretrial release and detention in criminal proceedings adopted pursuant to Supreme Court Order No. 17-8300-005 effective on July 1, 2017 ("2017 Rules"). Plaintiffs are the Bail Bond Association of New Mexico, three New Mexico Senators, one member of the New Mexico House of Representatives, and Darlene Collins, a criminal defendant who has been charged in New Mexico state court with aggravated assault, a fourth-degree felony, and released on nonmonetary conditions pending trial after her first appearance before a Bernalillo County Metropolitan Court judge. (Doc. 56 at ¶ 18). Defendants are the New Mexico Supreme Court and all of its Justices, the Second Judicial District Court and its Chief Judge and Court Executive Officer, the Bernalillo County Metropolitan Court and its former Chief Judge and Court Executive Officer, and the Board of County Commissioners of the County of Bernalillo.[2] (*Id.*).

Plaintiffs allege that in promulgating the 2017 Rules, the New Mexico Supreme Court violated the Eighth Amendment's guarantee against excessive bail, Fourth Amendment protections against unreasonable searches and seizures, and the Due Process Clause of

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2 The Court previously granted Defendant Julie Morgas Baca's Rule 12(b)(6). Motion to Dismiss (Doc. 54) on October 25, 2017, and ordered Plaintiffs to properly name the Board of County Commissioners of the County of Bernalillo as a Defendant in this case (Doc. 53).

the Fourteenth Amendment. (*Id.* at Kf 119-29, 131-47, 149-61). In addition, Plaintiffs assert that the implementation of a pretrial release risk assessment tool in Bernalillo County which was authorized by the New Mexico Supreme Court violates the Eighth Amendment by prioritizing nonmonetary conditions of release. (*Id.* at ¶ 126). Plaintiffs ask the Court to declare the 2017 Rules unconstitutional and enjoin enforcement of the 2017 Rules, to award Plaintiffs monetary damages against all Defendants individually pursuant to 42 U.S.C. § 1983, along with attorney's fees under 42 U.S.C. § 1988, and to certify this lawsuit as a class action on behalf of "[a]ll New Mexico criminal defendants who are or will be subject to the liberty-restricting conditions of pre-trial release permitted by the [2017] Rules... without having the opportunity to be considered for release on secured bond." (*Id.* at ¶ 86).

On August 18, 2017, the New Mexico Judicial Defendants (all defendants except Bernalillo County) filed their Rule 12 Motion to Dismiss. (Doc. 14). On August 28, 2017, Bernalillo County adopted the Motion to Dismiss filed by the New Mexico Judicial Defendants. (Docs. 18, 59). On September 1, 2017, Plaintiffs filed their Response to the Motion to Dismiss. (Doc. 23). On September 14, 2017, Defendants filed their Reply in support of the Motion to Dismiss. (Doc. 29).

On September 19, 2017, Plaintiffs filed their Opposed Motion to Amend Complaint. (Doc. 31). On October 3, 2017, the New Mexico Judicial Defendants filed their Response in opposition to the Motion to Amend. (Doc. 34). On October 6, 2017, Bernalillo County filed its Response in opposition to the Motion to Amend. (Doc. 40). On October 17, 2017, Plaintiffs filed their Reply in support of the Motion to Amend. (Doc. 44). The Court heard oral argument at a hearing held on

November 27, 2017. This matter is now ready for disposition.

A. Historical Perspective on Bail in New Mexico

Originating in medieval England, bail allowed untried prisoners to remain free before conviction in criminal cases:

> In 1275, the English Parliament enacted the Statute of Westminster, which defined bailable offenses and provided criteria for determining whether a particular person should be released, including the strength of the evidence against the accused and the accused's criminal history. *See* Note, *Bail: An Ancient Practice Reexamined*, 70 Yale L.J, 966, 966 (1961); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 523-26 (1983). In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could obtain a timely bail hearing, In 1689, Parliament enacted an English Bill of Rights that prohibited excessive bail. *See* Carbone, *supra*, at 528. Early American constitutions codified a right to bail as a presumption that defendants should be released pending trial. *See* Note, *Bail*, *supra*, at 967.

ODonnell v. Harris Cty., Tex., — F. Supp. —, 2017 WL 1735456, at *11 (S.D. Tex. 2017). New Mexico's Constitution, like the United States Constitution,

forbids "excessive bail." N.M. Const., art. II, § 13. Article II, Section 13 enshrines the principle that a person accused of a crime is entitled to retain personal freedom "until adjudged guilty by the court of fast resort." *State v. Brown*, 338 P.3d 1276, 1282 (N.M. 2014) (internal quotation marks and citations omitted). "Once released, a defendant's continuing right to pretrial liberty is conditioned on the defendant's appearance in court, compliance with the law, and adherence to the conditions of pretrial release imposed by the court." *Id.* at 1282.

"At the federal level, the Judiciary Act of 1789 provided an absolute right to bail in noncapital cases and bail at the judge's discretion in capital cases." *ODonnell*, 2017 WL 1735456, at *15. The first Congress also proposed the Eighth Amendment to the United States Constitution, which, like the New Mexico Constitution and the English Bill of Rights, prohibits excessive bail. U.S. Const, amend. VIII; N.M. Const., art. II, § 13. However, neither the United States Constitution nor the New Mexico Constitution explicitly guarantees a right to bail. *Id.* Rather, the United States Constitution and the New Mexico Constitution only forbid "excessive bail." *Carlson v. London*, 342 U.S. 524, 545–46 (1952) (the Eighth Amendment does not provide a "right to bail").

The Bail Reform Act of 1966 became "the first major reform of the federal bail system since the Judiciary Act of 1789." *Brown*, 338 P.3d at 1286; Bail Reform Act of 1966, 80 Stat. 214 (repealed 1984). The stated purpose of the Bail Reform Act of 1966 was "to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges... when detention serves neither the ends of justice nor the public interest." *Id.*

at Sec. 2. The Act included the following key provisions to govern pretrial release in noncapital criminal cases in federal court: (1) a presumption of release on personal recognizance unless the court determined that such release would not reasonably assure the defendant's appearance in court, (2) the option of conditional pretrial release under supervision or other terms designed to decrease the risk of flight, and (3) a prohibition on the use of money bail in cases where nonfinancial release options such as supervisory custody or restrictions on "travel... or place of abode" are sufficient to reasonably assure the defendant's appearance. *Id.* at Sec. 3. As stated by the New Mexico Supreme Court in *State v. Brown*:

> By emphasizing nonmonetary terms of bail, Congress attempted to remediate the array of negative impacts experienced by defendants who were unable to pay for their pretrial release, including the adverse effect on defendants' ability to consult with counsel and prepare a defense, the financial impacts on their families, a statistically less-favorable outcome at trial and sentencing, and the fiscal burden that pretrial incarceration imposes on society at large.

338 P.3d at 1287.

Congress again revised federal bail procedures with the Bail Reform Act of 1984, enacted as part of the Comprehensive Crime Control Act of 1984. *See* Bail Reform Act of 1984, Pub. L. No. 98–473, § 202, 98 Stat. 1837, 1976 (codified at 18 U.S.C. §§ 3141-3150 (2012)). The legislative history of the 1984 Act states that Congress wanted to "address the alarming problem of

crimes committed by persons on release" and to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released." S. Rep. 98–225, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185. The 1984 Act, as amended, retains most of the 1966 Act but "allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure... the safety of any other person and the community.'" *United States v. Salerno*, 481 U.S. 739, 741 (1987) (omission in original) (quoting the Bail Reform Act of 1984) (upholding the preventive detention provisions in the 1984 Act).

The New Mexico Rules of Criminal Procedure provide the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution, *See* Rule 5–401 NMRA (providing procedures for district courts); Rule 6–401 NMRA (providing procedures for magistrate courts); Rule 7–401 NMRA (providing procedures for metropolitan courts); Rule 8–401 NMRA (providing procedures for municipal courts). New Mexico modeled its bail rules, which were first adopted in 1972, on the federal Bail Reform Act of 1966. *See* NMSA 1978, Crim. P, Rule 22 (Repl. Pamp. 1980; including the May 1972 New Mexico Supreme Court order); *see also* Committee commentary to Rule 5–401 NMRA (explaining that the rule is modeled on the Bail Reform Act of 1966). Like the Bail Reform Act of 1966, the New Mexico bail rules establish a presumption of release by the least restrictive conditions and emphasize methods of pretrial release that do not require financial security. *See* Rule 5–401(A) NMRA;

Brown, 388 P.3d at 1288; *State v. Gutierrez*, 140 P.3d 1106, 1110 (N.M. 2006) (recognizing "that the purpose of the Federal Bail Reform Act of 1966, from which [the New Mexico] rule is derived, was to encourage more releases on personal recognizance").

Originally, the only valid purpose of bail in New Mexico was to ensure the defendant's appearance in court. *Stale v. Ericksons*, 746 P.2d 1099, 1100 (N.M. 1987) ("[T]he purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court."). To further incentivize appearance in court, in the early 1970s, the New Mexico Legislature granted courts statutory authority to order forfeiture of bail upon a defendant's failure to appear, *see* NMSA 1978, § 31-3-2(B)(2) (1972, as amended through 1993), and enacted separate criminal penalties for failure to appear, *see* NMSA 1978, § 31-3-9 (1973, as amended through 1999). Following recognition in the federal Bail Reform Act of 1984 that public safety is a valid consideration in pretrial release decisions, the New Mexico Supreme Court amended the rales to require judges to consider not only the defendant's flight risk but also the potential danger that might be posed by the defendant's release to the community in fashioning conditions of release. *See* Rule 5–401 NMRA (1990) (prescribing that judges consider "the appearance of the person as required" and "the safety of any other person and the community").

The 1972 New Mexico rules specifically incorporated the evidence-based, rather than money-based, procedures that are statutorily required for federal courts. (Doc. 15-1 at 2). Significantly, the New Mexico rules since 1972 have: (a) required release conditions to be set during and not before the defendant's initial court appearance; (b) required

release on nonfinancial conditions unless the court makes specific findings that no nonfinancial conditions will reasonably assure court appearance; and (c) directed courts to impose various restrictions of liberty on released defendants that are appropriate in the circumstances of particular cases. (*Id.* at 3). Relying on the money-bond industry, many New Mexico courts routinely required money bonds without judicial determinations of individual risk or ability to pay, in apparent violation of Rule 5–401 and New Mexico's Constitution, and in contrast to the practice of federal courts. *Brown*, 338 P.3d at 1289.

B. The 2017 New Mexico Pretrial Release Rules

In 2014, bail reform was sparked in New Mexico by the *State v. Brown*, 338 P.3d 1276 (N.M. 2014) decision of the New Mexico Supreme Court holding that the use of bail to detain a defendant when less restrictive conditions of release would protect the public violated New Mexico's constitution. *Brown*, 338 P.3d at 1278. As a result of the *Brown* litigation, the New Mexico Supreme Court formed a broad-based *ad hoc* pretrial release advisory committee (the "Committee") to study pretrial release and detention practices in New Mexico and to make recommendations both for improving compliance with existing law and for making remedial changes in the law. (Doc. 15-1 at Ex. 2). On recommendation of the Committee in August 2015, the New Mexico Supreme Court submitted to the New Mexico Legislature a proposed amendment to Article II, Section 13 of the New Mexico Constitution that would facilitate a shift from money-based to risk-based release and detention. (*Id.* at Exs. 3 & 4).

New Mexico voters amended the New Mexico

Constitution in 2016 to enshrine the *Brown* holding, with Justice Charles Daniels lending active support to the campaign. (Doc. 15-1 at 6). State constitutional amendments in New Mexico require passage by both houses of the New Mexico Legislature and passage by a majority of New Mexico voters in a general election. (*Id.* at 5). After both chambers of the New Mexico Legislature considered and passed the proposed constitutional amendment and placed it on the general election ballot, an overwhelming majority of New Mexico voters approved the constitutional amendment. (*Id.* at 6).

Following the passage of the amendments to Article II, Section 13 of the New Mexico Constitution, the Committee recommended and the New Mexico Supreme Court agreed that the procedural rules governing release and detention in New Mexico must be updated to comply with and effectuate the new constitutional mandates. (*Id.* at 6). Consistent with its rulemaking procedure, the New Mexico Supreme Court published all proposed rules for public comment in early 2017, and unanimously promulgated on June 5, 2017, the 2017 Rules that are the subject of this lawsuit with an effective date of July 1, 2017. (*Id.*).

C. The Challenged Risk Assessment Instrument

Plaintiffs seek to prevent the application of the 2017 Rules that allegedly violate Plaintiffs' constitutional rights through the use of the Public Safety Assessment court-based pretrial risk assessment tool developed by the Laura and John Arnold Foundation (the "Public Safety Assessment Tool"). (Doc. 56). Although the fundamental provisions of Rule 5–401, requiring judges to set conditions of

release based on assessments of individual danger and flight risk remained unchanged, the New Mexico Supreme Court promulgated several new procedural rules in 2017:

- Rule 5–409 administers the new detention-for-dangerousness authority that the constitutional amendment conferred on the district courts.
- Rule 5–408 provides early release mechanisms for low-risk defendants in place of the fixed bail schedules that had been created in various localities in apparent violation of the individual judicial risk assessment required by Rule 5–401 and principles of constitutional law.
- The rules were amended to clarify unequivocally that local courts had no authority to create fixed money bail schedules in violation of Rule 5–401 and equal protection requirements.
- Rule 5–403 clarifies and strengthens the authority of courts to amend conditions of release or revoke release entirely for defendants who commit new crimes on release or otherwise will not abide with release conditions.
- Other rules provide expedited appeals by both the prosecution and the defense to review release and detention rulings.
- The New Mexico Supreme Court promulgated equivalent rules for the Magistrate Courts, the Metropolitan Courts, and the Municipal Courts.

(Doc. 15-1 at 6-7).

The 2017 Rules contain two provisions authorizing use of validated risk assessment instruments in determining the likelihood of a particular defendant's risk for committing new offenses on release or failing to appear at future court appearances, Rule 5-401(C) provides in relevant part:

> In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information concerning [reciting a list of additional factors the court should consider taken from the 1972 federal pretrial release statutes].

(*Id.* at Ex. 10). Currently, Bernalillo County is the only county in New Mexico authorized by the New Mexico Supreme Court to use a risk assessment instrument in order to conduct a pilot project to determine the effectiveness of the Arnold Foundation Public Safety Assessment Tool. (*Id.* at 7-8). Following completion of this pilot project, the New Mexico Supreme Court will decide whether to authorize statewide use of the Public Safety Assessment Tool or any other risk assessment instrument under Rule 5–401 as an additional discretionary tool in pretrial release decisions. (*Id*).

Rule 5–408(C), which authorizes early release of low-risk defendants, may also allow the future use of a risk assessment instrument. (*Id.* at 8). The New Mexico Supreme Court has not yet approved any risk assessment instrument for use under that rule and is not expected to consider such an authorization until after it has a chance to assess Bernalillo County's completed experience with the Arnold Foundation Public Safety Assessment Tool pilot project. (*Id*). Importantly, like the federal release and detention provisions on which New Mexico's rules are modeled, New Mexico has not precluded consideration of financially-secured bonds, including commercial bail bonds, where a court determines a money bond is necessary in a particular case to reasonably assure a defendant's return to court, as provided textually in Rule 5–401.

II. Legal Standard

A. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) applies to challenges to a plaintiff's standing. Federal courts are courts of limited jurisdiction and, as the party seeking to invoke federal jurisdiction, the plaintiff bears the burden of proving such jurisdiction is proper. *See Southway v. Cent. Bank of Nigeria*, 328 F.3d 1267, 1274 (10th Cir. 2003). A court lacking jurisdiction "cannot render judgment but must dismiss the case at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking" *Basso v. Utah Power & Light Co.*, 495 F,2d 906, 909 (10th Cir. 1974). Motions to dismiss under Rule 12(b)(1) "generally take one of two forms. The moving party may (1) facially attack the complaint's allegations as to the existence of

subject matter jurisdiction, or (2) go beyond allegations contained in the complaint by presenting evidence to challenge the factual basis upon which subject matter jurisdiction rests," *Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell*, 363 F.3d 1072, 1074 (10th Cir. 2004) (internal citation and quotations omitted), Here, Defendants facially attack the sufficiency of the complaint's allegations as to the existence of subject matter jurisdiction. Where a motion to dismiss is based on a facial attack, courts "apply the same standards under Rule 12(b)(1) that are applicable to a Rule 12(b)(6) motion to dismiss for failure to state a cause of action." *Muscogee (Creek) Nation* v. *Okla. Tax Comm'n*, 611 F.3d 1222, 1227 n.1 (10th Cir. 2010).

B. Rule 12(b)(6)

Rule 12(b)(6) authorizes a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The nature of a Rule 12(b)(6) motion tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994), The sufficiency of a complaint is a question of law, and when considering a Rule 12(b)(6) motion, a court must accept as true all well-pled factual allegations in the complaint, view those allegations in the light most favorable to the non-moving party, and draw all reasonable inferences in the plaintiff's favor. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[O]nly if a reasonable person could not draw... an inference [of plausibility] from the alleged facts would the defendant prevail on a motion to dismiss."); *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) ("[F]or

purposes of resolving a Rule 12(b)(6) motion, we accept as true all well-pled factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff.").

A complaint need not set forth detailed factual allegations, yet a "pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action" is insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Iqbal*, 556 U.S. at 678. "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U,S. at 555.

To survive a motion to dismiss, a plaintiff's complaint must contain sufficient facts that, if assumed to be true, state a claim to relief that is plausible on its face. *Twombly*, 550 U.S, at 570; *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "Thus, the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complainant must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims." *Ridge at Red Hawk, LLC. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis omitted). According to the United States Court of Appeals for the Tenth Circuit:

> "[P]lausibility" in this context must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs "have not nudged their claims across the line from conceivable to plausible." The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief.

Robbins v. Okla., 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570).

III. Discussion

Defendants argue that the Court should dismiss this action in its entirety for lack of subject matter jurisdiction, for failure to state a claim upon which relief can be granted, and on grounds of immunity from suit. (Docs. 14, 59). As a preliminary matter, the Court addresses whether Plaintiffs' claims are appropriately presented under 42 U.S.C. § 1983, rather than 28 U.S.C. §2241. Defendants contend that "[e]ven if Collins were subject to conditions of release she believed to be unconstitutional, a lawsuit for constitutional due process violations via § 1983, like this one, is premature at best." (Doc. 14 at 9). "Section 1983 provides a remedy against 'any person' who, under color of state law, deprives another of rights protected by the Constitution." *Collins v. City of Marker Heights, Tex.*, 503 U.S. 115, 120 (1992). Relief under § 2241 requires a plaintiff to exhaust state remedies before seeking federal relief while § 1983 has no exhaustion

requirement.

The Court concludes 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). While the Supreme Court of the United States 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.

In *Wolff v. McDonald*, 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, In *Gerstein*, the constitutional validity of a method of pretrial procedure, rather than its application to any particular case, was the focus of the challenge. Thus, the validity of the criminal conviction of the plaintiff would not be affected by the unconstitutionality of the pretrial procedure in question.

The Supreme Court has further 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 Plaintiffs do not seek the immediate or speedier release of Collins into the community nor would a favorable judgment in this case imply the invalidity of any subsequent conviction or sentence. 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.

A. Rule 12(b)(1) Motion to Dismiss for Lack of Standing

Next, the Court considers jurisdictional issues, such as whether Plaintiffs have standing to bring their constitutional claims. Defendants argue that this suit should be dismissed because Plaintiffs lack standing. (Doc. 14). The Court will address the standing of each plaintiff in turn. Article III restricts federal courts to the adjudication of "cases or controversies." U.S. Const, art. III, § 2, cl. 1. "The standing inquiry ensures that a plaintiff has a sufficient personal stake in a dispute to ensure the existence of a live case or controversy which renders judicial resolution appropriate." *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004). To establish Article III standing, the plaintiff must establish that: (1) he has suffered an "injury in fact"

that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of defendants; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested. *See Friends of the Earth, Inc, v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Tandy*, 380 F.3d at 1283. The party seeking to invoke federal jurisdiction bears the burden of establishing all three elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

1. Bail Bond Association of New Mexico

Bail Bond Association of New Mexico states that it is "a professional membership organization comprised of bail bond businesses" doing business in New Mexico. (Doc. 56 at ¶ 19). The Bail Bond Association of New Mexico complains that the 2017 Rules "created [a] hierarchy effectively prohibiting the lower courts from considering secured bonds without placing untenable work requirements on the lower court judges therein effectively removing the option from consideration by judges and a de facto situation wherein jailhouse bonds where [sic] completely extinguished as an option for pre-arraignment release." (*Id.* at ¶ 51). The Bail Bond Association of New Mexico purports to represent an undefined population of potential customers who prefer pretrial release purchased with money bonds to release on nonfinancial conditions. (*Id.* at ¶ 62).

i. First-Party Standing

The Bail Bond Association of New Mexico does not, in the Complaint, allege a violation of its own

rights. 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 searches and seizures under the Fourth Amendment (as applied to the states through the Fourteenth Amendment). (Doc. 56). None of these claims directly addresses the rights of the Bail Bond Association of New Mexico or its member companies.

Defendants assert that the Bail Bond Association of New Mexico cannot maintain a viable cause of action on behalf of its member companies' prospective clients. (Doc. 14). The Court finds that the Bail Bond Association of New Mexico does not, in fact, assert violations of its own constitutional rights. The injury-in-fact requirement mandates that there be "an invasion of a legally protected interest," *Lujan*, 504 U.S. at 560. While the business of the Bail Bond Association of New Mexico's member companies may have been harmed economically by a reduction in the number of defendants given the option of monetary bail, this harm is not alleged to be the result of an invasion of the Bail Bond Association of New Mexico's legally-protected interest. *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 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")). Significantly, no member company of the Bail Bond Association of New Mexico has been named as a criminal defendant, has been confined, or has identified a constitutional right that it holds as a corporation that is seeks to vindicate. Likewise, the Due Process and Fourth Amendment claims in Plaintiffs' Complaint do not constitute an invasion of the Bail Bond Association of New Mexico's legally-protected interests, despite the economic harm to the Bail Bond Association of New Mexico's member companies that may allegedly result from the application of the 2017 Rules to their potential customers. Because the Bail Bond Association of New Mexico does not assert its own constitutional rights, the Court finds that the Bail Bond Association of New Mexico lacks first-party standing.

ii. Third-Party Standing

Next, Defendants argue that the Bail Bond Association of New Mexico lacks third-party standing. (Doc. 14). The Tenth Circuit recognizes third-party standing. *Aid for Women v. Foulston*, 441 F.3d 1101, 1112 (10th Cir. 2006) (finding that particular relationships, such as the physician- patient relationship, are "sufficiently close for third-party standing."). 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. *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998); *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991).

Assuming that criminal defendants are prevented from entering into a contractual relationship with a bail bond company like those belonging to the Bail Bond Association of New Mexico, and that those defendants have a constitutional entitlement to that monetary bail, the Bail Bond Association of New Mexico still does not articulate how it can satisfy the third necessary precondition to third-party standing. There are no factual allegations to establish a "close relationship" in the colloquial or commonsense meaning of the phrase. The Bail Bond Association of New Mexico does not allege an existing contractual relationship with any criminal defendant whose rights have been violated. Regardless, the Court does not see how criminal defendants face obstacles or that there is some hindrance in pursuing their own claims. *Campbell*, 523 U.S. at 397.

In fact, Plaintiffs have named a criminal defendant, Darlene Collins, in this lawsuit and she has faced no obstacle or hindrance in asserting her claims that her constitutional rights were violated. As such, the Court cannot discern a basis to allow for third-party standing for the Bail Bond Association of New Mexico where the "third party" is a named plaintiff actively participating in this lawsuit. Accordingly, the Court finds that the Bail Bond Association of New Mexico has not satisfied the necessary preconditions to establish third-party standing in this action. Therefore, the Bail Bond Association of New Mexico's claims against Defendants shall be **DISMISSED.**

2. Criminal Defendant Darlene Collins

Plaintiffs claim by subjecting Plaintiff Darlene Collins "and other presumptively innocent criminal defendants to... restrictive conditions of release, including home detention and GPS monitoring through an ankle bracelet, Defendants intrude on the constitutionally protected right to liberty." (Doc. 56 at ¶ 139). Defendants assert Collins was released on the least restrictive terms available as outlined under the 2017 Rules. *See* Rule 5–401 (D) NMRA; Rule 7–401(D) NMRA. Defendants argue that Plaintiffs cannot use Collins to challenge "home detention and GPS monitoring through an ankle bracelet" as she was never subjected to either of those release conditions. *See Brown v. Livingston*, 524 F. App'x 111, 115 (5th Cir. 2013) (parolee lacked standing to challenge GPS monitoring because that condition had not been imposed on him, rendering his claims "hypothetical and conjectural").

The Court is mindful of the requirement under Article III that 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*, 504 U.S. at 561. After Collins's arrest for aggravated assault, she was released on purely nonmonetary conditions. (Doc. 56 at ¶ 74). Plaintiffs do not allege that Collins was subjected to home detention or required to undergo GPS monitoring through an ankle bracelet. (*Id.*). However, Collins claims that her injury does not solely result from restrictions on her liberty, but rather, an arraignment hearing that violated her rights under the Fourth, Eighth, and Fourteenth Amendments. (*Id.*). Collins alleges she was injured by the holding of a hearing that did not afford her constitutional rights, including the alleged right to have "a non-excessive

secured bond" considered on an equal footing with other conditions of release, (Doc. 56 at 5). The Court finds Collins has standing to assert these claims. The redress she seeks is a process to set conditions of release where monetary bail is given equal consideration as nonmonetary conditions. Accordingly, the Court finds Collins has adequately pled the necessary elements of Article III standing.

3. Individual New Mexico State Legislators

Plaintiffs claim that because the New Mexico Legislature has "exercised its legislative authority to pass laws to preserve the public peace," the New Mexico Supreme Court cannot promulgate procedural rules for pretrial release and detention. (Doc. 56 at ¶ 80). "[A] threshold question in the legislator standing inquiry is whether the legislator-plaintiffs assert an institutional injury." *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214 (10th Cir. 2016). Institutional injuries "are those that do not zero in on any individual Member," but instead are "widely dispersed" and necessarily impact all members of a legislative body equally. *Id.* In other words, "an institutional injury constitutes some injury to the power of the legislature as a whole rather than harm to an individual legislator. An individual legislator cannot 'tenably claim a personal stake' in a suit based on such an institutional injury." *Id.*

Plaintiffs concede that the New Mexico Constitution gives the New Mexico Supreme Court the authority "to write rules for the administration of justice in the lower courts." (Doc. 56 at ¶ 77). Yet, Plaintiffs complain that the New Mexico Supreme Court's promulgation of the 2017 Rules and the lower

courts' enforcement of those Rules intrude upon the authority of the New Mexico Legislature. (*Id.*). These alleged injuries are to the New Mexico Legislature as a whole and not to Senator Richard Martinez, Senator Bill Sharer, Senator Craig Brandt, and Representative Carl Trujillo as individual legislators.

The Court is of the opinion that a single legislator, acting individually, does not have standing to prosecute an injury to the entire legislature. Plaintiffs do not claim they have been authorized to prosecute this action on behalf of the New Mexico Legislature. Further, the legislator Plaintiffs do not allege they have any specific interest separate and apart from their legislative colleagues who have not joined this lawsuit. Because the legislator Plaintiffs claim an institutional injury, the Court finds they do not have standing. *See Kerr*, 824 F.3d at 1214 ("[I]ndividual legislators may not support standing by alleging only an institutional injury."). Accordingly, the legislator Plaintiffs' claims against Defendants shall be **DISMISSED.**

B. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim

Plaintiffs' Amended Complaint contains three counts: "Count One Violation of Right to Bail (Eighth and Fourteenth Amendments)," "Count Two Deprivation of Liberty Without Due Process of Law (Fourteenth Amendment," and "Count Three Unreasonable Search and Seizure (Fourth and Fourteenth Amendments)." (Doc. 56). During oral argument at the hearing held on November 27, 2017, Plaintiffs also asserted a separation of powers claim, although no such claim is specifically delineated in their Complaint. (*Id.*). Plaintiffs' claims derive from Collins's

constitutional rights under the Fourth, Eighth, and Fourteenth Amendments. (*Id.*). Defendants assert that because Plaintiffs fail to state a claim for any violation of Collins's rights, this action should be dismissed in its entirety. (Docs. 14, 59).

At the outset, the Court notes that the Complaint does not contain specific allegations against each defendant. For example, the only substantive allegations against Bernalillo County are contained in paragraph 49 of the Complaint, (Doc. 56 at ¶ 49). There, Plaintiffs state that Bernalillo County entered into an agreement with the Arnold Foundation to implement the Public Safety Assessment Tool authorized by the 2017 Rules, which allegedly denied criminal defendants "the opportunity to secure their pre-trial release through a secured bood[.]" (*Id.*). These allegations, without more, fail to establish any constitutional violation on behalf of Bernalillo County.

Plaintiffs fail to explain how each individual defendant allegedly committed separate § 1983 violations, Instead, in a conclusory fashion, Plaintiffs lump together Defendants with no effort to distinguish them. Such general, global allegations of fault are not permissible pleading practice under the Federal Rules of Civil Procedure and are insufficient to allege a constitutional violation against any individual defendant. *Robbins v. Oklahoma*, 519 F.3d 1242, 1249-50 (10th Cir. 2008) ("In § 1983 cases, defendants often include the government agency and a number of government actors sued in their individual capacities," and for that reason "it is particularly important in such circumstances that the complaint make clear exactly who is alleged to have done what to whom, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from

collective allegations against the state.").

1. Excessive Bail

First, Plaintiffs argue that the 2017 Rules violate the Eighth Amendment rights of Collins and other presumptively innocent criminal defendants, (Doc. 56). Plaintiffs claim the New Mexico Supreme Court "may not... restrict the liberty of presumptively innocent defendants without offering the one alternative to substantial pre-trial deprivations that the Constitution expressly protects—monetary bail." (Doc. 56 at ¶ 9). In simple terms, Collins believes she is entitled under the Eighth Amendment to have monetary bail prioritized above nonmonetary options in the pretrial release decision.

In relevant part, the Eighth Amendment of the U.S. Constitution provides that "[ejxcessive bail shall not be required." U.S. Const, amend. VIII. 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). Plaintiffs argue the Eighth Amendment's prohibition of "excessive bail" presupposes a right to bail as an alternative to pretrial deprivation of liberty for bailable offenses, and the 2017 Rules impermissibly foreclose monetary bail as an option. In other words, Plaintiffs contend that if the Bail Clause of the Eighth Amendment is to have any meaning, it must create a constitutional right to bail.

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. 1981) (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).

Notably, Plaintiffs 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 any conditions of release pending trial. Traditionally, bail has been defined 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). Some of these bail definitions involve money but others do not, such as the one applicable here, release on a criminal defendant's own recognizance.

While the United States Constitution and the New Mexico Constitution forbid excessive bail, they do not guarantee an absolute right to bail or money bail. *See* U.S. Const., amend. VIII; N.M. Const., art. II, § 13; *United States v. Salerno*, 481 U.S. 739, 752 (1987) ("The Eighth Amendment addresses pretrial release by providing merely that 'excessive bail shall not be required.' This Clause, of course, says nothing about whether bail shall be available at all."); *Carlson v. Langdon*, 342 U.S, 524, 545-46 (1952) (holding the Eighth Amendment does not provide for an absolute "right to bail."). In the landmark case of *United States v. Salerno*, 481 U.S. 739 (1987), the Supreme Court held that the Eighth Amendment "says nothing about whether bail shall be available at all." *Salerno*, 481 U.S. at 752. Accordingly, the Court concludes that there is no right to money bail implied within the Eighth Amendment.

Next, Plaintiffs argue that the 2017 Rules violate the Eighth Amendment because New Mexico cannot impose deprivations of liberty, like home detention and electronic monitoring, without first offering money bail. Plaintiffs complain that the State does not allow monetary bail unless all other nonmonetary options have been exhausted. *Salerno* articulates the constitutional principles governing the use of preventive detention in the pretrial context, and provides support for the constitutionality of the 2017 Rules. 481 U.S. at 739.

Salerno concerned a facial attack on the federal Bail Reform Act of 1984. The Bail Reform Act requires courts to detain arrestees charged with certain serious

felonies prior to trial when considering the safety of the community under 18 U.S.C. § 3142(f), 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 person and the community." 18 U.S.C. § 3142(e). The Bail Reform Act is silent as to the level of proof required to establish risk of flight and circuit courts across the country have ruled that flight risk need only be supported by a "preponderance of the evidence." *See United States v. Cisneros*, 328 F.3d 610, 616 (10th Cir. 2003) ("The government must prove risk of flight by a preponderance of the evidence, *see, e.g.*, *United States v. Xulam*, 84 F.3d 441, 442 (D.C. Cir. 1996) (per curiam); *United States v. Quartermaine*, 913 F.2d 910, 917 (11th Cir. 1990), and it must prove dangerousness to any other person or to the community by clear and convincing evidence, 18 U.S.C. § 3142(f).")

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, "[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. Thus, the Supreme Court in *Salerno* 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.

The 2017 Rules do not forbid commercial bail. In fact, the 2017 Rules explicitly contemplate that courts may require secured bonds for a criminal defendant's release. Rule 5-401(E) & (F), Rule 5–401.2 NMRA. The 1972 Rules presumptively required that a criminal defendant "shall be released pending trial on [her or his] personal recognizance or upon the execution of an unsecured appearance bond," unless the court made written findings that those conditions would be insufficient to ensure the defendant's appearance. (Doc. 15-1 at Exhibit 1). Only if the court made a written determination that release on personal recognizance or an unsecured appearance bond would not ensure the defendant's appearance or would endanger the safety of another person or the community, would the court proceed to consider a secured bond requirement prior to the 2017 Rules. (*Id.*).

The Court is of the opinion that there is no provision in the 1972 Rules, or any other source of law, guaranteeing the option of money bail to criminal defendants in New Mexico. Plaintiffs do not cite a single *post-Salerno* bail case mandating monetary bail, let alone one finding that nonmonetary conditions cannot be utilized by a judicial officer when considering the pretrial release of a criminal defendant. Accordingly, the Court finds that Plaintiffs fail to state a claim for any violation of the Eighth Amendment.

2. Due Process

Plaintiffs allege that "[b]y subjecting Plaintiff Collins and other presumptively innocent criminal defendants to denial of pre-arraignment release, restrictive conditions of release, including home detention and GPS monitoring through an ankle bracelet, Defendants intrude on the constitutionally protected right to liberty." (Doc. 56 at 137). Unquestionably, the Due Process Clause applies to pretrial detention. *See United States v. Cos*, 198 F. App'x 727, 732 (10th Cir. 2006) ("[A]t some point due process may require a release from pretrial detention"); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986) ("Although pretrial detention is permissible when it serves a regulatory rather than a punitive purpose, we believe that valid pretrial detention assumes a punitive character when it is prolonged significantly."). Criminal defendants routinely assert their due process rights in arguing for pretrial release as opposed to continued detention. *See, e.g., United States v. Gonzales*, 995 F. Supp. 1299, 1303–04 (D.N.M. 1998).

i. Procedural Due Process

First, Plaintiffs argue the 2017 Rules violate Collins's due process rights because liberty-restricting conditions were considered before monetary bail in her pretrial release determination. The Court has serious doubts that Collins is the appropriate plaintiff to advance a due process claim based on home detention or GPS monitoring since she was not subjected to those specific conditions of release. However, the Court addresses the merits of Plaintiffs' due process claims to avoid the possibility of needlessly prolonging this lawsuit simply by substituting plaintiffs.

Procedural due process requires the balancing of three familiar 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). 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.

Plaintiff Collins was arrested on charges of

aggravated assault, a violent fourth-degree felony, on Sunday, July 2, 2017 at 5:54 a.m. (Doc. 15-3 at ¶ 3). Because Collins was charged with a violent felony, she was required to appear before a Metropolitan Court judge. *See* Rules 5–408 NMRA, 5–408 NMRA. Collins appeared before Metropolitan Judge Courtney Weaks on July 5, 2017. (Doc. 15-3 at ¶ 4). Judge Weaks ordered Collins released on her own recognizance, subject to certain limited conditions set forth in a written order, conditions to which Collins affirmatively agreed. (*Id.*). The 2017 Rules required the court to conduct a hearing and issue an order setting conditions of release within "three... days after the date of arrest if the defendant is being held in the local detention center." Rule 7–401(A) NMRA. Collins's hearing was held and the order of release was issued within the required timeframe. (Doc. 15-3).

A condition of release can violate due process if it prevents the courts from evaluating and setting relevant conditions of pretrial release for criminal defendants on an individual basis. *United States v. Torres*, 566 F. Supp. 2d 591, 596 (W.D. Tex. 2008). Yet, the 2017 Rules require courts to evaluate and set appropriate conditions of release on a case-by-case basis. Significantly, Plaintiffs never allege that any actual condition of Collins's release is unconstitutional. (Doc. 56). Further, Plaintiffs do not argue that Collins's conditions of release are vague or unintelligible. (*Id.*). In fact, Plaintiffs state that "[u]ltimately, no conditions were imposed upon [Collins's] release post-arraignment and pre-trial other than a verbal order from the Court that she was being released." (*Id.* at ¶ 74). Since Collins had a pretrial detention hearing on July 5, 2017, with the opportunity to afford herself all of the protections under New Mexico law and the

Constitution, and Collins consented on the record to the nonmonetary conditions in exchange for her release from jail, the Court finds that Plaintiffs fail to state a claim for any violation of procedural due process.

ii. Substantive Due Process

Plaintiffs also assert a substantive due process claim on Collins's behalf on the ground that "the option of non-excessive bail for a bailable offense is 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'" (Doc. 56 at ¶ 140). The substantive component of the Due Process Clause limits what government may do regardless of the fairness of procedures that it employs in order to "guarantee protect[ion] against government power arbitrarily and oppressively exercised." *Cty. 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. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* at 755.

Plaintiffs argue Collins's substantive due process rights were violated because the 2017 Rules prevent her from having the option of posting monetary bail sufficient to ensure her future appearance before being subjected to severe deprivations of pretrial liberty. (Doc. 56). Defendants contend that the option of monetary bail is not a fundamental right and need not be considered before nonmonetary conditions of pretrial release are implemented. (Doc. 14). "[B]ail 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." *Coffin v. United States*, 156 U.S, 432, 453 (1895). However, the Court is of the opinion that purchasing pretrial release with monetary bail does not implicate fundamental rights under a substantive due process analysis. *See Broussard v. Parish of Orleans,* 318 F.3d 644, 657 (5 th Cir. 2003).

As noted above, Plaintiffs' argument fails to distinguish between money bail and nonmonetary conditions of bail, especially in light of *Salerno.* Plaintiffs do not cite a single post- *Salerno* bail case describing monetary bail as a "fundamental" right. In *Salerno,* the Court made clear that the government has a legitimate interest in regulating pretrial release and detention. 481 U.S. at 753, 749 (rejecting "the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release," and noting that the government's interest in public safety "is both legitimate and compelling").

In the present case, the fact that Collins was released on her own recognizance with minimal conditions does not shock the Court's conscience, nor does the absence of a monetary bail option in lieu of, or in addition to, any potential restrictions that are aimed at deterring dangerousness. (Doc. 15-3 at 4). Moreover, Collins failed to challenge any nonmonetary conditions of release when she had the opportunity to do so at her pretrial detention hearing. 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 Plaintiffs fail to state a claim for any violation of substantive due process.

3. Fourth Amendment

Plaintiffs claim that the 2017 Rules violate the Fourth Amendment rights of Collins and other presumptively innocent criminal defendants to be free from unreasonable searches and seizures. The Amended Complaint alleges that "pre-trial release conditions such as home detention and mandatory reporting to pre-trial services constitute a Fourth Amendment 'seizure.'" (Doc. 56 at ¶ 152 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984)). Plaintiffs assert that because the 2017 Rules prioritize nonmonetary conditions, the Rules necessarily "violate[ ] the Fourth Amendment." (*Id.* at ¶ 159).

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. The Fourth Amendment only prohibits "unreasonable" searches and seizures. *Id.* "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) (internal citations and quotation marks omitted).

While the conditions complained of in this case, such as electronic monitoring or home detention, were not actually imposed on Collins, the Court agrees that under normal circumstances such conditions would likely constitute an intrusion upon an individual's reasonable expectation of 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*, 569 U.S. 435, 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, pretrial release conditions such as electronic monitoring and home arrest may well be "reasonable" under the circumstances.

The Supreme Court has held that a judicial officer's determination of the reasonableness of significant intrusions into the liberty or property of an individual under all the circumstances protects the right to be free from unreasonable searches and seizures, as preserved by the Fourth Amendment, *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. *Id.*

Again, the Court cannot overlook the fact that Collins was not subjected to any conditions requiring electronic monitoring or home detention. Thus, Collins has not been subjected to any severe restrictions of her liberty as a result of the 2017 Rules. Faced with the risk of pretrial detention, Collins was released on her own recognizance with minimal conditions. (Doc. 15-3 at ¶ 4). Within this context, the Court does not find the pretrial conditions imposed on Collins to be unreasonable. Moreover, the Tenth Circuit has expressly declined to adopt a "continuing seizure" analysis that would deem pretrial release conditions a "seizure" under the Fourth Amendment. *See Becker v. Kroll*, 494 F.3d 904, 915 (10th Cir. 2007) ("To extend liability in cases without a traditional seizure would expand the notion of seizure beyond recognition.... [I]f the concept of a seizure is regarded as elastic enough to encompass standard conditions of pretrial release, virtually every criminal defendant will be deemed to be seized pending the resolution of the charges against him."). As a result, the Court finds Plaintiffs fail to state a claim for any violation of the Fourth Amendment.

4. Separation-of-Powers Claim

Plaintiffs cite to New Mexico's rules of pleading, practice and procedure as the legislative enactment upon which Defendants have encroached. Specifically, NMSA § 38-1-1 states:

> The supreme court of New Mexico shall, by

> rules promulgated by it from time to time, regulate pleading, practice and procedure injudicial proceedings in all courts of New Mexico for the purpose of simplifying and promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant.

At the hearing held on November 27, 2017, Plaintiffs' counsel argued that the 2017 Rules violate this statute by abridging or modifying the substantive rights of criminal defendants.

As previously discussed, Plaintiffs have not shown that the 2017 Rules violate any constitutional rights of criminal defendants under the Fourth Amendment, Eighth Amendment, or Fourteenth Amendment. The 1972 Rules in existence prior to the 2017 Rules directed courts to apply a presumption of release on nonfinancial conditions, unless a court made specific findings that no non-financial conditions would assure court appearance. Thus, criminal defendants have never been guaranteed the option of monetary bail under New Mexico law in existence before or after the 2017 Rules. Accordingly, Plaintiffs have not identified any "substantive rights" that the 2017 Rules allegedly "abridge, enlarge or modify[.]" NMSA § 38-1-1. Therefore, Plaintiffs fail to state a viable separation-of-powers claim,

Next, Plaintiffs claim by promulgating the 2017 Rules, the New Mexico Supreme Court has "infringe[d] upon the power of the Legislature to make law." (Doc. 56 at ¶ 80). Plaintiffs assert the 2017 Rules "infringe[ ] upon the authority of the New Mexico Legislature to pass laws preserving the public peace." (Doc. 56 at 31-

32). However, under New Mexico law, the New Mexico Supreme Court retains "ultimate rule-making authority" to enact procedural rules for the New Mexico state courts. *Albuquerque Rape Crisis Cir. v. Blacbner*, 120 P.3d 820, 822 (N.M. 2005); *State v. Roy*, 60 P.2d 646, 660 (N.M. 1936) (discussing the New Mexico Supreme Court's "exercise of an inherent power... to prescribe such rules of practice, pleading, and procedure as will facilitate the administration of justice"). The New Mexico Legislature has long recognized the New Mexico Supreme Court's rule-making authority, which encompasses the authority to promulgate rules of criminal procedure. NMSA 1978, § 38-1-1(A) (providing that "[t]he supreme court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico."). Thus, Plaintiffs' claims that the New Mexico Supreme Court modified statutory law without legislative authority are meritless.

5. Public Safety Assessment Tool Claims

Plaintiffs also claim the Public Safety Assessment Tool developed by the Laura and John Arnold Foundation authorized by the New Mexico Supreme Court for use in a pilot program in Bernalillo County "deprive[s] presumptively innocent pre-trial defendants of their liberty rights... [and] provides no room for discretion and consideration of bail instead of such deprivations." (Doc. 11 at 21). Plaintiffs mischaracterize the 2017 Rules and the purpose of the Public Safety Assessment Tool. As previously discussed, there is no constitutionally-protected liberty interest in securing release from pretrial detention

through a commercial bond.

Moreover, the 2017 Rules provide that the court "shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction," in evaluating the least restrictive conditions of release that will reasonably ensure the appearance of a criminal defendant. Rule 5–401(C) NMSA. The careful process of gathering reliable information and risk assessments, as contemplated by the 2017 Rules and the Public Safety Assessment Tool implemented in Bernalillo County, provides 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. While trial courts may consider the Public Safety Assessment Tool, it does not displace the discretion of judges. Therefore, Plaintiffs fail to state a claim that the Public Safety Assessment Tool in Bernalillo County is unconstitutional.

6. Money Damages

To establish a violation of civil rights actionable under § 1983, "a plaintiff must allege that (1) he was deprived of a right secured by the Constitution or laws of the United States, and (2) the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 52 U.S. 40, 49-50 (1999). Because § 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred," a plaintiff requesting relief under § 1983 must "identify the specific constitutional right allegedly infringed."

Albright v. Oliver, 510 U.S. 266, 271 (1994). "Conclusory allegations will not suffice." *Wise v. Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981). As explained above, Plaintiffs cannot state a claim for any violation of Collins's Eighth, Fourth, or Fourteenth Amendment rights. As a result, Plaintiffs cannot seek money damages from Defendants through § 1983. *Duvall v. Cabinet for Human Res.*, 920 F. Supp. 111, 114 (E.D. Ky. 1996) ("If there is no constitutional right violated, then the question of whether the right is clearly established is irrelevant."). Therefore, Plaintiffs fail to state a claim for money damages.

C. Immunity

1. Sovereign Immunity

"[S]uits against States and their agencies ... are barred regardless of the relief sought" by the Eleventh Amendment to the United States Constitution. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). "If there is no waiver of sovereign immunity, the government is immune from suit, and the court has no subject-matter jurisdiction to hear the case." *Vallo v. United States*, 298 F. Supp. 2d 1231, 1234 (D.N.M. 2003); *Clymore v. United States*, 415 F,3d 1113, 1118 n.6 (10th Cir. 2005). The Eleventh Amendment to the United States Constitution provides that the "Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U,S. Const. amend. XI. "The Eleventh Amendment bars suits for damages against a state or state agency absent congressional

abrogation or waiver and consent by the state." *Ross v. Bd. of Regents of the Univ. of N.M.*, 599 F.3d 1114, 1117 (10th Cir. 2010).

The New Mexico Supreme Court is a component part of the State of New Mexico, and therefore immunized from any suit for damages. *See* N.M. Const., art. VI, § 1 ("The judicial power of the state shall be vested in... a supreme court," and enumerated lower courts); *see also Russillo v. Scarborough*, 727 F. Supp. 1402, 1409 (D.N.M. 1989) (Supreme Court and other state courts are state agencies and, absent their consent, "are immune from federal suits brought by [the state's] own citizens"). Similarly, Second Judicial District Court and Bernalillo County Metropolitan Court are agencies of the State. *See* NMSA 1978, § 34-6-21 ("The district courts are agencies of the judicial department of the state government."); § 34-8A-8(B) ("The metropolitan court is an agency of the judicial branch of state government."). State officials and employees, like the judges and court administrators sued here, "are likewise provided immunity as 'an arm of the state,'" *Hunt v. Cent. Consol. Sch. Dist.*, 951 F. Supp. 2d 1136, 1992 (D.N.M. 2013) (quoting *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280-81 (1977)); *Ysais v. N.M. Judicial Standard Comm'n*, 616 F. Supp. 2d 1176, 1186 (D.N.M. 2009) ("The Eleventh Amendment bars a suit for damages in federal court against a State, its agencies, and its officers acting in their official capacities").

While "[s]tates enjoy sovereign immunity from suit under the Eleventh Amendment," that "immunity is not absolute." *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012). Under *Ex parte Young*, 209 U.S. 123 (1908), "a plaintiff may bring suit against individual state officers acting in their official

capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief." *Id.; see also Quern v. Jordan*, 440 U.S. 332, 337 (1979) (under *Ex parte Young*, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law."). To determine whether "*Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). "[T]he exception is narrow: It applies only to prospective relief, [and it] does not permit judgments against state officers declaring that they violated federal law in the past[.]" *P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 146.

Because Plaintiffs' claims for damages against Defendants Charles W. Daniels, Edward L. Chavez, Petra Jimenez Maez, Barbara J. Vigil, Judith K. Nakamura, the New Mexico Supreme Court, Nan Nash, James Noel, the Second Judicial District Court, Henry A. Alaniz, Robert L. Padilla, and Bernalillo County Metropolitan Court are barred by sovereign immunity, Plaintiffs tail to state a claim for "damages to compensate for the injuries they have suffered as a result of Defendants' unconstitutional conduct." (Doc. 56 at 32). Furthermore, as explained above, Plaintiffs fail to state a claim for an ongoing violation of federal law under the Fourth Amendment, Eighth Amendment, or Fourteenth Amendment. Therefore, the *Ex parte Young* exception to Eleventh Amendment immunity does not apply and Plaintiffs fail to state official-capacity claims against the Judicial Defendants.

2. Judicial Immunity and Legislative Immunity

It is well-established that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Stump v. Sparkman*, 435 U.S. 349, 355 (1978). "The primary policy of extending immunity to judges and to prosecutors is to ensure independent and disinterested judicial and prosecutorial decisionmaking." *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (citations omitted). "Judicial immunity applies only to personal capacity claims." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011).

Where judges act in a ride-making capacity rather than an adjudicative capacity, the Supreme Court has indicated that the applicable immunity is legislative rather than judicial. *See Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731 (1980) (determining that Virginia Supreme Court's issuance of State Bar Code "was a proper function of the Virginia court," but "was not an act of adjudication but one of rulemaking"); *id.* at 734 (Where lawsuits against the State Supreme Court are premised on "issuance of, or failure to amend, the challenged rules, legislative immunity would foreclose suit"); *Abick v. Michigan*, 803 F.2d 874, 877-78 (6th Cir. 1986) (concluding the Michigan Supreme Court's promulgation of rules of practice and procedure was a legislative activity and therefore the justices of that court were entitled to legislative immunity); *Lewis v. N.M. Dep't of Health*, 275 F. Supp. 2d 1319, 1325 (D.N.M. 2003) ("[O]fficials outside the legislative

branch," including judges, "are entitled to immunity when they perform legislative functions,") (citation omitted).

"Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998). The purpose of legislative immunity is to "enable[ ] officials to serve the public without fear of personal liability. Not only may the risk of liability deter an official from proper action, but the litigation itself 'creates a distraction and forces legislators [or other state officials entitled to legislative immunity] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Sable v. Myers*, 563 F.3d 1120, 1123-24 (10th Cir. 2009) (quoting *Sup. Ct. of Va.*, 446 U.S. at 733). The absolute immunity applies both to claims for damages and to those for prospective relief. *Sup. Ct. of Va.*, 446 U.S. at 732-33.

Here, the Complaint alleges wrongdoing by the New Mexico Supreme Court Justices in their rule-making capacity. (Doc. 56 at ¶ 9). Specifically, Plaintiffs claim that the New Mexico Supreme Court's enactment of the 2017 Rules violates criminal defendants' right to opt for money bail before being offered other conditions of release. (*Id.* at ¶ 80). Further, Plaintiffs allege that the New Mexico Supreme Court intruded on the exclusive province of the New Mexico Legislature in promulgating the 2017 Rules. (*Id.*). Legislative immunity, therefore, protects the state court justices from suit.

Plaintiffs also sue the Second Judicial District Court, Bernalillo County Metropolitan Court, and those courts' chief judges and court executive officers on the basis that they "adopted and implemented the Public Safety Assessment court-based pretrial risk

assessment tool," which Plaintiffs assert "effectively eliminated pre-trial release pursuant to a secured bond denying [criminal defendants] the pre-trial liberty option of a secured bond." (Doc. 56 at ¶ 5); (*Id.* at ¶ 49) ("The use of the Arnold [Public Safety Assessment] Tool... infringe[s] upon a person's pretrial liberty just as the Supreme Court Rules do."). Judge Nash and Judge Alaniz are protected by judicial immunity in connection with their implementation of the 2017 Rules.

Mr. Noel and Mr. Padilla are likewise protected by quasi-judicial immunity. The absolute immunity available to judges is "extended, under the rubric of quasi-judicial immunity, to other officials who perform functions closely associated with the judicial process." *Fuller v. Davis*, 594 F. App'x 935, 939 (10th Cir. 2014); *Kincaid v. Vail*, 969 F.2d 594, 601 (7th Cir. 1992) (Quasi-judicial immunity exists to protect court staff from "the danger that disappointed litigants blocked by the doctrine of absolute immunity from suing the judge directly, will vent their wrath on clerks, court reporters, and other judicial adjuncts."). In this case, the court staff defendants are sued only because they implemented court rules and orders, and thus, they are protected from suit. *See Penn v. United States*, 335 F.3d 786, 790 (8th Cir. 1982) (Absolute quasi-judicial immunity applies to public officials who are required to act under a court order or at a judge's direction). Therefore, Plaintiffs fail to state individual-capacity claims against the Judicial Defendants.

D. Plaintiffs' Motion to Amend

Plaintiffs seek leave to amend to add two other state legislators as named party plaintiffs, to name the individual defendants in their personal capacity for

damages under 42 U.S.C. § 1983, to add criminal defendant William Martinez as a named party plaintiff, to add claims for violations of the First Amendment based on the Rule 11 Motion for Sanctions filed by Judicial Defendants in this case on September 22, 2017 (Doc. 33), and to add a new separation-of-powers claim under the New Mexico Constitution. (Doc. 31). Under Fed. R. Civ. P. 15, the Court should give leave to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). Although Federal Rule of Civil Procedure 15(a) provides that leave to amend is to be given freely, the district court may deny leave to amend where an amendment is futile. *Bradley v. Val-Mejias*, 379 F.3d 892, 901 (10th Cir. 2004). A proposed amendment is futile if the complaint, as amended, would be subject to dismissal. *TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1028 (10th Cir. 1992); *Jefferson Cty. Sch. Dist. No. R-l v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 859 (10th Cir. 1999).

1. Additional Legislative Plaintiffs

Plaintiffs' proposed amendment suffers from the same deficiencies as their current complaint in that they fail to make allegations sufficient to state a plausible § 1983 claim. *Twombly*, 550 U.S. at 570. First, Plaintiffs move "to add two other state legislators that wish [to] participate in the lawsuit." (Doc. 31 at ¶ 7). However, Representative Rod Montoya and Representative Debbie Rodella lack standing and fail to state a claim for relief just as the existing legislator Plaintiffs have failed to state a claim against Defendants. Therefore, this proposed amendment is fertile and shall be denied.

2. Individual-Capacity Claims

Second, Plaintiffs request leave to amend "for clarification by modifying the statements regarding 'personal capacity' to instead reflect that individual Defendants are sued for damages in their 'individual capacity acting under color of law.'" (*Id.* at ¶ 8). Yet, the live pleading currently states that Defendants are sued "individually in her [or his] official capacity." (Doc. 56 at 1). Thus, Plaintiffs have already attempted to assert claims against Defendants in both their official and individual capacities. However, those individual-capacity claims fail as a matter of law because, as stated above, the United States Constitution does not provide for an absolute right to money bail, there is no source of law guaranteeing the option of money bail to criminal defendants, Plaintiff Collins was not subjected to any unreasonable search or seizure, purchasing pretrial release with monetary bail does not implicate fundamental rights under the Due Process Clause, and the Government has a legitimate interest in regulating pretrial release and detention. Therefore, this proposed amendment is futile and shall be denied.

3. Plaintiff William Martinez

Third, Plaintiffs "seek to add Mr. William Martinez as [a] presumably innocent person that is experiencing excessive and punitive conditions of release, because he has been denied the option of non-excessive bail." (*Id.* at ¶ 9). Unlike Plaintiff Collins, Mr. Martinez is a criminal defendant who has allegedly been subjected to electronic monitoring. However, as discussed previously, the promulgation and

implementation of the 2017 Rules as applied to Plaintiff Collins or any other potential criminal defendant does not violate their constitutional rights, including their procedural due process rights under the Fourteenth Amendment. Plaintiffs cannot state a viable claim for relief under § 1983 by arguing that Collins, Martinez, or any other criminal defendant suffered an injury by not receiving the option of monetary bail in lieu of nonmonetary conditions of release. Therefore, this proposed amendment is futile and shall be denied.

4. First Amendment Claim

Fourth, Plaintiffs seek to add a claim against Judicial Defendants for "violation of the First Amendment... for vindictive prosecution." (Doc. 31 at 3). On September 22, 2017, Judicial Defendants filed a Rule 11 Motion for Sanctions after serving Plaintiffs with a copy of that motion and affording them a 21-day safe harbor required by Rule 11. (Doc. 33). According to Plaintiffs, Judicial Defendants are liable for damages to Plaintiffs for "serving a retaliatory and vindictive Rule 11 Motion." (Doc. 31 at ¶¶ 181-82). Plaintiffs claim Judicial Defendants "undertook to threaten and intimidate Plaintiffs into abandoning their Free Speech and right of access to the Courts through the service of a defamatory Rule 11 Motion directed personally at Plaintiffs' counsel." (*Id.* at ¶ 10).

Rule 11 provides that the court may impose sanctions on an attorney who pursues a frivolous lawsuit. Fed. R. Civ. P. 11(b)(1), (b)(2), (c)(1). Rule 11 sanctions are warranted when a party files a pleading that (1) has no reasonable factual basis; (2) is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument

to change existing law; and (3) is filed in bad faith for an improper purpose. *Neilzke v. Williams*, 490 U.S. 319, 325 (1989). Plaintiffs contend that the allegations in their Complaint are protected speech under the First Amendment. (Doc. 45). Defendants argue the instant action is frivolous or made for an improper purpose, and therefore, is not protected by the First Amendment. (Doc. 33).

There is no constitutional right to file frivolous litigation. *Wolfe v. George*, 486 F.3d 1120, 1125 (9th Cir. 2007). The First Amendment does not protect frivolous claims. *United States v. Ambort*, 405 F.3d 1109, 1117 (10th Cir. 2005). Courts have awarded Rule 11 sanctions to public officials, including state court judges and justices, where frivolous claims have been raised against them. *Snyder v. Snyder*, Nos. 97-1081, 97-1192, 1998 WL 58175, at *5 (10th Cir. Feb. 11, 1998) (unpublished); *Johnson ex rel. Wilson v. Dowd*, 345 F. App'x 26, 28 (5th Cir. 2009) (unpublished) (affirming district court's grant of Rule 11 sanctions to state judicial defendants where plaintiff disregarded those defendants' absolute immunity from suit); *Kircher v. City of Ypsilanti*, 458 F. Supp. 2d 439, 453-54 (E.D. Mich. 2006) (awarding Rule 11 sanctions in favor of state judges where plaintiff's "opposition to the Judicial Defendants' assertion of judicial immunity lacked any basis in existing law, nor was it supported by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law.").

According to Defendants, this is a patently groundless suit because Plaintiffs "filed this federal lawsuit against Judicial Defendants not with any colorable prospect of obtaining a ruling in their favor, but for the improper purpose of advancing a local and

national public relations campaign on behalf of the money bail industry against bail reforms in New Mexico and throughout the United States." (Doc. 33 at 2). Further, Defendants assert that "Plaintiffs' claims under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution are both utterly unsupported and filed in direct contravention of governing law." (*Id.*). In addition, Defendants state that Plaintiffs' claims have no basis in law because the Court lacks jurisdiction, Plaintiffs do not have standing, and Judicial Defendants have immunity from suit. (*Id.*).

The Court is of the opinion that Plaintiffs have not been denied access to the courts. Rather, Plaintiffs have pursued their rights in the instant lawsuit without inhibition. Moreover, the Court has already determined that all plaintiffs in this action, with the exception of Darlene Collins, lack standing, Plaintiff Collins's claims are subject to dismissal for failure to state a claim, and Judicial Defendants are immune from suit. As such, the allegations in Judicial Defendants' Motion for Sanctions under Rule 11 regarding standing, jurisdiction, and immunity are, at least in part, correct. Therefore, the Court concludes that the filing of the Rule 11 Motion was not a retaliatory act to punish Plaintiffs, but rather, an acceptable pleading expressly allowed by the Federal Rules of Civil Procedure. Further, the Court concludes that the Rule 11 motion is not a regulatory enforcement action against Plaintiffs. In this lawsuit, Judicial Defendants are acting as a litigant and not as an adjudicator.

In sum, Plaintiffs have failed to state a claim for any First Amendment violation as a result of the filing of Judicial Defendants' Rule 11 Motion for Sanctions. *In re Harper*, 725 F.3d 1253, 1261 (10th Cir. 2013) (because

"the First Amendment does not protect the filing of frivolous motions," the sanctioned attorney's argument that his actions were constitutionally protected was "meritless"). Since Plaintiffs' proposed amendment to add a First Amendment claim would be futile and the amended complaint would be immediately subject to dismissal for failure to state a claim on which relief can be granted under § 1983, Plaintiff's Motion to Amend shall be denied. (Doc. 31).

5. New Mexico Constitution Claim

Plaintiffs' proposed amended complaint adds a new claim for "Declaratory Judgment of Violation of New Mexico Constitution's Separation of Powers and of the New Mexico Constitution's Right to Bail." (Doc. 31). However, Plaintiffs' claims under the New Mexico Constitution do not present a federal question. *See Schuykill Trust Co. v. Pennsylvania*, 302 U.S. 506, 512 (1938) (holding that whether a state court has exceeded its power under the state constitution does not present a federal question). 28 U.S.C. § 1367(c) provides that a district court may decline to exercise supplemental jurisdiction if:

(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

A district court's decision whether to exercise supplemental jurisdiction under § 1367 is a matter within its discretion. *See Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639–40 (2009); *Estate of Harshman v. Jackson Hole Mountain Resort Corp.*, 379 F.3d 1161, 1165 (10th Cir. 2004).

Here, the Court declines to exercise supplemental jurisdiction over Plaintiffs' new separation- of-powers claim under the New Mexico Constitution because all federal-law claims have been dismissed. In addition, exercising jurisdiction over a separation-of-powers claim based on the New Mexico Constitution violates fundamental principles of federalism and comity because New Mexico has a definite interest in determining whether its own laws comport with the New Mexico Constitution, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (warning that it "is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their own conduct to state law."). Therefore, Plaintiffs' proposed amendment shall be denied.

IV. Conclusion

Because the Bail Bond Association of New Mexico and the legislator Plaintiffs, including Senator Richard Martinez, Senator Bill Sharer, Senator Craig Brandt, and Representative Carl Trujillo lack standing, Defendants' Rule 12(b)(1) Motion to Dismiss is **GRANTED**. (Docs. 14, 59). In addition, Plaintiffs fail to state a claim for any violation of Collins's Eighth Amendment, Fourth Amendment, or Fourteenth Amendment rights. Likewise, Plaintiffs fail to state a

viable separation- of-powers claim. Plaintiffs also cannot state a claim for money damages under 42 U.S.C. § 1983 or any claim that the Public Safety Assessment Tool violates Collins's constitutional rights. Therefore, Defendants' Rule 12(b)(6) Motion to Dismiss is also **GRANTED.** (Docs. 14, 59).

Further, Plaintiffs' proposed Second Amended Complaint would be subject to immediate dismissal. Allowing Plaintiffs to amend to add two additional state representatives without standing and a criminal defendant with meritless claims would be futile. In addition, Plaintiffs cannot prevail on their new First Amendment claim based on the filing of Judicial Defendants' Rule 11 Motion for Sanctions. Lastly, the Court declines to exercise supplemental jurisdiction over Plaintiffs' proposed separation-of-powers claim under the New Mexico Constitution, Accordingly, Plaintiffs' Motion to Amend is **DENIED.** (Doc. 31).

The Court's ruling on the Motion to Dismiss (Docs. 14, 59) and the Motion to Amend (Doc. 31) should not be interpreted as a ruling on the merits of the pending Rule 11 Motion for Sanctions. The Court will issue a separate order pertaining to the Rule 11 Motion for Sanctions at a future date.

It is therefore **ORDERED** that Defendants' Rule 12(b)(1) Motion to Dismiss is **GRANTED** (Docs. 14, 59) and the claims brought against Defendants Charles W. Daniels, Edward L. Chavez, Petra Jimenez Maez, Barbara J. Vigil, Judith K. Nakamura, the New Mexico Supreme Court, Nan Nash, James Noel, the Second Judicial District Court, Henry A. Alaniz, Robert L. Padilla, Bernalillo County Metropolitan Court, and Board of County Commissioners of the County of Bernalillo by Plaintiffs Bail Bond Association of New Mexico, Senator Richard Martinez, Senator Bill

Sharer, Senator Craig Brandt, and Representative Carl Trujillo, are hereby **DISMISSED WITH PREJUDICE** for lack of subject matter jurisdiction.

It is further **ORDERED** that Defendants' Rule 12(b)(6) Motion to Dismiss is **GRANTED** and the claims brought against Defendants Charles W. Daniels, Edward L. Chavez, Petra Jimenez Maez, Barbara J. Vigil, Judith K. Nakamura, the New Mexico Supreme Court, Nan Nash, James Noel, the Second Judicial District Court, Henry A. Alaniz, Robert L. Padilla, Bernalillo County Metropolitan Court, and Board of County Commissioners of the County of Bernalillo by Plaintiff Darlene Collins are **DISMISSED WITH PREJUDICE** for failure to state a claim.

It is further **ORDERED** that Plaintiffs' Motion to Amend is **DENIED** as futile, (Doc. 31).

It is so **ORDERED.**

SIGNED this _____ day of _____ 2017.

_____
ROBERT A. JUNELL
Senior United States District Judge

12/11/2017
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DARLENE COLLINS, *et al.*,	§	
***Plaintiffs*,**	§	
	§	
v.	§	**No. 1:17-CV-00776-RJ**
	§	
CHARLES W. DANIEL,[1] *et al.*	§	
***Defendants*.**	§	

FINAL JUDGMENT

On December 11, 2017, the Court entered an Order Granting Defendants' Motions to Dismiss (Docs. 14, 59) and denied Plaintiffs' Motion to Amend (Doc. 31). (Doc. 67). The Court now enters its Final Judgment pursuant to Federal Rule of Civil Procedure 58.

It is therefore **ORDERED** that Defendants' Rule 12(b)(1) Motion to Dismiss is **GRANTED** (Docs. 14, 59) and the claims brought against Defendants Charles W. Daniels, Edward L. Chavez, Petra Jimenez Maez, Barbara J. Vigil, Judith K. Nakamura, the New Mexico Supreme Court, Nan Nash, James Noel, the Second Judicial District Court, Henry A. Alaniz, Robert L. Padilla, Bernalillo County Metropolitan Court, and Board of County Commissioners of the County of Bernalillo by Plaintiffs Bail Bond Association

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1 Plaintiffs incorrectly identify Justice Charles Daniels of the New Mexico Supreme Court as "Charles W. Daniel" in the caption of their Complaint. (Doc. 56 at 1).

of New Mexico, Senator Richard Martinez, Senator Bill Sharer, Senator Craig Brandt, and Representative Carl Trujillo, are hereby **DISMISSED WITH PREJUDICE** for lack of subject matter jurisdiction.

It is further **ORDERED** that Defendants' Rule 12(b)(6) Motion to Dismiss is **GRANTED** and the claims brought against Defendants Charles W. Daniels, Edward L. Chavez, Petra Jimenez Maez, Barbara J. Vigil, Judith K. Nakamura, the New Mexico Supreme Court, Nan Nash, James Noel, the Second Judicial District Court, Henry A. Alaniz, Robert L. Padilla, Bernalillo County Metropolitan Court, and Board of County Commissioners of the County of Bernalillo by Plaintiff Darlene Collins are **DISMISSED WITH PREJUDICE** for failure to state a claim.

It is further **ORDERED** that Plaintiffs' Motion to Amend is **DENIED** as futile. (Doc. 31).

It is finally **ORDERED** that the Clerk of the Court **CLOSE** this case.

It is so **ORDERED**.

SIGNED this 20th day of December, 2017.

_____

ROBERT A. JUNELL
SENIOR U.S. DISTRICT JUDGE

9/7/17

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DARLENE COLLINS, *et al.*,	§	
***Plaintiffs*,**	§	
	§	
V.	§	**No. 1:17-CV-00776-RJ**
	§	
CHARLES W. DANIEL, *et al.*	§	
***Defendants*.**	§	

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

BEFORE THE COURT is Plaintiffs Darlene Collins, on behalf of herself and others similarly situated, Bail Bonds Association of New Mexico ("BBANM"), Senator Richard Martinez, Senator Bill Sharer, Senator Craig Brandt, Representative Bill Rehm, and Representative Carl Trujilo's (collectively, "Plaintiffs") Corrected Motion and Brief in Support for a Preliminary Injunction. (Doc. 11). After due consideration, Plaintiffs' motion for preliminary injunction shall be **DENIED.**

I. Background

Plaintiffs ask the Court to enjoin provisions of the New Mexico Supreme Court Rules regarding pretrial release and detention in criminal proceedings

adopted pursuant to Supreme Court Order No. 17-8300-005 effective on July 1, 2017 ("2017 Rules"). Plaintiffs filed their Complaint on July 28, 2017, alleging that Defendants Charles W. Daniel, Edward L. Chavez, Petra Jimenez Maez, Barbara J. Vigil, Judith K. Nakamura, the New Mexico Supreme Court, Nan Nash, James Noel, the Second Judicial District Court, Henry A. Alainz, Robert L. Padilla, Bernalillo County Metropolitan Court, Julie Morgas Baca, and Bernalillo County (collectively, "Defendants") modified statutory law without legislative authority, approval or action. (Doc. 1). In addition, Plaintiffs argue that the 2017 Rules violate the Eighth Amendment, the Due Process Clause, and the Fourth Amendment of the United States Constitution as well as Article 2, Section 13, of the New Mexico Constitution "by subjecting presumptively innocent criminal defendants to severe restrictions of pre-trial liberties—including home detention and 24-hour electronic monitoring through an ankle bracelet—without providing them the constitutionally-protected option of bail." (Doc. 11 at 8). Further, Plaintiffs contend that the 2017 Rules violate "the mandate of separation of powers provided for in the Federal and State constitutions as it impermissibly treads into the purview of the legislature and ultimately the citizenry to pass laws or constitutional changes." (*Id.*).

On August 3, 2017, Plaintiffs filed their Amended Complaint. (Doc. 7). On August 4, 2017, Plaintiffs filed their Motion for a Preliminary Injunction. (Doc. 9). On August 5, 2017, Plaintiffs filed their Corrected Motion for a Preliminary Injunction. (Doc. 11). Plaintiffs seek an injunction preventing the application of the 2017 Rules by the Second Judicial District Court, Bernalillo County Metropolitan Court, and Bernalillo County that

allegedly violate Plaintiffs' constitutional rights through the use of the Public Safety Assessment court-based pretrial risk assessment tool developed by the Laura and John Arnold Foundation (the "Public Safety Assessment Tool"). On August 18, 2017, Defendants filed their Response in Opposition to Plaintiffs' Corrected Motion for Preliminary Injunction. (Doc. 15). On September 1, 2017, Plaintiffs filed their Reply. (Doc. 24). This matter is now ready for disposition.

A. Pretrial Release of **Plaintiff Darlene Collins**

Darlene Collins was arrested on charges of aggravated assault, a violent fourth-degree felony, on Sunday, July 2, 2017 at 5:54 a.m. (Doc. 15-3 at ¶ 3), Because Collins was charged with a violent felony, she was required to appear before a Metropolitan Court judge. *See* Rules 5–408 NMRA, 7–408 NMRA, Collins appeared before Metropolitan Judge Courtney Weaks on July 5, 2017. (*Id.* ¶ 4). Judge Weaks ordered Collins released on her own recognizance, subject to certain limited conditions set forth in a written order, conditions to which Collins affirmatively agreed. (*Id.*). Under the 2017 Rules, the court was required to conduct a hearing and issue an order setting conditions of release within "three... days after the date of arrest if the defendant is being held in the local detention center," Rule 7–401(A) NMRA. Collins's hearing was held and the order of release was issued within the required timeframe. (Doc. 15-3).

B. The Historical Developriient of Bail

Originating in medieval England, bail allowed untried prisoners to remain tree before conviction in criminal cases;

> In 1275, the English Parliament enacted the Statute of Westminster, which defined bailable offenses and provided criteria for determining whether a particular person should be released, including the strength of the evidence against the accused and the accused's criminal history. *See* Note, *Bail: An Ancient Practice Reexamined*, 70 Yale L.J. 966, 966 (1961); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 523-26 (1983). In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could obtain a timely bail hearing. In 1689, Parliament enacted an English Bill of Rights that prohibited excessive bail. *See* Carbone, *supra*, at 528. Early American constitutions codified a right to bail as a presumption that defendants should be released pending trial. *See* Note, *Bail*, *supra*, at 967.

ODonnell v. Harris Cnty, Tex., — F. Supp. —, 2017 WL 1735456, at *11 (S.D. Tex. 2017). New Mexico's Constitution, like the United States Constitution, forbids "excessive bail." N.M. Const., art. II, § 13. Article II, Section 13 enshrines the principle that a person accused of a crime is entitled to retain personal freedom "until adjudged guilty by the court of last resort." *State v. Brown*, 338 P.3d 1276, 1282 (N.M. 2014) (internal quotation marks and citations omitted). "Once released, a defendant's continuing right to pretrial liberty is conditioned on the defendant's appearance in court, compliance with the law, and adherence to the

conditions of pretrial release imposed by the court." *Id.* 1282.

"At the federal level, the Judiciary Act of 1789 provided an absolute right to bail in noncapital cases and bail at the judge's discretion in capital cases." *ODonnell*, 2017 WL 1735456, at *15. The first Congress also proposed the Eighth Amendment to the United States Constitution, which, like the New Mexico Constitution and the English Bill of Rights, prohibits excessive bail, U.S. Const. amend. VIII; N.M. Const., art. II, § 13. However, neither the United States Constitution nor the New Mexico Constitution explicitly guarantees a right to bail. *Id.* Rather, the United States Constitution and the New Mexico Constitution only forbid "excessive bail." *Carlson v. London*, 342 U.S. 524, 545–46 (1952) (the Eighth Amendment does not provide a "right to bail").

C. Federal Bail Reform

The Bail Reform Act of 1966 became "the first major reform of the federal bail system since the Judiciary Act of 1789." *Brown*, 338 P.3d at 1286; Bail Reform Act of 1966, 80 Stat. 214 (repealed 1984). The stated purpose of the Bail Reform Act of 1966 was "to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges... when detention serves neither the ends of justice nor the public interest." *Id.* at Sec. 2. The Act included the following key provisions to govern pretrial release in noncapital criminal cases in federal court: (1) a presumption of release on personal recognizance unless the court determined that such release would not reasonably assure the defendant's appearance in court, (2) the option of conditional

pretrial release under supervision or other terms designed to decrease the risk of flight, and (3) a prohibition on the use of money bail in cases where nonfinancial release options such as supervisory custody or restrictions on "travel... or place of abode" are sufficient to reasonably assure the defendant's appearance. *Id.* at Sec. 3. "By emphasizing nonmonetary terms of bail, Congress attempted to remediate the array of negative impacts experienced by defendants who were unable to pay for their pretrial release, including the adverse effect on defendants' ability to consult with counsel and prepare a defense, the financial impacts on their families, a statistically less- favorable outcome at trial and sentencing, and the fiscal burden that pretrial incarceration imposes on society at large." *Brown*, 338 P.3d at 1287.

Congress again revised federal bail procedures with the Bail Reform Act of 1984, enacted as part of the Comprehensive Crime Control Act of 1984. *See* Bail Reform Act of 1984, Pub. L. No. 98–473, §202, 98 Stat. 1837, 1976 (codified at 18 U.S.C. §§ 3141-3150 (2012)). The legislative history of the 1984 Act states that Congress wanted to "address the alarming problem of crimes committed by persons on release" and to "give the courts adequate authority to make release decisions that give appropriate recognition to the danger *a* person may pose to others if released." S. Rep, 98-225, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185. The 1984 Act, as amended, retains most of the 1966 Act but "allows a federal court to detain an arrestee pending trial if the Government, demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure... the safety of any other person and the community.'" *United States v. Salerno*, 481 U.S. 739, 741 (1987) (omission in

original) (quoting the Bail Reform Act of 1984) (upholding the preventive detention provisions in the 1984 Act).

D. The New Mexico Pretrial Release Rules

The New Mexico Rules of Criminal Procedure provide the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution. *See* Rule 5–401 NMRA (providing procedures for district courts); Rule 6–401 NMRA (providing procedures for magistrate courts); Rule 7–401 NMRA (providing procedures for metropolitan courts); Rule 8–401 NMRA (providing procedures for municipal courts). New Mexico modeled its bail rules, which were first adopted in 1972, on the federal Bail Reform Act of 1966. *See* NMSA 1978, Crim. P. Rule 22 (Repl. Pamp. 1980; including the May 1972 New Mexico Supreme Court order); *see also* Committee commentary to Rule 5–401 NMRA (explaining that the rule is modeled on the Bail Reform Act of 1966). Like the Bail Reform Act of 1966, the New Mexico bail rules establish a presumption of release by the least restrictive conditions and emphasize methods of pretrial release that do not require Financial security. *See* Rule 5–401 (A) NMRA; *Brown*, 388 P.3d at 1288; *State v. Gutierrez*, 140 P.3d 1106, 1110 (recognizing "that the purpose of the Federal Bail Reform Act of 1966, from which [the New Mexico] rule is derived, was to encourage more releases on personal recognizance").

Originally, the only valid purpose of bail in New Mexico was to ensure the defendant's appearance in court. *State v. Ericksons*, 746 P.2d 1099, 1100 ("[T]he purpose of bail is to secure the defendant's attendance

to submit to the punishment to be imposed by the court."). To further incentivize appearance in court, in the early 1970s, the New Mexico Legislature granted courts statutory authority to order forfeiture of bail upon a defendant's failure to appear, *see* NMSA 1978, § 31–3–2(B)(2) (1972, as amended through 1993), and enacted separate criminal penalties for failure to appear, *see* NMSA 1978, § 31–3–9 (1973, as amended through 1999). Following recognition in the federal Bail Reform Act of 1984 that public safety is a valid consideration in pretrial release decisions, the New Mexico Supreme Court amended the rules to require judges to consider not only the defendant's flight risk but also the potential danger that might be posed by the defendant's release to the community in fashioning conditions of release. *See* Rule 5–401 NMRA (1990) (prescribing that judges consider "the appearance of the person as required" and "the safety of any other person and the community").

The 1972 New Mexico rules specifically incorporated the evidence-based, rather than money-based, procedures that are statutorily required for federal courts. (Doc. 15-1 at 2). Significantly, the New Mexico rules since 1972 have: (a) required release conditions to be set during and not before the defendant's initial court appearance; (b) required release on nonfinancial conditions unless the court makes specific findings that no nonfinancial conditions will reasonably assure court appearance; and (c) directed courts to impose various restrictions of liberty on released defendants that are appropriate in the circumstances of particular cases. (*Id.* at 3). Regardless, many New Mexico state courts drifted into unlawful reliance on a growing money-bond industry and practices of routinely requiring money bonds that did

not require judicial determinations of individual risk or ability to pay, in apparent violation of Rule 5–401 and New Mexico's constitution, and in contrast to the practice of federal courts. *Brown*, 338 P.3d at 1289.

In 2014, bail reform was sparked in New Mexico by the *State v. Brown*, 338 P.3d 1276 (N.M. 2014) decision of the New Mexico Supreme Court holding that the use of bail to detain a defendant when less restrictive conditions of release would protect the public violated New Mexico's constitution. *Brown*, 338 P.3d at 1278. As a result of the *Brown* litigation, the New Mexico Supreme Court formed a broad-based ad hoc pretrial release advisory committee (the "Committee") to study pretrial release and detention practices in New Mexico and to make recommendations both for improving compliance with existing law and for making remedial changes in the law, (Doc. 15-1 at Exhibit 2). On recommendation of the Committee in August 2015, the New Mexico Supreme Court submitted to the New Mexico Legislature a proposed amendment to Article II, Section 13 of the New Mexico Constitution that would facilitate a shift from money-based to risk-based release and detention. (*Id.* at Exhibits 3 & 4).

New Mexico voters amended the New Mexico Constitution in 2016 to enshrine the *Brown* holding, with Chief Justice Charles Daniels lending active support to the campaign. (*Id.* at 6). State constitutional amendments in New Mexico require passage by both houses of the New Mexico Legislature and passage of a majority of New Mexico voters in a general election. (*Id.* at 5). After the proposed constitutional amendment was considered and passed by both chambers of the New Mexico Legislature and placed on the general election ballot, it was approved by an overwhelming

majority of New Mexico voters. (*Id.* at 6).

Following the passage of the amendments to Article 11, Section 13 of the New Mexico Constitution, the Committee recommended and the New Mexico Supreme Court agreed that the procedural rules governing release and detention in New Mexico must be updated to comply with and effectuate the new constitutional mandates. (*Id.* at 6). Consistent with its rulemaking procedure, the New Mexico Supreme Court published all proposed rules for public comment in early 2017, and after considering all input and making resulting revisions, unanimously promulgated on June 5, 2017, the 2017 Rules that are the subject of this lawsuit with an effective date of July 1, 2017. (*Id.*).

E. The Challenged Risk Assessment Instrument

Although the fundamental provisions of Rule 5–401, requiring judges to set conditions of release based on assessments of individual danger and flight risk remained unchanged, the New Mexico Supreme Court promulgated several new procedural rules in 2017:

- Rule 5–409 administers the new detention-for-dangerousness authority that the constitutional amendment conferred on the district courts.
- Rule 5–408 provides early release mechanisms for low-risk defendants in place of the fixed bail schedules that had been created in various localities in apparent violation of the individual judicial risk assessment required by Rule 5–401 and principles of constitutional law.
- The rules were amended to clarify unequivocally that local courts had no authority to create fixed money bail schedules in violation of Rule 5–401

and equal protection requirements.

- Rule 5–403 clarifies and strengthens the authority of courts to amend conditions of release or revoke release entirely for defendants who commit new crimes bn release or otherwise will not abide with release conditions.
- Other rules provide expedited appeals by both the prosecution and the defense to review release and detention rulings.
- The New Mexico Supreme Court promulgated equivalent rules for the Magistrate Courts, the Metropolitan Courts, and the Municipal Courts.

(Doc. 15-1 at 6–7). The 2017 Rules contain two provisions authorizing use of validated risk assessment instruments in determining the likelihood of a particular defendant's risk for committing new offenses on release or failing to appear at future court appearances. First, Rule 5–401(C) provides in relevant part:

> In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information concerning [reciting a list of additional factors the court should consider taken from the 1972 federal pretrial release statutes].

(*Id.* at Exhibit 10).

Currently, Bernalillo County is the only county in New Mexico authorized by the New Mexico Supreme Court to use a risk assessment instrument in order to conduct a pilot project to determine the effectiveness of the Arnold Foundation Public Safety Assessment Tool. (*Id.* at 7–8). Following completion of this pilot project, the New Mexico Supreme Court will decide whether to authorize a statewide use of the Public Safety Assessment Tool or any other risk assessment instrument under Rule 5–401 as an additional discretionary tool in pretrial release decisions. (*Id.*). Rule 5–408(C), which authorizes early release of low-risk defendants, may also allow the future use of a risk assessment instrument. (*Id.* at 8). The New Mexico Supreme Court has not yet approved any risk assessment instrument for use under that rule and is not expected to consider such an authorization until after it has a chance to assess Bernalillo County's completed experience with the Arnold Foundation Public Safety Assessment Tool pilot project. (*Id.*). Importantly, like the federal release and detention provisions on which New Mexico's rules are modeled, New Mexico has not precluded consideration of financially-secured bonds, including commercial bail bonds, where a court determines a money bond is necessary in a particular case to reasonably assure a defendant's return to court, as provided textually in Rule 5–401.

II. Legal Standard

To obtain a preliminary injunction, the moving party must establish: "(1) a substantial likelihood of

success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F. 3d 1222, 1226 (10th Cir. 2007). "[A] preliminary injunction is an extraordinary and drastic remedy, one that 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); *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) ("As a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal.").

While any preliminary injunction is an extraordinary remedy, the United States Court of Appeals for the Tenth Circuit has identified "three types of specifically disfavored preliminary injunctions" and "a movant must satisfy an even heavier burden" in those instances." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004), The three types of injunctions that are particularly disfavored include: "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *Id.* These disfavored injunctions "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Id.*

As a preliminary matter, the court must determine whether the requested injunction falls within one of the disfavored categories in order to

evaluate Plaintiffs' Motion for a Preliminary Injunction under the proper standard. The Court finds that the injunction sought by Plaintiffs would alter the status quo by enjoining lawfully promulgated rules of the New Mexico Supreme Court. In addition, the Court is of the opinion that by granting the preliminary injunction, Plaintiffs would receive an immediate ruling in their favor on every form of relief included in their Amended Complaint, with the exception of their claim for money damages. "The burden on the party seeking a preliminary injunction is especially heavy when the relief sought would in effect grant plaintiff a substantial part of the relief it would obtain after a trial on the merits." *GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984). Accordingly, the preliminary injunction sought by Plaintiffs is "disfavored" and "warrants a heightened standard of proof... to assure that the exigencies of the ease support the granting of a remedy that is extraordinary even in the normal course." *Logan v. Pub. Emps. Ret. Ass'n*, 163 F. Supp. 3d 1007, 1027 (D.N.M. 2016) (internal quotation marks and citations omitted).

III. Discussion

Plaintiffs allege that Defendants have attempted to "re-write the New Mexico Constitution and change legislation without the benefit [of] debate and consideration required when changing law and impacting individual rights." (Doc. 11 at 8). Plaintiffs claim that Defendants have denied "pre- trial defendants of the option of monetary security to appear at trial b[y] posting bonds, in favor of the curtailment or elimination of liberty rights[.]" (*Id.* at 9). According to Plaintiffs, the Public Safety Assessment Tool does not

provide for the consideration of attendance security by posting bond unless no mix of non-monetary, liberty restrictions would provide for likely attendance at trial. (*Id.*). In response, Defendants argue that Plaintiffs lack standing to bring their claims,[1] Plaintiffs are unlikely to succeed on the merits of their claims, Plaintiffs will not suffer any irreparable harm if the preliminary injunction does not issue, Defendants will suffer irreparable harm if the Court grants the Motion for Preliminary Injunction, and the public interest favors denying the Motion for Preliminary Injunction. (Doc. 15).

A. Likelihood of Success on the Merits

As previously stated, the preliminary injunction sought by Plaintiffs would alter the status quo and in effect grant Plaintiffs a substantial part of the relief they seek in this action. Thus, Plaintiffs must make a heightened showing of the likelihood of success on the merits. *Logan*, 163 F. Supp. 3d at 1027; *GTE Corp.*, 731 F.2d 676 at 679. Because Plaintiffs are not likely to succeed on the merits of their claims in this case, Plaintiffs are not entitled to a preliminary injunction.

1. Eighth Amendment Claims

Plaintiffs ask the Court to create a constitutional right to "the option of monetary security to appear at trial b[y] posting bonds," which does not currently exist

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1 The substance of Defendants' argument regarding standing is contained within their Motion to Dismiss. Accordingly, the Court will address the standing issue by future order when ruling on the pending Motion to Dismiss.

under binding precedent. (Doc. 11 at 2). While the United States Constitution and the New Mexico Constitution forbid excessive bail, they do not provide for an absolute right to bail or money bail. *See* U.S. Const., amend. VIII; N.M. Const., art. II, § 13; *United States v. Salerno*, 481 U.S. 739, 752 (1987) ("The Eighth Amendment addresses pretrial release by providing merely that 'excessive bail shall not be required.' This Clause, of course, says nothing about whether bail shall be available at all."); *Carlson v. Langdon*, 342 U.S. 524, 545–46 (1952) (holding that the Eighth Amendment does not provide for an absolute "right to bail.").

The 2017 Rules do not forbid commercial bail. In fact, the 2017 Rules explicitly contemplate that courts may require secured bonds for a criminal defendant's release. Rule 5-401(E) & (F), Rule 5–401.2 NMRA. Plaintiffs' assertion that the 2017 Rules replace "a system that guaranteed a monetary bail determination to all defendants" is false. (Doc. 11 at 20). The 1972 Rules presumptively required that a criminal defendant "shall be released pending trial on [her or his] personal recognizance or upon the execution of an unsecured appearance bond," unless the court made written findings that those conditions would be insufficient to ensure the defendant's appearance. (Doc. 15-1 at Exhibit 1). Only if the court made a written determination that release on personal recognizance or an unsecured appearance bond would not ensure the defendant's appearance or would endanger the safety of another person or the community, would the court proceed to consider a secured bond requirement prior to the 2017 Rules. (*Id.*). There is no provision in the 1972 Rules, or any other source of law, guaranteeing the option of money bail to criminal defendants. Accordingly, Plaintiffs are not likely to succeed on their

Eighth Amendment Claims.

2. Fourth Amendment Claims

Plaintiffs argue that the non-monetary restrictions that a court could impose on a criminal defendant seeking pretrial release constitute a "seizure." (Doc. 11 at 32). However, the Tenth Circuit has expressly declined to adopt a "continuing seizure" analysis that would deem pretrial release conditions a "seizure" under the Fourth Amendment. *See Becker v. Kroll*, 494 F.3d 904, 915 (10th Cir, 2007) ("To extend liability in cases without a traditional seizure would expand the notion of seizure beyond recognition.... [I]f the concept of a seizure is regarded as elastic enough to encompass standard conditions of pretrial release, virtually every criminal defendant will be deemed to be seized pending the resolution of the charges against him."). Therefore, Plaintiffs' Fourth Amendment claim fails under applicable Tenth Circuit law and Plaintiffs cannot demonstrate any likelihood of prevailing on this claim.

3. Procedural or Substantive Due Process Claims

Plaintiffs contend that Defendants' actions have transgressed Darlene Collins's rights under the Due Process Clause of the Fourteenth Amendment. Unquestionably, the Due Process Clause applies to pretrial detention. *See United States v. Cos*, 198 F. App'x 727, 732 (10th Cir. 2006) ("[A]t some point due process may require a release from pretrial detention"); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir, 1986) ("Although pretrial detention is permissible when it serves a regulatory rather than a punitive purpose,

we believe that valid pretrial detention assumes a punitive character when it is prolonged significantly"). Criminal defendants routinely assert their due process rights in arguing for pretrial release as opposed to continued detention. *See, e.g.*, *United States v. Gonzales*, 995 F. Supp. 1299, 1303-04 (D.N.M, 1998). However, Plaintiff Darlene Collins was not subject to pretrial detention; rather, she was released on her own recognizance with minimal conditions. (Doc. 15-3 at ¶ 4).

A condition of release can violate due process if it prevents the courts from evaluating and setting relevant conditions of pretrial release for criminal defendants on an individual basis. *United States v. Torres*, 566 F. Supp. 2d 591, 596 (W.D. Tex. 2008). Yet, the 2017 Rules require courts to evaluate and set appropriate conditions of release on a case-by-case basis. Further, Plaintiffs do not argue that Collins's conditions of release are vague or unintelligible. In fact, Plaintiffs do not complain about Collins's conditions of release in any manner. Rather, Plaintiffs take issue with hypothetical conditions that might apply to other, unnamed individuals. (Doc. 11 at 20) (complaining of pretrial release conditions like "home detention" and "electronic monitoring with an ankle bracelet"). Because Plaintiffs cannot bring a claim for due process violations relating to conditions of release that were not imposed on any Plaintiff in this case, Plaintiffs' due process claim is not likely to succeed.

Moreover, purchasing pretrial release with monetary bail does not implicate fundamental rights under a substantive due process analysis. *See Broussard v. Parish of Orleans*, 318 F.3d 644, 657 (5th Cir. 2003). In addition, the Supreme Court of the United States has made clear that the government has a legitimate interest in regulating pretrial release and

detention. *Salerno*, 481 U.S. at 753, 749 (rejecting "the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release," and noting that the government's interest in public safety "is both legitimate and compelling."). For all of these reasons, Plaintiffs cannot show a likelihood of success on their due process claims.

4. Separation-of-Powers Claim

Plaintiffs claim that by promulgating the 2017 Rules, the New Mexico Supreme Court has "infringe[d] upon the power of the Legislature to make law." (Doc. 7 at ¶¶ 81). Yet, Plaintiffs fail to specifically identify any legislative enactment upon which Defendants have encroached. Plaintiffs generally state that the 2017 Rules "infringe[ ] upon the authority of the New Mexico Legislature to pass laws preserving the public peace." (*Id.* at 31-32), However, under New Mexico law, the New Mexico Supreme Court retains "ultimate rule-making authority" to enact procedural rules for the New Mexico state courts. *Albuquerque Rape Crisis Ctr. v. Blackmer*, 120 P.3d 820, 822 (N.M. 2005); *see also State v. Roy*, 60 P.2d 646, 660 (N.M. 1936) (discussing the New Mexico Supreme Court's "exercise of an inherent power... to prescribe such rules of practice, pleading, and procedure as will facilitate the administration of justice").

The New Mexico Legislature has long recognized the New Mexico Supreme Court's rule-making authority, which encompasses the authority to promulgate rules of criminal procedure. NMSA 1978, § 38-1-1(A) (providing that "[t]he supreme court of New Mexico shall, by rules promulgated by it from time to

time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico."). Thus, Plaintiffs' claims that the New Mexico Supreme Court "sought to and did modify statutory Jaw without legislative authority" and "essentially re-wr[o]te the New Mexico Constitution and change[d] legislation without the benefit [sic] debate and consideration required when changing law and impacting individual rights," are meritless. (Doc. 11 at 1).

Again, Plaintiffs fail to specifically identify any "statutory law" or "legislation" that the 2017 Rules supposedly contravene. The 1972 Rules in existence prior to the 2017 Rules directed courts to apply a presumption of release on nonfinancial conditions, unless a court made specific findings that no non-financial conditions would assure court appearance. Thus, criminal defendants have never been guaranteed the option of monetary bail under New Mexico law in existence before and after the 2017 Rules. Accordingly, Plaintiffs cannot show a substantial likelihood of success on this claim.

5. Public Safety Assessment Tool Claims

Plaintiffs claim that the Public Safety Assessment Tool developed by the Laura and John Arnold Foundation authorized by the New Mexico Supreme Court for use in a pilot program in Bernalillo County "deprive[s] presumptively innocent pre-trial defendants of their liberty rights... [and] provides no room for discretion and consideration of bail instead of such deprivations." (Doc. 11 at 21). Plaintiffs mischaracterize the 2017 Rules and the purpose of the Public Safety Assessment Tool. First, there is no constitutionally-protected liberty interest in securing release from pretrial

detention through a commercial bond or in obtaining release prior to arraignment. Second, the 2017 Rules provide that the court "shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction," in evaluating the least restrictive conditions of release that will reasonably ensure the appearance of a criminal defendant. Rule 5–401 (C) NMSA. While trial courts may consider the Public Safety Assessment Tool, it does not displace the discretion of judges. Therefore, Plaintiffs are unlikely to succeed on their claims that the Public Safety Assessment Tool in Bernalillo County is unconstitutional.

B. Irreparable Injury

To obtain injunctive relief, Plaintiffs must show that they will suffer irreparable injury if their request for injunctive relief is denied. *See Schrier*, 427 F.3d at 1258. "To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Irreparable harm is more than "merely serious or substantial" harm. *Id.* (citation omitted). The party seeking the preliminary injunction "must show that 'the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (citation omitted). Therefore, Plaintiffs "must establish both that harm will occur, and that, when it does, such harm will be irreparable." *See Vega v. Wiley*, 259 F. App'x 104, 106 (10th Cir. 2007). Here, Plaintiffs have failed to demonstrate that they are likely to

experience more than "merely serious or substantial harm." *Heideman*, 348 F.3d at 1189.

1. Bail Bonds Association of New Mexico

Plaintiffs allege that the membership of BBANM "will continue to lose business and revenue" absent a preliminary injunction. (Doc. 11 at 37). However, it is "well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm," *Heideman*, 348 F.3d at 1189. Furthermore, BBANM offers no evidence that its member companies have lost business and revenue as a result of the 2017 Rules. BBANM's unsupported allegation that the 2017 Rules caused its member companies to lose "business by dramatically reducing the number of defendants given the option of a secured monetary bond" is too speculative to establish irreparable injury. Therefore, BBANM is not entitled to preliminary injunctive relief.

2. Criminal Defendant Darlene Collins

Plaintiffs assert that absent relief, "Plaintiff Collins and other presumptively innocent criminal defendants... will continue to be subjected to severe restrictions of liberty." (Doc. 11 at 37). Plaintiffs do not object to Collins's actual conditions of release to which Collins agreed in writing. (Doc. 11 at 20) (objecting to pretrial release conditions like "home detention" and "electronic monitoring with an ankle bracelet," which have not been imposed on Collins). The actual conditions of release applicable to Collins include routine conditions such as "[n]ot to buy, sell, consume, or possess illegal drugs," "[t]o avoid all contact with the alleged victim or anyone who may testify in this case,"

to "appear at all Court settings" unless excused by the presiding judge, and "[n]ot to violate any federal, state or local criminal law," (Doc. 15-3 at Exhibit 1). Because these minimal conditions of release do not rise to the level of irreparable injury, Collins is not entitled to a preliminary injunction.

3. New Mexico State Legislators

Plaintiffs claim that Plaintiffs Senator Richard Martinez, Senator Bill Sharer, Senator Craig Brandt, Representative Bill Rehm, and Representative Carl Trujilo (collectively, the "State Legislator Plaintiffs") are "harmed as their constitutionally confirmed powers continue to be usurped." (Doc. 11 at 37). However, this conclusory statement does not constitute irreparable harm. *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir, 2004). As discussed above, the New Mexico Supreme Court acted pursuant to its lawful rule-making authority in promulgating procedural rules to give effect to the 2016 constitutional amendment and did not intrude on the exclusive domain of the New Mexico Legislature. Accordingly, the State Legislator Plaintiffs are not entitled to a preliminary injunction.

C. Potential Harm to Defendants

Granting the relief Plaintiffs seek in their motion for preliminary injunction would preclude the New Mexico Supreme Court from exercising its established rule-making authority. Further, the preliminary injunction would forbid New Mexico state courts from carefully considering the most effective means of assessing risk for pretrial release. The Court finds that

enjoining the New Mexico Supreme Court from effectuating the constitutional amendment lawfully enacted by the New Mexico Legislature and the voters of New Mexico would cause the Defendants in this ease irreparable harm. *Maryland v. King*, — U.S. —, 133 S.Ct, 1, 3 (2012). Because the relief sought by Plaintiffs would disrupt the functioning of the judicial branch in New Mexico, Plaintiffs' request for preliminary injunction shall be denied.

D. Public Interest

The public interest would be adversely affected by a preliminary injunction enjoining the 2017 Rules because the public interest favors the preservation of lawfully-enacted constitutional amendments and court rules. Plaintiffs actively participated in the legislative and judicial rule-making process that resulted in the 2017 Rules. However, Plaintiffs were unsuccessful in persuading lawmakers and voters of the merits of their position at the state level. Because public interest favors the rule of law over the interests of a few, the preliminary injunction shall be denied.

IV. Conclusion

The Court concludes that Plaintiffs are not likely to succeed on the merits of their claims, they have not shown that they will suffer irreparable harm if the injunction is denied, Defendants would be irreparably harmed by the requested injunction, and the public interest favors denying the preliminary injunction. For the foregoing reasons, Plaintiffs' Corrected Motion and Brief in Support for a Preliminary Injunction (Doc. 11) shall be **DENIED**.

It is therefore **ORDERED** that Plaintiffs' Corrected Motion and Brief in Support for a Preliminary Injunction (Doc. 11) is hereby **DENIED**.

It is so **ORDERED**.

SIGNED this _____ day of _____ 2017.

_____
ROBERT A. JUNELL
Senior United States District Judge

4/1/2019
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DARLENE COLLINS, et al., Plaintiffs - Appellants, v. CHARLES W. DANIELS, et al., Defendants - Appellees.	Nos. 17-2217 & 18-2045

ORDER

Before **BRISCOE**, **MATHESON**, and **BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No 17-2217
Consolidated with 18-2045

DARLENE COLLINS, *et al.*,

Appellants,

v.

DANIELS, *et al.*,

On Appeal from the United States District Court For the District of New Mexico (Hon. Robert Junell)
District Case No. 1:17-cv-00776

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Dated: July 9, 2018

Oral Argument Requested

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STATEMENT OF PRIOR RELATED APPEALS

There are no prior related appeals in this matter.

JURISDICTIONAL STATEMENT

The United States District Court for the District of New Mexico had subject matter jurisdiction of the underlying case pursuant to the Fourth, Eighth and Fourteenth Amendments of the United States Constitution, 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

This Court has jurisdiction over the appeal per 28 U.S.C. § 1291. The District Court entered an Order Granting Defendants' Motions to Dismiss on December 11, 2017, and final judgment issued December 20, 2017. (Aplt App 636-677, 678-679) Appellants timely noticed its appeal on December 21, 2017. The District Court entered an Order Granting Rule 11 Sanctions on January 4, 2018 (Aplt App 680- 694).

Subsequently, on March 22, 2018, the District Court granted Plaintiffs' / Appellants' Motion for Leave to Deposit Funds with the Court Registry and denied Defendants' / Appellees' Motion to Amend or Modify the Court's January 4, 2018, Order. (Aplt App 732-733). Appellants timely filed a 2nd Notice of Appeal on March 26, 2018, and on May 16, 2018, this Court ordered the Appeals procedurally consolidated for briefing, record and submission.

STATEMENT OF THE ISSUES

I. Did the District Court err when it applied *United States v. Salerno* to find the Eighth Amendment to the United States Constitution does not provide a fundamental right to secured bail and thus dismissed

Plaintiffs action?

II. Did the District Court err when it found that Appellees New Mexico Supreme Court did not act in access of powers granted to them by the New Mexico Constitution and the limited delegated authority from the legislature that expressly prohibits the courts from implementing any rule that impacts the substantive rights of citizens?

III. Did the District Court err when it held that the Appellees Supreme Court's rule-making activity did not violate the Due Process rights of Plaintiffs and that Appellees Second Judicial Defendants did not violate the procedural Due Process rights of state citizens by adoption of the Arnold Tool?

IV. Did the District Court err in finding that immunities barred suit, and when it found that appellants Bail Bond Association of New Mexico (BBANM) and individually named legislators acting as state citizens did not have an objectively reasonable basis for standing to petition the District Court to hear their challenge to defendants' actions?

V. Did the District Court err in denying Plaintiff's Motion to Amend the Complaint?

VI. Did the District Court err when if found that Counsel Dunn brought the underlying suit for "political reasons" and thus sanctioned counsel?

STATEMENT OF THE CASE

This dispute centers on the constitutionality of recent New Mexico Supreme Court Rules regarding pretrial release and detention in criminal proceedings adopted pursuant to Supreme Court Order No. 17-8300-005 effective July 1, 2017. ("2017 Rules"). Appellants are the Bail Bond Association of New Mexico

(BBANM), three individual state Senators, one House of Representatives member, and Darlene Collins, a criminal defendant charged in New Mexico state court with aggravated assault and released on nonmonetary conditions by a Bernalillo County Metropolitan Court Judge, pending trial. (Aplt App 590). Appellees are the New Mexico Supreme Court and its Justices, the Second Judicial District Court and its Chief Judge and Court Executive Officer, the Bernalillo County Metropolitan Court and its former Chief Judge and Court Executive Officer, and the Board of County Commissioners of the County of Bernalillo. (Aplt App 590-593).

Appellants allege that in drafting, passing and implementing the 2017 Rules, the New Mexico Supreme Court violated the Eighth Amendment's guarantee prohibiting excessive bail, Fourth Amendment protections against unreasonable seizures, and the Due Process Clause of the Fourteenth Amendment (Aplt App 608- 614) and that implementation of a pretrial release risk assessment tool in Bernalillo County (Arnold Tool) violates the Eighth Amendment by prioritizing nonmonetary conditions of release (Aplt App 609). Appellants sought relief, asking that the 2017 Rules be declared unconstitutional by the District Court, that the rule's application and enforcement be enjoined, for an award of monetary damages against Appellees individually pursuant to 42 U.S.C. § 1983, and attorney's fees under 42 U.S.C. § 1988. (Aplt App 614-615). Appellants also sought certification of the lawsuit as a class action, defining the Damages Class as: All New Mexico criminal defendants denied the opportunity for pre-arraignment liberty and criminal defendants who are or were subject to the liberty-restricting conditions of pre-

release due to the 2017 Rules and/or Arnold Tool, without being afforded consideration for release by posting a secured bond, and who suffered compensable harm. (Aplt App 603, 614).

On August 18, 2017, Judicial Appellees filed their Motion to Dismiss (Aplt App 171-199) which was adopted by Bernalillo County Defendants on August 28, 2017 (Aplt App 280-292, 630-631). Appellants filed their Response on September 1, 2017, (Aplt App 295-312) and Judicial Appellees' Reply in support was filed September 14, 2017. (Aplt App 347-359). Appellants moved to Amend the Complaint on September 19, 2017, (Aplt App 360-444), to which Judicial Appellees responded on October 3, 2017, (Aplt App 461-472) and Bernalillo County Appellants responded on October 6, 2017, (Aplt APP 499-501). Appellants filed a Consolidated Reply in support of amendment on October 17, 2017. (Aplt App 527-535). Oral argument was heard on November 27, 2017, and the District Court's decision issued on December 11, 2017. (Aplt App 636-677).

SUMMARY OF THE ARGUMENT

The powers of the New Mexico Supreme Court are limited by the separation of powers provided for in the New Mexico Constitution and by NMSA § 38-1-1, which prohibits it from making any rule to "abridge, enlarge or modify the substantive rights of any litigant." The District Court erred when it failed to give effect to separation of powers limitations as well as the prohibition codified by the Legislature that prevents the Courts from engaging in rulemaking activities that curtail or modify the substantive rights of citizens.

The New Mexico Legislature acted in 2016 to make changes to implementation of bail by constitutional amendment, demonstrating that the New Mexico Supreme Court's subsequent rule changes as to bail issuance was an impermissible change to public policy affecting citizens' fundamental liberty interest in bail. The Amendment adopted by the voters requires that an accused proceed by motion to be excused from secured bail bond.

Instead of giving effect to the will of the voters and the law as passed by the Legislature, the New Mexico Supreme Court, and in particular the Rules' sponsor (Justice Daniels), impermissibly, engaged in their own legislative endeavors, without regard to the fundamental and substantive rights impacts. No aspect of the New Mexico Supreme Court's change in law was adjudicatory in nature. The Appellees in this case acted contrary to the separation of powers protected by the New Mexico Constitution and the limited delegated rule-making authority provided to the Courts when they acted to promulgate the 2017 Rules. Appellants also violated the Eighth Amendment, and the due process provisions of the Fourth and Fourteenth Amendments to the United States Constitution.

At a minimum, there is a good faith basis for this litigation, which is substantially similar to other bail modification challenges ongoing nationwide. Appellees (the Courts of New Mexico acting through the Attorney General) engaged through the retaliatory misuse of Rule 11, to quell the protected speech of Appellants and to quash Appellants' right of access to the courts. Seeking to assert First Amendment rights violations, Appellants sought to amend the Complaint, then the District Court erred by denying such

amendment and compounding that error by granting the Rule 11 motion.

STANDARD OF REVIEW

An appellate court applies an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law (that enjoys *de novo* rule) or on a clearly erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, (1990); *Adamson v. Bowen*, 855 F.2d 673 (10th Cir. 1988).

This appeal arises from the district court's grant of Defendants' Rule 12(b)(1) and Rule 12(b)(6) motion on the grounds of legislative immunity, quasi- judicial immunity and sovereign immunity, as well as failure to state a claim. The Tenth Circuit "review[s] a Rule 12(b)(6) dismissal de novo." *Nixon v. City & Cty. of Denver*, 784 F.3d 1364, 1368 (10th Cir. 2015) (internal quotation marks omitted). In doing so, the appellate court must "accept all the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the non-movant," *id.* (ellipsis and internal quotation marks omitted). To withstand dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Tenth Circuit also reviews *de novo* the legal question of

whether a constitutional right is clearly established. *Pyle v. Woods*, 874 F.3d 1257, 1263 (10th Cir. 2017).

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT APPLIED *UNITED STATES V. SALERNO* FINDING THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT PROVIDE A FUNDAMENTAL RIGHT TO SECURED BAIL.

A. Background of Bail in NM.

1. The Challenged 2017 Rules and the Use/Adoption of the "Arnold Tool" in the Second Judicial District.

Prior to 2016 and immediately following the adoption of a constitutional amendment in the fall of 2016, pretrial release and even pre-arraignment release by posting a sufficient financial surety was recognized as a fundamental right reflecting the presumption of innocence. NM's Constitution, as do most states' constitutions, provides:

> [a]ll persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

NM Const. Art. II, §13, (1911). The 13th Amendment to the NM Constitution retains this clause largely

unchanged even after the voter-adopted amendment of November of 2016, now stating:

> [a]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

N.M. Const. Art. II, § 13. The 2016 amendment did not abridge the substantive right to obtain pretrial liberty or importantly here, the ability to avoid pre-arraignment incarceration. Rather, the 2016 Amendment added language to accommodate the public's desire to provide for an alternative means of pre-trial release for those without the financial ability to secure bail, allowing those who are not dangerous or a flight risk to obtain pretrial liberty by filing an appropriate motion:

> [a] person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner.

N.M. Const. Art. II, § 13. Under the guise of promulgating rules to comply with the 2016 Amendment, the New Mexico Supreme Court created and implemented rules that sidestep the process

adopted by the public, nullifies the process to obtain release without bail, and imposes excessive pre-arraignment/pre-trial liberty restrictions.

The New Mexico Supreme Court Rules adopted June of 2017 and effective July 1st) ("2017 Rules") created a hierarchy that requires courts to consider an all- encompassing host of liberty restrictions before even considering the posting of a secured bond to obtain pretrial release. Many conditions are highly restrictive of personal liberty. (Aplt App 052-064). For example, a court may order various forms of physical detention, house arrest or remaining "in the custody of a designated person." *Id.* A court, before considering secured bond, must consider severe and imposing restrictions such as "specified curfews," restrictions "on personal associations, place of abode, or travel," and tracking a defendant's movements (even within a home) through an ankle GPS device worn 24 hours a day. *Id.* A court can further mandate that an accused undertake activities, from regular reporting to pre- trial services to invasive actions such as medical or psychological treatment or "any other condition" or restriction – before considering secured bond. The court now imposes these severe restrictions without any heightened showings by the state. Then, only if none of these liberty depriving conditions would likely secure the return of the accused to trial, which must be found by written determination of a judge, can the court allow secured bail for pretrial release. The 2017 Rules changed substantive rights by removing the ability of New Mexicans, such as Collins, to avoid the life-threatening pre-arraignment incarceration by eliminating the option of a jailhouse bond. The 2017 Rules substantially changed the NM criminal justice system, replacing guarantees of pretrial liberty through

a right to bail with a system that instead severely restricts pretrial liberty rights without consideration of secured bail.

B. The District Court Erred in Determining that Appellant Darlene Collins and Other Criminal Defendants in NM Were Not Deprived of Their Fundamental Liberty Interests in a Presumption of Innocence by the Denial of Their Pre-arraignment and Pretrial Release Thru Bail.

The District Court's determination that bail is not a fundamental liberty interest is at odds with the Constitution. The Supreme Court in *United States v. Salerno*, 481 U.S. 739 (1987) evaluated whether, through regulatory powers, the government possessed a compelling interest justifying curtailing liberty interests. Such consideration presupposes that bail is a liberty interest. Thus, defendants awaiting trial "remain clothed with a presumption of innocence and with their constitutional guarantees intact." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978)(*en banc*); *United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2006). A finding of probable cause does not disturb the innocence presumption and is not a substitute for a showing that would justify severe pretrial restrictions on liberty. Thus, in our system, bail is the mechanism that protects the well-established "right to freedom before conviction," while also protecting society's interest in ensuring that defendants answer the charges against them. *Stack v. Boyle*, 342 U.S. 1(1951). Critically, a defendant released on bail generally *faces*

no restrictions on her liberty; her only obligation is to appear for trial.

As described above, the 2017 Rules mandate that courts impose *any and all combination of non-monetary conditions* to ensure the defendant's future appearance and protect the community *before ever considering monetary bail*. (Aplt App 052- 064). Severe liberty restrictions are imposed without any heightened showing by the state. The mandatory preference for non-monetary conditions before monetary bail is considered, means that defendants who could reasonably ensure their appearance at trial by posting bail are instead subjected to severe restrictions, including pre- arraignment incarceration, home detention and ankle bracelets. The new law mandates a deprivation of liberty when no such deprivation is necessary to ensure the defendant's appearance.

The 2017 Rules' and Arnold Tool's needless deprivation of liberty is unprecedented and unconstitutional. No previous law required subjecting a presumptively innocent defendant - who is not a danger and whose future appearance can be ensured by posting monetary bail - to extensive liberty curtailments. Such is the very definition of excessive bail in contravention of the Eighth Amendment.

1. Appellant Darlene Collins.

Darlene Collins' case is illustrative. After a domestic dispute with her granddaughter, she was arrested and charged with aggravated assault on July 1, 2017. Collins is a disabled 61-year old retiree, with a supportive family and local residence. Under the century-old prevailing system, Ms. Collins would have had the option to post a jailhouse bond through

professional bondsmen, avoiding incarceration of several days that nearly cost her life and cost taxpayers significant medical expenses. Monetary bail - stopped by the 2017 Rules - would have allowed Collins to enjoy full pretrial liberties *and* ensure her court appearance. Yet, Collins was subjected to pre-arraignment confinement in the Bernalillo County Detention Center and at least one hospital for several days (July 1st thru July 5th), without the state justifying the appropriateness of such restrictions by clear and convincing evidence.

Appellants do not, nor have, claimed an absolute right to bail. In tailoring restrictions, States may deny bail for serious offenses, and courts may set monetary bail at non-excessive amounts that some cannot afford. States may deny bail if a defendant is accused of identified crimes or is a special danger to the community, or if no bail is sufficient to ensure that a defendant will appear at trial. A state is free to develop laws that offer defendants a choice between monetary bail and liberty restrictions as conditions of release. But here, the Supreme Court has changed substantive rights and public policy, by determining that ***any*** monetary bail is inappropriate if some or all personal liberties can be curtailed instead. The NM Supreme Court Defendants have made a personal judgment call, that money bail is always inappropriate, while taking away individuals' liberty interests. Under the 2017 Rules, available jailhouse bonds are eliminated. After a period of incarceration, a court then determines conditions of pretrial release that are sufficient to reasonably ensure a defendant's appearance at trial. However, there is one condition a court cannot initially consider—monetary bail. The excessive curtailment of

liberty rights is wholly unnecessary and not narrowly tailored.

2. The 2017 Rules and the Implementation of Those Rules by the Adoption of the Arnold Tool Violates Appellants' Eighth Amendment Right to Pretrial Liberty Through Non- Excessive Bail.

Monetary bail has been the mechanism for preserving the "traditional right to freedom before conviction." *Stack*, 342 U.S. at 4. Thus, the Supreme Court has described bail as a "right" and a "constitutional privilege" that safeguards pretrial liberties of the presumptively innocent who provide sufficient security to assure their appearance and do not endanger the community. *Id.* ("right to bail"); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981); *United States v. Barber*, 140 U.S. 164, 167 (1891); *see Baker v. McCollan*, 443 U.S. 137, 147 (1979) (Blackmun, J., concurring).

The source of such right is the Eighth Amendment, which prohibits "[e]xcessive bail," along with "excessive fines" and "cruel and unusual punishments" (U.S. Const. amend. VIII) which applies to states. *See McDonald v. City of Chicago*, 561 U.S. 742, 764 n.12 (2010); *Baker v. McCollan*, 443 U.S. at 144 n.3. This Court has ruled consistently that "bail constitutes a fundament of liberty underpinning our criminal proceedings" that "has been regarded as elemental to the American system of jurisprudence." *Sistrunk v. Lyons*, 646 F.2d 64, 70 (3rd Cir. 1981). Both the Supreme Court and Third Circuit have explained

that a state can violate the Bail Clause by restraining pretrial liberty through either detention or "conditions of release." *Salerno*, 481 U.S. at 754; *United States v. Perry*, 788 F.2d 100, 112 (3d Cir. 1986).

Just as the right to a speedy trial implies the right to a *trial;* and just as the right to due process implies the right to *process;* so too does the Eighth Amendment's prohibition of "[e]xcessive bail" presupposes a right to *bail*. Indeed, "[l]ogic defies any other resolution of the question." *Hunt v. Roth*, 648 F.2d 1148, 1157. If the Eighth Amendment did not imply right to bail, a state could eliminate bail entirely without running afoul of it. Under a "devitalizing interpretation," the "Eighth Amendment's ban on excessive bail means just about nothing." *Carlson v. London*, 342 U.S. 524, 556 (1952) (Black, J., dissenting). Such reading would violate principles of constitutional interpretation, as "[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible." *Marbury v. Madison*, 5 U.S. 137, 174 (1803). The logical interpretation, then, is the Eighth Amendment "implies, and therefore safeguards, the right to give bail" before depriving the presumptively innocent of pretrial liberty. *United States v. Motlow*, 10 F.2d 657, 659 (7th Cir. 1926) (Butler, Circuit J.). Indeed, this Court in its most extensive discussion of the Bail Clause recognized that the "constitutional right to be free from excessive bail ... shades into a protection against a denial of bail." *Sistrunk*, 646 F.3d at 70 n.23.

The history of bail underscores this commonsense reading of the Eighth Amendment, with the Excessive Bail Clause adopted against an English and American backdrop in which the right to bail itself was deeply ingrained. *See Cobb v. Aytch*, 643 F.2d 946,

958 n.7; Verrilli, *Right to Bail*, 82 Colum. L. Rev. at 337 & n.50. The First Congress proposed the Eighth Amendment to the States for ratification on the same day it passed the Judiciary Act of 1789, mandating a right to bail for non-capital defendants. *See Stack*, 342 U.S. at 4; *Cobb*, 643 F.2d at 958 n.7; Verrilli, *Right to Bail* at 338. In short, Eighth Amendment protections were adopted in understanding of the antecedent right to bail as the means to secure pretrial liberty. Exceptions to bail issuance are "carefully limited." *Salerno*, 481 U.S. at 755; *see United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985) (Kennedy, J.)("Only in rare circumstances should release be denied.")

Under the 2017 Rules and as implemented by the Arnold Tool, a court is barred from even considering the option of bail instead of severely restraining personal liberties. As Collin's case illustrates, a defendant who desires to post non-excessive bail as a jailhouse bond to avoid initial incarceration (or a defendant such as putative Plaintiff William Martinez,) and for whom appearance at trial is reasonably likely must still be subjected to liberty restrictions. Thousands of other presumptively innocent defendants, including those served by the Bail Bond Association of NM ("BBANM") and member Pacheco Bail Bonds, are similarly affected. (Aplt App 124-125, 126-127).

There is no historical basis for the New Mexico Supreme Court's approach, that "lack of historical precedent" is a "telling indication of the severe constitutional problem." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010). Unlike the Bail Reform Act provisions upheld in *Salerno*, the 2017 Rules, without heightened showing, imposes severe restrictions on the

pretrial liberty of *all* defendants except those released on their own recognizance, including individuals like Collins despite that monetary bail alone would reasonably secure future appearances. *See Stack*, 342 U.S. at 4.

The District Court's contrary conclusion turned on a misreading of one sentence in *Salerno*. In the District Court's view, the *Salerno* "Court *held* that the Eighth Amendment 'says nothing about whether bail shall be available at all.'" (Aplt App 656)(quoting *Salerno*, 481 U.S at 752)(emphasis added). But that single sentence simply noted a truism of the literal text of the Bail Clause and was concededly not relevant to *Salerno*'s only Eighth Amendment holding—that the Bail Clause does not protect "a right to bail calculated solely upon considerations of flight." *Salerno*, 481 U.S. at 752, 754.

The District Court further misapplied *Salerno* by concluding that, because *Salerno* held that the federal Bail Reform Act's authorization of pretrial detention is constitutionally permissible to address risk of flight and safety of persons and community, then so too are the 2017 Rules lesser conditions imposing restrictions on pre-trial liberty. But *Salerno* was not the broad license for pretrial detention the District Court imagines. Rather, *Salerno*'s narrow holding was that the Bail Reform Act was not *facially* unconstitutional. *See* 481 U.S. at 745. The Court emphasized the Act's limited application to defendants accused of "extremely serious offenses" and found to endanger the public by "clear and convincing evidence," and the Court explicitly recognized "the individual's strong" and "fundamental" interest in liberty. *Id.* At 750-55. Nothing in *Salerno* remotely authorized the wholesale elimination of monetary bail or authorized

severe pretrial deprivations of liberty on anything less than a showing of clear and convincing evidence.

Indeed, the United States Supreme Court has subsequently emphasized that the liberty restriction authorized in *Salerno* was "narrowly focused" and "carefully limited." *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992). The Third Circuit has likewise stressed *Salerno*'s limited reach. *See, e.g.*, *Steele v. Cicchi*, 855 F.3d 494, 502 (3d Cir. 2017). In short, nothing in *Salerno* provides any support for the 2017 Rules' 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. And without *Salerno*, the Appellees have no real Eighth Amendment case.

III. THE DISTRICT COURT ERRED WHEN IT FOUND THAT THE NEW MEXICO SUPREME COURT DEFENDANTS DID NOT ACT IN EXCESS OF THE POWERS GRANTED TO THEM.

Plaintiffs agree that, normally, state constitutional questions, in particular those concerning separation of powers, interpretation of state constitutions or delegation of powers by a legislature, do not fall within the province of the federal judiciary. This is almost entirely because it is left to the supreme courts of the respective states to address those concerns. Nevertheless, this case presents a unique set of circumstances where state legislators, among others, are challenging the actions of members of the state judiciary on behalf of the citizenry they represent, not the body of the Legislature. The state's judiciary is not

an adequate or appropriate forum to decide such a dispute, given that the state's judiciary is a party and is inclined to vigorously defend its actions. Appellants note that the Judiciary Appellees threatened, sought and then obtained Rule 11 sanctions against Appellants' attorneys for the insult of bringing this lawsuit. It was facile to claim that the federal district court cannot act upon a justiciable question merely because it carries a label that is often applied to describe cases outside the purview of the federal courts.

The Supreme Court has, to the contrary, stated:

> When challenges to state action respecting matters of 'the administration of the affairs of the State and the officers through whom they are conducted'[] have rested on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim.

Baker v. Carr, 369 U.S. 186, 229, (1962). The Supreme Court in *Baker* specifically alluded to "federal courts' power to inquire into matters of state governmental organization." If aspects of state governmental organization result in constitutional deprivations, the District Court should rule upon the merits such deprivations including as here, whether the state's judiciary has the right to enact legislation causing those deprivations. The District Court failed to properly consider that the Judicial Appellees' actions invaded the province of the Legislature protected by New Mexico's separation of powers, that the 2017 Rules were wholly inconsistent with the 2016 constitutional amendment adopted by the voters of New Mexico and

in failing to recognize bail as a substantive right of New Mexico citizens, failed to properly consider that the Judicial Appellees' actions were violative of the prohibition contained in the delegation to the New Mexico Courts by the Legislature in NMSA §38-1-1.[123]

III. THE DISTRICT COURT ERRED IN HOLDING THAT SUPREME COURT DEFENDANTS' RULE-MAKING ACTIVITY DID NOT VIOLATE DUE PROCESS RIGHTS OF PLAINTIFFS AND SECOND JUDICIAL DEFENDANTS DID NOT VIOLATE DUE PROCESS RIGHTS OF STATE CITIZENS BY ADOPTION OF THE ARNOLD TOOL.

The Due Process Clause of the Fourteenth Amendment (in both its procedural and substantive dimensions) protects the rights of Collins and other presumptively innocent criminal defendants—including those served by members of BBANM— against

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1 "The supreme court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico for the purpose of simplifying and promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant." NMSA §38-1-1 (emphasis added)

2 State v. Montoya, 2010, 149 N.M. 242, 247 P.3d 1127, certiorari denied 150 N.M. 558, 263 P.3d 900. (discussing whether a court rule is procedural, rather than substantive, and thus does not violate separation of powers.)

3 Smith v. Love, 1984, 101 N.M. 355, 683 P.2d 37 (Supreme Court may establish rules of procedure, but may not abridge any right provided by Constitution.)

restrictions of pretrial liberty including the right to avoid incarceration altogether through the historically available option of a jailhouse bond without the option of non-excessive bail. The 2017 Rules and the Arnold Tool implementation plainly eliminates that right.

A. The District Court Erred In Determining That The 2017 Rules Did Not Violate Appellants' Procedural Due Process Rights.

The Due Process Clause's protection of "liberty" has "always ... been thought to encompass freedom from bodily restraint." *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977); *see Perry*, 788 F.2d at 112 ("liberty" includes "[f]reedom from constraint"). The protection against bodily restraint includes not only freedom from "government custody, detention, or other forms of physical restraint," *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), but also "the right to move freely about one's neighborhood or town," *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990); *see Perry*, 788 F.2d at 112 ("freedom of movement"); *see also* 1 William Blackstone, Commentaries 134 ("personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law").

The Due Process Clause's protection of liberty applies to presumptively innocent individuals awaiting trial (*Pugh*, 572 F.2d at 1056) and is plainly implicated by the 2017 Rules. Home detention squarely restricts a defendant's constitutionally protected liberty, as "[e]very confinement of the person is an imprisonment, whether it be in a common prison or in a private house."

Wallace v. Kato, 549 U.S. 384, 388- 89 (2007). Likewise, "[r]equired wearing of an electronic bracelet, every minute of every day, with the government capable of tracking a person not yet convicted as if he were a feral animal would be considered a serious limitation on freedom by most liberty-loving Americans." *United States v. Polouizzi*, 697 F. Supp. 2d 381, 389 (E.D.N.Y. 2010). The Third Circuit has expressly observed that being "subjected to electronic monitoring" may "implicate due process concerns." *Coulter v. Unknown Prob. Officer*, 562 F. App'x 87, 90 (3d Cir. 2014).

By denying the option of avoiding incarceration by jailhouse bond and imposing these liberty-restricting conditions on Collins and other presumptively innocent individuals without offering them either the historically- required option of monetary bail, or requiring any heightened showing, the 2017 Rules violate Appellants' right to procedural due process. The 2017 Rules impose severe deprivations on presumptively innocent individuals without any consideration of the historically protected option of release on monetary bail. *See Medina v. California*, 505 U.S. 437, 446 (1992) ("Historical practice is probative of whether a procedural rule can be characterized as fundamental" for purposes of procedural due process). Moreover, the 2017 Rules impose these severe legal restrictions without requiring any heightened showing from the state. Imposing these conditions without any heightened showing of need or any consideration of monetary bail as an alternative runs short of both the *Mathews* and *Medina* tests for due process. (*See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)). Realistically, "[t]here is simply no way for the government to know whether [bail] would adequately" ensure appearance

because the 2017 Rules deny judges the power to consider that option. *See Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017). Accordingly, the 2017 Rules violate due process by "fail[ing] to provide 'adequate procedural protections' to ensure that" pretrial deprivations of liberty are "reasonably related to a legitimate governmental interest." *Id.*

B. The District Court Erred In Determining That The 2017 Rules Did Not Violate Appellants' Substantive Due Process Rights.

Similarly, the 2017 Rules violate Appellants' substantive rights under the Due Process Clause. A right is protected by substantive due process if it is "fundamental to [our] scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767; *see Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Lutz*, 899 F.2d at 267-68. Although a right need only meet one of those standards to receive constitutional protection, the right asserted by Appellants—the right of option to post monetary bail sufficient to ensure future appearance before subjection to severe liberty deprivations—satisfies both prongs of the inquiry.

First, a defendant's right to bail as an option before being subjected to severe deprivations of pretrial liberty is "fundamental to [our] scheme of ordered liberty." *McDonald*, 561 U.S. at 767. As explained above, 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. *Coffin v. United States*, 156 U.S. 432,

453(1895). Bail preserves that fundamental principle by ensuring "freedom before conviction"—the same range of freedom enjoyed by all other presumptively innocent members of society—for defendants who can reasonably ensure their future court appearances and do not endanger the community. *Stack*, 342 U.S. at 4. Ensuring a presumptively innocent defendant's pretrial liberty is not only valuable in its own right, but directly relevant to the fair functioning of the criminal justice system. Without the full range of pretrial freedom provided by bail, presumptively innocent defendants are "handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense." *Id.* at 8 (Jackson, J., concurring). Bail is thus "a calculated risk which the law takes as the price of our system of justice." *Id.*

The Supreme Court has accordingly recognized the fundamental place of bail, describing it as "basic to our system of law," *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971), and a "constitutional privilege" to which pretrial defendants are "entitled," *Barber*, 140 U.S. at 167. This Court has similarly held that "bail constitutes a fundament of liberty underpinning our criminal proceedings" that "has been regarded as elemental to the American system of jurisprudence." *Sistrunk*, 646 F.2d at 70; *see* Verrilli, *Right to Bail*, 82 Colum. L. Rev. at 329 (right to bail is "a fundamental principle of American criminal jurisprudence"). Of particular relevance here, the Supreme Court has directly connected bail to preserving the presumption of innocence that all agree is fundamental to our scheme of ordered liberty, *see Coffin*, 156 U.S. at 453, explaining that "[u]nless th[e] right to bail before trial is preserved, the presumption of innocence, secured only

after centuries of struggle, would lose its meaning," *Stack*, 342 U.S. at 4.

Second, bail is also protected by the substantive component of the Due Process Clause because it is "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767. Few aspects of our criminal justice system have deeper roots, with the right to bail dating back to "the struggle to implement the Magna Carta's 39th chapter which promised due process safeguards for all arrests and detentions." *Sistrunk*, 646 F.2d at 68. As explained above, the right to bail reflects the same "deep-rooted commitment to freedom before conviction" in this country. *Id.* The right to bail was recognized in the Massachusetts Body of Liberties in 1641 and other fundamental documents of the Founding Era—including in New Jersey. *See id.* at 69; *State v. Mairs*, 1 N.J.L. 335, 336 (1795). The right to bail has been "unequivocally" protected by federal law since the Northwest Ordinance of 1787 and the Judiciary Act of 1789. *Stack*, 342 U.S. at 4. And, of critical importance here, the overwhelming consensus of States— including all but two to join the Union after the Founding—is that pretrial defendants have a right to bail. *See Cobb*, 643 F.2d at 958 n.7; Verrilli, *Right to Bail*, 82 Colum. L. Rev. at 337, 351; Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 920-27 (2013). If the right to bail as an alternative to deprivations of pretrial liberty does not qualify as "deeply rooted in this Nation's history and tradition," *McDonald*, 561 U.S. at 767, it is difficult to imagine what would. The District Court dismissed this extensive legal history because it preceded *Salerno*, despite *Salerno* reaffirming that as to non-dangerous defendant's appearance at trial, "bail must be set by a

court at a sum designed to ensure that goal, and no more." *Id.* at 754, *citing Stack*, 342 U.S. 1.

C. The District Court Erred In Determining That the 2017 Rules Did Not Violate Appellants' Fourth Amendment Rights.

Finally, the 2017 Rules violate the Fourth Amendment right of Collins and other criminal defendants to be free from "unreasonable searches and seizures." Just as a presumptively innocent criminal defendant does not lose her constitutional right to freedom of movement, a defendant who has been released before trial "does not lose his or her Fourth Amendment right to be free of unreasonable" searches and seizures. *Scott*, 450 F.3d at 868. Moreover, a defendant's consent to Fourth Amendment searches or seizures as a condition of release does not immunize the restrictions from constitutional scrutiny. *Id.* at 866.

There can be no real dispute that electronic monitoring of a defendant constitutes a search, and pre-arraignment incarceration or post-arraignment home detention constitutes a seizure. *See Grady v. North Carolina*, 135 S. Ct. 1368, 1369 (2015) (ankle bracelet is a search); *United States v. Jones*, 565 U.S. 400, 404 (2012) (attaching GPS tracker to vehicle is a Fourth Amendment search); *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984) (a "meaningful interference, however brief, with an individual's freedom of movement" is a Fourth Amendment seizure). The only question is whether the search and seizure are reasonable.

The denial of the historically available jailhouse bond necessary to preserve her health imposed on

Collins was not based on reasonable suspicion or probable cause that she will commit a crime. Nevertheless, the government may be able to justify denial under the "special needs" doctrine. *Scott*, 450 F.3d at 868. Under that doctrine, reasonableness is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

Here, the degree to which the search and seizure, particularly the denial of jailhouse bond, intruded upon Collins' movement so severely that it placed her life in jeopardy. (Aplt App 122-123). Other conditions presumably innocent defendants must now endure should also be considered, as Judge Weinstein explained, wearing "an electronic bracelet, every minute of every day, with the government capable of tracking a person not yet convicted as if he were a feral animal" can only "be considered a serious limitation on freedom." *Polouizzi*, 697 F. Supp. 2d at 389. The intrusion on presumably innocent defendants' privacy is particularly severe because it reaches into their home, where their interest in privacy is "at its zenith." *Scott*, 450 F.3d at 871; *see United States v. Karo*, 468 U.S. 705, 714 (1984).

On the other side of the balance, New Mexico has a "legitimate governmental interest[]" in securing a criminal defendants' appearance at trial. *Houghton*, 526 U.S. at 300. But the state cannot possibly show that intrusive electronic monitoring of the kind imposed on defendants under the 2017 Rules is "needed for the promotion of" that interest when the state prohibits courts from considering the mechanism used to promote that interest for most of the past millennium.

Id. at 300. It is especially unreasonable to prohibit consideration of monetary bail to fulfill that interest when monetary bail is expressly protected by the Constitution. "[S]urely a [search or] seizure of a person that violates another provision of the Constitution ... must be viewed as constitutionally unreasonable within the meaning of the Fourth Amendment." Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 664-65 (1996).

IV. THE DISTRICT COURT ERRED IN FINDING THAT IMMUNITIES BARRED SUIT, AND WHEN IT FOUND THAT APPELLANTS' BAIL BOND ASSOCIATION OF NEW MEXICO (BBANM) AND INDIVIDUALLY NAMED LEGISLATORS ACTING AS STATE CITIZENS DID NOT HAVE AN OBJECTIVELY REASONABLE BASIS FOR STANDING.

The District Court incorrectly determined that legislative and judicial immunities applied to the damages claims of Appellants (as discussed more extensively below regarding the Rule 11 Sanctions) and that BBANM as well as the Appellant Legislators lacked standing.

A. Both Appellant BBANM and Appellant Legislators Have Standing.

Collins, BBANM and the Legislators have standing to bring this challenge to Appellees' unprecedented restrictions on criminal defendants' pretrial liberty. The doctrine of standing requires that

the plaintiff "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). All Appellants easily satisfy these requirements. The District Court recognized the standing of Appellant Collins, but failed to recognize the standing of Appellant BBANM to address the constitutional violations with regard to the violations of the Fourth, Eighth and Fourteenth Amendments and failed to recognize the citizen legislator standing of the named Appellant Legislators to address the usurpation of powers and statutory violations under the District Courts' pendant jurisdiction over those claims arising under the New Mexico Constitution and New Mexico Statute delegating authority to the New Mexico Supreme Court.

1. BBANM Standing.

Organizational or representational standing is sufficient to meet Article III standing requirements. BBANM acted in its own capacity as an organization and as an association on behalf of its harmed membership. (Aplt App 590, 599).

a. The BBANM has standing to bring suit in its own capacity and as an association.

An association may have standing as the representative of its members. *E.g., National Motor Freight Assn. v. United States*, 372 U.S. 246 (1963). To demonstrate standing, an association must allege that

its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make a justiciable case had the members themselves brought suit. *Sierra Club v. Morton*, 405 U.S. 727, 734-741 (1972). If "the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Warth v. Seldin*, 422 U.S. 490 (1975).

BBANM has associational standing in this instance. Members of BBANM have suffered a concrete and particularized injury—the collapse of its business a "paradigmatic economic injury." *Cranpark, Inc. v. Rogers Grp., Inc.*, 821 F.3d 723, 30 731 (6th Cir. 2016). The fact that each member of BBANM shares that injury only serves to strengthen standing in this instance. Citizens, such as BBANM's members, have a right to be protected from arbitrary action of government. The Due Process Clause is intended to protect citizens from arbitrary and oppressive exercise of power by the actions of government employees, that curtail a constitutional right. The United States Supreme Court in *Barry v. Barchi* opined as to the constitutionally protected property interest in engaging in one's chosen profession. *Barry v. Barchi*, 443 U.S. 55 (1979). The Judicial Appellees cannot, in acting as a super-legislature, wipe out an entire industry and then seek to deny standing to the very organization representing those entities.

The District Court incorrectly found that BBANM lacks prudential standing because its injury falls outside the "zone of interests" of the constitutional

provisions invoked, confusing standing to represent third-parties addressed *supra.*, with associational standing. An association has standing to bring a lawsuit in federal court "when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (U.S. 1977). There is a long-standing history in federal court of allowing certain entities or organizations to bring suit for injunctive relief in federal court on behalf of their own patrons. For example, in *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, owners of private schools where granted standing because they "asked [for] protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property." 268 U.S. 510 (1925).

BBANM is a professional membership organization comprised of bail bond businesses licensed to operate throughout New Mexico. (Aplt App 023-024). BBANM, and members, will cease to exist when the ongoing harms identified by its memberships close their doors and force them into bankruptcy.

b. <u>BBANM has standing to represent third-party interests.</u>

BBANM also has third-party standing to assert the constitutional rights of potential customers denied bail under Supreme Court Order No. 17-8300-005. The District Court agreed that an entity may have standing

to bring third-party interests. The District Court, however, misapplied the test from *Powers v. Ohio*, 499 U.S. 400 (1991) finding that BBANM does not meet the second and third prongs of the *Powers'* 3 standards[4], *i.e.* "the litigant has a close relation to the absent third party" and the existence of "some hindrance to the third party's ability to protect his own interests" to support representational action. (Aplt App 650-651).

The District Court incorrectly decided that BBANM did not have standing to bring third-party interests. The District Court did not address, as is applicable here, that third party representational standing may exist "when enforcement of a restriction against the litigant 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 (typically a constitutional entitlement)." *Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990). By subordinating bail to non-monetary conditions of release, the challenged Rules prevent the "litigant" BBANM members such as Madrid Bonds from entering into a "contractual relationship" with a third party (a pre-arraignment and pre-trial defendant like Collins) who has a "constitutional entitlement" to bail. BBANM and the third parties its members would serve—criminal defendants unconstitutionally denied bail—have a relationship "such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Powers v. Ohio*, 499 U.S. 400, 413 (1991). Members of BBANM and bailable criminal defendants

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4 The first prong is that the litigant has suffered an injury in fact giving it a sufficiently concrete interest in the outcome of the issue. See Powers, 499 U.S. at 410.

subjected to pre-arraignment incarceration, house arrest and 24-hour monitoring "have a common interest" in ensuring that bail can be considered alongside restrictive conditions of pretrial release. *Id.* "And, there can be no doubt that [BBANM members] will be a motivated, effective advocate for" these criminal defendants. *Id.* at 414.

Criminal defendants burdened by house arrest, 24-hour monitoring, and the need to prepare for their criminal trial plainly "face obstacles to pursuing litigation themselves." *Pa. Psychiatric Soc'y v. Green Spring Health Services, Inc.* 280 F.3d 278, 290 (3rd Cir. 2002). As the Court explained, "[t]his criterion does not require an absolute bar from suit, but 'some hindrance to the third party's ability to protect his or her own interests.'" *id.* (quoting *Powers*, 499 U.S. at 411). Without a third-party willing to expend funds to challenge the constitutionality of the challenged Rules and represent those actually impacted, the legality of the Rules would likely never be adequately challenged. Moreover, the District Court's reasoning ignores the dictates of *Powers*, which instructed courts to weigh the "financial stake involved and the economic burdens of litigation." 499 U.S. at 414-15. The Court below gave no weight to these factors, but as *Powers* recognized, a §1983 suit represents an "arduous process" for someone seeking "to vindicate his own rights." *Id.* at 415. These obstacles are all the more daunting for criminal defendants burdened by house arrest and the demands of preparing for a criminal trial.

2. New Mexico Legislators Have Standing to Challenge the Improper, Superlegislative Powers the NM Judicial

Appellants Have Usurped Under Pendant Jurisdiction.

The District Court incorrectly determined that per *Kerr v. Hickenlooper* the New Mexico Legislative Plaintiffs lacked standing. The problem with such determination was that allegations raised in this instance are not on point with the type of legislative action issue in that case. *Kerr* derived from *Coleman v. Miller*, 307 U.S. 433 (1939), in which the Court considered a challenge to Kansas' ratification of a proposed constitutional amendment after the lieutenant governor cast a tie-breaking vote in the state senate. 307 U.S. at 435. The Court held that twenty-one state senators, including the twenty who voted against ratification, possessed standing to sue because their "votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification." *Id.* at 438. It concluded that "these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Kerr*, 824 F.3d 1207, 1212 (10th Cir. 2016), *citing Id.* In *Raines v. Byrd*, 521 U.S. 811 (1997), the Court considered whether the Line Item Veto Act ("LIVA") caused cognizable injury by granting the President the authority to cancel certain spending and tax measures after signing them into law. 521 U.S. at 814. The Court held that six members of Congress who voted against LIVA lacked standing to challenge the law. *Id.* at 813–14. It distinguished *Coleman* on the ground that the legislators in that case had their votes "completely nullified." *Id.* at 823. In contrast, the *Raines* challengers merely alleged an "abstract dilution of institutional legislative power." *Id.* at 826.

Unlike *Coleman* the legislators here do not bring suit asserting legislative vote nullification by the executive branch nor as in *Raines*, standing of individual legislators to challenge an act such as the Line Item Veto Act. NM Legislator Appellants challenge a complete usurpation of power in violation of the separation of powers per the state constitution. Thus, allegations brought by the New Mexico legislators do not fall near either *Coleman* or *Raines* for precedential guidance on standing of a legislator to challenge the judicial branches usurpations. Nor is this case akin to the struggle between the State legislature and executive branch in passing laws consistent with a "State's prescription for lawmaking" at issue in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015). Rather, this case involves "the ordinary business" of legislating which is reserved to the legislative branch of a state consistent with its constitution. *See Hawke v. Smith*, 253 U.S. 221, 230 (1920). At stake in this litigation and what the Legislative Appellants seek to protect is what the New Mexico Constitution provides for and what was usurped by the Judicial Defendants.

The focus of the Legislator Appellants' action was not an institutional injury by the Judicial Defendants as they sought to cast in their Motions, but rather a challenge to an unconstitutional usurpation of power by one branch – the Judicial branch, designated to interpret laws and decide disputes, not to make law – from another, the legislative branch.

V. THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' MOTION TO AMEND THE COMPLAINT.

Further compounding upon the error in determining that Appellants had failed to state a complaint for constitutional violation, for standing and for damages, the District Court erred in denying Appellants' amendment. It is well settled in the 10th Circuit that amendment of pleadings "shall be given when justice so requires." *Duncan v. Manager, Dep't of Safety, City and Cnty. of Denver*, 397 F.3d 1300, 1315 (10th Cir. 2005) (internal quotation marks and citation omitted). "To the extent that Plaintiffs' motion to supplement sought the addition of a party, it is controlled by Rule 15(a) because it is actually a motion to amend. Fed.R.Civ.P. 15(d) (supplemental pleadings are those which set forth 'transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented')." *Frank v. U.S. W., Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993) Thus Appellants' Amended Complaint was actually both an amendment and a supplement to add new claims associated to the actions of Judicial Appellees for the explicit purpose of chilling the protected speech of Plaintiffs.

Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment. *See Castleglen, Inc. v. Resolution Trust Corp.*, 984 F.2d 1571, 1585 (10th Cir.1993) (*internal citation omitted).* "The futility question is functionally equivalent to the question whether a complaint may be dismissed for failure to state a claim." *Gohier v. Enright*, 186 F.3d 1216, 1218 (10th Cir. 1999).

A. Plaintiffs' New First Amendment

Claim was Not Baseless.

As is more detailed *infra.*, discussing the propriety of the District Courts' award of Rule 11 Sanctions, Appellants and their counsel have a good faith basis for this litigation. This case mirrors the litigation brought by Paul D. Clement, Former United States Solicitor General, in the New Jersey *Holland* case.[5] Additionally, Judicial Defendants engaged in an extra judicial campaign with press statements by their attorneys, the Attorney General's Office, to drive the case from the Courts and from the public's purview. The New Mexico Supreme Court Defendants, as the highest disciplinary authority for attorneys, exert a far bigger threat than other litigants when demanding sanctions per Rule 11. The obvious displeasure and personal animus of the Judicial Appellees evidenced by their Rule 11 Motion has had consequences farther reaching than the instant litigation, nothing short of a calculated effort to quell rights of Free Speech and Petition. It is this extrajudicial action of Judicial Defendants that went too far, that exceeded the bounds of their traditional judicial activity for which they would enjoy immunity, to the type of enforcement activity evincing a vindictive prosecution that the Tenth Circuit has found to fit squarely within a Section 1983 cause of action. Indeed, the Sixth Circuit has discussed in evaluating claims against judges under Section 1983, that "initiation of accusatory processes, such as criminal prosecutions or civil contempt proceedings, is a non-judicial act that may subject a judge to liability." *Johnson v. Turner*, 125 F.3d 324,

5 Holland v. Rosen, et al., No. 17-cv-03104 (D. NJ); Holland v. Rosen, et al., No. 17-cv-04317 (3rd Cir.)

333–34 (6th Cir. 1997); *citing Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir.1984).

As it was derivative of the instant case, Appellants' First Amendment claim was properly addressed in the District Court proceeding, if for no other reason than efficiency's sake. The Tenth Circuit has made it clear that "[o]ur cases suggest a § 1983 malicious prosecution claim need not always rest on the right to be free from unreasonable searches and seizures under the Fourth Amendment. As we have previously noted, an Appellant's § 1983 malicious prosecution claim may also encompass procedural due process violations. Other explicit constitutional rights could also conceivably support a § 1983 malicious prosecution cause of action, although the Supreme Court specifically excluded substantive due process as the basis for a malicious prosecution claim." *Wilkins v DeReyes*, 528 F.3d 790, 806 fn. 4. (10th Cir. 2008) (internal citations and quotations omitted). Appellants' First Amendment claim is recognized under federal law, albeit under a different name – that of vindictive prosecution.

In *Poole v. County of Otero*, 271 F.3d 955 (10th Cir. 2001), the Tenth Circuit addressed, among other matters, a claim made by plaintiff Mr. Poole for violation of his First Amendment right of access to the courts. At footnote 5, the Court pointed out that:

> N**onetheless, we recognize that this court has not limited the term to the criminal prosecution setting**, but has characterized First Amendment claims similar to Mr. Poole's as "vindictive prosecution." *See Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996) (comparing a First Amendment

> claim to a "vindictive prosecution action"); *Gehl Group*, 63 F.3d at 1534 (stating that a First Amendment claim alleging retaliatory prosecution "is essentially one of vindictive prosecution");

Poole at fn. 5 (10th Cir. 2001) (emphasis added).

In *Wolford*, the Tenth Circuit examined whether an Appellant's constitutional rights were violated by the government's prosecution of her, where she alleged the government's action was motivated in part to retaliate against her for exercising her First Amendment rights. The Court commented "[i]n the context of a government prosecution, the decision to prosecute which is motivated by a desire to discourage protected speech or expression violates the First Amendment and is actionable under § 1983." *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996). Cases such as *Wolford*, *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988) and *Gehl Group v. Koby*, 63 F.3d 1528 (10th Cir. 1995) make clear that governmental legal action brought with the intent to retaliate against a citizen for the exercise of First Amendment rights is of itself a separate violation that provides grounds for a § 1983 suit." The Rule 11 Motion in this instance is analogous to initiating a prosecution or regulatory enforcement action against Plaintiffs' counsel, when the New Mexico Supreme Court is the enforcement body charged with regulation of the conduct of the undersigned attorneys. The District Court erred in denying the Amendment to include the First Amendment Claim on the basis of futility.

VI. WHETHER THE LOWER COURT ERRED IN SANCTIONING COUNSEL DUNN

BASED ON ITS DISMISSAL OF THE UNDERLYING SUIT AND ALSO FINDING THAT SUCH SUIT WAS BROUGHT FOR IMPROPER "POLITICAL REASONS."

A. RULE 11 Standards.

Rule 11 requires the signer of legal papers to certify that a filed paper has not been presented for an improper purpose. The Rule provides in relevant part:

> **(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
> (3) the factual contentions have evidentiary support...

Fed. R. Civ. P. 11(b). Per Rule 11, the signature of counsel on the amended complaint constitutes a certification that: "(1) the attorney had read the

complaint; (2) to the best of counsel's "knowledge, information, and belief formed after reasonable inquiry" the amended complaint is well grounded in fact; (3) is warranted by existing law or a *good faith argument for the extension, modification, or reversal of existing law*; and (4) that the amended complaint was not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in cost of litigation." *Burkhart Through Meeks v. Kinsley Bank*, 852 F.2d 512, 514 (10th Cir. 1988)(emphasis added).

The standard for triggering Rule 11 liability is "objective unreasonableness." *Salovaara v. Eckert*, 222 F.3d 19, 34 (2nd Cir. 2000). The test is not whether a litigant's interpretation of the cases relied upon proves to be wrong, but whether the interpretation is "'so untenable as a matter of law as to necessitate sanction.'" *Id.* (quoting *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2nd Cir. 1990), *cert denied*, 498 U.S. 1028 (1991)(emphasis added); some citation omitted, *see citing Sec. Indus. Ass'n v. Clarke*, 898 F.2d 318, 321 (2nd Cir. 1990) ("A distinction must be drawn between a position which is merely losing, and one which is both losing and sanctionable.")(internal quotation marks omitted)).

The purpose of Rule 11 is to deter filing of unwarranted papers. The First Circuit clarifies that so long as the paper is *objectively* reasonable it should not matter what an attorney does pre-filing:

> It is easy to imagine a myriad number of satellite litigations arising if [we adopted Combined's approach]. Anytime an attorney did not fully flesh out an argument he would be subject to a charge that he had not engaged in a reasonable investigation. .. .

> Sanctions should not be imposed where a "plausible good faith argument can be made …."

Kale v. Combined Insurance Co. of America, 861 F.2d 746, 759 (1st Cir. 1988). Thus, sanctions are not appropriate if an attorney has a reasonable belief that the pleading is grounded in fact and is warranted by existing law or when a good faith argument for clarification of the law, extension, modification or reversal of existing law exists. *Id.*; *Eastway Construction Corp City of New York*, 762 F.2d 243, 254 (2nd Cir.1985).

"Where, as here, the complaint is the primary focus of Rule 11 proceedings, a district court must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually 'baseless' from an objective perspective, and (2) if the attorney [or party] has conducted 'a reasonable and competent inquiry' before singing and filing it." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002). The reasonableness inquiry is assessed objectively. *Troupe v. Smith*, No. C15-5671 RBL-KLS, 2016 WL 3397710, at *2 (W.D. Wash. June 6, 2016); *Conn v. Borjorquez*, 967 F.2d 1418, 1421 (9th Cir. 1992). As such, Rule 11 is violated only if "it is patently clear that a claim has absolutely no chance of success under the existing precedents." *Eastway Constr. Corp.*, 762 U.S. at 254, *superseded on other grounds by rule*. Even if violated, Rule 11 sanctions are not mandatory. *Ipcon Collections LLC v. Costco Wholesale Corp.*, 698 F.3d 58, 63 (2d Cir. 2012).

In reviewing a district court's Rule 11 decision, a district court has abused its discretion and thus erred, if it is based on: (1) an erroneous view of the law; (2) a clearly erroneous assessment of the evidence (such as

motivation); or (3) reached a decision that is not located within the range of permissible decisions. *Sorenson v. Wolfson*, 683 F. App'x 33, 35 (2d Cir. 2017)

B. The Lower Court's Sanction is Based on an Erroneous View of the Law.

The Appellees argued in the District Court proceeding that "[a]ny minimally qualified attorney conducting the most rudimentary research would have to be aware that Appellants' claims under the Fourth, Eighth and Fourteenth Amendment to the United States Constitution are both utterly unsupported and filed in direct contravention of governing law." (Aplt App 449). Subsequently, the Court held, as discussed above, that the Eight Amendment does not provide a fundamental right to money bail, that the State Supreme Court rules did not violate the separation of powers doctrine and while Plaintiff Collins had standing to sue, her due process rights were not violated. The Court while making such adverse rulings noted that such claims have a legal basis in that they seek to change or clarify the law. (Aplt App 686). On this basis alone, Rule 11 sanctions should be reversed.

The sanctions decision stems from a determination that the suit was brought for political reasons (Aplt App 691) coloring the lack of standing determinations for BBANM (1st or 3rd person standing) and the New Mexico legislators and thus, sanctions were appropriate because of a "lack of reasonable basis for asserting standing" (Aplt App 687); as well as its finding of immunity from suit under sovereign immunity, legislative immunity and/or judicial immunity (Aplt App 688-690). The District Court wholly fails to discuss Appellants' efforts to change,

develop or clarify the law as to immunities for the Judicial Defendants.

Judicial immunity principles are a developing area of law, warranting litigation and clarification. Appellants' counsel recognizes the long history of the judiciary's role in United States jurisprudence, buttressing the independence needed to allow judges to make sound decisions or take sound action in the context of a case and controversy based upon the existing law without fear of suit based from that judicial action. Counsel for Appellants understand and concur with such immunity in such covered instances of judicial action, such that they would not initiate suit to challenge that immunity unless extrajudicial action was suggested from the existing facts. But here, the type of absolute immunity accorded as a defense is either not applicable or should be narrowed. Such was a consideration and motivation in bringing the underlying suit. It is this type of advocacy and development of the law, that must be protected as part of the Constitution's Petition Clause and which are undermined by sanctioning an attorney for engaging in good faith to seek such legal development, clarification, modification or extension of the law. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387, (2011)("[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government."); *Sure–Tan, Inc. v. NLRB*, 467 U.S. 883, 896–897, (1984); see also *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 525, (2002).

It is not the adjudicatory activity of the judiciary that is challenged here. Rather, it is the invasion into the public policy reform arena and passage of new law, specifically reserved to the Legislature, that is at issue; or the ministerial decisions such as adoption of the

Arnold Tool. Further, it is the enforcement and implementation of that public policy reform and the enforcement and implementation of that legislation under the control of the state Supreme Court. Thus, this Court must not simply assume that the New Mexico Supreme Court and other Appellees are both sovereign and absolutely immune from suit in this instance.

In order to evaluate the Rule 11 allegations, one must undertake the deeper analysis the Appellants' counsel undertook before filing the Complaint to see if any immunities *clearly barred* suit against Appellees and whether there was a lack of any basis for seeking clarification or change in the law of immunities before finding that Appellant's counsel utterly and wholly ignored the law or lacked any objectively reasonable basis to pursue a suit that included damages as a requested relief.

A review of the law as to legislative or qualified immunity supports that the judiciary is not completely immune from suit for damages under existing law or the facts at issue in this proceeding as Justice Stevens' dissent in *Mireles v. Waco*, 502 U.S. 9, 11 (1991) suggests. And while the harms complained of in this suit may not at first blush appear as offensive as a judge ordering police to beat an attorney, because Plaintiff Collins' ordeal nearly resulted in her death – caused by the passage of and implementation of new public policy and new law relating to pretrial release - was equally damaging. Justice Stevens wrote in his *Mireles* dissent that:

> Respondent Howard Waco alleges that petitioner Judge Raymond Mireles ordered police officers "to forcibly and with

> excessive force seize and bring" respondent into petitioner's courtroom. App. to Pet. for Cert. B-3, ¶ 7(a). As the Court acknowledges, ordering police officers to use excessive force is "not a 'function normally performed by a judge.' " *Ante,* at 288 (quoting *Stump v. Sparkman,* 435 U.S., at 362, 98 S.Ct., at 1108). The Court nevertheless finds that judicial immunity is applicable because of the action's "relation to a general function normally performed by a judge." *Ante,* at 288.
>
> ...
>
> petitioner issued two commands to the police officers. He ordered them to bring respondent into his courtroom, and he ordered them to commit a battery. The first order was an action taken in a judicial capacity; the second clearly was not. Ordering a battery has no relation to a function normally performed by a judge.

Id., at 14–15. Jurisprudence thus demonstrates that absolute judicial immunity is overcome in two sets of circumstances. A judge is not immune from liability for actions not taken in the judge's judicial capacity in administering a case (*Forrester v. White,* 484 U.S., 219, 227-229 (1988); *Stump v. Sparkman*, 435 U.S. 349, 360(1978)); nor when taken in the absence of jurisdiction (*Stump* at 356-357; *Bradley v. Fisher*, 80 U.S. 335, 351–52 (1871)). Thus, actions such as legislating or regulatory enforcement of rules for the administration of the courts are not of the nature of judicial activity for which Appellees would enjoy absolute immunity. The relevant inquiry that supports

that legislating policy is not a judicial activity for which absolute immunity attaches, is seen in *Mireles*:

> Accordingly, as the language in *Stump* indicates, the relevant inquiry is the "nature" and "f unction" o f the act, not the "act itself." 435 U.S., at 362, 98 S.Ct., at 1108. In other words, we look to the particular act's relation to a general function normally performed by a judge, in this case the function of directing police officers to bring counsel in a pending case before the court.

Mireles at 11–13 (*emphasis added*).

Deriving from *Mireles*, there is an objectively reasonable basis for a suit in damages for a decidedly non-adjudicatory, non-judicial activity of the Appellees, such as here. Further, because Congress waived Eleventh Amendment sovereign immunity for individual state actors acting under the color of law that violate clearly established constitutional rights of citizens under 42 U.S.C. §1983, an argument regarding sovereign immunity in a case such as this one is not fully dispositive.

Likewise, if the Court determines that in the non-judicial activity of promulgating rules that the Appellees lacked authority to legislate major public policy reforms by creating new law, which rests in the exclusive province of the New Mexico Legislature under the New Mexico Constitution at N.M. Const. art. III, § 1[6], the Appellees could be sued for damages under

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6 The State Constitution provides, "[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person

section 1983. While Appellants' counsel acknowledges that a judge will not be deprived of immunity because an adjudicatory action taken was in error, done maliciously, or in excess of authority, a Judicial officer is subject to liability when he has acted in the "clear absence of all jurisdiction." *Bradley v. Fisher*, 80 U.S. at 351–52. Such was the clarification and extension sought by bringing the underlying suit.

The focus in assessing legislative immunity is based on the authority and the nature of the acts in question. "Absolute legislative immunity attaches to all actions taken in the sphere of *legitimate* legislative activity." *Sable v. City of Nichols Hills*, No. 07-6286, at 7 (10th Cir. 2009)(*emphasis added*). The New Mexico Supreme Court is not empowered to legislate major policy reforms or changes in law by the New Mexico Constitution. In fact, as the judicial branch, they are prohibited from so acting and such act is therefore lacking in authority.

Even if the Court were to find the New Mexico Supreme Court was not devoid of all authority to enact major public policy reforms, a suit under section 1983 would still be appropriate because the U.S. Supreme Court in *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 466 U.S. 719 (1980), provided that declaratory and injunctive relief are available where the legislative authority over bail was not completely vested in another branch of government. *Id.* at 734. In New Mexico, the Legislature has legislated on the issue

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or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted. NM CONST Art. 3, § 1

of bail. It has never delegated exclusive legislative authority to the New Mexico Supreme Court. In acting to create new law and establish public policy, the New Mexico Supreme Court does not enjoy legislative immunity because it has never been authorized to exercise the "entire legislative power with respect to regulating [] [bail][7]." *Id. at* 734. In fact, in *Supreme Court of Virginia* actually allowed claims for injunctive and declaratory relief, and claims for attorney's fees, to proceed, reasoning:

> we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. ... We need not decide whether judicial immunity would bar prospective relief, for we believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities. As already indicated, § 54-74 gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were.

Id. at 735-36 (*emphasis added*). Far from Appellees being completely off-limits for suits seeking damages, the law supports Appellants' counsels' position that there is an objectively colorable question to be decided

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7 Bail is addressed by the Legislature in statute at NMSA 1978 § 31-3-1 et seq.

by this Court on whether such relief may be sought and provided.

It was also objectively reasonable for BBANM and individually identified legislators to be named as plaintiffs in this case as discussed in great detail above. In determining what is "objectively reasonable" in the context of identifying a plaintiff with standing to bring suit, "courts have engaged in a broad review. Thus, in *Hawaiian Crow 'Alala v. Lujan*, 906 F. Supp. 549, 552-3 (D. Haw. 1991), counsel was not sanctioned even when naming an individual bird as a Party-Plaintiff, because some types of suit (perhaps not the one brought) would allow a *species* to be named. *Id.* In discussing Rule 11's objective test, in *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986), the Ninth Circuit reviewed the policies underlying Rule 11 and the developing case law, which supported that "[i]f, judged by an objective standard, a reasonable basis for the position exists in both law and in fact at the time the position is adopted, then sanctions should not be imposed." *Id.* In *Golden Eagle*, the Court found "salutary admonitions against misstatements of the law, failure to disclose directly adverse authority, or omission of critical facts," not considerations for Rule 11. Rather, the standards of the Rule itself was what the Court admonished it "must deal" with. *Id.*, 801 F.2d at 1539. The First Circuit, in *Kale v. Combined Insurance Co. of America* took a similar approach. 861 F.2d at 759. Cases such as these demonstrate that the considerations in a Rule 11 context must be narrowed to the salient considerations of the Rule and not a hodge-podge of every ill the movant perceives. For Rule 11, the question is, were the claims and legal contentions warranted by existing law or by non-frivolous argument for extending, modifying, or

reversing existing law or for establishing new law? Do factual contentions have evidentiary support or, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery? Judge Posner took an informed and pragmatic approach in *Mars Steel Corp. v. Continental Bank, N.A.*, in considering frivolousness:

> The focus of Rule 11 [is] on conduct rather than result …. How much investigation should have been done in a given case becomes a question of line-drawing …. One standard of frivolousness is risibility--*if you start laughing when repeating the argument, then it's frivolous.*

Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928 (7th Cir. 1989) (en banc); *see Harsch v. Eisenberg*, 956 F.2d 651, 662 (7th Cir. 1992) (Rule 11 focuses on conduct, not result), *cert. denied*, 506 U.S. 818 (1992). A finding of frivolousness cannot be justified by "the mere absence of legal precedent, the presentation of an unreasonable legal argument, or the failure to prevail on the merits of a particular legal contention (or in the entire case being litigated)." *Dean Foods Co. v. United Steel Workers of America*, 911 F. Supp. 1116, 1129 (N.D. Ind. 1995)(declining to impose sanctions). For example, the term "frivolous" should connote that the legal contention of the lawsuit is utterly implausible and lacks any arguable basis or is characterized by abuse or egregiousness.

Since the 1993 amendments, Courts have evidenced a more forgiving application of the objective test. In *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1397-98 (Fed. Cir. 1996),

the Court rejected a movant's argument – similar in this case - that counsel demonstrated a disregard for the obligation to support their legal opinions, noting that "[i]n virtually every case, an appellate court finds one party's arguments and authorities unpersuasive, but that is not remotely sufficient to make the losing party's conduct sanctionable." Id. (internal citation omitted).

Finally, the approach taken in *National Ass'n of Government Employees, Inc. v. National Federation of Federal Employees*, 844 F.2d 216 (5th Cir. 1988) by a panel of the Fifth Circuit, is instructive. There, the Fifth Circuit reversed a sanctions award, because there had been no showing that the plaintiff had failed to conduct *any* pre-filing inquiry. The Circuit Court found that sanctions against a Rule 11 target should not be imposed unless there is a showing that the party failed to conduct a reasonable inquiry, *and* the burden of proving a lack of reasonable inquiry rests on the Rule 11 movant as a matter of due process. *Id.* at 222. Plaintiffs, inclusive of the individually named legislature-citizens and BBANM present an objectively reasonable case for standing, as discussed *supra* and *infra*.

C. The Lower Court Failed To Discuss And Apply The Factors For Consideration From *Abramson* In Issuing A Sanction, And Instead Found And Relied Upon A Finding Of Political Motivation For Filing Suit, Inconsistent With Due Process And An Assessment Of Evidence As To Dunn's Motivations.

While the District Court noted that *Abramson v. Bowen* provided a comprehensive list of factors to consider when determining whether a sanction is warranted based on the initiation of a suit, the Court failed to actually discuss those factors, or the facts related to them when issuing a sanction. (*See* Aplt App 683). Instead, the Court issued a sanction based on a pervasive finding of "political reason" for filing suit. (Aplt App 687). "Further, the Court finds that Plaintiffs' counsel added legislators and the Bail Bond Association of New Mexico as parties to this case for in [sic] improper purpose -- namely for political reasons to express their opposition to lawful bail reforms in the State of New Mexico."; (Aplt App 687), "Therefore, sanctions are appropriate to deter Plaintiff's counsel from filing unsupportable lawsuits for political reasons."; (Appl App 693), issuing sanction to "deter violations outlined in this ruling.")

The Lower Court did not afford due process or allow for the development of evidence at hearing as to alleged political motivations by Dunn when it found such motivation. Instead, in reaching its conclusion, the Lower Court primarily relied on argument by opposing counsel, (Aplt App 454-455), one letter sent by Dunn to the legislature (after Appellee had similarly sent a correspondence to the state Legislature) (Aplt App 459-460) and a few newspaper articles (Aplt App 481, 722- 724). No hearing as to Dunn' motivations was held, nor discovery had. The Lower Court ignores Dunn's affidavit in considering "motivation" as it provides no notation or discussion of it. The Lower Court expressly found that the filing of the lawsuit was based on political reasons and it was this determination that colored and ultimately lead to sanctions. This record

does not support an "improper" political reason for bringing the underlying lawsuit.

The Court focused its attention on Dunn's August 10, 2017, letter to the state legislature to reach its determination of political motivation, given that this is the only evidentiary reference to political motivation in its decision. (Aplt App 387). The political speech, if Dunn's letter to the legislature can even be considered to be such, is protected per the Speech Clause of the First Amendment. Thus, reliance on the letter to reach a sanction decision based on political motivation is in error as not "located within the range of permissible decisions" and as retaliatory for such protected speech. Such conclusion is bolstered by the lack of discussion (only mere recitation) in the Court's decision as to the *Abramson* factors.

The Dunn letter was only a response to an August 4, 2017, correspondence from Defendant Justice Daniels to the state Legislature. The Dunn letter only addresses two issues, providing an alternative view and clarification for the Legislature as to Defendant Daniels presentment to the legislature. First, the Dunn letter sought to explain the basis of the section 1983 claims contained in the lawsuit and second, discussed Defendant Daniel's representations as to the propriety of the Supreme Court rule in conjunction with the constitutional amendment that had been recently passed. (Aplt App 566-567). The letter does nothing more and is benign as to political agenda. Based on Dunn letter's content, there is a lack of supporting evidence to reach a political motivation conclusion.

D. The Lower Court's Sanction Is Not Within A Range Of Permissible Decisions Because Its "Political

Reasons" Determination Both Fails To Support Issuing Sanction And Is Contrary To First Amendment Petition Protections.

Appellees suggested, and the Lower Court adopted, an alternative basis for sanctions, *i.e.* that Dunn filed the Complaint for "political and public relations goals." (Aplt App 454-455, 691). Appellees erroneously argued to the District Court that improper motivation is itself an "independent ground for sanctions under Rule 11." (Aplt App 454). A review of motivating factor cases demonstrates that such theory is not correct. In addition, there is a lack of evidence or development of the record to support the political motivation finding against as to Dunn.

1. Legislative or Political motivation in bringing litigation is not an Improper Purpose to alone support issuance of Sanctions.

In *Gieringer v. Silverman*, 731 F.2d 1272 (7th Cir. 1984) the Seventh Circuit noted that even in instances that suggest evidence of some improper purpose, the fact that "'the claims advanced were [not] entirely without color'" will prevent a litigant from sanctions. *Id.* at 1281. In *Gieringer*, there was substantial evidence that the Appellants had brought a strike suit to force a better settlement. The Seventh Circuit, however, while recognizing that Rule 11 had been amended in 1983 to provide a more potent sanctioning tool, gave the rule a reading no broader than pre-existing law. *Id.* at 1281. Thus, it was found that

sanctions were not proper even though the suit, was lacking in merit. 731 F.2d 1272 (7th Cir. 1984).

The Ninth Circuit, in *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986), looked at the improper purpose clause of Rule 11[8], The Court ultimately found that an improper purpose alone does not justify sanctions as the "political inspiration" for the lawsuit did not mean that the action had been filed for an improper purpose because "[w]hatever the true purpose of the litigant, the vindication of voting rights secured by the fourteenth amendment cannot be deemed impermissible harassment." *Id.* at 834. The Fifth and importantly this Circuit have followed the Ninth Circuit's approach. *See Jennings v. Joshua Indep. Sch. Dist.*, 877 F.2d 313, 320 (5th Cir. 1989) (complaint that complies with "objective" prong of Rule 11 cannot constitute harassment), *cert. denied*, 496 U.S. 935 (1990); *Burkhart v. Kinsley Bank*, 852 F.2d 512, 515 (10th Cir. 1988).

Similarly, the Seventh Circuit in *Indianapolis Colts v. Mayor of Baltimore*, 775 F.2d 177 (7th Cir. 1985) in accord with the Ninth, held that the filing of a complaint in federal court in an attempt to have the federal court resolve a colorable claim cannot form the basis of Rule 11 sanctions under the improper purpose clause:

> If we were to allow sanctions against Indianapolis for attempting to protect their legal interests by filing a colorable interpleader claim, we undoubtedly would

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8 Zaldivar involved a bitter political fight between supporters of a city councilman and opponents. The Court found that the Appellants intended to achieve a political purpose by filing the lawsuit, assuming an interest in saving the councilman's job and/or rights of Spanish-speaking voters likely to vote against him.

> "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."

Id. at 182 (*quoting* Fed. R. Civ. P. 11 advisory committee's note (1983)); *Klein v. Wilson, Elser, Moskowitz, Edelman & Dicker (In re Highgate Equities, Ltd.)*, 279 F.3d 148, 154 (2nd Cir. 2002) (if a paper serves any legitimate purpose, it may not be the basis for sanctions under the improper purpose clause of Rule 11). The Second Circuit in *Sussman v Bank of Isreal* held that:

> The district court held that the filing of the complaint with a view to exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity reflected an improper purpose. To the extent that a complaint is not held to lack foundation in law or fact, we disagree. It is not the role of Rule 11 to safeguard a defendant from public criticism that may result from the assertion of nonfrivolous claims. Further, unless such measures are needed to protect the integrity of the judicial system or a criminal defendant's right to a fair trial, a court's steps to deter attorneys from, or to punish them for, speaking to the press have serious First Amendment implications. Mere warnings by a party of its intention to assert non-frivolous claims, with the predictions of those claims' likely public reception, are not improper.

Sussman, 56 F.3d 450, 458-59 *(*2nd Cir. 1995*)*, *cert. denied sub nom. Bank of Ist. v. Lewin*, 516 U.S. 916 (1995)*; see also City of Yonkers v. Otis Elevator Co.*, 649 F. Supp. 716, 736 (S.D.N.Y. 1986) (since argument was supported by colorable legal support, bad-faith motive did not justify Rule 11 sanctions), *aff'd*, 844 F.2d 42 (2nd Cir. 1988).

While there was no improper motivation – including political motivation – in filing Plaintiff's suit in this case, nevertheless, improper motivation does not warrant sanction when there is in objective basis for filing suit. Such must be the case because, as the district court in *Sussman* noted, there may be several motivations underlying a decision or course of conduct. It would be counterproductive for courts to engage in the business of determining which motive was paramount. So long as there is an objective basis for filing, attorneys and their clients are not subject to sanctions.

2. Legislative or Political motivation in bringing litigation is Protected.

The Dunn letter is the type of speech protected by the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *and see First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776–777 (1978). Undoubtedly, "the First Amendment affords the highest protection to 'core' political or religious speech, *Meyer v. Grant*, 486 U.S. 414, 414 (1988). Governmental restrictions on such speech are entitled to "exacting scrutiny," and are upheld only when "narrowly tailored to serve an overriding state interest'. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 [](1995)."

Cornelius v. Deluca, No. 1:10-CV-027-BLW, 2011 WL 977054, at *3 (D. Idaho Mar. 15, 2011). Non-core speech is also entitled to First Amendment protections. *McIntyre*, 514 U.S. at 346. Thus, to sanction counsel for writing a follow-up clarification letter (to Defendant's letter) must be viewed in the lens of the First Amendment. It does not pass such scrutiny if the Dunn letter is political speech, by which political motivation for suit was found.

Litigation that includes a component of political expression or association is protected. "Rights of political expression and association may not be abridged because of state interests ... without substantial support in the record." *In re Primus*, 436 U.S. 412, 434 (1978), *citing First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789–790 (1978). In *In re Primus*, the Supreme Court overturned a state disciplinary sanction imposed in violation of First Amendment protections of an attorney and observed "that findings compatible with the First Amendment could not have been made in this case." Here, the record does not support a political motivation as the basis for bringing the suit. With evidence of political motivation lacking and the existence of similar suits in other circuit and district courts challenging bail reform activity, the current litigation climate cuts directly against a political motivation finding. When "a person petitions the government" in good faith, "the First Amendment prohibits any sanction on that action." *Nader v. Democratic National Committee,* 567 F.3d 692, 696 (D.C.Cir.2009). [T]he *Noerr–Pennington* doctrine implements that general principle... a petition conveys the special concerns of its author to the government. ..." *Venetian Casino Resort, L.L.C. v. N.L.R.B.*, 793 F.3d 85, 89-90 (D.C. Cir. 2015) (internal

quotes and citation omitted). The Supreme Court has determined that lawsuits meet this definition. *Nader v. Democratic Nat. Comm.*, 567 F.3d 692, 696 (D.C. Cir. 2009).

The underlying lawsuit was brought in good faith seeking clarification of the scope of the Eighth Amendment, *i.e.* whether there is a fundamental right to bail, albeit not absolute. The suit challenged the requisite separation of powers between the New Mexico Legislature and the state Supreme Court actors based on rule passage impacting substantive rights of citizens. Each party bringing suit was harmed by the actions of the New Mexico Supreme Court, by due process deprivations evidence by Appellees action, including the implementation of the Arnold Tool. The suit is not frivolous and bringing it should in no way subject the parties or attorneys to sanctions.

CONCLUSION

The order dismissing the claims should be reversed and the sanctions award vacated in its entirety.

ORAL ARGUMENT STATEMENT

Pursuant to 10th Cir. L. R. 28.2(C)(4), Appellants request oral argument in this matter. Such argument is necessary because the issues involve important questions of procedural law. Appellants respectfully suggest that the Court may benefit from the interactive conversation that oral argument would provide on these issues.

Respectfully submitted this 9th day of July 2018.

/s/ A. Blair Dunn
A. Blair Dunn, Esq.

/s/ Dori E. Richards
Dori E. Richards, Esq.

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CERTIFICATE OF COMPLAINCE

Undersigned counsel certifies that Appellant's Opening Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 14,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This opening brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that the copy of the foregoing Opening Brief submitted in digital form via the Court's ECF system is an exact copy of the written document filed with the Clerk.

I further certify that all required privacy redactions have been made and that this brief has been scanned for viruses using Microsoft Windows Defendant Antivirus version: 1.263.1946.0 updated March 15, 2008 and, according to this program, is free of viruses.

Privacy redactions: no privacy redactions were required.

CERTIFICATE OF SERVICE

I certify that on July 9, 2018, I filed Appellant's Opening Brief through the United States Court of Appeals for the Tenth Circuit's ECF System, causing each counsel of record to be served; and served seven (7) hardcopies of Appellant's Opening Brief with the Clerk of the Court, July 9, 2018.

/s/ A. Blair Dunn
A Blair Dunn, Esq.

/s/ Dori E. Richards
Dori E. Richards, Esq.

ADDENDUM

It is further **ORDERED** that Judicial Defendants shall submit an affidavit detailing their reasonable costs and attorney's fees incurred in defending this action within **thirty (30)** days of the date of this Order. Upon submission of the stipulation or statement that the parties have been unable to reach an agreement, the Court will consider the relevant factors and make a determination as to the amount of attorney's fees and costs to impose.

It is so **ORDERED**.

SIGNED this _____ day of _____ 20___.

_____
ROBERT A. JUNELL
Senior United States District Judge

No. 17-2217
Consolidated with 18-2045

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DARLENE COLLINS, et al.,

Plaintiffs/Appellants

v.

CHARLES W. DANIELS, et al.,

Defendants/Appellees

APPELLEE BOARD OF COUNTY COMMISSIONER OF THE COUNTY OF BERNALILLO'S ANSWER BRIEF

On Appeal from the District Court for the District of New Mexico, The Honorable Robert A. Junell 1:17-CV-00776-RJ-KK

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STATEMENT OF RELATED CASES

Related matters were appealed under Tenth Circuit case 18-2002 and this case has been consolidated with 18-2045.

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Board of County Commissioners of the County of Bernalillo ("the Board") is named as an appellee in this case; however, no arguments advanced in the Appellants' Opening Brief are directed at the arguments under which the District Court granted dismissal for the Board. Therefore, the only question which is relevant to the Board is:

1. Have the Appellants waived any argument against the Board by failing to address issues related to the Board in the Opening Brief?

II. STATEMENT OF THE CASE

Appellants filed their original Complaint on July 28, 2017. That complaint made a number of claims against the justices of the New Mexico Supreme Court in their individual and official capacities. Neither the County, nor its manager, were parties to the original suit. On August 03, 2017, Appellants amended their complaint to state a number of claims against the local judges for the Second Judicial District, which is comprised of Bernalillo County, New Mexico. The Amended Complaint also named "Bernalillo County" and its county manager as defendants, but made only two mentions of the County in the Complaint. (Aplt. App. 017-072). Both of those simply identify the County as a signatory to a memorandum of understanding regarding a local court plan to use a risk assessment tool to evaluate the risk an arrestee may pose to the community.

Based on Plaintiffs' failure to assert any substantive allegations against the County or the County Manager, the County and the Manager moved to dismiss all claims against them based on the literal failure to state any claim against the County or the manager. (Aplt. App. 280-292). The County also illustrated that it could not be sued as captioned based on a state statute requiring that all claims against the County be brought against the Board. Appellants moved to amend their complaint again. (Aplt. App. 360-444).

On October 25, 2017, the District Court granted the motion to dismiss the County Manager based on the failure to state a viable claim against her; that decision is not on appeal. On October 25, 2017, the District Court ordered Plaintiffs to amend their complaint to properly identify the Board. On October 30, 2017, Appellants filed another version of their amended complaint, for the first time correctly identifying the Board. (Aplt. App. at 584). While the "Corrected 1st Amended Class Action Complaint" did finally caption the Board correctly, the Plaintiffs did not make any changes to the substantive allegations (to the extent there were any) against the Board.

Specifically, paragraph 5 continued to improperly name "the County," as did paragraph 49. Based on the order to correct the parties/caption, the Board filed a new motion to dismiss adopting the earlier motion based on the failure to make plausible and actionable allegations against it. (Aplt. App. 630-631). The Plaintiffs filed no further response to the arguments and never explained how the two glancing references that vaguely mention the County somehow state a plausible civil rights claim.

After holding oral argument, the District Court dismissed the Board based on the failure to plead allegations that would "establish any constitutional violation on behalf of the Board." (Aplt. App. at 654) [Order at *19]. The District Court decision specifically noted that "the only substantive allegations against Bernalillo County are contained in paragraph 49 of the Complaint." The District Court found that that allegation was not enough to state a viable claim.

III. SUMMARY OF THE ARGUMENTS

In this Circuit, when a plaintiff/appellee fails to explicitly challenge the district court's dismissal of claims against a party, that plaintiff/appellee has waived any challenge to the dismissal of the party. *Becker v. Kroll*, 494 F.3d 904, 913, FN6 (10th Cir. 2007). Here, by failing to proffer any arguments with respect to the Board, the Plaintiffs have waived any appellate issue regarding the Board.

IV. ARGUMENT[1]

A. PLAINTIFFS HAVE WAIVED ANY ARGUMENT THAT THEIR SINGLE ASSERTION, WHICH WAS VAGUELY INFERRED AGAINST THE COUNTY, SOMEHOW STATES A VIABLE CLAIM.

1 Prior to drafting and filing this Brief, Appellee requested that Appellants dismiss it from the Appeal. Appellants declined and stated that they would be advancing their arguments against the Board in their Reply Brief.

The Tenth Circuit "routinely ha[s] declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief. *Robinson v. Am. Airlines, Inc.*, 2018 WL 3689657, at *2 (10th Cir. Aug. 2, 2018)(citation removed). Arguments not briefed on appeal are deemed abandoned and waived. *Havens v. Colorado Dep't of Corr.*, 2018 WL 3580861, at *11 (FN9)(10th Cir. July 26, 2018). More specifically, an appellant must raise its arguments in its opening brief; arguments initially stated in a reply brief are deemed waived. *Haskett v. Flanders*, 654 Fed. Appx. 379, 384 (10th Cir. 2016)(unpublished). *See also Reedy v. Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011)("It is insufficient merely to state in one's brief that one is appealing an adverse ruling below without advancing reasoned argument as to the grounds for the appeal.").

The Tenth Circuit "will not address issues not raised in the appellant's opening brief, especially where the arguments are based on authority that was readily available at the time of briefing." *Lombardo v. Potter*, 166 Fed. Appx. 319, 320 (10th Cir. 2006)(unpublished)(striking additional pleadings attempting to assert issues after the opening brief.). "It is not sufficient to merely mention an issue in a reply brief." *Coleman v. B-G Maint. Mgmt. of Colorado, Inc.*, 108 F.3d 1199, 1205 (10th Cir. 1997). "[A]rguments initially raised in a reply brief rob the appellee of the opportunity to demonstrate that the record does not support an appellant's factual assertions and to present an analysis of the pertinent legal precedent." *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1016 (10th Cir. 2002)(quotation removed).

"[A] litigant who fails to press a point by supporting it with pertinent authority, or by showing

why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point." *Aguirre v. City of Greeley Police Dept.*, 511 Fed. Appx. 814, 816 (10th Cir. 2013)(citation removed)(unpublished). *See also Tran v. Trustees of State Colleges in Colorado*, 355 F.3d 1263, 1266 (10th Cir. 2004). Arguments mentioned in the summary section of a brief, but not developed in the argument section are similarly deemed waived. *United States v. Mascarenas*, 30 Fed. Appx. 784, 791 (10th Cir. 2002)(unpublished).

The holdings apply not only to substantive issues, but also to specific parties. *See Becker v. Kroll*, 494 F.3d 904, 913, FN6 (10th Cir. 2007). When an appellant names an appellee as a party to an appeal, but fails to directly take issue with the district court's ruling for that party, the issues against that party have been waived. *Horne v. McCall*, 171 Fed. Appx. 246, 247 FN1 (10th Cir. 2006)(unpublished).

Other circuits are in conformity with this Circuit's decisions on this issue. For example, the Fourth Circuit has noted that "fleeting reference[s]… in the opening brief fails to satisfy this requirement because it does not mention that the district court held otherwise, let alone assert a basis for that holding being incorrect." *N. Am. Precast, Inc. v. Gen. Cas. Co. of Wis.*, 413 Fed. Appx. 574, 578 (4th Cir. 2011)(unpublished). Similarly, the Ninth Circuit has stated that it ordinarily will not consider matters which were not specifically and distinctly argued in an opening brief "because an issue advanced only in reply provides the appellee no opportunity to meet the contention." *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1356–57 (9th Cir. 1998)(citation removed). The Federal Circuit has recognized that

"mere statements of disagreement with the district court…" do not amount to a developed argument. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). Finally, the Second Circuit has held that "[i]t is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001)(citation removed).

Here, the Opening Brief, just as the Amended Complaint below, fails to address either the Board or the substantive basis for dismissal of the Board. More specifically, the District Court dismissed the Board based on the literal failure to state a claim. *See* Decision at *19 (Aplt. App. at 654) holding:

> At the outset, the Court notes that the Complaint does not contain specific allegations against each defendant. For example, the only substantive allegations against Bernalillo County are contained in paragraph 49 of the Complaint. (Doc. 56 at 1149). There, Plaintiffs state that Bernalillo County entered into an agreement with the Arnold Foundation to implement the Public Safety Assessment Tool authorized by the 2017 Rules, which allegedly denied criminal defendants "the opportunity to secure their pre-trial release through a secured bond[.]" (*Id.*). These allegations, without more, fail to establish any constitutional violation on behalf of Bernalillo County.

Plaintiffs have failed to address that holding anywhere in their Opening Brief. As such, Appellants have

waived and abandoned any claim that the holding was in error. The Board cannot rebut non-existent arguments and should not be required to speculate about how Appellants believe that the District Court erred when it found that the totality of one substantive allegation was insufficient to state a constitutional violation.

Not only have the Appellants failed to address the underlying basis for the District Court's decision dismissing the Board, but they have also failed to make any substantive arguments that would implicate the Board in any way. For example, the Board is specifically mentioned only on page 3 of the Opening Brief when it was identified as an Appellee. On page 4 of the Brief, Appellants mention that, as one of many arguments made in their motion to dismiss the "Bernalillo County Defendants" adopted the Judicial Defendants' Motion to Dismiss. Appellants then assert that the "Bernalillo County Appellants" (sic) filed a response to Appellants' Motion to Amend. None of those references are developed substantive arguments and none of those references adequately puts the Board on notice of any argument the Appellants may be trying to make against it.

Even when Appellants mention the "Arnold Tool," they only do so in the context of its use by the Second Judicial Defendants or within the bounds of the County as opposed to the tool somehow being used in any way by the Board. *See* Opening Brief at 3-4 (noting use "in Bernalillo County" as opposed to by the County). *See also* Opening Brief page 8 where Appellants address the use in the "Second Judicial District"; Opening Brief Section III addressing Appellants' claims against the "Supreme Court Defendants." None of those statements develops any

cogent arguments regarding the Board. Instead, just as below, the Appellants seem determined to include the Board in this appeal unnecessarily and without any legitimate basis. Because Appellants have wholly failed to explain any error in the District Court's decision with respect to the County or to even proffer an argument as to error, the Court should affirm the District Court's decision dismissing the Board from this case. In the alternative, the Court should dismiss the appeal as to the Board.

V. REQUEST FOR ORAL ARGUMENT

The Appellees request oral argument on this matter. Oral argument will allow the Appellees the opportunity to respond to inquiry by the Court on the issues and the legal argument addressed herein. Dated: August 8, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,481 words or less.

This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Brandon Huss
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DIGITAL SUBMISSION CERTIFICATION

I hereby certify that:

(1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and

(2) the digital submissions have been scanned for viruses with Webroot Secure Anywhere, last updated August 8, 2018, and, according to the program, are free of viruses.

/s/ Brandon Huss

THE NEW MEXICO
ASSOCIATION OF COUNTIES

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August 2018, I sent a copy of the foregoing by via the CM/ECF system to all counsel of record. I also caused seven (7) hardcopies to be delivered to the Court within two (2) business days from today. The hardcopies are exact duplicates of the electronically filed version.

/s/ Brandon Huss
THE NEW MEXICO ASSOCIATION OF COUNTIES

Case No. 17-2217 & 18-2045

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DARLENE COLLINS, et al.,

Plaintiffs-Appellants,

v.

CHARLES W. DANIELS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of New Mexico
The Honorable Robert Junell (Sitting by Designation)
Case No. 1:17-cv-00776-RJ-KK

ANSWER BRIEF OF NEW MEXICO JUDICIAL DEFENDANTS- APPELLEES

Oral argument is not requested.

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August 8, 2018

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STATEMENT OF THE ISSUES

1. Did the District Court correctly hold that Plaintiffs' claims against Judicial Defendants under the Eighth, Fourth and Fourteenth Amendments to the United States Constitution fail as a matter of law?

2. Did the District Court correctly determine that Bail Bond Association of New Mexico and the Legislator Plaintiffs lack standing to maintain this action?

3. Did the District Court properly apply black letter law in holding that Judicial Defendants are immunized from Plaintiffs' claims for money damages?

4. Did the District Court correctly conclude that Plaintiffs fail to raise a claim for violation of separation-of-powers principles in the New Mexico Constitution that is cognizable in federal court, and that the Amended Complaint otherwise must be dismissed for failure to state a claim?

5. Did the District Court appropriately rule that Plaintiffs' motion to further amend their complaint should be denied as futile?

6. Did the District Court properly determine that Plaintiffs' counsel violated Rule 11 of the Federal Rules of Civil Procedure because key claims in Plaintiffs' Complaint and Amended Complaint are not warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law or for creating new law?

STATEMENT OF THE CASE

New Mexico's Constitution, like the United States Constitution, enshrines the presumption that criminal defendants are entitled to retain personal

freedom pending trial, absent limited exceptions. *State v. Brown*, 2014-NMSC-038, ¶ 19, 338 P.3d 1276 (citation omitted). "Once released, a defendant's continuing right to pretrial liberty is conditioned on the defendant's appearance in court, compliance with the law, and adherence to the conditions of pretrial release imposed by the court." *Id.* ¶ 21.

Like the federal Bail Reform Act of 1966 and its progeny, the New Mexico bail rules, promulgated in 1972 as part of the Rules of Criminal Procedure for the New Mexico state courts, establish a presumption of release by the least restrictive conditions and emphasize methods of pretrial release that do not require financial security. [Aplt. App. 640] As the district court found, "the 1972 New Mexico rules specifically incorporated the evidence-based, rather than money-based, procedures that are statutorily required for the federal courts." [Aplt. App. 641]

In its 2014 opinion in *Brown*, the New Mexico Supreme Court concluded that, notwithstanding the 1972 Rules, some state district courts routinely imposed money bonds and relied upon fixed bond schedules that did not require judicial determinations of individual risk or ability to pay without making specific written findings demonstrating that nonfinancial release options would be insufficient – in violation of the Rules of Criminal Procedure and constitutional requirements. *Brown*, 2014-NMSC-038, ¶ 40, 338 P.3d at 1289.

Following the issuance of its decision in *Brown*, the New Mexico Supreme Court formed a pretrial release advisory committee to study pretrial release and detention practices in New Mexico and to make recommendations for improving compliance with existing law and for making remedial changes to the law. [Aplt. App. 642] In August 2015, at the advisory

committee's recommendation, the New Mexico Supreme Court submitted a proposal to the Legislature to amend Article II, Section 13 of the New Mexico Constitution to "facilitate a shift from money-based to risk-based release and detention." [Aplt. App. 642]

The proposed constitutional amendment was submitted to New Mexico voters, who approved it by an overwhelming majority. [Aplt. App. 642] Following the passage of that amendment, the advisory committee recommended "and the New Mexico Supreme Court agreed that the procedural rules governing release and detention in New Mexico must be updated to comply with and effectuate the new constitutional mandates." [Aplt. App. 642] As the district court noted, consistent with its rulemaking procedure, the New Mexico Supreme Court published all proposed rules for public comment in early 2017, and unanimously promulgated the rules at issue in this lawsuit (the "2017 Rules"), with an effective date of July 1, 2017. [Aplt. App. 642-43]

Plaintiffs are the Bail Bond Association of New Mexico ("Bail Bond Association"), a membership organization for commercial bail bond companies, four individual New Mexico state legislators ("Legislator Plaintiffs"), and Darlene Collins, a defendant who was charged with criminal violations in New Mexico state court and released on nonmonetary conditions pending trial. [Aplt. App. 23-24]

Plaintiffs filed their Complaint in the underlying action on July 28, 2017, and amended their complaint on August 3, 2017, asserting claims against the New Mexico Supreme Court and its Justices, the Second Judicial District Court and its Chief Judge and Court Executive Officer, and the Bernalillo County Metropolitan Court and its former Chief Judge and

Court Executive Officer ("Judicial Defendants"), both in their individual as well as official capacities. Plaintiffs also named Bernalillo County and its County Manager as defendants.

In their Amended Complaint, Plaintiffs alleged that in promulgating the 2017 Rules, the New Mexico Supreme Court violated the Eighth Amendment's guarantee against excessive bail, Fourth Amendment protections against unreasonable searches and seizures, and the Due Process Clause of the Fourteenth Amendment with respect to Collins. [Aplt. App. 41-47] In addition, Plaintiffs asserted that the implementation of a pretrial release risk assessment tool (the "Arnold Tool") in Bernalillo County which was authorized by the New Mexico Supreme Court violates the Eighth Amendment by prioritizing nonmonetary conditions of release. [Aplt. App. 42, 643-44]

Plaintiffs moved for a preliminary injunction on August 4, 2017. [Aplt. App. 73-127] By order dated September 7, 2017, the district court denied Plaintiffs' motion, [Aplt. App. 329-46] determining, *inter alia*, that there is no provision in any source of applicable law "guaranteeing the option of money bail to criminal defendants"; that "Plaintiffs' Fourth Amendment claim fails under applicable Tenth Circuit law"; that Plaintiffs cannot maintain due process claims, let alone demonstrate a likelihood of success on those claims; and that Plaintiffs failed to establish irreparable injury to any cognizable legal interest. [Aplt. App. 340, 341- 42, 344]

Judicial Defendants moved to dismiss the Amended Complaint on August 18, 2017, [Aplt. App. 171-99] and on September 22, 2017, after complying with Rule 11's safe-harbor provision, moved for Rule 11

sanctions against Plaintiffs' counsel for initiating and maintaining groundless claims. [Aplt. App. 445-60]

After full briefing and a hearing, the district court granted Judicial Defendants' motion to dismiss by order dated December 11, 2017, and entered Final Judgment shortly thereafter. [Aplt. App. 636-77, 678-79] In addition to determining that Plaintiffs' constitutional claims all fail as a matter of law, the district court held that Bail Bond Association and Legislator Plaintiffs lack standing to sue, that Judicial Defendants are immunized from Plaintiffs' claims for money damages, and that Plaintiffs otherwise fail to state a claim upon which relief could be granted. [Aplt. App. 650-61, 653-54, 658-59, 660-61, 664-66, 669-70] In the same order, the district court denied Plaintiffs' motion to further amend their Complaint, finding that amendment would be futile, and reserved decision on the issue of Rule 11 sanctions. [Aplt. App. 671-74, 676]

On January 4, 2018, the district court entered an order granting Judicial Defendants' motion for Rule 11 sanctions in the amount of their reasonable attorney's fees defending the underlying action, [Aplt. App. 680-94] finding *inter alia* that Plaintiffs' counsel had failed to make an objectively reasonable inquiry into the legal basis for the standing of Bail Bond Association and Legislator Plaintiffs and for claims for money damages against Judicial Defendants in their individual capacities. [Aplt. App. 691] The district court did not enter judgment for Judicial Defendants in a sum certain, but directed the parties to confer on the amount of Judicial Defendants' reasonable attorney's fees. [Aplt. App. 693-94] The parties agreed on the appropriate amount of fees, but could not agree on other terms. The district court granted Plaintiffs' motion to deposit the agreed-upon amount into the

court registry pending this appeal. [Aplt. App. 717-18] Plaintiffs' appeal of the district court's order granting Judicial Defendants' motion to dismiss and denying leave to further amend (17-2217) was consolidated in this Court with Plaintiffs' appeal of the district court's order imposing Rule 11 sanctions and awarding Judicial Defendants their reasonable attorney's fees in a sum certain (18-2045).

SUMMARY OF THE ARGUMENT

The New Mexico Supreme Court promulgated the 2017 Rules consistent with the constitutional amendment passed by New Mexico voters. Plaintiffs filed suit in an attempt to nullify the 2017 Rules, arguing that they violate the Eighth Amendment's guarantee against excessive bail, Fourth Amendment protections against unreasonable searches and seizures, and the Due Process Clause of the Fourteenth Amendment. All of Plaintiffs' constitutional claims depended on the theory, never adopted by any federal court, that criminal defendants have a fundamental right to purchase pretrial release with money bail, as opposed to securing release through nonmonetary conditions, and that bail bond companies may vindicate that purported right on behalf of criminal defendants who might become their potential customers. In addition to declaratory and injunctive relief invalidating the application of the Rules, Plaintiffs demanded money damages against the Justices of the New Mexico Supreme Court and other state court judges and staff personally.

On appeal, as they did below, Plaintiffs offer little more than their belief that their views are correct and that the district court is wrong. In doing so, they

continue to disregard black-letter law governing standing and immunity, among other subjects, without making any meaningful attempt to distinguish that law or argue for its revision. The district court correctly ruled that all of Plaintiffs' claims fail as a matter of law, that permitting further amendment would be futile, and that in several respects Plaintiffs' Amended Complaint violates Rule 11. Accordingly, all of the district court's rulings that Plaintiffs challenge on appeal should be affirmed.

ARGUMENT

I. The District Court Correctly Concluded That Plaintiffs' Constitutional Claims Uniformly Fail as a Matter of Law.

A. The 2017 Rules Do Not Violate the Bail Clause of the Eighth Amendment As There Is No Constitutional Right to Monetary Bail.

Plaintiffs' first, and most central, challenge on appeal is that the district court erred in holding that the Eight Amendment to the United States Constitution "does not provide a fundamental right to secured bail." [BIC 7] Under the guise of providing background information, Plaintiffs attack the validity of the 2017 Rules under state law, asserting that "the New Mexico Supreme Court created and implemented rules that sidestep the process adopted by the public[.]" [BIC 8-9] Plaintiffs' argument that the 2017 Rules violate the New Mexico Constitution, aside from being wholly meritless, was not adjudicated below and accordingly should not be considered on appeal. *See*

Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("[A] federal appellate court does not consider an issue not passed upon below.")

The only arguments for Plaintiffs' Eighth Amendment claim that were actually presented to and decided by the district court, and therefore that may properly be presented on appeal, are (i) whether the Eighth Amendment to the United States Constitution guarantees a right to monetary bail, and (ii) whether the 2017 Rules violate that Amendment because, under their provisions, monetary bail is not an alternative a criminal defendant may choose or a district court may consider ahead of non-monetary conditions of release. [Aplt. App. 041-42[1]; 639-40[2]] Because the district court properly answered both questions in the negative, its order granting Judicial Defendants' motion to dismiss should be affirmed.

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1 Amended Complaint ¶ 122 ("The Eighth Amendment's protection against 'excessive bail' has always been understood to refer to monetary bail."); id. ¶ 124 ("The only way to give meaning to the Eighth Amendment protection against excessive bail is to recognize the logically antecedent 'right to bail before trial."); id. ¶ 127 ("The [2017 Rules] violate the Eighth Amendment by permitting judges to consider secured bond only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required.").

2 Dec. 11, 2017 Order at 19 ("Plaintiffs claim the New Mexico Supreme Court may not restrict the liberty of presumptively innocent defendants without offering the one alternative to substantial pre-trial derivations that the [United States] Constitution expressly protects—monetary bail." (internal quotation marks and citation omitted); id. at 21 ("Plaintiffs argue that the 2017 Rules violate the Eighth Amendment because New Mexico cannot impose deprivations of liberty, like home detention and electronic monitoring, without first offering money bail.").

Specifically, the district court held that "there is no right to *money* bail implied within the Eighth Amendment." [Aplt. App. 641] (emphasis added). Other than assert error on this point in a section heading, Plaintiffs' opening brief does not challenge this holding,[3] [BIC 7-18], and the Court should affirm on that ground alone. *See Utahns for Better Transp. v. United States Dep't of Transp.*, 305 F.3d 1152, 1175 (10th Cir. 2002) ("[I]ssues will be deemed waived if they are not adequately briefed.").

Rather, Plaintiffs argue only that the Eighth Amendment guarantees the right to bail generally, which is irrelevant to the propriety of the district court's dismissal of their lawsuit. [BIC 14-16].[4] To the extent Plaintiffs equate the Eighth Amendment term "bail" with "monetary bail," Plaintiffs neither provided any authority in support of that assumption below, nor do so on appeal. *See Phillips v. Calhoun*, 956 F.2d 949, 953-54 (10th Cir. 1992) (party must support its argument with legal authority or risk forfeiting that argument) (citation omitted).

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3 Plaintiffs likewise failed to develop an argument below in support of their position that the Eighth Amendment guarantees monetary bail, thereby conceding Judicial Defendants' position to the contrary. [Aplt. App. 315-21; 640 ("Notably, Plaintiffs 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 any conditions of release pending trial." (emphasis in original))]

4 See BIC 14 ("[T]he Eighth Amendment's prohibition of [e]xcessive bail presupposes a right to bail.") (emphasis in original); BIC 15 ("If the Eighth Amendment did not imply right to bail, a state could eliminate bail entirely without running afoul of it."); BIC 16 ("Eighth Amendment protections were adopted in understanding of the antecedent right to bail[.]").

To the contrary, the United States Supreme Court has interpreted the (statutory) "right to bail" as a "right to *release* before trial [that] is conditioned upon the accused's giving adequate assurances that he will stand trial and submit to sentence if found guilty[,]" not an entitlement to purchase pretrial release with money. *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (also referring to bail as a "traditional right to *freedom* before conviction") (emphases added). Likewise in *United States v. Salerno*, the Supreme Court discussed bail in terms that presuppose non-monetary conditions of release. 481 U.S. 739, 752 (1987) ("The Eighth Amendment addresses *pretrial release* by providing merely that excessive bail shall not be required.") (internal quotations omitted) (emphasis added); *id.* at 754 ("The only arguable substantive limitation of the Bail Clause is that the Government's proposed *conditions of release or detention* not be 'excessive' in light of the perceived evil.") (emphasis added).

In a substantively identical lawsuit challenging recently enacted bail reforms in the State of New Jersey, the Third Circuit recently explained that "[t]hough there persists a rigorous debate whether the Excessive Bail Clause incorporates a 'right to bail' inherent in its proscription of excessive bail," the question "whether that right requires *monetary* bail" is separate and distinct. *Holland v. Rosen*, 895 F.3d 272, 288 (3d Cir. 2018) (emphasis original). Thus, because Plaintiffs fail to adequately challenge on appeal the district court's holding that there is no right to *monetary* bail under the Eighth Amendment, that ruling should be affirmed. *See Utahns for Better Transp.*, 305 F.3d at 1175.

The same result should follow if this Court nevertheless decides to reach Plaintiffs' new Eighth

Amendment argument on the merits. In rejecting substantially identical challenges to New Jersey's recent bail reform, and after conducting a thorough review of the history of bail both prior to and following the adoption of the Eighth Amendment, the Third Circuit concluded in *Holland* that, even assuming that there is a constitutional right to bail, such a right does not equate to or require monetary bail; "non-monetary conditions of release are also 'bail.'" *Holland*, 895 F.3d at 291; *see also United States v. Gardner*, 523 F. Supp. 2d 1025, 1029 (N.D. Cal. 2007) ("Although the explicit text of the Eighth Amendment appears to address the amounts of bail fixed, no court has so limited the reach of this provision. None have held that the clause does not apply to conditions of release.").

Plaintiffs next argue that "subjecting a presumptively innocent defendant— who is not a danger and whose future appearance can be ensured by posting monetary bail—to extensive liberty curtailments ... is the very definition of excessive bail in contravention of the Eighth Amendment." [BIC 12; 16-17] ("[T]he 2017 Rules, without heightened showing, impose[ ] severe restrictions on the pretrial liberty of *all* defendants except those released on their own recognizance, including individuals like Collins despite that monetary bail alone would reasonably secure future appearances.") (emphasis original). This argument was not preserved below and should not be permitted for the first time on appeal. *Wulff*, 428 U.S. at 120; *Crow v. Shalala*, 40 F.3d 323, 324 (10th Cir. 1994) ("Absent compelling reasons, we do not consider arguments that were not presented to the district court.").

Plaintiffs do not provide a citation to the record demonstrating that this argument was raised in the

district court. A review thereof reveals that it was not; instead, Plaintiffs argued that "Collins ... is entitled under the Eighth Amendment to have monetary bail prioritized above nonmonetary options in the pretrial release decision[,]" [Aplt. App. 640] and that "the 2017 Rules violate the Eighth Amendment because New Mexico cannot impose deprivations of liberty, like home detention and electronic monitoring, without first offering money bail." [Aplt. App. 641] Both of these arguments depend on a finding of a constitutional right to monetary bail and, as such, were properly rejected by the district court.

Whether or not house arrest and other non-monetary pretrial conditions constitute excessive bail where a secured bond would be sufficient to guarantee a non-dangerous arrestee's appearance is a markedly different question which the district court did not have an opportunity to consider. Addressing this issue now would violate the settled principle that "[i]t is the significant but limited job of our appellate system to correct errors made by the district court in assessing the legal theories presented to it, not to serve as a second-shot forum... where secondary, back-up theories may be mounted for the first time." *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (holding that a new theory not raised before the district court is forfeited on appeal) (internal quotations and citation omitted).

Nevertheless, should this Court decide to reach Plaintiffs' new legal theory, the district court's dismissal of the Amended Complaint still should be affirmed, because Plaintiffs fail to state a claim for violation of Collins' right to non-excessive bail under the Eighth Amendment. *See Fish v. Kobach*, 840 F.3d 710, 729 (10th Cir. 2016) (holding that this Court will

reverse a district court on the basis of a forfeited argument "only if failing to do so would entrench a plainly erroneous result.") (internal quotations and citation omitted).

Accepting the well-pleaded facts in the Amended Complaint as true, following her arrest "for aggravated assault[] based on her alleged role in a domestic disturbance[,]" Collins was granted pretrial release on her own recognizance, with minimal conditions that did not include electronic monitoring or home detention. [Aplt. App. 023] "[F]or those conditions ... to violate the Eighth Amendment, they must be excessive in light of the perceived evil[;] ... the existence of a purportedly less restrictive means does not bear on whether the conditions are excessive." *Holland*, 895 F.3d at 291 (rejecting the identical argument that New Jersey's bail reform act "would violate the Eighth Amendment by subjecting defendants to home detention and electronic monitoring when monetary bail would suffice.") (internal quotations omitted). Collins's minimal conditions of release can hardly be construed as excessive, and no decision of which the undersigned is aware has categorically held them to be so.

Aside from raising the above-described unpreserved argument, Plaintiffs' opening brief does not otherwise challenge the district court's holding that the 2017 Rules do not violate the Eighth Amendment despite failing to install monetary bail as a mandatory "option" or priority. [BIC 7-18; APP 641-43] As such, any possible challenges thereto should be deemed waived. *United States v. Martinez*, 518 F.3d 763, 67 n. 2 (10th Cir. 2008) (argument not raised in opening brief deemed waived). As they did below, Plaintiffs fail to offer any support on appeal for the position that monetary bail must be given priority or be made

optional for arrestees. No court has ever adopted that position, and the Third Circuit recently reached precisely the opposite holding in adjudicating the challenge to New Jersey's bail reforms. *See Holland*, 895 F.3d at 292 ("Regardless whether the [Bail Clause of the Eighth Amendment] incorporates a right to bail, the latter is not limited to cash bail or corporate surety bonds …. 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 … court to consider monetary bail with the same priority as non-monetary bail for a criminal defendant.").

For the foregoing reasons, this Court should hold that the district court properly found that Plaintiffs failed to state a claim for relief under the Bail Clause of the Eighth Amendment.

B. Plaintiffs Failed to State a Claim for Relief Under the Due Process Clause.

Plaintiffs next argue that the district court erred in rejecting their challenges to the 2017 Rules on Due Process grounds.[5] [BIC 20] In their Amended Complaint, Plaintiffs alleged that the Rules violated both procedural and substantive due process protections. [Aplt. App. 044, Amended Complaint ¶¶ 140-41] In response to Judicial Defendants' arguments in their Motion to Dismiss that both challenges fail to

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5 While Plaintiffs also mention the Arnold Tool in the section heading, they present no argument with respect thereto, [BIC 20-28] and this Court should hold that Plaintiffs therefore have waived any such arguments. Utahns for Better Transp., 305 F.3d at 1175 ("[I]ssues will be deemed waived if they are not adequately briefed.").

state a claim for relief, however, Plaintiffs abandoned their procedural due process claim and solely addressed substantive due process. [Aplt. App. 179, 180-82; 296; 323-25] *See, e.g.*, *Am. Registry of Radiologic Technologies v. Bennett*, 655 F. Supp. 2d 944, 946 n.2 (D. Minn. 2009) ("It is well established that a party concedes an issue by failing to address it in an opposing brief."). The district court nevertheless addressed the issue, holding that Plaintiffs failed to state a claim for a violation of procedural due process. [Aplt. App. 644-45]. Plaintiffs now challenge that decision. [BIC 21] While this Court is at liberty to address Plaintiffs' arguments, *see Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our practice permits review of an issue not pressed below so long as it has been passed upon") (internal quotation marks, alterations and citation omitted), it should decline to do so under the doctrine of constitutional avoidance, especially given Plaintiffs' demonstrated disregard for the rules of preservation. *Escambia Cnty v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam) ("It is a well-established principle governing the prudent exercise of [federal courts'] jurisdiction that normally [courts] will not decide a constitutional question if there is some other ground upon which to dispose of the case[.]").

In any event, Plaintiffs utterly fail to demonstrate that the district court's holding was incorrect. Plaintiffs completely ignore the district court's analysis and present only conclusory statements to the effect that procedural due process was violated, while presenting no authority that supports that proposition. [BIC 21-23] Merely repeating the term "due process" is insufficient to properly advance a procedural due process argument, in the absence of any citation to authority or analysis. *See Craven v. Univ. of*

Colo. Hosp. Auth., 260 F.3d 1218, 1226 (10th Cir. 2001) ("[A] bare assertion does not preserve a claim.") (internal quotation omitted). Plaintiffs assert that imposing non-monetary conditions of release "without any heightened showing of need or any consideration of monetary bail as an alternative runs short of both the *Mathews* and *Medina* tests for due process" without conducting the requisite balancing of factors under either. Neither this Court, nor Judicial Defendants, should be forced to guess at what Plaintiffs' arguments may be in an attempt to exhaust every imaginable line of attack. *See Garrett v. Shelby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (this Court "cannot take on the responsibility of serving as the litigant's attorney in construing arguments and searching the record.").

After conducting a detailed analysis of the procedural safeguards contained in the analogous New Jersey bail reforms, the Third Circuit concluded that "the lower priority of monetary bail to non-monetary bail conditions does not make constitutionally inadequate the extensive safeguards available [to arrestees under that law.]" *Holland*, 895 F.3d at 300. This Court should likewise reject Plaintiffs' procedural due process challenge.

Plaintiffs' substantive due process argument fares no better. Plaintiffs renew their conclusory argument that "the right of option [sic] to post monetary bail sufficient to ensure future appearance before subjection to severe liberty deprivations" is a fundamental right. [BIC 23; Aplt. App. 645] The district court rejected that conclusion, and the Third Circuit has since agreed. *Holland*, 895 F.3d at 296 ("[W]e hold that 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."). The Fifth Circuit has likewise rejected the claim that access to bail implicates fundamental rights under a substantive due process analysis. *Broussard v. Parish of Orleans*, 318 F.3d 644, 657 (5th Cir. 2003). These opinions are consistent with the United States Supreme Court's reluctance "to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citation omitted).

Against this line of authority, Plaintiffs quote *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971), where bail was described as "basic to our system of law" in a case that was "not at all concerned [ ] with any fundamental right to bail or any Eighth Amendment-Fourteenth Amendment question of bail excessiveness." [BIC 24] Plaintiffs also quote a case from 1891 where bail was referred to as a "constitutional privilege[,]" *United States v. Barber*, 140 U.S. 164, 167 (1891), but ignore the inconvenient fact that that description has not been adopted by other courts over the last 120 years. Plaintiffs further rely on a case from the Third Circuit [BIC 22][6] which, as mentioned above, has since held that there is <u>not</u> a fundamental right to monetary bail. Lastly, Plaintiffs cite *Salerno*, [BIC 26], ignoring its pronouncement that "[t]he only arguable substantive limitation of the Bail Clause is that the Government's proposed *conditions of release or detention* not be 'excessive' in light of the perceived evil." 481 U.S. at 754 (emphasis added).

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6 Plaintiffs' subsequent reliance on Stack is likewise misplaced, as the Supreme Court there dealt with a statutory right to bail.

Since Plaintiffs cannot establish the existence of a fundamental right, and they did not allege below that Collins is a member of a suspect class, to make out a claim for violations of substantive due process, the Amended Complaint must allege facts showing that Collins was deprived of a "liberty interest warranting due process protection, and that the deprivation was 'arbitrary and capricious.'" *Cider v. County Comm'rs County of Boulder*, 246 F.3d 1285, 1289 (10th Cir. 2001).

Government action is only arbitrary and capricious if it is "unrelated to a legitimate governmental interest." *Anglemyer v. Hamilton County Hosp.*, 848 F. Supp. 938, 941 (D. Kan. 1994). "In other words, the decision must meet the rational basis test." *Id.* Here, as discussed above, Plaintiffs cannot show that Collins has a protected liberty interest in obtaining release through a commercial bail bond as opposed to through nonmonetary conditions of release. In addition, *Salerno* made clear that the government has a legitimate interest in regulating pretrial release and detention. 481 U.S. at 753, 749 (rejecting "the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release," and noting that the government's interest in public safety "is both legitimate and compelling."). For all of these reasons, this Court should affirm the district court's ruling that Plaintiffs failed to state a claim for violation of Collins' (or any other Plaintiff's) procedural or substantive due process rights.

C. Plaintiffs Fail to State a Claim Under the Fourth Amendment as Pretrial Release Is Not a "Search" or "Seizure."

Plaintiffs alleged below that pretrial conditions such as electronic monitoring and home detention, where monetary bail is not considered, violate the Fourth Amendment, even though Collins was not subjected to any such conditions. [Aplt. App. 045-47] The district court disagreed, accepting Judicial Defendants' argument that Plaintiffs cannot meet the prerequisite of showing that pretrial release constitutes a "search" or "seizure" pursuant to this Court's holding in *Becker v. Kroll*, 494 F.3d 904 (10th Cir. 2007). [Aplt. App. 648-49, 178] Plaintiffs appeal from that determination. [BIC 26]

In *Becker*, this Court declined to adopt a "continuing seizure" analysis under which routine pretrial release conditions like those imposed on Collins may constitute a "search" or "seizure" for purposes of constitutional liability. *Id.* at 915 ("To extend liability in cases without a traditional seizure would expand the notion of seizure beyond recognition . . . . '[I]f the concept of a seizure is regarded as elastic enough to encompass standard conditions of pretrial release, virtually every criminal will be deemed to be seized pending the resolution of the charges against him.'" (citing *Nieves v. McSweeney*, 241 F.3d 46, 55 (1st Cir. 2001)).

Rather than address this binding authority that is contrary to their position, or the district court's analysis on this point, on appeal Plaintiffs simply reiterate their opinion that the 2017 Rules violate the Fourth Amendment. [BIC 26-28] That approach is insufficient to meet Plaintiffs' burden of demonstrating error on appeal. *See Pelfrense v. Vill. of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990) ("A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack

of supporting authority or in the face of contrary authority, forfeits the point."). The district court's dismissal of Plaintiffs' Fourth Amendment claim should be affirmed.

II. The District Court Properly Concluded that Virtually All Plaintiffs Lack Standing.

"Constitutional standing involves three elements: (1) injury in fact; (2) causation; and (3) redressability." *Citizen Ctr. v. Gessler*, 770 F.3d 900, 909 (10th Cir. 2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Injury in fact is the "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. Lack of standing is treated as a defect in subject matter jurisdiction. *See Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1176 (10th Cir. 2009) ("[S]tanding is a component of this court's jurisdiction, and we are obliged to consider it sua sponte to ensure the existence of an Article III case or controversy."). Here, the District Court properly determined that all Plaintiffs except for Collins lack standing to maintain this action.

A. Bail Bond Association Lacks Standing to Sue.

Bail Bond Association alleged that it is "a professional membership organization comprised of bail bond businesses" doing business in New Mexico. [Aplt. App. 23-24, Amended Complaint ¶ 19] It complained that the 2017 Rules "created [a] hierarchy effectively prohibiting the lower courts from considering secured bonds without placing untenable work requirements on

the lower court judges therein effectively removing the option from consideration by judges and a de facto situation wherein jailhouse bonds where [sic] completely extinguished as an option for pre-arraignment release." [Aplt. App. 29-30, Amended Complaint ¶ 52] Bail Bond Association purported to represent both its member companies and an undefined population of potential customers who prefer pretrial release purchased with money bonds to release on nonfinancial conditions. [Aplt. App. 23, 32, Amended Complaint, ¶¶ 19, 63] The district court properly determined that Bail Bond Association lacks standing, whether in its own right or on behalf of anyone else. [Aplt. App. 648-51]

1. Bail Bond Association Lacks First-Party Standing.

In their Amended Complaint, Plaintiffs alleged that Bail Bond Association's members, commercial bail bond companies, "have been severely harmed by the drastic reduction in the number of defendants given the option of jailhouse bonds or secured bonds" under the 2017 Rules. [Aplt. App. 32, Amended Complaint ¶ 61] Bail Bond Association's claim to relief rests on a series of hypothetical developments: "[T]he jailhouse could have set a reasonable, non-excessive monetary bail to ensure Plaintiff Collin's [sic] appearance at arraignment and then for trial," and then "[i]f such a bond had been allowed, Plaintiff Collin's [sic] family was prepared to use their own financial resources with the assistance of a member of [Bail Bond Association] to pay the required amount." [Aplt. App. 33, Amended Complaint ¶¶ 70-71]

The crux of Bail Bond Association's claim is that one of its member companies would have issued a money bond to a defendant in a criminal proceeding, if it had the opportunity to do so, and that if the 2017 Rules had not been promulgated, it might have had such an opportunity. That chain of contingencies cannot satisfy the requirement that to obtain standing a plaintiff must claim "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *United States v. Hays*, 515 U.S. 737, 743 (1995); *see also Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2016) (To demonstrate injury in fact, "a plaintiff must offer something more than the hypothetical possibility of injury.").

Equally fatal to its claim of standing, Bail Bond Association, whether on behalf of itself or its member companies, cannot be injured by the conduct alleged in the Amended Complaint because the constitutional rights supposedly violated apply only to criminal defendants, not bail bond companies. On appeal, Plaintiffs incorrectly characterize the district court's conclusion that Bail Bond Association cannot establish first-party standing as "confusing standing to represent third-parties … with associational standing." [BIC 31] But Judicial Defendants did not argue, and the district court did not hold, that an organization may never sue on behalf of its members as a general matter; rather, Bail Bond Association lacks standing to maintain the lawsuit it actually filed below, which asserts injuries to Collins alone, rather than to Bail Bond Association's member companies.

It is well-established that an association may assert standing as the representative of its members. *See Int'l Union, Untied Auto., Aerospace & Agric.*

Implement Workers v. Brock, 477 U.S. 274, 281 (1986) (stating that the doctrine of associational standing "has long been settled"). An association may maintain such standing only if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 756 (10th Cir. 2010) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977)). Bail Bond Association is not an advocacy organization for criminal defendants' constitutional rights, but rather a membership association representing its member bail bond companies' business interests. [Aplt. App. 23-24, Amended Complaint ¶ 19; BIC 30]

Here, however, the Amended Complaint does not assert any constitutional claims for an unlawful taking or deprivation of business opportunities, or claim that the 2017 Rules deny commercial bail bondsmen any due process protections to which they are entitled, although Plaintiffs make offhanded references to "the collapse of [Bail Bond Association's] business." [BIC 30] Rather, the Amended Complaint only alleges that Judicial Defendants violated Collins's constitutional rights under the Eighth, Fourth and Fourteenth Amendments, and that Judicial Defendants violated separation-of-powers principles in promulgating the 2017 Rules.

As the district court correctly concluded, "[n]one of these claims directly addresses the rights of the Bail Bond Association … or its member companies," because "[t]he Eighth Amendment's bail clause protects the interests of criminal defendants, not corporations who

seek to provide bail to them," and likewise "the Due Process and Fourth Amendment claims … do not constitute an invasion of the Bail Bond Association['s] … legally-protected interests." [Aplt. App. 649-50] *See Holland v. Rosen*, 277 F. Supp. 3d 707, 728 (D.N.J. 2017) ("[T]he Eighth Amendment's bail clause protects the interests of criminal defendants, not corporations who seek to provide bail bonds to them"); *Johnson Bonding Co. v. Kentucky*, 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"). This Court should affirm the district court's determination that "no member company of [Bail Bond Association] … has identified a constitutional right that it holds as a corporation that i[t] seeks to vindicate." [Aplt. App. 650]

2. Bail Bond Association Lacks Third-Party Standing.

Bail Bond Association similarly lacks standing to pursue this litigation in the name of its member companies' "prospective clients," *i.e.* an unascertained subset of criminal defendants. [Aplt. App. 22, Amended Complaint ¶ 14] In general, a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); *see also Flast v. Cohen*, 392 U.S. 83, 99 n.20 (1968) ("[A] general standing limitation imposed by

federal courts is that a litigant will ordinarily not be permitted to assert the rights of absent third parties.").

The United States Supreme Court has recognized a limited right of litigants to bring actions on behalf of third parties only when the following three criteria are met: (1) the litigant has suffered an injury in fact giving it a sufficiently concrete interest in the outcome of the issue; (2) the litigant has a close relation to the absent third party; and (3) there exists some hindrance to the third party's ability to protect his own interests. *Powers v. Ohio*, 499 U.S. 400, 410 (1991). Plaintiffs fail to demonstrate that the Bail Bond Association meets any, let alone all, of these criteria, and accordingly the Association lacks standing to pursue this suit on behalf of hypothetical customers or any other third parties.

Many courts, including this Circuit, have found that particular relationships, such as the physician-patient relationship, are "sufficiently close for third-party standing." *Aid for Women v. Foulston*, 441 F.3d 1101, 1112 (10th Cir. 2006). A limited exception to the general rule against third-party standing permits businesses to advocate on behalf of their clients "against discriminatory actions that interfere with that business relationship." *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1041 (11th Cir. 2008) (emphasis added); *see also Barrows v. Jackson*, 346 U.S. 249, 258, 254-55 (1953) (where a racially restrictive covenant would effectively "punish respondent for not continuing to discriminate against non-Caucasians in the use of her property," United States Supreme Court found white landowner had standing to sue on behalf of black purchasers to attack racial discrimination).

In contrast to *Young Apartments* and *Barrows*, most ordinary business relationships between

companies and their customers are simply too attenuated to create third-party standing. *See, e.g.*, *W.R. Huff Asset Mgm't Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 110 (2d Cir. 2008) (rejecting third-party standing based on relationship of investment advisor and client). That is particularly true for hypothetical, as opposed to actual, business relationships. *See Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004) (rejecting standing where attorneys sought to challenge a statute on behalf of "yet unascertained [indigent criminal defendants] who will request, but be denied, the appointment of appellate counsel," because the attorneys had "no relationship at all" with those defendants).

As the district court properly held, Bail Bond Association and its member companies lack the requisite close relationship to potential customers to sue on their behalf; Bail Bond Association "does not allege an existing contractual relationship with any criminal defendant whose rights have been violated." [Aplt. App. 650-51]

In its recent decision rejecting substantively identical constitutional claims directed at New Jersey's bail reforms, the Third Circuit affirmed the district court's holding that Lexington National Insurance Company, an underwriter and corporate surety of bail bonds, has at most a "hypothetical relationship with potential customers," a relationship that "closely mirrors that of attorneys with potential clients" discussed in *Kowalski* and held insufficient to confer standing. *Holland*, 895 F.3d at 288 (citing and following *Kowalski*, 543 U.S. at 132).

Nor can Bail Bond Association show that criminal defendants preferring monetary bail bonds over release on their own recognizance are uniquely

hindered in their ability to vindicate their own legal interests, such that they require advocacy on their behalf from a distant third party like Bail Bond Association. Determining the existence of a "hindrance" under the *Powers* test requires examining "the likelihood and ability of the third parties … to assert their own rights." *Powers*, 499 U.S. at 414. Courts have found deterrence from filing suit due to privacy concerns, imminent mootness of a case, or systemic practical challenges to pursuing one's own rights to constitute the requisite hindrance. *See id.* at 414 (permitting criminal defendants to raise equal-protection challenges to race-based peremptory strikes due to the limited potential relief, small financial stake, and cost of litigation, all of which keep jurors from raising the claim themselves). Crucially, "[n]o practical barriers exist if the third party actually asserts his own rights." *Hodak v. City of St. Peters*, 535 F.3d 899, 904 (8th Cir. 2008).

Here, as the district court recognized, Collins appeared as a plaintiff in the proceedings below, and "she has faced no obstacle or hindrance in asserting her claims that her constitutional rights were violated."[7] [Aplt. App. 651] The Third Circuit similarly determined that a criminal defendant's participation as a party in that underlying lawsuit indicated that he had "the unfettered ability" to vindicate his own interests, and therefore did not require the commercial bail industry to advocate for him. *Holland*, 895 F.3d at 288. For all of these reasons, this Court should affirm the district

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7 Plaintiffs' complaint that "criminal defendants burdened by house arrest" are unable to vindicate their own rights through litigation is a non sequitur, because they concede that Collins was not subject to house arrest. [Aplt. App. 651]

court's determination that Bail Bond Association lacks first-party as well as third-party standing to sue.

B. Legislator Plaintiffs Lack Standing to Sue.

The district court properly concluded that Legislator Plaintiffs likewise lack standing to sue under Tenth Circuit law. [Aplt. App. 652-53] "[A] threshold question in the legislator standing inquiry is whether the legislator-plaintiffs assert an institutional injury." *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214 (10th Cir. 2016). Institutional injuries "are those that do not zero in on any individual Member," but instead are "widely dispersed" and necessarily impact all members of a legislative body equally. *Id.* (discussing and citing *Arizona State Legis. v. Ariz. Indep. Redistricting Comm'n*, __ U.S. __, 135 S. Ct. 2652, 2664 (2015)). In other words, "an institutional injury constitutes some injury to the power of the legislature as a whole rather than harm to an individual legislator. An individual legislator cannot 'tenably claim a personal stake' in a suit based on such an institutional injury." *Id.* (citing *Arizona State Legis.*, 135 S. Ct. at 2664).

Plaintiffs argue unconvincingly on appeal that "[t]he focus of the Legislator [Plaintiffs'] action was not an institutional injury by the Judicial Defendants … but rather a challenge to an unconstitutional usurpation of power by one branch – the Judicial branch … from another, the legislative branch." [BIC 36] Notwithstanding that rhetoric, Legislator Plaintiffs complain of a purely institutional injury, arguing that the Supreme Court's promulgation of the 2017 Rules and the lower courts' enforcement of those Rules intrude upon the authority of the Legislature. The

individual Legislator Plaintiffs do not allege that they have any specific interest separate and apart from their numerous legislative colleagues who have not lent their names to this lawsuit. A legislator does not hold any legally protected interest in the application (or enjoinment) of a law that is distinct from the interest held by every member of the public. *See Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000) (Congressional plaintiffs do not "have standing anytime a President allegedly acts in excess of statutory authority"). Under *Kerr*, which Plaintiffs make no genuine effort to distinguish, the allegations of the Amended Complaint are insufficient to permit standing for the legislator Plaintiffs, as the district court correctly concluded.

In addition, while Plaintiffs now argue for the first time on appeal that Legislator Plaintiffs are suing "on behalf of the citizenry they represent" rather than their own individual or institutional interests, [BIC 19] that reframing fails to confer standing on them. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 829-30 (1997) (Congressmen lacked standing to sue on behalf of their constituents because alleged injury was "abstract and widely dispersed," and Congressmen did not have "sufficient 'personal stake' in the dispute"); *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1337 (D.C. Cir. 1999) (Injuries to a state's citizens "do not deprive individual [state] legislators of something to which they are personally entitled."); *Kucinich v. Defense Fin. and Accounting Serv.*, 183 F. Supp. 2d 1005, 1011 (N.D. Ohio 2002) (dismissing action for lack of standing because "[a]llowing members of Congress … to sue on behalf of their constituents in cases where some portion of the constituents are adversely affected by duly enacted legislation would pose grave separation of powers dangers.").

III. The District Court Correctly Dismissed Plaintiffs' Separation-of- Powers Argument and Otherwise Held That Plaintiffs Fail to State a Claim upon which Relief May be Granted.

The Amended Complaint alleges in passing that by promulgating the 2017 Rules, the New Mexico Supreme Court has "infringe[d] upon the power of the Legislature to make law," and the "authority of the New Mexico Legislature to pass laws preserving the public peace." [Aplt. App. 35, 47-48, Amended Complaint ¶ 81, and at 31-32]. The burden is on Plaintiffs to specifically identify their causes of action, along with sufficient facts showing they are entitled to relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Coates v. Heartland Wireless Commc'ns, Inc.*, 26 F. Supp. 2d 910, 914 (N.D. Tex. 1998) ("To survive Rule 12(b)(6) dismissal, plaintiffs must allege facts entitling them to relief *for their substantive causes of action*.") (emphasis added).

Plaintiffs' conclusory statement that the 2017 Rules violate separation-of- powers principles is not a cause of action; rather, Plaintiffs' only stated causes of action are for alleged violations of Collins's Eighth, Fourth and Fourteenth Amendment rights. [Aplt. App. 40-47, Amended Complaint ¶¶ 119-61] Nor can Plaintiffs rely on their demand for declaratory relief as a substitute for an actual cause of action. Even if the Amended Complaint raised a claim under the Declaratory Judgment Act, which it did not, the Declaratory Judgment Act "does not confer any 'substantive rights' or create a cause of action." *Cheyenne and Arapaho Tribes v. First Bank & Trust*

Co., 560 F. App'x 699, 708 (10th Cir. 2014) (unpublished) (citing *Farmers Alliance Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1386 (10th Cir. 1978)).

Plaintiffs' separation-of-powers argument fails for additional reasons. Their belief that because "the Legislature has legislated on the issue of bail," it exercises sole dominion on any matter relating to bail [BIC 49], itself would violate separation of powers. *See Lewis v. La. State Bar Ass'n*, 792 F.2d 493, 497 (5th Cir. 1986) (When exercising its rulemaking authority, "a state supreme court occupies the same position as that of the state legislature.").[8] The New Mexico Supreme Court retains "ultimate rule-making authority" to enact procedural rules for New Mexico state courts, *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 5, 138 N.M. 398, an authority that the New Mexico Legislature long has recognized. *See* NMSA 1978, § 38-1-1(A) ("The supreme court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico").

Furthermore, it is doubtful at best whether federal courts have jurisdiction to adjudicate asserted separation-of-powers disputes between two or more branches of state government, and even if they do have that jurisdiction, they should decline to exercise it. *See Austin v. Jackson*, 213 F.3d 298, 302 (6th Cir. 2000) ("[S]eparation of powers between branches of state government is a matter of state law."). Contrary to Plaintiffs' assertion that "[t]his case presents a unique

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8 The point is also logically infirm. State courts are not deprived of rule-making authority in matters of criminal procedure, for example, merely because state legislatures enact legislation defining and regulating criminal offenses.

set of circumstances," [BIC 18-19] numerous federal court decisions make clear that separation-of-powers conflicts between state legislators and a state judiciary are not cognizable in federal court. *See, e.g.*, *United States v. Delaporte*, 42 F.3d 1118, 1120 (7th Cir. 1994) ("The refusal of the executive branch of state government to enforce a law enacted by the legislative branch is, in general, no business of a federal court … [but rather] a matter of state prerogative."); *Chromiak v. Field*, 406 F.2d 502, 505 (9th Cir. 1969) (noting that resolution of an issue concerning separation of powers in a state constitution is for the state courts to decide); *Johnson Bonding Co.*, 420 F. Supp. at 338 (whether "the Kentucky legislature has impermissibly infringed upon the powers of the judicial branch in violation of the doctrine of separation of powers …. is not a matter for inquiry under the United States Constitution").

Finally, as the district court recognized, Plaintiffs fail to state a claim with respect to their generic assertion that the public safety assessment tool utilized by the Second Judicial District Court pursuant to the 2017 Rules is unconstitutional, because it is one of many pieces of information that a district judge considers in assessing a defendant's pretrial release, and does not displace a district judge's analysis and discretion. [Aplt. App. 665-66] On appeal, Plaintiffs do nothing more than repeat conclusory assertions that the risk assessment tool is "unprecedented and unconstitutional," [BIC 12] and therefore do not effectively present the issue for review. *See Palma-Salazar v. Davis*, 677 F.3d 1031, 1037 (10th Cir. 2012) (declining to address conclusory statements (collecting cases)).

IV. The District Court Correctly Held That

Judicial Defendants are Absolutely Immune from Plaintiffs' Claims for Money Damages.

Plaintiffs do not address Judicial Defendants' immunity in their opening brief, except with respect to the district court's determination that Plaintiffs' disregard of governing law regarding immunity was so flagrant as to require Rule 11 sanctions. "Issues not raised in the opening brief are deemed abandoned or waived." *Tran v. Trs. of State Colleges in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004) (citation and internal quotation marks omitted).

To the extent this Court reaches the question, though, it is beyond real dispute that Judicial Defendants are immunized from Plaintiffs' claim for money damages. "Sovereign immunity is a limitation on the Court's subject matter jurisdiction," and a motion to dismiss on grounds of immunity should be "considered as a challenge to the Court's subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1)." *Owens v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 2013 WL 6492838 at *1 (N.D. Okla. Dec. 10, 2013) (citing *Clymore v. United States*, 415 F.3d 1113, 1118 n.6 (10th Cir. 2005)); *see also Vallo v. United States*, 298 F. Supp. 2d 1231, 1234 (D.N.M. 2003) ("If there is no waiver of sovereign immunity, the government is immune from suit, and the court has no subject-matter jurisdiction to hear the case.").

The district court determined that the New Mexico Supreme Court, the Second Judicial District Court, and Bernalillo County Metropolitan Court all enjoy immunity from Plaintiffs' suit, because "[t]he Eleventh Amendment bars suits for damages against a state or state agency absent congressional abrogation or waiver and consent by the state," neither of which

occurred here. *Ross v. Bd. of Regents of the Univ. of N.M.*, 599 F.3d 1114, 1117 (10th Cir. 2010). [Aplt. App. 667] The Justices, judges and staff of those courts "are likewise provided immunity as 'an arm of the state.'" *Hunt v. Cent. Consol. Sch. Dist.*, 951 F. Supp. 2d 1136, 1992 (D.N.M. 2013) (quoting *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280- 81 (1977)). [Aplt. App. 667]

The district court also held that Judicial Defendants are immunized from Plaintiffs' individual-capacity claims. [Aplt. App. 668-70] It is well-established that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Stump v. Sparkman*, 435 U.S. 349, 355-5 (1978) (emphasis added). "The primary policy of extending immunity to judges and to prosecutors is to ensure independent and disinterested judicial and prosecutorial decisionmaking." *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (citations omitted). "Judicial immunity applies only to personal capacity claims." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011).

Where judges act in a rule-making capacity rather than an adjudicative capacity, the United States Supreme Court has instructed that the applicable immunity is legislative rather than judicial. *See Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731 (1980) (determining that Virginia Supreme Court's issuance of State Bar Code "was a proper function of the Virginia court," but "was not an act of adjudication but one of rulemaking"); *id.* at 734 (Where lawsuits against state supreme court are premised on "issuance of, or failure to amend, the

challenged rules, legislative immunity would foreclose suit"); *see also Abick v. Michigan*, 803 F.2d 874, 877-78 (6th Cir. 1986) (concluding that the Michigan Supreme Court's promulgation of rules of practice and procedure was a legislative activity and therefore the justices of that court were entitled to legislative immunity); *Lewis v. N.M. Dep't of Health*, 275 F. Supp. 2d 1319, 1325 (D.N.M. 2003) ("[O]fficials outside the legislative branch," including judges, "are entitled to immunity when they perform legislative functions.") (citation omitted).

"Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998).[9] The purpose of legislative immunity is to "enable[ ] officials to serve the public without fear of personal liability. Not only may the risk of liability deter an official from proper action, but the litigation itself 'creates a distraction and forces legislators [or other state officials entitled to legislative immunity] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Sable v. Myers*, 563 F.3d

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9 Plaintiffs suggest in their opening brief that Judicial Defendants should be stripped of legislative immunity because the New Mexico Supreme Court's rulemaking was not "legitimate." [BIC 49] But just as judicial immunity protects all official actions conceivably connected to a judge's duties, "legitimate legislative activity" is properly construed as activity related to any aspect of the formal legislative process, such as participating in committee meetings, issuing reports and resolutions, voting, and budgetmaking. Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 300 (D. Md. 1992). Under Plaintiffs' contrasting approach, legislative immunity would cease to exist because any party challenging a particular statute or rule could simply deem the legislature's or court's enactment as illegitimate.

1120, 1123-24 (10th Cir. 2009) (quoting *Supreme Court of Va.*, 446 U.S. at 733).

In their Amended Complaint, Plaintiffs alleged wrongdoing by New Mexico Supreme Court Justices in their rule-making capacity. [Aplt. App. 21-22, Amended Complaint ¶ 9; Aplt. App. 35, Amended Complaint ¶ 81] Legislative immunity, therefore, is the applicable protection from suit that United States Supreme Court precedent has guaranteed to state court justices for decades.

Plaintiffs lodged different allegations against the Second Judicial District Court, Bernalillo County Metropolitan Court, and those courts' chief judges and court executive officers, claiming that they "adopted and implemented the Public Safety Assessment court-based pretrial risk assessment tool," which Plaintiffs asserted "effectively eliminated pre-trial release pursuant to a secured bond denying [criminal defendants] the pre-trial liberty option of a secured bond," and "infringe[s] upon a person's pretrial liberty just as the Supreme Court Rules do." [Aplt. App. 20, Amended Complaint ¶ 5; Aplt. App. 29, Amended Complaint ¶ 50]

Judge Nash and Judge Alaniz unequivocally are protected by judicial immunity in connection with their implementation of the 2017 Rules. *See Hyland v. Davis*, 149 F.3d 1183, 1998 WL 384556 at *2 (6th Cir. 1998) (unpublished table decision) ("Providing direction on the enforcement of a court rule, although somewhat administrative in nature, is still a judicial act for which the judge is immune because the parties' rights and liabilities are thereby affected.") (citing *Mann v. Conlin*, 22 F.3d 100, 104 (6th Cir.), *cert. denied*, 513 U.S. 870 (1994)).

Mr. Noel and Mr. Padilla are just as clearly protected by quasi-judicial immunity. The absolute immunity available to judges is "extended, under the rubric of quasi-judicial immunity, to other officials who perform functions closely associated with the judicial process." *Fuller v. Davis*, 594 F. App'x 935, 939 (10th Cir. 2014) (unpublished); *see also Kincaid v. Vail*, 969 F.2d 594, 601 (7th Cir. 1992) (Quasi-judicial immunity exists to protect court staff from "the danger that disappointed litigants blocked by the doctrine of absolute immunity from suing the judge directly, will vent their wrath on clerks, court reporters, and other judicial adjuncts."). Where, as here, court staff are sued only because they have implemented court rules and orders, they are entitled to protection from suit. *See Penn v. United States*, 335 F.3d 786, 790 (8th Cir. 1982) (Absolute quasi-judicial immunity applies to public officials who are required to act under a court order or at a judge's direction).

Under black-letter law, all of the individual Judicial Defendants are immunized from individual-capacity claims, as the district court correctly ruled. In the proceedings below, Plaintiffs failed to identify a single source of legal authority that would permit them to disregard such long-held principles of immunity, and entitle them to money damages from Justices, judges and court staff personally. In their opening brief, they offer only their opinion that "[j]udicial immunity principles are a developing area of law, warranting litigation and clarification," [BIC 45] again without offering any coherent argument or set of principles that should be applied to defeat legislative, judicial and quasi-judicial immunity in this case.

Plaintiffs also repeat their false statement from briefing below that *Supreme Court of Virginia v.*

Consumers Union [446 U.S. 719 (1980)] "provided that declaratory and injunctive relief are available where the [state supreme court's] legislative authority over bail was not completely vested in another branch of government." [BIC 49] That decision had nothing to do with bail, but with the Virginia Supreme Court's authority to promulgate disciplinary rules for the Virginia state bar. The United States Supreme Court found the justices absolutely immune from suit for claims relating to their enactment of court rules, which the Court determined were actions taken in the justices' legislative capacity. *Supreme Court of Virginia*, 446 U.S. at 731. No decision of the United States Supreme Court or any other court has overruled or revisited that holding.

Of no application whatsoever to this case, the Supreme Court also concluded that because Virginia law gave the Virginia Supreme Court the "independent authority of its own to initiate [disciplinary] proceedings against attorneys," that court and its justices were proper defendants in a suit for purely declaratory and injunctive relief in their enforcement capacity only. *Id.* at 736. Even if that determination could apply here, *Supreme Court of Virginia* gives no support to Plaintiffs' claim for money damages. In the presence of United States Supreme Court precedent barring their claims, and in the absence of any argument for a modification or reversal of that law, Plaintiffs' demand for money damages against individual New Mexico Supreme Court Justices, state court judges, and court personnel remains frivolous, as the district court found in assessing Rule 11 sanctions against Plaintiffs' counsel for advancing that utterly unsupportable claim.

V. The District Court Properly Denied Plaintiffs' Motion to Amend Their Complaint.

In the proceedings below, Plaintiffs sought amendment for five reasons: (1) to add a First Amendment claim against Judicial Defendants for "engag[ing] in a vindictive prosecution in an effort to cause Plaintiffs to abandon their litigation against the Judicial Defendants" by "serving a retaliatory and vindictive Rule 11 Motion directed personally against Plaintiffs' attorneys" [Aplt App. 385, 397, 361- 62]; (2) to add a new claim under New Mexico state law for a "Declaratory Judgment of Violation of New Mexico Constitution's Seperation [sic] of Powers and of the New Mexico Constitution's Right to Bail" [Aplt. App. 397]; (3) to add additional legislators as plaintiffs [Aplt. App. 361, 372]; (4) to clarify that each Judicial Defendant is being sued for damages in her or his "individual capacity under color of state law" [A. 361]; and (5) to add another criminal defendant as a plaintiff [Aplt. App. 361, 371]

On appeal, Plaintiffs contend only that the district court erred in determining Plaintiffs' prospective First Amendment claim was baseless, thereby abandoning their challenge to the District Court's denial of leave to amend on any of the other grounds. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed are waived.").

While Federal Rule of Civil Procedure 15(a) provides that amendment should be freely granted, a district court properly denies leave to amend where amendment would be futile. *Moya v. Garcia*, F.3d , 2018 WL 3356160 at *8 (10th Cir. 2018) (citation omitted). Amendment is futile "when the proposed amended

complaint would be subject to dismissal for any reason." *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 562 (10th Cir. 1997). Although a decision to deny leave to amend a complaint is reviewed for an abuse of discretion, "when denial is based on a determination that amendment would be futile, [this Court's] review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch.*, 565 F.3d 1232, 1249 (10th Cir. 2009).

Plaintiffs sought leave to amend in pertinent part to assert a new claim against Judicial Defendants for exercising their rights as litigants in federal court by serving and filing a motion – later granted by the district court – for Rule 11 sanctions. [Aplt. App. 672] In denying Plaintiffs' motion to amend on grounds of futility, the district court determined that "the filing of the Rule 11 Motion was not a retaliatory act to punish Plaintiffs, but rather, an acceptable pleading expressly allowed by the Federal Rules of Civil Procedure. Further, the Court concludes that the Rule 11 motion is not a regulatory enforcement action against Plaintiffs. In this lawsuit, Judicial Defendants are acting as a litigant and not as an adjudicator." [Aplt. App. 674]

Plaintiffs argued below, and repeat on appeal, that the First Amendment immunizes their decision to pursue claims against Judicial Defendants that have no colorable basis in law and to force Judicial Defendants to defend themselves in federal court from (*inter alia*) frivolous demands for money damages. [BIC 38-40] But the First Amendment provides Plaintiffs neither a shield nor a sword. "Just as false statements are not immunized by the First Amendment right to freedom of speech … baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's*

Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983); *see also In re Harper*, 725 F.3d 1253, 1261 (10th Cir. 2013) (because "the First Amendment does not protect the filing of frivolous motions," the sanctioned attorney's argument that his actions were constitutionally protected was "meritless"); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 891 (10th Cir. 2000) ("[T]he right to petition is not an absolute protection from liability.").

Nor do Plaintiffs provide any support for their position that a private litigant may assert baseless claims at will but avoid any ensuing consequences simply because the defendants he has sued happen to be governmental actors. Public officials, including state court judges and justices, appropriately seek – and are awarded – sanctions under Rule 11 where the opposing party raises frivolous claims against them, on the same footing as other litigants. *See, e.g.*, *Snyder v. Snyder*, 139 F.3d 912, 1998 WL 58175 at *1, 4 (10th Cir. 1998) (unpublished table decision) (affirming district court's award of sanctions in favor of state judges who had to "defend [ ] against plaintiff's frivolous claims" despite the protection of absolute immunity); *Johnson ex rel. Wilson v. Dowd*, 345 F. App'x 26, 28, 30 (5th Cir. 2009) (unpublished) (affirming district court's grant of Rule 11 sanctions to state judicial defendants where plaintiff disregarded those defendants' absolute immunity from suit); *Kircher v. City of Ypsilanti*, 458 F. Supp. 2d 439, 453-54 (E.D. Mich. 2006) (awarding Rule 11 sanctions in favor of state judges where plaintiff's "opposition to the Judicial Defendants' assertion of judicial immunity lacked any basis in existing law, nor was it supported by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law."). As the district court

recognized, in this proceeding Judicial Defendants are acting as litigants, not as adjudicators or prosecutors; Plaintiffs fail to identify any authority for their suggestion that simply because they are judges or court staff, Judicial Defendants may not avail themselves of the procedural protections available to all other parties to litigation.

Finally, the very nature of Rule 11 makes it incapable of denying a party lawful access to the courts. A determination that Plaintiffs' lawsuit was filed in violation of Rule 11, as the district court rendered, itself negates any claim that Plaintiffs have been unlawfully denied access to the courts. Judicial Defendants' motion for sanctions pursuant to Rule 11 cannot create a new viable cause of action for Plaintiffs where none existed before. *See Port Drum Co. v. Umphrey*, 852 F.2d 148, 150 (5th Cir. 1988) (Rule 11 does not "confer new substantive rights" or create new causes of action).[10] Plaintiffs' position that any public defendant could be sued for seeking Rule 11 sanctions to rectify litigation misconduct would effectively destroy the use of Rule 11 in the courts. The district court correctly denied as futile Plaintiffs' motion to further amend their Amended Complaint to add a First Amendment claim premised on Judicial Defendants' Rule 11 motion.

VI. The District Court Properly Exercised Its Discretion in Imposing Rule 11 Sanctions on Plaintiffs' Counsel.

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10 Plaintiffs bizarrely argue that Judicial Defendants' filing of a Rule 11 motion was an "extrajudicial action." [BIC 38] A Rule 11 motion, of course, takes place entirely within a judicial proceeding, and "is designed to regulate proceedings among parties already before the court in a particular case." Port Drum Co., 852 F.2d at 150.

Rule 11 "imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and not interposed for any improper purpose." *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 393 (1990) (internal citations omitted). The rule's purpose is "to bring home to the individual signer his personal, nondelegable responsibility ... to validate the truth and legal reasonableness of the papers filed." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 547 (1991) (internal quotation omitted). The rule operates by requiring a signature on all court submissions certifying that the signer conducted a reasonable inquiry into the claims advanced and that after such inquiry can attest that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2).

Where an attorney fails to conduct the requisite "reasonable inquiry," Rule 11 provides for the imposition of sanctions. *Bus. Guides*, 498 U.S. at 541. "Rule 11 requires sanctions against attorneys who file signed pleadings, motions or other papers in district court which are not well-grounded in fact, are not warranted by existing law or a good faith argument for its extension, or are filed for an improper purpose." *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988).

"In order to avoid Rule 11 sanctions, an attorney's actions must be objectively reasonable – that is, it is not sufficient that the attorney has a good faith belief in the merit of his argument; 'the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the

circumstances.'" *Cascade Energy & Metals Corp. v. Banks*, 85 F.3d 640, 1996 WL 15549 at *5 (10th Cir. Jan. 17, 1996) (unpublished) (quoting *White v. Gen. Motors Corp.*, 908 F.2d 675, 680 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991)). Sanctions "are not warranted where there is [only] a minor or tangential misrepresentation by a party," or a misrepresentation that the court determines "is an honest mistake." *Bonadeo v. Lujan*, 748 F. Supp. 2d 1268, 1272 (D.N.M. 2009) (citations omitted). Where frivolous legal claims are at issue, courts "routinely direct sanctions … at attorneys rather than clients." *Barrett v. Tallon*, 30 F.3d 1296, 1303 (10th Cir. 1994) (citations omitted).

In the event a district court determines that Rule 11 sanctions are appropriate, "the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." *Olcott v. Del. Flood Co.*, 76 F.3d 1538, 1554 (10th Cir. 2004) (quoting Fed. R. Civ. P. 11(c)(2)).[11] "A sanction imposed under [Rule 11] must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4).

Rule 11 imposes several procedural requirements on a party seeking sanctions. "A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)." Fed. R. Civ. P. 11(c)(2).

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11 The quoted language is now contained in Fed. R. Civ. P. 11(c)(4).

In addition, "[t]he motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." *Id.* This process, known as the "safe harbor" provision, permits a would-be Rule 11 violator to withdraw the improper filing and thereby protect itself "from sanctions whenever possible in order to mitigate Rule 11's chilling effects . . . and encourage the withdrawal of papers that violate the rule without involving the district court." *Kazazian v. Emergency Serv. Physicians, P.C.*, 300 F.R.D. 672, 677 (D. Colo. 2014) (quoting *Roth v. Green*, 466 F.3d 1179, 1192 (10th Cir. 2006) (brackets omitted)). The Tenth Circuit has instructed that "[s]trict compliance with the requirements of Rule 11 conserves judicial resources and offers the best mechanism to ensure that defendants understand their situation" and take prompt corrective action. *United States v. Edgar*, 348 F.3d 867, 871 n.3 (10th Cir. 2003). Judicial Defendants complied with the procedural requirements of Rule 11. [Aplt. App. 684]

Judicial Defendants sought Rule 11 sanctions against Plaintiffs' counsel on a number of grounds. While the district court concluded that Plaintiffs' constitutional claims are meritless, it determined those claims are not frivolous so as to trigger sanctions: "While the Court disagrees with Plaintiffs' interpretation of the cases relied upon, their interpretation is not untenable as a matter of law as to necessitate sanctions." [Aplt. App. 686]

The district found that two other aspects of Plaintiffs' Amended Complaint, however, crossed the line from merely meritless to frivolous. First, the

district court held that "[t]he failure of Plaintiffs' counsel to identify a reasonable basis for standing of the legislator Plaintiffs and the Bail Bond Association of New Mexico … justifies the imposition of sanctions pursuant to Rule 11." [Aplt. App. 687]. Second, the district court determined that "Plaintiffs' claims for money damages against Judicial Defendants are frivolous because Judicial Defendants are protected by well-established immunity doctrines," Plaintiffs' counsel failed to cite to existing law or argue for extending, modifying or reversing existing law or establishing new law in that regard, and therefore "either failed to make a reasonable inquiry into or disregarded the relevant law." [Aplt. App. 690]

In reviewing a decision to impose Rule 11 sanctions, this Court applies an abuse of discretion standard. *Roth v. Green*, 466 F.3d 1179, 1187 (10th Cir. 2006); *see also Eisenberg v. Univ. of N.M.*, 936 F.2d 1131, 1137 (D.N.M. 1991) ("[I]t is not our role to second-guess the district court's Rule 11 determination absent an abuse of discretion.") (citation and internal quotation marks omitted). The Court properly affirms an award of sanctions "on any grounds supported by the record." *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 446 (6th Cir. 2006); *see also Whitehead v. Food Max of Miss., Inc.*, 332 F.3d 796, 807 (5th Cir. 2003) (en banc) (where district court concluded that sanctioned attorney violated multiple subparts of Rule 11, on appeal "it is only necessary to decide whether he violated one.").

The district court's order granting Judicial Defendants' motion for Rule 11 sanctions should be affirmed. Attorneys who ignore well-established immunity doctrines do so at their own peril. *See Bethesda Lutheran Homes and Servs., Inc. v. Born*, 238 F.3d 853, 859 (7th Cir. 2001) (reversing district court's

denial of Rule 11 sanctions in a case where "it should have been obvious to any lawyer that relief was barred on multiple grounds, including res judicata, the Eleventh Amendment ... and qualified immunity."). Sanctions are appropriate under Rule 11 where, *inter alia*, a plaintiff proceeds to assert claims for which relief is plainly barred under governing law. *See Roth*, 466 F.3d at 1188-89 (affirming Rule 11 sanctions where "there were a host of legal impediments" to the underlying lawsuit); *see also Harrison v. Luse*, 760 F. Supp. 1394, 1399 (D. Colo. 1991) (Rule 11 is violated where it is patently clear that a claim has no chance of surviving a motion to dismiss under existing precedent and where no reasonable argument can be advanced to extend, modify or reverse existing law).

More particularly, district courts properly impose sanctions where an attorney has decided to disregard black-letter law and simply forge ahead with meritless claims against defendants who are immunized from suit. *See, e.g.*, *Hernandez v. Joliet Police Dep't*, 197 F.3d 256, 264-65 (7th Cir. 1999) (affirming Rule 11 sanctions where plaintiff's attorney overlooked defendant's "obvious" Eleventh Amendment defense and failed to voluntarily dismiss after it was brought to his attention); *Marley v. Wright*, 137 F.R.D. 359, 363-64 (W.D. Okla. 1991), *aff'd*, 968 F.2d 20 (10th Cir. 1992) (unpublished Table decision) (imposing Rule 11 sanctions against attorney for filing claims against state court judges and court staff clearly barred by absolute immunity); *Sveeggen v. United States*, 988 F.2d 829, 830-31 (8th Cir. 1993) (affirming dismissal of suit and award of Rule 11 sanctions because judges have absolute judicial immunity for acts taken in the course of fulfilling their judicial duties); *Bullard v. Downs*, 161 F. App'x. 886, 887 (11th Cir. 2006) (unpublished)

(imposing Rule 11 sanctions where judicial immunity clearly applied to bar plaintiffs' claims). The same principles apply where the relevant form of immunity is legislative rather than judicial. *See DeSisto College, Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989) (Plaintiffs' counsel properly sanctioned for failing to sufficiently research precedent on legislative immunity and failing to acknowledge that such precedent foreclosed their position).

Demands for money damages against state court Justices, judges or court staff based on allegations that they mishandled their official duties may appear from time to time in *pro se* lawsuits. Here, though, Plaintiffs are represented by counsel, which makes their assertion of claims undeniably barred by absolute immunity sufficiently egregious to merit sanctions. *See In re West*, 338 B.R. 906, 914 (Bankr. N.D. Okla. 2006) ("Pro se pleadings are … granted a degree of indulgence under Fed. R. Civ. P. 11 not extended to those drafted by attorneys.").

Plaintiffs cannot plausibly claim that in filing this action, they were aware of black-letter law on standing and immunity, but were simply arguing for an extension, modification or reversal of existing law, or the creation of new law. In their briefing below, they did not acknowledge and attempt to distinguish governing precedent, but simply asserted that their position is correct. Even on appeal, their arguments against the district court's finding of frivolousness are limited to conclusory pleas that their claims below were "objectively reasonable" and that immunity doctrines continue to evolve. [BIC 45, 48-51]

But a plaintiff cannot retroactively assert that he sought to extend, modify, or reverse existing law to fend off Rule 11 sanctions; the plaintiff must actually

have argued for such a change below rather than using "*post hoc* sleight of hand" to bolster otherwise implausible claims. *Int'l Shipping Co., S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 390 (2d Cir. 1989) (citation omitted). Rule 11 requires "that the party against whom sanctions would be imposed must actually make the reasonable argument, not merely assert after-the-fact that a reasonable argument *could* have been made …. That means the litigant must acknowledge the precedent against its position and then assert the basis for a modification of that existing precedent." *In re Ronco*, 838 F.2d 212, 218 (7th Cir. 1988); *see also Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) (plaintiffs did not make a good-faith argument to modify or reverse binding appellate law because "they did not refer to it at all"); *Thrush v. Morrison*, 665 F. Supp. 372, 377 (M.D. Pa. 1987) (Where the plaintiff mentioned a desire to modify or reverse existing law "[o]nly *after* the filing of the Rule 11 motion," sanctions properly imposed).[12]

Given their chronic inability to identify law supporting their claims for standing and money damages against Judicial Defendants or to articulate reasons why existing law should be modified or overturned, even on appeal, Plaintiffs cannot offer a well-reasoned basis for disturbing the district court's Rule 11 decision. Instead of confronting the egregious deficiencies of their Amended Complaint and

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12 Similarly, Plaintiffs cannot undermine the district court's Rule 11 ruling simply by stating, without any explanation or analysis, that binding precedent is inapplicable or incorrect. See Knipe v. Skinner, 146 F.R.D. 58, 61 (N.D.N.Y. 1993) (Rule 11 sanctions properly imposed where counsel "simply insists that [prior decisions] are wrong," without providing the court with any support for his point of view).

subsequent briefing, Plaintiffs' opening brief tries to change the subject, arguing that the district court's Rule 11 determination should be reversed because the district court "issued a sanction based on a pervasive finding of 'political reason' [sic] for filing suit," which in Plaintiffs' view was improper. [BIC 53-54] Plaintiffs do not challenge the district court's decision that awarding reasonable attorney's fees, as opposed to imposing some other form of sanction, was appropriate, and therefore waive that issue on appeal.

In launching their "political reason" argument – to which they devote at least one-third of their opening brief – Plaintiffs seriously mischaracterize the district court's Rule 11 ruling. The district court's Rule 11 January 4, 2018 order granting Judicial Defendants' motion for Rule 11 sanctions makes reference in a *single paragraph* to the court's reasonable inference that Plaintiffs were motivated by an improper purpose in filing the underlying lawsuit. [Aplt. App. 687] *See* Fed. R. Civ. P. 11(b)(1) (requiring attorney's certification that a pleading "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."). And the district court mentioned its finding about the improper motivations of Plaintiffs' counsel merely as an additional fact further supporting the court's determination that some of Plaintiffs' claims were sufficiently frivolous to merit Rule 11 sanctions.[13]

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13 Plaintiffs cite several cases for the proposition that parties' improper motivations alone do not justify Rule 11 sanctions where those parties advanced colorable claims. [BIC 56-57] That point is irrelevant on appeal, because the district court (1) did not sanction Plaintiffs' counsel solely, or even primarily, on the basis of improper motivation, and (2) the district court unambiguously

[Aplt. App. 687-88] The district court's inference that Plaintiffs were motivated by an improper purpose, in any case, is supported by record evidence, particularly correspondence and press releases prepared by Plaintiffs' counsel [Aplt. App. 440, 459-60, 481, 482-83] but also appropriately derived from the absolute baselessness of Plaintiffs' claims themselves. *See Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 665-66 (11th Cir. 2010) (holding that improper purpose under Rule 11 may be "inferred from an attorney's filing of factually or legally frivolous claims") (internal citations and quotation marks omitted).

As Judicial Defendants pointed out below, [Aplt. App. 455] Plaintiffs unquestionably are entitled to express their viewpoints, including their belief that New Mexico's bail reform is unlawful or unwise, in any medium; but they are not entitled to commandeer the federal courts for public relations purposes in the absence of any colorable legal claims. *See White*, 908 F.2d at 683 (affirming district court's finding of improper purpose under Rule 11 where the plaintiffs "utilize[d] the media to create adverse publicity" for the defendants, in light of the plaintiffs' "failure to make reasonable inquiry and failure to make claims cognizable under the law"); *Whitehead*, 332 F.3d at 807 (reversing appellate panel and reinstating district court's decision to impose Rule 11 sanctions, in part because "[t]he media event orchestrated by [the plaintiff's attorney] … constitutes objective evidence of his improper purpose" in filing suit, and collecting cases reaching similar conclusion).

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determined that a number of Plaintiffs' claims in fact were not colorable, i.e. frivolous.

Contrary to Plaintiffs' assertion, [BIC 54-55] courts may properly consider a party's (or attorney's) statements or conduct outside of the pleadings to evaluate whether the party or attorney was motivated by an improper purpose in filing those pleadings; the external statements or conduct need not themselves be sanctionable, of course, but may be probative of a party's (or attorney's) motivations in pursuing litigation. *See Whitehead*, 332 F.3d at 807. And despite Plaintiffs' inaccurate characterization, the district court did not sanction Plaintiffs' counsel for writing a letter to a state legislative committee offering to provide "information" about bail reform; rather, the court considered the letter among many other pieces of evidence – foremost among them, the allegations of the Amended Complaint itself – in determining that Plaintiffs' suit was not prompted by a good-faith expectation that they would obtain judicial relief on their claims.

It is of no moment that expressing one's viewpoint or communicating with the media, as the sanctioned attorney did in *Whitehead*, is protected by the First Amendment as a general matter; courts may reasonably regulate conduct in the proceedings over which they preside, including through Rule 11. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-50 (1991). That principle applies even where it was later determined that the court lacked jurisdiction over the merits of the case. *See Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992) ("[T]he maintenance of orderly procedure, even in the wake of a jurisdiction ruling later found to be mistaken – justifies the conclusion that the sanction ordered here need not be upset."). Furthermore, attorneys are held to a higher standard of litigation conduct than members of the general

public. *See Carroll v. Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290, 293-94 (5th Cir. 1997) (explaining that officers of the court "owe a duty to the court that far exceeds that of lay citizens").

Plaintiffs' notion that groundless filings should be exempted from Rule 11 sanctions because citizens generally have expressive rights under the First Amendment is utterly bereft of support in law, and at least one appellate court has deemed a similar argument itself to be frivolous. *In re Kelly*, 808 F.2d 549, 550-51 (7th Cir. 1986); *see also Carroll*, 110 F.3d at 294 (rejecting attorney's claim that court-imposed sanction violated his First Amendment rights); *Fuller v. Donahoo*, 33 F.3d 1378, 1994 WL 486931 at * (5th Cir. Aug. 10, 1994) (unpublished) (rejecting sanctioned party's argument that a letter cannot "be a basis for sanctions because the letter represents protected First Amendment activity," and explaining that "there is no First Amendment exception to a Rule 11 violation."); *In re Gleason*, 492 F. App'x 86, 88-89 (11th Cir. 2012) (unpublished) (rejecting claim by suspended attorney that judicially-imposed sanction violated his First Amendment right to free speech).

Plaintiffs present a handful of additional scattershot objections to the district court's Rule 11 order. The opening brief makes a series of confusing references to the "*Abramson* factors," [BIC 53, 55] presumably the two-step process articulated in *Adamson* [*v. Bowen*], 855 F.2d at 672, [Aplt. App. 3-4] and incorrectly states that the district court failed to consider those factors.[14] Plaintiffs claim, again

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14 As the district court noted, Adamson held simply that "the award of Rule 11 sanctions involves two steps"; first, the court must find that a pleading violates Rule 11, and second, the court

inaccurately, that their attorney was denied due process because "[n]o hearing as to [attorney] Dunn'[s] motivations was held, nor discovery had." [BIC 54] The district court held a hearing on Judicial Defendants' Rule 11 motion, at which Plaintiffs' counsel argued at length, and Plaintiffs were on notice well in advance of that hearing that among other arguments for the imposition of sanctions, Judicial Defendants had argued that counsel was motivated by media relations goals rather than the advancement of plausible legal claims in initiating the underlying action. [Aplt. App. 446 (explaining that Plaintiffs did not file the underlying lawsuit "with any colorable prospect of obtaining a ruling in their favor"), 454-55] The imposition of Rule 11 sanctions requires notice and an opportunity to be heard, not serial hearings on every separate issue contained in a Rule 11 motion or extensive additional proceedings. *See Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1160 (10th Cir. 1991) ("The opportunity to fully brief the issue is sufficient to satisfy due process requirements.") (quoting *White*, 908 F.2d at 686 (internal quotation marks omitted)); *G.J.B. & Assocs., Inc. v. Singleton*, 913 F.2d 824, 830 (10th Cir. 1990) (oral or evidentiary hearing not required in determining whether Rule 11 sanctions are warranted). Plaintiffs' counsel received the process to which he was entitled prior to the district court's imposition of sanctions.

CONCLUSION

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imposes an appropriate sanction. The district court's Rule 11 order self-evidently considers both of those components of a Rule 11 analysis. [Aplt. App. 680-94]

For all of the foregoing reasons, Judicial Defendants respectfully request that the district court's orders granting Judicial Defendants' motion to dismiss, denying Plaintiffs' motion to amend, and granting Judicial Defendants' motion for Rule 11 sanctions be affirmed in all respects.

Respectfully Submitted,

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STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Judicial Defendants do not request oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007/2010 in 14-point Times New Roman. This brief complies with the type- volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by the Court's order of June 26, 2018, because it contains 14,669 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

In accordance with the court's CM/ECF User's Manual, I hereby certify that all required privacy redactions have been made. In addition, I certify that the hard copies of this pleading that may be required to be submitted to the court are exact copies of the ECF filing, and the ECF submission has been scanned for viruses with the most recent version of Webroot SecureAnywhere, last updated on July 23, 2018 and, according to the program, is free of viruses.

CERTIFICATE OF SERVICE

On August 8, 2018, I filed the foregoing document through the Court's CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Ari Biernoff

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DARLENE COLLINS, *et al.*,	)	
Appellants,	)	No. 1:17 Consolidated with 18-2045
v.	)	
DANIELS, et al.	)	
Appellees.	)	

On Appeal from the United States District Court for the District of New Mexico The Honorable Robert Junell
Case No. 1:17-cv-00776

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Plaintiffs-Appellants Darlene Collins et al., ("Collins") hereby file this Reply to the Answer Briefs of the Appellees.

I. INTRODUCTION

The posture of this civil rights case is unique. In a case of first impression in this Circuit, Collins asserts claims of violation of constitutional rights against the New Mexico Supreme Court and its Justices, and the lower court responsible for implementing the bail scheme that violated Ms. Collins' constitutional rights. Unless otherwise specifically noted, the Appellees will simply be referred to as the New Mexico Supreme Court. Collins readily concedes that it is extraordinary for a state supreme court be a proper defendant in a civil rights case. However, as shown in *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980), a state supreme court can be a proper defendant when it acts extra-judicially, as the New Mexico Supreme Court acted here.

Until recently, and for more than a century, every State in the United States, afforded newly arrested criminal defendants the right to post bail using some form of financial surety.[1] In 2017, two States dramatically altered their approach to bail, effectively eliminating in most instances the option of posting monetary bail.

The State of New Jersey virtually eliminated monetary bail through state constitutional amendment and implementing legislation. A group of plaintiffs and attorneys, headed up by Paul Clement, former Solicitor

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1 Hereinafter generally: "monetary bail."

General of the United States, brought nearly identical constitutional challenges as are at issue in this case, seeking to strike down the New Jersey bail scheme. On the day Collins filed her Opening Brief (July 9, 2018), the Third Circuit rejected those challenges. *Holland v. Rosen*, 895 F.3d 272 (3d Cir. 2018).

The New Mexico Supreme Court in its Answer Brief, not surprisingly, relies heavily on *Holland*. A careful analysis of that opinion, however, reveals its flaws and inconsistencies. Moreover, *Holland* relied heavily on the fact that the lead plaintiff in that case was properly subject to non-monetary restraints because of his danger to the community, and the fact that he waived various procedural protections in place.

Collins's case is different and much stronger. Ms. Collins is not and was not dangerous at the time of arrest. She did not waive her procedural rights as did Mr. Holland, and she suffered physical harm due to being denied monetary bail while the procedures for determining her conditions for release worked their way through the court system.

This Court should decline to follow the Third Circuit or find the *Holland* opinion distinguishable. This Court should also reject the Rule 11 sanctions on trial counsel A. Blair Dunn. As the briefing in this appeal demonstrates, the constitutional claims at issue here are very far from frivolous.

II. This Court Should Hold That There is a Right to Monetary Bail or At Least Allow Further Development on This Issue in the Trial Court

A. The New Mexico Supreme Court's Attempt to Deflect Collins' Argument on This Point Should be Rejected

The New Mexico Supreme Court goes to great lengths to assert that Collins has not properly appealed the trial court's mis-application of *United States v. Salerno*, 481 U.S. 739 (1987) in holding that Collins failed to establish a constitutional right to monetary bail. *Answer Br.* at 9-10. With all due respect, this Court should swiftly reject any such assertion. Collins clearly challenges this part of the trial court's opinion. *See, e.g., Opening Br.* at 10 ("The 2017 Rules changed substantive rights by removing the ability of New Mexicans, such as Collins, to avoid the life-threatening pre-incarceration by eliminating the option of a jailhouse bond."); 11 ("the 2017 Rules mandate that courts impose *any and all combination of non-monetary conditions* to ensure the defendant's future appearance and protect the community *before ever considering monetary bail*.") (emphasis in original); 12 ("Under the century-old prevailing system, Ms. Collins would have had the option to post a jailhouse bond through professional bondsmen, avoiding incarceration of several days that nearly cost her life and cost taxpayers significant medical expenses. Monetary bail – stopped by the 2017 Rules – would have allowed Collins to enjoy full pretrial liberties *and* ensure her court appearance.") (emphasis in original); 13 ("here, the [New Mexico] Supreme Court has changed substantive rights and public policy, by determining that ***any*** monetary bail is inappropriate if some or all personal liberties can be curtailed instead. The New Mexico Supreme Court Defendants have made a personal judgment call, that monetary bails is always inappropriate, while taking away individuals' liberty interests.")(emphasis in original); *id.* ("Monetary bail has been the mechanism for preserving the 'traditional

right to freedom before conviction.'" (quoting *Stack v. Boyle*, 342 U.S. 1 at 4 (1951).").[2]

B. Collins' Eighth Amendment Right to Monetary Bail Was Denied Her

The New Mexico Supreme Court does not offer much analysis in defense of its Eighth Amendment arguments beyond its procedural/waiver arguments and its reliance upon *Holland*. Given that, and especially given that *Holland* represents an important opinion addressing the subject matter of this case from a sister Circuit, this Reply will focus on *Holland* and address which aspects of *Holland* this Court should follow and which aspects it should distinguish or reject.

The *Holland* court provides a very lengthy historical analysis of the right of bail and how it was incorporated into our Bill of Rights. The *Holland* court describes early history on bail as providing for a "personal surety system." While the court distinguishes that "personal surety system" with "corporate sureties of today," *see Holland* 895 F.3d at 288-89, the *Holland* court does not explain how "corporate sureties" are different for Eighth Amendment purposes. The important point for Eighth Amendment purposes was that at the time the Eighth Amendment was adopted, monetary bail was the norm.

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2 The New Mexico Supreme Court also appears to assert that Collins never properly raised her Eighth Amendment challenge in the trial court. This assertion is not well taken. See Order Granting Defendants' Motion to Dismiss at 19-20 [App. 639-40] ("Plaintiffs claim the New Mexico Supreme Court 'may not ... restrict the liberty of presumptively innocent defendants without offering the one alternative to substantial pre-trial deprivations that the Constitution expressly protects – monetary bail.'").

The *Holland* court noted that prior to adoption of the Eighth Amendment, American colonies' laws provided bail by providing "sufficient sureties," *id.* at 289 (referencing the Province of New Jersey), as did the Northwest Ordinance. *Id.* And, in this context, "numerous colonies" "prohibited excessive bail." *Id.*

The *Holland* court, however, tries to limit these historical facts to the context of the "early personal surety bail system" and rejects the argument that monetary bail as contemplated by the Eighth Amendment should be interpreted in a broader context:

> 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 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.

Id. at 290. Limiting the scope of monetary bail in such a fashion is unjustifiably narrow, especially in the context of considering whether it violates the Eighth

Amendment to effectively deny any form of monetary bail.

It is important to note that the Supreme Court addressed and rejected the personal surety versus commercial surety distinction in *Leary v. United States*, 224 U.S. 567 (1912). This is explained at length by Yale Law School Professor Daniel Freed in his testimony regarding the first iteration of the Bail Reform Act. *Bail Reform Act 1981-82: Hearing on H.R. 3006, H.R. 4264, and H.R. 4362 Before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 97th Cong., at 99-107 (1981) (statement of Prof. Daniel Freed, Yale Law School). *See especially id.* at 104-05 ("I think the Supreme Court undoubtedly ruled the way it did not only because of its notions about contracts in 1912 but also because it felt that bail was too important as a liberalizing institution in enabling release of persons prior to trial to invalidate it and put it all back on the idea of personal surety.").

The new New Jersey and New Mexico bail schemes essentially abolish monetary bail. In its place, both States use the so-called Arnold Tool that subjects citizens to days of incarceration while the "tool" is applied to profile a particular defendant. *Id.* at 281-82. The court describes the array of procedures that make up the new New Jersey bail system, including a pre-trial detention hearing, the right to counsel, the right to cross-examine witnesses, and the right to subpoena and call the State's witnesses. *Id.* What is clearly missing is ***any*** meaningful ability to avoid all of the procedures to be released promptly from custody upon posting of monetary bail.

In Collins' case, prior to the 2017 Rules, she would have been able to post monetary bail and be promptly released. As a result of the new New Mexico

Bail Scheme as relfected in the 2017 Rules, she was needlessly incarcerated for four days – incarceration that nearly cost her her life.

The *Holland* court found instructive the definition of "bail":

> "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 prioner ***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."

Id. at 290 (emphasis added) (quoting Webster's Third New Int'l Dictionary (1971)). Four of the five definitions provide that monetary bail ***is*** bail. The *Holland* court unaccountably ignores this fact and focuses solely on the fifth definition: "The last iteration is how we often think of bail colloquially: a means of achieving pretrial release from custody conditioned on adequate assurances." *Id.*

There are two problems with this part of the *Holland* court's analysis. First, it patently and transparently ignores the major thrust of the definition of bail: "bail" necessarily assumes some monetary

component. The second problem is that the *Holland* court entirely reads out of the Eighth Amendment the word "excessive." No one can legitimately question that monetary bail can be "excessive." But it is a much bigger reach in logic to envision "excessive" as referring to "adequate assurances." Moreover, the fifth definition, relied upon by the *Holland* court, would appear to merely describe the process that encompasses the first four definitions that all encompass that "bail" contemplates "monetary bail" in some form.

The Third Circuit's work in *Holland* offers this Court an important starting point for considering the constitutional issues in this case – but only that. The Third Circuit showed its work in how it came to its conclusions, but the error in those conclusions is patent. The choice is not as the Third Circuit framed it between corporate sureties and personal surities; it is, rather, the choice between immediate release using monetary bail and being subjected to detention for precious days in a person's life while the so-called Arnold Tool is implemented.

Collins respectfully submits that the Framers' prohibition of "excessive bail" under the Eighth Amendment necessarily contemplates the right to post monetary bail in some form. *See Opening Brief* at 13-16. Accordingly, a newly minted bail scheme that effectively abolishes this right violates the Eighth Amendment. Collins also respectfully submits that the facts of her particular situation should be fleshed out at trial, or at least through the summary judgment phase, to develop a more adequate factual record upon which to assess the degree to which the denial of monetary bail caused her constitutional harm.

III. Collins States a Valid Claim Under Both Substantive and Procedural Due Process

As it did in addressing the Eighth Amendment, the New Mexico Supreme Court relies heavily on procedural "preservation" arguments as well as *Holland* in opposing Collins' due process arguments. A review of the trial court's order of dismissal on the merits belies the first point, and a review of *Holland*, similar to the above, will address the second.

A. Substantive Due Process

A right is protected by substantive due process if it is "deeply rooted in this Nation's history and tradition," or "fundamental to our scheme of ordered liberty." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). Regarding the first prong, the *Holland* court rejected that the right to be free from incarceration by posting monetary bail implicated substantive due process primarily on the ground that monetary bail – in the manner in which the *Holland* court characterized it – was of relatively recent vintage. For reasons noted above, the *Holland* court's reliance on the recent vintage of commercial bail bonds is misplaced. Simply because monetary bail evolved, relying more on less-personal commercial sureties, *see* 895 F.3d at 294, should be irrelevant for Eighth Amendment purposes. The Third Circuit simply missed the monetary bail forrest while examining the various types of monetary bail trees. The key fact is that monetary bail itself is deeply rooted in this Nation's history and tradition.[3]

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3 It is remarkable that the Holland court concludes at it did and yet cites law review articles that provide a detailed historical

The fact that certain facets of the commercial bail bonding industry faced issues or were regulated, *see Holland*, 895 F.3d at 295, does not negate the broader point that monetary bail itself has deep historical roots, as noted earlier in the *Holland* opinion and as discussed above.

The New Mexico Supreme Court's attempt to address key precedent in the Opening Brief is unavailing. The New Mexico Supreme Court concedes that *Schilb v. Kuebel*, 404 U.S. 357, (1971) opines that bail is "basic to our system of law,"[4] *see Answer Brief* at 19, but in a use of quotations and citation that is difficult to follow, the court suggests that *Schilb* is unrelated to the fundamental right of bail. The New Mexico Supreme Court also concedes that *United States v. Barber*, 140 U.S. 164, (1891) opines that bail is

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analysis that document, beyond question, support for the proposition that the Eighth Amendment does contemplate an underlying right to bail in the first instance and monetary bail was at the time of adoption, and today, an essential feature of bail. See, e.g., Caleb Foote, Coming Constitutional Crisis in Bail, 113 U. Pa. L. Rev 959 (1965) (cited in Holland, 895 F.3d at 290); id. at 987 ("my conclusion that the excessive bail clause was meant to provide a constitutional right to bail"); 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, 267 (1993)("For most of this country's history, pretrial release conditions were almost exclusively defined in financial terms, i.e., the amount of 'bail' a defendant or his surety was required to pledge to assure appearance in court.") (Holland, 895 F.3d at 289).

4 See Schilb, 404 U.S. at 365 ("Bail, of course, is basic to our system of law…and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment")

a "constitutional privilege,"[5] but states (with an argument that is of little persuasive quality in the context of an historical analysis) that Collins "ignore[s] the inconvenient fact that that description has not been adopted by other courts over the last 120 years." *Id.*

The New Mexico Supreme Court states that *Broussard v. Parish of Orleans*, 318 F.3d 644, 657 (5th Cir. 2003), "rejected the claim that access to bail implicates fundamental rights under a substantive due process analysis." *Id.* at 18-19. What the Fifth Circuit did in that case was indicate that certain bail-related ***fees*** did not implicate a fundamental right. *See id.* ("these fees do *not* implicate fundamental rights")(emphasis in original). The right to be free of pretrial detention through access to monetary bail is "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767.

As for the "fundamental to our scheme of ordered liberty" prong, as noted in Collins's *Opening Brief*, freedom pending adjudication of guilt is fundamental to the principle of innocent until proven guilty, and freedom pending trial substantially advances an accused's ability to mount a proper defense. *See Opening Br.* at 24. The New Mexico Supreme Court's response to this prong appears to be subsumed in the arguments noted above and unavailing for the same reasons.

As for *Holland*, the court concedes that being free on bail serves the presumption of innocence and

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5 Barber, 140 U.S. at 167 (describing bail in monetary terms and noting that defendants are "[p]resumptively ... innocent of the crimecharged, and entitled to their constitutional privilege of being admitted to bail").

mounting a proper defense, but rejects the argument that is based upon these principles on the ground that the "type" of monetary bail sought by the defendant in that case somehow is not worthy of recognition as "fundamental." *See id.* at 296 ("To be sure, 'bail constitutes a fundament of liberty underpinning our criminal proceedings, but we cannot say the same of Holland's requested forms of monetary relief." (quoting *Sistrunk v. Lyons*, 646 F.2d 64, 70 (3d Cir. 1981). The *Holland* court then dismisses monetary bail with the observation that monetary bail "came at a cost: criminal defendants who were unable to post or pay even most sums to secure their release were kept in jail." *Holland*, 895 P.3d at 296.

Collins does not challenge what in effect is a portion of the 2017 Rules designed to allow persons who cannot afford monetary bail an alternative way of securing their freedom without posting monetary bail. That is a salutory development. But this facet of the 2017 Rules does not justify deprivation of the right to post monetary bail as Ms. Collins sought to do in this case.

The *Holland* court was clearly motivated by the fact that under the new rules in New Jersey, more persons who couldn't afford posting monetary bail were able to secure pretrial release. *See, e.g.*, *Holland*, 895 P.3d at 283 ("Overall, the State's pretrial jail population was reduced by 20%."). But this most salutory result can be accomplished by simply making the new bail system rules in addition to, as opposed to in lieu of, monetary bail. Monetary bail – that affords an accused the right to a prompt release pending trial without having to be subjected to some days-long assessment – is unquestionably "fundamental to our scheme of ordered liberty."

B. Procedural Due Process

The New Mexico Supreme Court adds little beyond *Holland* to defend against Collins' procedural due process claims. All three tests under *Mathews v. Eldridge*, 424 U.S. 319 (1976) tip Collins's way. The private interest involved is freedom from pretrial detention, a fundamental right of constitutional proportion as noted above. The risk of an erroneous deprivation is great. While the belabored application of the Arnold Tool admittedly gives rise to detailed process and procedures designed to reach the "right" result on conditions of pretrial release (a major factor for the *Holland* court, *see* 895 P.3d at 298-99), they do nothing to address the deprivation of liberty for the days it takes to apply the tool and follow the required process. For the time it takes to effectuate the tool, for citizens like Ms. Collins, there is no risk of an erroneous deprivation; rather, it is a certainty. Lastly, there is virtually ***no cost or additional burden to the State of New Mexico*** for affording citizens like Ms. Collins the option citizens have enjoyed historically of posting monetary bail in lieu of pursuing the Arnold Tool route.[6]

IV. Fourth Amendment

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6 On this last part of the Mathews test, the Holland court was moved by the fact that the Arnold Tool route also had the additional benefit of addressing danger to the community. There is no evidence that Ms. Collins posed any type of danger to the community. The court also referred to persons unable to post monetary bail. As noted above, this is not a valid argument because the Arnold Tool approach can be in addition to rather than in lieu of monetary bail.

Collins withdraws her appeal based upon the Fourth Amendment.

V. The New Mexico Supreme Court Violated New Mexico's Separation of Powers by Adopting the 2017 Rules

This case comes to this Court in a unique posture. Here, the New Mexico Supreme Court is the proper defendant because it is directly responsible for the constitutional violations at issue. It is the proper defendant not only because it adopted the 2017 Rules that caused the constitutional deprivations discussed above, but also because in doing so it acted ultra vires in a manner that violates New Mexico law – underscoring why the New Mexico Supreme Court is not cloaked with immunity here and why the New Mexico state legislators are proper plaintiffs.

As noted by the trial court in dismissing Collins' separation of powers claim, New Mexico law expressly prohibits the New Mexico Supreme Court from abridging, enlarging or modifying substantive rights of any litigant:

> The supreme court of New Mexico shall, by rules promulgated by it from time to time, regulate pleadings, practice and procedure in judicial proceedings in all courts of New Mexico for the purpose of simplifying and promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant.

NMSA § 38-1-1. See App. 649. There is no question that the New Mexico Supreme Court has adbridged and modified the substantive rights of Collins and citizens like her.

The New Mexico Supreme Court cites to a number of cases for the proposition that federal courts should not involve themselves with separation-`of-powers questions between branches of state government. But here, there is no other way to vindicate the constitutional rights of New Mexico citizens to not be subjected to the deprivations caused by the New Mexico Supreme Court that also violate state law. Does anyone really believe the New Mexico Supreme Court could in any way fairly address this issue? In none of the cases cited by the New Mexico Supreme Court is a state supreme court the alleged violator of separation of powers.[7] And, as noted below dealing with immunity and legislator standing, this claim is significant for reasons going beyond the fact that the New Mexico Supreme Court clearly violated NMSA § 38-1-1.

VI. The New Mexico Supreme Court Enjoys Neither Judicial or Legislative Immunity And Unquestionably Is the Proper Defendant Here[8]

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7 Chromiak v. Field, 406 F.2d 502, 505 (9th Cir. 1969) involved a court but it was a state court allegedly misapplying state law in a habeas case (and violating the habeas petitioner's constitutional rights in the process); it is not remotely analogous to this case.

8 Not surprisingly, the New Mexico Supreme Court yet again asserts that Collins waived its arguments on immunity. Immunity is listed in the Statement of Issues and briefed at length at pages 44 through 50 of the Opening Brief. The principal briefing on this issue is included in that section of the brief given word limitations

Collins is mindful of the optics of bringing a case against the New Mexico Supreme Court. As discussed more fully below in addressing the First Amendment claim Collins sought to add in the amended complaint, there have been consequences for trial counsel in bringing this case. This is the rare case where a state supreme court is a proper defendant in a civil rights case.

A fundamental question surrounding the propriety of bringing a case against the New Mexico Supreme Court involves the validity of the claims themselves – as obvious from the briefing below, the trial courts' rulings (especially imposing Rule 11 sanctions), and the briefing on behalf of the New Mexico Supreme Court in this Court. However, the claims against the New Mexico Supreme Court are far from frivolous.

As discussed in the *Opening Brief*, the voters of New Mexico approved a constitutional amendment to the provision of the New Mexico Constitution guaranteeing a state constitutional right to bail. The central feature of the amendment was to expand the right to bail to persons without the financial ability to post monetary bail.[9] *See Opening Br.* at 8-9.

One or more justices of the New Mexico Supreme Court then lobbied for legislation that would have implemented the Arnold Tool. These efforts were rejected by the New Mexico Legislature. Undeterred, the New Mexico Supreme Court, by rule, adopted the

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and that this was one of the two principal bases upon which the trial court found Rule 11 sanctions applicable.

9 Please note the discussion above about providing for non-monetary means of securing pre-trial release in addition to, rather than in lieu of, monetary bail.

new Ballot Scheme reflected in the 2017 Rules that effectively abolishes monetary bail and relies upon the Arnold Tool. Collins respectfully submits that this action violated NMSA § 38-1-1 and deprived her and other citizens of the State of New Mexico of their constitutional rights. Such conduct, Collins submits, went beyond the New Mexico Supreme Court's traditional role as the highest court of the State, violated New Mexico law, and properly subjected the New Mexico Supreme Court to the claims at issue in this case.

In addressing the merits regarding immunity, the New Mexico Supreme Court starts by asserting that it is absolutely immune for its judicial acts. *Answer Br.* at 38. But there is no question that the New Mexico Supreme Court was not acting in its judicial capacity as it fashioned and implemented the 2017 Rules. The New Mexico Supreme Court then hedges its bets and proceeds to assert that it also enjoys "absolute legislative immunity." *Id.* at 39. It then goes on to state that one of the key cases upon which Collins relied in this context, *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980), has "no application whatsoever to this case." *Answer Br.* at 42.

Regarding legislative immunity, the New Mexico Supreme Court fails to acknowledge in this context that Collins alleges that in enacting the 2017 Rules, the court violated NMSA § 38-1-1 by effecting a substantive change in the law rather than promulgating procedural rules governing New Mexico courts and procedures. As for *Supreme Court of Virginia*, the inescapable fact is that it establishes beyond question that a state supreme court can be subject to suit in federal court when judicial immunity is not at issue. Collins acknowledged in the *Opening Brief*, and does

here, that the holding in *Supreme Court of Virginia* is that the Virginia Supreme Court was subject to declaratory relief, injunctive relief and a claim for attorneys' fees, but not monetary damages. But as explained in the *Opening Brief*, as for money damages, "there is an objectively colorable question to be decided by this Court" on whether money damages can be sought under the facts in this case – especially in light of the violation of NMSA § 38-1-1, the decision in *Supreme Court of Virginia*, and the dissent in *Mireless v. Waco*, 502 U.S. 9 (1991) – authorities wholly ignored by the New Mexico Supreme Court. *See Opening Br.* at 46-50. Regardless, there is no question that the New Mexico Supreme Court is a proper party in this case, regardless of whether ultimately it can be subjected to money damages.[10]

VII. Bail Bond Association and Legislator Standing

First Party Associational Standing of Bail Bond Association of N.M.

The New Mexico Supreme Court appears to take no issue with associational standing of the Bail Bond Association of New Mexico (BBANM) pursuant to *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333 (1977). Rather, the court focuses on the rights of BBANM's members to bring the claims at issue here, arguing, as the trial court decided, that BBANM's members are not asserting a violation of their

10 Upon review of the Board of County Commissioners' Answer Brief, Collins withdraws her appeal as to the Board.

constitutional rights but rather the rights of their prospective customers such as Collins.

First, the New Mexico Supreme Court makes no attempt to respond to Collins' reliance in her Opening Brief on *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925). *See id.* at 535 ("Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees ...) But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action."). Second, as the New Mexico Supreme Court acknowledges, Collins' claims include one "that Judicial Defendants violated separation-of-powers principles in promulgating the 2017 Rules." *Answer Brief* at 26. BBANM has first party standing to challenge a violation of NMSA § 38-1-1 that will likely cause collapse of the bail bond industry in New Mexico if not corrected by this case.

Third-Party Standing of BBANM

Third-party standing is recognized in this Circuit under *Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006)(approving third-party standing in patient physician context). The New Mexico Supreme Court relies upon the *Holland* court's decision denying third-party standing to the bail bonding company at issue in that case, which, in turn, relied upon *Kowalski v. Tesmer*, 543 U.S. 125 (2004) (rejecting second "close relationship" and third "obstacles" prongs of third-

party standing test as to attorneys seeking to represent interests of indigent clients). With all due respect, this Court should follow *Aid for Women* and decline to follow *Holland* and its reliance upon *Kowalski*.

First of all, it is important to note that the trial court readily conceded the first prong, injury to BBANM. Second, third-party standing is a prudential test, not a jurisdictional one. Third, under *Aid for Women*, the importance of the second "close-relationship" prong of the test is to make sure that the entity asserting third party standing will do so with the necessary expertise and adversarial zeal. *See id.* 441 F.3d at 1113 ("The concern behind the 'close relationship' prong is whether 'the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal.'"; citation omitted). There is no question that BBANM will more than meet these requirements. Inter alia, the survival of the bail bonding industry in New Mexico may well depend upon succeeding in this case. Moreover, unlike the attorneys at issue in *Kowalski* that unquestionably performed legal work for a broad spectrum of clients beyond those sought to be represented in that case, for many if not most of BBANM's members, underwriting monetary bail is all of their business. In this respect, the relationship here is much closer to the physician/patient relationship in *Aid for Women* than the hypothetical potential relationship at issue in *Kowalski*.

Fourth, potential bail recipients like Ms. Collins face "genuine obstacles." This Circuit noted in *Aid for Women* the obstacles faced need not rise to level of an actual bar to the courthouse door. In that case, deterrence caused by privacy concerns related to sexual health were sufficient. Here, as noted in the

Opening Brief: "Criminal defendants burdened by house arrest, 24-hour monitoring, and the need to prepare for their criminal trial plainly 'face obstacles to pursuing litigation themselves.'" *Opening Br.* at 33-34. (citing *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs.*, 280 F.3d 278, 290 (3d Cir. 2002)). In addition, with all due respect to the Third Circuit in *Holland*, that court discounted far too much the fact that Mr. Holland's claims were brought in the first instance with the help of the bail company at issue there. Here, similarly, Ms. Collins benefitted greatly by the assistance of BBANM.

In short, this Court should recognize BBANM's third-party standing.

Legislator Standing

Collins' claim for legislator standing is premised on the New Mexico Supreme Court's "complete usurpation of power in violation of the separation of powers. ..." *Opening Br.* at 36. Unlike in any of the other cases cited by the New Mexico Supreme Court, including especially *Kerr v. Hickenlooper*, 824 F.3d 1207 (10th Cir. 2016)(denying individual legislator standing to challenge Colorado's anti-tax TABOR amendment) (relied upon by the trial court below), here there is a specific separation of powers component. In cases like *Kerr*, members of the legislature seek to challenge some action or law with which they disagree. In this case, however, one body of state government, the New Mexico Supreme Court, took action violating the substantive constitutional rights of New Mexico citizens, all the while purporting to exercise "legislative" power when the New Mexico Constitution

and NMSA § 38- 1-1 expressly prohibit the New Mexico Supreme Court from doing so.

Given the separation-of-powers component of this Case, the fact that the branch of state government violating separation of powers is the judiciary, and in light of the discussion of the separation of powers claim, above, this case is *sui generis*. Accordingly, this Court should hold that the legislator plaintiffs have standing to challenge the New Mexico Supreme Court's violation of separation of powers and fully ligitate this violation's impact on Collins' claims.

VIII. Amendment of the Complaint Should Have Been Granted

The New Mexico Supreme Court's response is based almost entirely on the fact that the proposed First Amendment claim to be added by the amendment is futile because the First Amendment offers no defense to Rule 11 sanctions, and Rule 11 sanctions were properly awarded in this case. Because Rule 11 sanctions should not have been awarded, this claim should be reconsidered on remand when this Court reverses the Rule 11 sanction award.

IX. At the Barest Minimum, This Court Should Reverse the Rule 11 Sanctions Award

Both the New Mexico Supreme Court in response and the trial court below assert that "claims" that are frivolous can be subject to sanction, and, Rule 11 sanctions can be awarded even if some "claims" are not frivolous.

The trial court awarded sanctions on three ***bases***: (1) no standing by either BBANM or the

legislator plaintiffs; (2) alleged "claims" for money damages when the "Judicial Defendants" enjoy immunity; and (3) "to deter Plaintiffs' counsel from filing unsupportable lawsuits for political reasons." There are a host of reasons why the Rule 11 sanctions award should be reversed.

First, as hopefully apparent from the *Opening Brief* and this *Reply*, no claim is frivolous. It should be noted that the original complaint contained only three claims: Eighth Amendment; Due Process and Fourth Amendment. See App. 040-046. None of these claims is frivolous, and the trial court also expressly found the constitutional claims were not frivolous. App. 671.

Second, the "claim" for money damages is not in any way shape, size or form a "claim." The cases relied upon by the New Mexico Supreme Court and the trial court below deal with actual claims brought and dismissed as frivolous against government entities enjoying immunity. As noted in the *Opening Brief* and above, there is no question that the New Mexico Supreme Court is a proper defendant. It does not and cannot enjoy immunity as a party – immunity as a party that essentially underlies the trial court's Rule 11 award. *See* App. 673-74.[11] Whether the ***relief*** of monetary damages is a proper relief, Collins submits, is an open question for reasons argued above, but it is not a "claim." Moreover, a review of the briefs suggests no extra burden on the New Mexico Supreme Court by defending against the monetary damages "claim"; the New Mexico Supreme Court argued below, as it does in this Court here, for absolute immunity as an entity, regardless of the form of relief sought. As detailed in

11 Recognizing the New Mexico Supreme Court as a proper defendant extinguishes a principal basis for Rule 11 sanctions.

the *Opening Brief* and here in *Reply*, the New Mexico Supreme Court is simply not immune from suit.

Third, as for standing, the trial court found that Ms. Collins had standing to bring the constitutional claims. App. 672. On this basis alone, the Rule 11 award should be reversed.

Fourth, for reasons detailed above, there are good faith arguments to support the standing of BBANM and the legislator plaintiffs. As for BBANM, it is important to note that the New Mexico Supreme Court never challenged representational standing; instead, it only challenged, in effect, the standing of its members to assert the claims at issue. In *Holland*, there was a detailed analysis of the third party standing of the bail bond company at issue. While the *Holland* court ultimately found that there was no standing by the bail bond company, there is not even the slightest hint that its claim for standing was in any way frivolous.

Fifth, as for the "unsupportable political reasons," there is ***no*** evidence in the record to support such "political reasons," which this Court can ascertain itself by looking at the record. *See Opening Br.* at 54-55 (discussing all evidence in the record). The New Mexico Supreme Court appears to downplay the "political reasons" component of the Rule 11 award. *See Answer Br.* at 56 (It was only a "*single paragraph*"; it was merely "an additional fact further supporting the court's determination that some of Plaintiff's claims were sufficiently frivolous"). Collins respectfully submits that the improper purpose/"unsupportable political reasons" component of the trial court's Rule 11 order was a major reason underlying the award, but it has ***no*** support in the record, as the New Mexico Supreme Court's response effectively demonstrates.

Even giving credence to the New Mexico Supreme Court's argument here, this point is inextricably tied with whether the constitutional claims at issue are frivolous. *See Answer Br.* at 57-58. Because they are clearly not, this basis for the Rule 11 award evaporates as well.

At the barest minimum, the Rule 11 sanctions should be reversed.

CONCLUSION

For the foregoing reasons, the trial court's dismissal should be reversed, and, except for the Rule 11 sanctions ruling, remanded for further proceedings.

Dated this 4th day of September 2018.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants believe that oral argument would materially assist this Court in the determination of this appeal. Accordingly, they request oral argument.

FED. R. APP. P. 32(A)(7)(C) CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this reply brief is proportionally spaced and contains 6,500 words. I relied on Microsoft Word 2013 to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: *s/Peter J. Krumholz*

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018 a true and correct copy of the foregoing Reply Brief was served via the Tenth's Circuit's ECF System, causing each counsel of record to be served.

ECF Submission: undersigned certifies that this ECF submission is an exact duplicate of the seven hard copies delivered to the clerk's officer pursuant to 10th Cir. R. 31.5.

s/Peter Krumholz
Peter Krumholz

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that the copy of the foregoing Opening Brief submitted in digital form via the Court's ECF system is an exact copy of the written document filed with the Clerk. I further certify that all required privacy redactions have been made and that this brief has been scanned for viruses using Microsoft Windows Defendant Antivirus version: 1.263.1946.0 updated March 15, 2008 and, according to this program, is free of viruses.

/s/ A. Blair Dunn
A. Blair Dunn, Esq.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 17-2217
Consolidated with 18-2045

DARLENE COLLINS, *et al.*,
Plaintiffs-Appellants,

v.

DANIELS, *et al.*,
Defendants-Appellee

On Appeal from the United States District Court For the District of New Mexico (Hon. Robert Junell)
District Case No. 1:17-cv-00776

APPELLANTS' PETITION FOR REHEARING EN BANC

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Dated: March 11, 2019

RULE 35(B)(1) STATEMENT CONCERNING EN BANC CONSIDERATION

I express a belief, based on reasoned and studied professional judgment, that the Panel's decision (i) conflicts with existing United States Supreme Court case law and Tenth Circuit precedent, and (ii) is contrary to the underlying policies and protections provided for in Fed. R. Civ. Pro., Rule 11. The issue involves a question of exceptional importance warranting consideration by the Court *en banc*, because if allowed to stand, the Panel's published decision strikes at the very heart of the rights of speech and petition protected by the First Amendment, as well excuses the New Mexico judiciary from accountability for non-adjudicatory conduct that contravenes the decision of the United States Supreme Court in *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (citing *Forrester v. White*, 484 U.S. 219, 227-29 (1988); *Stump v. Sparkman*, 435 U.S. 349, 360 (1978)). Further, the Panel's published decision incorrectly harms the ability to petition the courts for redress by incorrectly limiting standing, especially with regard to this Circuit's decision in *Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006).

/s/ Richard A Westfall
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STATEMENT OF THE ISSUES

1. Did the Panel err in affirming the sanctioning of one attorney even though that attorney was only one of the lawyers signing pleadings and when colorable arguments regarding standing and immunities were repeatedly presented?

2. Did the Panel err in failing to recognize that there are not just colorable arguments regarding standing, but also erred ignoring other precedent to reach an incorrect conclusion?

3. Did the Panel err in affirming the district court's decision finding the Defendants are immune from suit?

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

This case arises from a challenge to the constitutionality of recent New Mexico Supreme Court Rules regarding pretrial release and detention in criminal proceedings adopted pursuant to New Mexico Supreme Court Order No. 17-8300- 005 effective July 1, 2017. ("2017 Rules"). Appellants are the Bail Bond Association of New Mexico (BBANM), three individual state Senators, one House of Representatives member, and Darlene Collins, a criminal defendant charged in New Mexico state court with aggravated assault and released on nonmonetary conditions by a Bernalillo County Metropolitan Court Judge, pending trial. Appellees are the New Mexico Supreme Court and its Justices, the Second Judicial District Court and its Chief Judge and Court Executive Officer, the Bernalillo

County Metropolitan Court and its former Chief Judge and Court Executive Officer, and the Board of County Commissioners of the County of Bernalillo.

Appellants allege that in drafting, passing and implementing the 2017 Rules, the New Mexico Supreme Court violated the Eighth Amendment's guarantee prohibiting excessive bail, and the Due Process Clause of the Fourteenth Amendment and that implementation of a pretrial release risk assessment tool in Bernalillo County (Arnold Tool) violates the Eighth Amendment by prioritizing nonmonetary conditions of release. Appellants sought relief, asking that the 2017 Rules be declared unconstitutional by the District Court, that the rule's application and enforcement be enjoined, and for an award of monetary damages against Appellees individually pursuant to 42 U.S.C. § 1983, and attorney's fees under 42 U.S.C. §1988.

Appellants timely appealed the District Court's order granting Defendants' Motions to Dismiss on December 21, 2017; as well as the District Court's order granting Judicial Defendants' Rule 11 Motion for Sanctions on March 26, 2018. The appeals were consolidated March 27, 2018. This Court issued its decision on February 25, 2019, affirming the district court's decisions on the Motions to Dismiss, and allowing for sanctions of one attorney for Plaintiffs, Mr. A. Blair Dunn.

INTRODUCTION

Understandably, in a case testing the balance between judicial independence and judicial accountability, the panel erred on the side of judicial independence, but that is a significant reason why this

case merits *en banc* review given the potential that the delicate balance may be upset by the Panel's decision. At a base level, this case is about the state judiciary of New Mexico exceeding the boundaries set for them in the New Mexico Constitution and by the New Mexico Legislature, to violate the substantive rights of New Mexicans protected by the United States Constitution. This lawsuit represents the most realistic avenue for New Mexico citizens (in the form of everyday citizens, citizen legislators and a long-standing citizen industry) to hold their judiciary accountable.[1]

The panel erred in insulating the New Mexico Judiciary on the basis of standing and immunity as noted by Thomas Jefferson:

> To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps ... and their power the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control. The Constitution has

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1 "This member of the Government was at first considered as the most harmless and helpless of all its organs. But it has proved that the power of declaring what the law is ... by sapping and mining slyly and without alarm the foundations of the Constitution, can do what open force would not dare to attempt." From Thomas Jefferson to Edward Livingston, 25 March 1825," Founders Online, National Archives, version of January 18, 2019. https://founders.archives.gov/documents/Jefferson/98-01-02-5077

> erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves.[2]

Moreover, this danger of an unaccountable judiciary is what Robert Yates writing as "Brutus" in *Anti-Federalist Papers No. 11* warned against:

> The real effect of this system of government, will therefore be brought home to the feelings of the people, through the medium of the judicial power. It is, moreover, of great importance, to examine with care the nature and extent of the judicial power, because those who are to be vested with it, are to be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications. The only causes for which they can be displaced, is, conviction of treason, bribery, and high crimes and misdemeanors. This part of the

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2 Letter from Thomas Jefferson to William C. Jarvis, 1820. Available at https://founders.archives.gov/documents/Jefferson/98-01-02-1540

> plan is so modelled, as to authorise the courts, not only to carry into execution the powers expressly given, but where these are wanting or ambiguously expressed, to supply what is wanting by their own decisions.
>
> …
>
> When the courts will have a precedent before them of a court which extended its jurisdiction in opposition to an act of the legislature, is it not to be expected that they will extend theirs, especially when there is nothing in the constitution expressly against it? and they are authorised to construe its meaning, and are not under any control? This power in the judicial, will enable them to mould the government, into almost any shape they please.

Robert Yates, "Essay No. 11," *Anti-federalist Papers*, first published in the *New York Journal*, March 20, 1788. Available at www.constitution.org.

The Panel erred by affirming sanctions against one of the attorneys involved by ignoring colorable arguments regarding standing and immunities to excuse the New Mexico Judiciary from accountability. The Panel failed to give consideration or explanation in at least three major respects:

1. There is no explanation or analysis by the district court for how one attorney, inseparable from two other attorneys that signed the same pleadings regarding the standing of plaintiffs and regarding the immunities of defendants, is different.

2. There are undoubtedly colorable arguments regarding standing.
3. The New Mexico Judiciary enjoys neither Judicial nor Legislative immunity in this particular instance based upon these specific facts.

ARGUMENT

I. The Panel erred in affirming that sanctions against one attorney, inseparable from the other attorneys signing the pleadings, when colorable arguments regarding standing and immunities were repeatedly presented was proper.

As is demonstrated below and extensively throughout the briefing, signed by all of the plaintiffs' counsel, Appellants had a well-researched objective basis for filing the litigation and including both the BBANM plaintiffs and the Legislator plaintiffs.

For instance, the Panel relies heavily on the failure of all Appellants' counsel to recognize *Kowalski v. Tesmer*, 543 U.S. 125 (2004) before joining the BBANM plaintiffs to the suit but provides no rationale as to why sanctioned counsel is solely responsible for not recognizing precedent that was never cited to by either the district court or the Appellees. Moreover, Appellants cited and distinguished *Kowalski* in their Reply Brief. *Reply Brief* at 20-21.

Likewise, the Panel upheld the concept that joining Legislator plaintiffs was done for improper or political purpose in clear violation of *Kerr v. Hickenlooper*, 824 F.3d 1207 (10th Cir. 2016) such that sanctioned counsel was again held solely responsible.

This holding was clearly in contravention of the clear protection of an attorney to advance arguments to extend, overturn or modify precedent. In fact, a political motivation is not a *de facto* disqualifier for advancing legislators as plaintiffs. Using Rule 11 as a stick to punish a singled-out attorney for attaching plaintiff legislators with a reasonable objective basis for participating in the litigation whether or not there is a political purpose is improper because "Rule 11 should not be used to discourage advocacy, including that which *challenges existing law*." *White v. Gen. Motors Corp.*, 908 F.2d 675, 683 (10th Cir. 1990). Appellants understand and accept that Rule 11 is designed to protect against frivolous filings, but many of the most important legal reforms have been achieved through the pursuit of litigation that depended on legal theories incompatible with existing precedent. Until legislative reforms began to make headway, most major civil rights victories were the result of petitions to the judiciary to reverse existing, and often longstanding, binding precedent. Appellants in this case advanced legal theories in good faith, cited to legal authority, and, advanced a theory of constitutional law that is not necessarily currently accepted, but that is colorable. Rule 11 Sanctions in such a setting are, in and of themselves, unconstitutional.

Undoubtedly, maintaining the independence of the judiciary is important; however, the Panel's decision misapplies precedent. The Second Circuit in agreement with the Fifth, Seventh, Ninth, and Tenth Circuits' approach has found that an improper purpose alone does not subject an attorney bringing a case to Rule 11 sanctions. *Sussman v. Bank of Israel*, *56 F.3d 450, 458-59 (*2nd Cir. 1995*), cert. denied sub nom. Bank of Ist. v. Lewin*, 516 U.S. 916 (1995). *See also Klein v.*

Wilson, Elser, Moskowitz, Edelman & Dicker (In re Highgate Equities, Ltd.), 279 F.3d 148, 154 (2nd Cir. 2002) (if a paper serves any legitimate purpose, it may not be the basis for sanctions under the improper purpose clause of Rule 11). The Second Circuit in *Sussman* held that:

> The district court held that the filing of the complaint with a view to exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity reflected an improper purpose. To the extent that a complaint is not held to lack foundation in law or fact, we disagree. It is not the role of Rule 11 to safeguard a defendant from public criticism that may result from the assertion of nonfrivolous claims. Further, unless such measures are needed to protect the integrity of the judicial system or a criminal defendant's right to a fair trial, a court's steps to deter attorneys from, or to punish them for, speaking to the press have serious First Amendment implications. Mere warnings by a party of its intention to assert non-frivolous claims, with the predictions of those claims' likely public reception, are not improper.

Sussman v. Bank of Israel, 56 F.3d 450, 458-59 (2nd Cir. 1995), cert. denied sub nom. Bank of Ist. v. Lewin, 516 U.S. 916 (1995). *See also City of Yonkers v. Otis Elevator Co.*, 649 F. Supp. 716, 736 (S.D.N.Y. 1986) (since argument was supported by colorable legal support, bad-faith motive did not justify Rule 11

sanctions), *aff'd*, 844 F.2d 42 (2nd Cir. 1988). There is nothing in the record to justify affirming sanctions against just one of the trial counsels brining this case. And, again, a political motivation is not, on its own, an improper purpose.

II. The Panel erred in failing to recognize that there are colorable arguments regarding standing.

The Panel relied heavily on *Kowalski* (rejecting second "close relationship" and third "obstacles" prongs of third-party standing test as to attorneys seeking to represent interests of indigent clients) to reach the conclusion that the BBANM plaintiffs did not have a basis for standing and that there was no objective basis for including them in the lawsuit in the first place. This decision is reached despite the fact that neither the district court nor the Appellees cite to *Kowalski*[3]. In fact, Appellants are the first to cite to and discuss *Kowalski* to instead distinguish that third-party standing is recognized in this Circuit under *Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006)(approving third-party standing in patient physician context) *Reply Brief* at 20-21. In this regard the Panel errs by ignoring this Circuit's precedent in *Aid for Women* and by failing to provide any rationale for why that case is not applicable here.

Additionally, as to the standing of BBANM plaintiffs, the Panel erred concerning the first party standing of BBANM plaintiffs on associational grounds

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3 Kowalski was relied upon by the Third Circuit in Holland v. Rosen, 895 F.3d 272 (3d Cir. 2018). It was handed down the same day the Opening Brief was filed in this case.

by incorrectly limiting their analysis to the fact that BBANM's members are not criminal defendants. These Plaintiffs however, cited precedent and supported the notion that Appellants were asserting first-party associational standing with regard to the destruction of their industry. This was supported by the precedent supplied to the Panel and disregarded without explanation of *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *see id.* at 535 ("Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees . ... But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action."). Second, the BBANM asserted first-party standing to challenge a violation of NMSA § 38-1-1 that caused the collapse of the bail bond industry in New Mexico if not corrected by this case. Appellants correctly pointed out to the Panel that citizens, such as BBANM's members, have a right to be protected from arbitrary action of government. The Due Process Clause is intended to protect citizens from arbitrary and oppressive exercise of power by the actions of government employees, that curtail a constitutional right. The United States Supreme Court in *Barry v. Barchi* opined as to the constitutionally protected property interest in engaging in one's chosen profession. *Barry v. Barchi*, 443 U.S. 55 (1979). BBANM Plaintiffs have both third and first party standing and the Panel erred by failing to recognize their standing.

Going yet further with respect to first-party standing the Panel erred in failing to recognize that the first-party standing of the Legislator plaintiffs was not derived from instutional injury but rather from the direct injury to the citizens of New Mexico of having one branch of government usurp the powers delegated exclusively to the Legislature. The Panel's reliance on *Kerr v. Hickenlooper*, 824 F.3d 1207 (10th Cir. 2016) is misplaced and this case presents a distinguishable situation warranting first impression review. Collins' claim for legislator standing is premised on the New Mexico Supreme Court's "complete usurpation of power in violation of the separation of powers. ..." *Opening Br.* at 36. Unlike in any of the other cases cited by the New Mexico Supreme Court or recognized by the Panel, including especially *Kerr v. Hickenlooper*, 824 F.3d 1207 (10th Cir. 2016)(denying individual legislator standing to challenge Colorado's anti-tax TABOR amendment) (relied upon by the trial court below), here there is a specific separation of powers component. The present case is distinguishable and should be treated differently than the situation in *Kerr* given the separation of powers component and the unavailability of any other adequate remedy to address a usurpation of power by the New Mexico Judiciary from the New Mexico Legislature. *See* Reply Brief at 22. The extra-judicial action of the New Mexico Judiciary, and the Panel's affirmance serves to cut off the New Mexico citizens' abilitity, including her citizen legislators, to seek review of the unconstitutional extra-judicial actions of her courts. This alone merits an *en banc* review at a minimum by this Court.

III. The Panel erred in affirming the district court's decision finding the Defendants are

immune from suit.

The New Mexico Judiciary does not enjoy judicial immunity for their non- adjudicatory acts under *Mireles v. Waco*, 502 U.S. 9 (1991) and they do not enjoy legislative immunity for actions taken outside of their delegated jurisdiction under *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 466 U.S. 719 (1980). As to judicial immunity, it is beyond argument that the actions complained of in this action fall well outside of the sphere for which the New Mexico Judiciary enjoy immunity. "A judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity." *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (citing *Forrester v. White*, 484 U.S. 219, 227-29 (1988); *Stump v. Sparkman*, 435 U.S. 349, 360 (1978)). This important legal principle was recently applied to bail in the context of suing members of the judiciary in *Schultz v. State*, Case No. 5:17-cv- 00270-MHH (N.D. Ala. 2018) wherein the district court there applied the guidance from the Eleventh Circuit that a court looks to the "nature and function" of the act, "not the propriety of the act itself, and consider[s] whether the nature and function of the particular act is judicial." *See* ECF Doc. 198 p. 13 (applying *McCullough v. Finley*, 907 F.3d 1324, 1331 (11th Cir. 2018). Under *McCullough*, a court should consider:

> the nature and functions of the alleged acts are judicial by considering four factors:
>
> > (1) the precise act complained of is a normal judicial function;
> > (2) the events involved occurred in the judge's chambers; (3) the

> controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity.

McCullough, 907 F.3d at 1331. In the present case the Panel erred by failing to recognize that the act of adopting procedural rules and entering into agreements to utilize the Arnold Tool were legislative or administrative in nature, not judicial. None of the conduct complained of fits within the *Mireles* definition of judicial conduct warranting absolute judicial immunity.

Further, the Panel erred by assuming that the New Mexico Legislature delegated legislative authority to the court to pass procedural rules that impacted the substantive rights of litigants appearing before the Courts. In fact, the opposite is true, as the New Mexico Legislature retains exclusive authority over laws and rules impacting the substantive rights of litigants appearing in front of the Courts under NMSA § 38-1-1.[4] The powers of the New Mexico Supreme Court are limited by the separation of powers provided for in the New Mexico Constitution and by NMSA § 38-1-1, which prohibits it from making any rule to "abridge, enlarge or modify the substantive rights of any litigant." The

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4 A. The supreme court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico for the purpose of simplifying and promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant.

NMSA 1978 § 38-1-1

Panel erred when it failed to give effect to the unique separation of powers limitations at issue in this case, as well as the prohibition codified by the Legislature that prevents the Courts from engaging in rulemaking activities that curtail or modify the substantive rights of citizens, and the Panel erred in affirming the district court in this regard. Read against the Supreme Court's guidance in *Supreme Court of Virginia v. Consumers Union of U.S., Inc.* the Panel erred in failing to recognize that if the New Mexico Supreme Court does not hold exclusive legislative jurisdiction (in this instance they hold no jurisdiction over rules affecting the substantive rights of litigants) then they are not entitled to legislative immunity. *Reply Brief* at 1,18.

CONCLUSION

In failing to recognize that the Appellees did not enjoy either judicial or legislative immunity, the Panel failed to address important constitutional questions meriting analysis and determination by the Circuit regarding the denial of monetary bail to New Mexico citizens. The failure to recognize standing of Appellants based upon the precedent of this Circuit cuts off the ability of the citizens of New Mexico to hold their judiciary accountable to the United States Constitution, the New Mexico Constitution and the duly adopted laws of the State of New Mexico. Judicial independence is of serious import, but it must be balanced against the citizens' ability to hold the judiciary accountable. The Panel's decision affirming the conduct of the New Mexico judiciary upsets that delicate balance and as such merits *en banc* review by this Court. At the barest minimum, *en banc* review is called for to overturn the sanctions award.

Dated this 11th day of March 2019.

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CERTIFICATE OF COMPLAINCE

Undersigned counsel certifies that Appellant's petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) and Fed. R. App. P. 40(b)(1) because it contains 3,515 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The petition also complies with Fed. R. App. P 35(b)(2)(B) regarding page limitation as it consists of less than 15 pages.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that the copy of the foregoing response submitted in digital form via the Court's ECF system is an exact copy of the written document filed with the Clerk.

I further certify that all required privacy redactions have been made and that this brief has been scanned for viruses with the Microsoft Windows Defendant Antivirus version: 1.263.1946.0 updated March 15, 2008 and, according to this program, is free of viruses.

Privacy redactions: no privacy redactions were required.

/s/ A. Blair Dunn, Esq.
A Blair Dunn, Esq.

CERTIFICATE OF SERVICE

I certify that on March 11, 2019, I filed Appellant's Petition for Rehearing En Banc through the United States Court of Appeals for the Tenth Circuit's ECF System, causing each counsel of record to be served; and served six (6) hardcopies of the Petition with the Clerk of the Court.

/s/ A. Blair Dunn, Esq.
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