

No.

IN THE
Supreme Court of the United States

DARLENE COLLINS, ET AL

v.

CHARLES W. DANIELS, ET AL

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Well before New Mexico's history as a territory and a state, wherein money bail or bail by sufficient sureties was the primary and for a long period the exclusive means of preserving the person's (accused of a crime but not yet convicted) innocence. Even before the Framing and adoption of the Eighth Amendment, bail was recognized as the tool to protect the idea that "liberty is the norm and detention prior to trial is the carefully limited exception" *United States v. Salerno* 48 U.S. 739, 755 (1987).

For decades in New Mexico, if not since before statehood, monetary bail was the manner in which the accused's "right to freedom before conviction" by release both prior to arraignment and prior to trial was preserved. *Stack v. Boyle*, 342 U.S. 1, 4 (1951). In 2016 the citizens of New Mexico, acting first through their representative citizen legislature, and then at the ballot box, reaffirmed the criminal justice system's use of monetary bail to protect the presumption of innocence and an accused's pretrial liberties. Unfortunately, unsatisfied with the will of New Mexico's citizens, in 2017, the New Mexico Supreme Court adopted bail reform policy, passed by the state of New Jersey through her legislature, by rulemaking. Petitioners sought to address the impacts to New Mexicans' constitutional rights by litigation in the Federal Court system, to which the Respondents reacted to drive any criticism of them forever from the courts by seeking and achieving sanctions against one of the counsel that would dare challenge their immunities or enter the political arena they had already occupied.

1. Was the application of legislative immunity to actions of the New Mexico Courts to

legislate policy outside of the authorities granted to them by the New Mexico Constitution or delegated to them by the New Mexico Legislature proper, was the application of judicial immunity to the non-adjudicatory actions of the New Mexico Courts to adopt and administer rules proper, and was the application of sovereign immunity proper provided that the District Court's decision regarding the Eighth Amendment and the Due Process Clause was incorrect?

2. Were the sanctions against one of the attorney's responsible for the initiation of the litigation proper in light of this Court's decisions and decisions from other Courts of Appeals?

PARTIES TO THE PROCEEDING

Petitioners are Darlene Collins, Bail Bond Association of New Mexico, Richard Martinez, Bill Sharer, Craig Brandt, and Carl Trujillo. They were plaintiffs in the District Court and plaintiffs-appellants in the Court of Appeals.

Respondents are Charles W. Daniels, Edward L Chavez, Petra Jimenez Maez, Barbara J. Vigil, and Judy K. Nakamura, who are sued individually and in their official capacity as Justices of the Supreme Court of New Mexico; Nan Nash, who is sued individually and in her official capacity as Chief Judge for the Second Judicial District Court; Henry A. Alaniz, who is sued in his official capacity as Chief Judge of the Bernalillo Metropolitan Court; and Bernalillo County Board of County Commissioners who are sued individually for actions taken under the color of law. All of whom were defendants in the District Court and defendants- appellees in the Court of Appeals.

RULE 29.6

Bail Bond Association of New Mexico has no parent corporation and has issued no stock to any publicly held corporation

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PETITION FOR WRIT OF CERTIORARI

Bail by sufficient sureties has been a fixture in the New Mexico criminal justice system since statehood and before. There is no argument against the fundamental concept that bail's protection of the presumption of innocence is foundational to our Anglo-American criminal justice system. That presumption of innocence is the very cornerstone upon which the entire system is built, its origins trace back at least to the Magna Carta, if not before, when that foundational document states that "no Freeman shall be taken or imprisoned, or be disseised of his Freehold or Liberties, or free Customs or be outlawed, or exiled, or any otherwise destroyed, nor will We not pass upon him nor condemn him, but by lawful judgment of his Peers or by the Law of the Land." Magna Carta, Ch. 39. In A. Howard, *Magna Carta Text and Commentary* 43(1964). Bail to protect against the unjust deprivation of liberty fundamental to the presumption of innocence prior to trial has always been measured against the government's interest in mitigating the risk of non-appearance at trial, by not having "bail set at a figure higher than an amount reasonably calculated to fulfill this purpose." *Stack v. Boyle*, 342 U.S. 1, 5(1951).

Prior to 2017 this system represented a constitutionally permissible, largely functioning, system in New Mexico. However, as the result of the case of *State v. Brown*, 338 P.3d 1276, (N.M. 2014), a case concerning a man without financial means who was incarcerated for a great period of time pretrial because he could not afford the bond set for his pretrial release, New Mexicans were convinced first through their Legislature and then later at the ballot box to adopt additional protections against excessive bail. Arguably

the *Brown* case was already in violation of the Eighth Amendment, but at the urging of at least one activist New Mexico Supreme Court Justice, who notoriously lobbied for the change in policy in the Legislature, a compromise was struck. That compromise resolved by the Legislature and later overwhelmingly adopted by the voters represents the rare occurrence of marked improvement in the protections found and adopted into a state constitution. The added language serves to increase the protections against excessive bail by allowing persons without financial means to file a motion to be excused from monetary conditions of bail. It is undersigned counsel's strong opinion that the compromise adopted by the people of New Mexico strikes a near perfect balance between the tension created by the New Jersey system at issue in *Holland v. Rosen*, 895 F.3d 272(3d Cir. 2018), *cert. denied*, *Holland v. Rosen*, 139 S. Ct. 440, 202 L. Ed. 2n 319 (2018), and the system at issue in *Walker v. City of Calhoun, GA*, 901 F.3d 1245, 1251 (11th Cir. 2018), *cert. denied sub nom. Walker v. City of Calhoun, Ga.*, 139 S. Ct. 1446 (2019). The new language now found in the New Mexico Constitution allows a person without financial means to file a motion to have the Court release them on non-monetary conditions.

Unfortunately, New Mexicans never got a real chance to test their legislative experiment. Before the ink was barely dry the New Mexico Supreme Court undertook to impose the New Jersey experiment on the New Mexico Court system by legislating a similar policy change through the passage of rules, just months after the 2016 election, on July 1, 2017. Petitioner Darlene Collins' case represents the novel situation where government officials tinkering with a constitutionally sound experiment after its adoption

have blown up the experiment to the constitutionally prohibited real-world detriment of New Mexicans. Instead of a system designed to provide the least restrictive and least intrusive means of mitigating flight risk measured on an individual's circumstance on a case by case basis; New Mexicans must now all suffer liberty-restrictive, non-monetary conditions of release treating them as presumptively guilty until trial even though a less intrusive monetary bail release is still available under their State Constitution. Thus, New Mexicans face the imposition of a system based upon a policy vetted and rejected by their Legislature, only to be instead legislated by a Court not elected for that purpose, and from which the only higher power to which they may appeal is this Court.

And without question, Petitioners could have begun their quest to remedy the horrible juxtaposition that New Mexico finds herself to be in by petitioning this Court under the Court's original jurisdiction. The horrible juxtaposition of a state's highest court legislating a policy that violates the state's citizen's constitutionally protected liberties by exceeding the powers granted to them under the state constitution or delegated to them by the state legislature is of course, unbelievably rare; no doubt warranting U.S. Supreme Court review, but is also undeniably subject to review in the lower Federal Courts pursuant to the Fourteenth Amendment, 42 U.S.C. § 1983 and the established pendant jurisdiction of the Federal District Courts. Petitioners, thus, believed that review of the New Mexico Supreme Court's actions was appropriately originated in the Federal District of New Mexico because upon review before filing the Justices of the New Mexico Supreme Court were subject to an action under 42 U.S.C. § 1983 for their actions, acting

under the color of law, that deprived New Mexico citizens of their rights guaranteed by the Eighth Amendment, and the Due Process Clause of the Fourteenth Amendment for which the Respondents enjoyed no judicial immunity as their act was not adjudicatory, and for which the Justices enjoyed no legislative immunity as their act was in excess of the non-exclusive legislative authority delegated to them by the Legislature under NMSA 1978 § 38-1-1, which is distinguishable from this Court’s holding in *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 466 U.S. 719, (1980).

Additionally, in New Mexico, for many decades if not over a century, even following the 2016 Constitutional Amendment, the citizens arrested for bailable crime enjoyed the substantive right to post a jailhouse bond according to a bail schedule to avoid pre-arrangement incarceration. That long-standing liberty evaporated just hours after Petitioner Collins’ arrest the night of June 30, 2017 as a result of the enactment of the new Supreme Court rules at midnight July 1, 2017. Plaintiff Collins’ case is highly demonstrative of the impact that this unconstitutional system had on her substantive rights as a litigant in the New Mexico Court system. Had Petitioner’s arrest occurred but a few hours earlier, the bond that her family had secured from one of the members of Petitioner Bail Bond Association of New Mexico (“BBANM”) would have secured her freedom so that she could have avoided 5 days of pre-arrangement incarceration that unnecessarily almost cost her life. Such a needless and dangerous deprivation of pretrial liberty has never been countenanced in New Mexico before the New Mexico Supreme Court’s efforts to legislate bail reform.

The District Court, however, found no constitutional infirmity, nor any inconsistency with statute with the New Mexico Supreme Court's actions, also incorrectly deciding that immunities applied, and standing was lacking which conflicts with the jurisprudence from this Court and the Tenth Circuit. The decision went so far afield regarding immunities and standing that the District Court used it as a basis to single out and sanction one of the counsel that had co-signed the pleadings as lacking a reasonable objective basis for filing suit despite dozens of pages of briefing signed by multiple competent attorneys that explained not just a reasonable objective basis to extend the law, but a colorable argument as to why the law already supported the position of Plaintiffs on standing, immunities and the merits of the case.

Despite some cursory acknowledgment that there may be issues of constitutional magnitude in the New Mexico Supreme Court's rules, the Tenth Circuit, none the less, affirmed¹ the rulings of the District Court on the basis of standing and immunities to further shield the New Mexico Judiciary from accountability for constitutional violations by avoiding the merits by electing to "not address the merits of Collins' claims that the 2017 Rules and the Arnold Tool violate the Eighth and Fourteenth Amendments" Pet.App. 24a.

The Tenth's decision on standing, immunities and sanctions conflicts with decisions of this Court, other decisions from the Tenth Circuit, and other circuits serving to insulate the New Mexico Judiciary

¹ The Tenth Circuit repeatedly penalized the Petitioners for not providing sufficient argument on several issues. However, Petitioners requested a word extension in order to fully brief all issues which was largely denied.

from accountability for the propriety of their actions as well as shielding their promulgated rules from scrutiny as to their constitutionality, leaving this Court as the final hope to escape judicial tyranny. The Tenth Circuit’s decision cannot be allowed to stand without doing severe damage to the criminal justice system and the public’s faith in the judiciary.

The Tenth Circuit’s avoidance of the merits allows a system to stand that conflicts with this Court’s decision in *Salerno*, that when a state seeks to ensure a defendant’s return to trial that “bail must be set by a court a sum designed to ensure that goal, and no more”. *Id* at 755. In this regard the jurisprudence that the Tenth Circuit seeks to insulate the New Mexico Supreme Court’s rules from being weighed against is crystal clear that the government may only achieve its legitimate interests by using the least restrictive mechanism to do so, as not to unnecessarily restrict the pretrial liberty of the presumptively innocent. *See, e.g., Walker v. City of Calhoun; Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017); *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc).

The Tenth Circuit’s decision serves to cut off any chance for New Mexico’s citizens to hold their state judiciary accountable and to protect their rights from destruction by the State acting through the Judiciary. This Court’s review thus becomes imperative, to say nothing of the unintended consequences of increased crime that New Mexicans very arguably face as a result of the rules passed by the New Mexico Supreme Court.

This Court should grant review to 1) reaffirm the “right to bail” by the least restrictive means to preserve the “presumption of innocence” *Stack*, 342 U.S. at 4; 2) restore the faith in the New Mexico Judiciary by returning them inside of their

constitutionally granted authority, and 3) restore the protections of the right to petition the Courts for redress of grievances by reversing the sanctions against an attorney that undertakes the unpopular task of attempting to hold the judiciary accountable for political and policy making actions outside of the State Judiciary's adjudicatory or legislative authority.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 916 F.3d 1302. Pet.App.1a-37a. (*Petition for Rehearing En Banc denied*, April 1, 2019) The unpublished Order of the United States District Court for the District of New Mexico in *Collins et al., v. Daniels et al.*, (Civil Action No. 17-00776-RJ-KK) dated December 11, 2017 granting Defendants' Motion to Dismiss and denying Plaintiffs' Motion to Amend. Pet.App.65a-122a.

JURISDICTION

The Tenth Circuit's opinion affirming the lower court's decision issued on February 25, 2019, and the denial of the Petition for Rehearing En Banc issued April 1, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(a).

RELEVANT PROVISIONS INVOLVED

U.S. Constitution, Article III, Section 1:

The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish...

U.S. Constitution – Amendment 8:

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

U.S. Constitution – Amendment 14:

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

28 U.S.C. Section 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States ... except where a direct review may be had in the Supreme Court.

28 U.S.C. Section 1331

The District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: 1) to recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, 2) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; and 3) to recover damages or to secure equitable or other relief under an Act of Congress providing for the protection of civil rights...

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial

capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. Section 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24 and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty.

N.M. Constitution, Article II, Section 13

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. Stat. Ann. § 38-1-1 (West)

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.

B. The supreme court shall cause all rules to be printed and distributed to all members of the bar of the state and to all applicants, and no rule shall become effective until thirty days after it has been so printed and distributed.

NMRA, Rule 5-401**A. Hearing.**

(1) *Time.* If a case is initiated in the district court, and the conditions of release have not been set by the magistrate or metropolitan court, the district court shall conduct a hearing under this rule and issue an order setting the conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or

(b) arraignment, if the defendant is not in custody.

(2) *Right to counsel.* If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. Right to pretrial release; recognizance or unsecured appearance bond. 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 under Paragraph D of this rule, 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.

C. Factors to be considered in determining conditions of release. 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

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;
- (2) the weight of the evidence against the defendant;
- (3) the history and characteristics of the defendant, including
 - (a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
 - (b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

- (5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and
- (6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. Non-monetary conditions of release. In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

- (1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;
- (2) maintain employment, or, if unemployed, actively seek employment;
- (3) maintain or commence an educational program;
- (4) abide by specified restrictions on personal associations, place of abode, or travel;

- (5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify concerning the offense;
- (6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;
- (7) comply with a specified curfew;
- (8) refrain from possessing a firearm, destructive device, or other dangerous weapon;
- (9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;
- (10) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;
- (11) submit to a drug test or an alcohol test on request of a person designated by the court;
- (12) return to custody for specified hours following release for employment, schooling, or other limited purposes;
- (13) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. Secured bond. 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.

(1) *Factors to be considered in setting secured bond.*

(a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.

(b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.

(c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.

(d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) *Types of secured bond.* If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

(a) Percentage bond. The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph M of this rule.

(b) Property bond. The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 5-401.1 NMRA.

(c) Cash or surety bond. The court may give the defendant the option of either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph M of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 5-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. Order setting conditions of release; findings regarding secured bond.

(1) *Contents of order setting conditions of release.* The order setting conditions of release shall

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the defendant of

(i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and
(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice.

(2) *Written findings regarding secured bond.* The court shall file written findings of the individualized facts justifying the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. Pretrial detention. If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 5-409 NMRA.

STATEMENT

A. History of Bail in the United States of America and in New Mexico.

Since at least the Magna Carta of 1215, bail has resolved the tension of the presumption of innocence for the accused against the government's interest in ensuring their return to stand trial by answering the "vexing question: what is to be done with accused, whose guilt has not been proven in the 'dubious interval'... between arrest and final adjudication." Donalds B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 Colum. L. Rev. 328, 352 (1982). New Mexico has historically answered this question even earlier in the criminal

justice process by allowing the accused to avoid incarceration even before arraignment by posting a jailhouse bond based upon a schedule for many decades. That schedule was based upon a monetary value ascribed to the event the person was accused of committing. New Mexico's decades old system was in this regard very similar to the system that was recently presented for review to this Court and which this Court declined to hear. *See Walker v. City of Calhoun*. That is not to say that the State of New Mexico did not have cases that ran afoul of the Eighth Amendment's prohibition of excessive bail and of this Court's holding that "bail must be set by a Court at a sum designed to ensure [the defendant's return for trial], and no more." *Salerno* at 755. However, New Mexico's statutory history reflects a system identical to the vast majority of state constitutions, wherein a protection of a right to bail by sufficient sureties does work. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 863-64 (2018); Verrilli 351. Therefore, a system more than passing constitutional muster was present in New Mexico for decades that provided the "fixing of bail for any individual defendant [was] based upon standards relevant to the purpose of assuring the presence of that defendant." *Stack* 342 U.S. at 5. And until the case of *State v. Brown*, the money bail system remained largely successful at settling the amount of sufficient surety or money bail at an amount that was not "excessive" – i.e. "higher than...reasonably calculated to" ensure the accused's appearance at arraignment or trial. *Stack* 342 U.S. at 5.

However, the *Brown* case, in addition to being resolved correctly on the existing law, ostensibly spawned a movement in New Mexico of arguably pure intentions, to increase the protection of the

presumption of innocence for those without financial means by ensuring pretrial release on non-monetary conditions. This noble effort to add additional protection against the denial of bail by setting excessive bail in a monetary sum resulted in legislative deliberation and compromise that did not fully adopt the model proposed mirroring the legislation passed in New Jersey but resulted in the addition of the following language to the New Mexico Constitution:

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

However, unsatisfied with the legislative compromise adopted by the voters, the New Mexico Supreme Court proceeded to rule-making and ultimately adopted the substantive policy that had been passed by the New Jersey Legislature. Notably, the rules adopted by the New Mexico Supreme Court contain no provision for the filing of a motion reflecting the legislative will of New Mexicans adopting the amendment to the New Mexico Bill of Rights. At a very base level this alone demonstrates the substantive policy impact that the New Mexico

Supreme Court legislated, in excess of their delegated legislative authority which was limited to general court procedures that did “not abridge, enlarge or modify the substantive rights of any litigant.” NMSA 1978 § 38-1-1, to say nothing of the protections of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment. The voters of New Mexico and their Legislature, by adoption of the Amendment, made it a substantive right of New Mexicans to file a motion to request relief from the requirement to post bond and the New Mexico Supreme Court modified that substantive right by removing the filing of a motion from the pretrial release process altogether.

Thus, contrary to over a century of protecting the right to bail by sufficient sureties in the Constitution of the State of New Mexico and contrary to the will of the voters, the New Mexico Supreme Court practically eliminated bail by sufficient sureties, replacing the system with new rules that impose greater liberty restricting conditions on all persons without the option of less restrictive money bail. *See* NMRA Rule 5-401.

The new rules mirroring the New Jersey Statutes, *see* N.J.S.A. § 2a:162-16 through 18, set up hierachal process that must be followed by lower Court judges. *See* NMRA Rule 5-401.

First, any defendant eligible for release under Art. II § 13 of the New Mexico Constitution “shall be ordered released unless the court makes written findings or particularized reasons why the release will not reasonably ensure the appearance of the defendant as required” on personal recognizance or an unsecured appearance bond (*i.e.*, an unconditioned promise to appear). NMRA Rule 5-401(B). *Second*, if the court finds that release on personal recognizance or an

unsecured appearance bond will not provide the requisite assurances, the court “may impose *non-monetary* conditions of release” (emphasis added), but “shall impose the least restrictive condition , or combination of conditions” that are needed to provide the requisite assurances. NMRA Rule 5-401(B). These conditions range from relatively minimal inconveniences to extreme restrictions on liberty. On one end of the spectrum, a court may order the accused to call pretrial services once a week. On the other end, the court may order physical detention, remaining “in the custody of a designated person,” or even returning “to custody [in jail] for specified hours.” NMRA 5-401(D). The court can additionally order that all of the accused’s movements (even within the home) be monitored through a GPS device worn around the ankle 24 hours a day. *Id.*

The court may impose any combination of these restrictions, including the most restrictive combination of these conditions, without the state making any heightened showing of their need. In other words, although the court is directed to “the least restrictive” combination of non-monetary conditions needed to address the government’s interest; the New Mexico Supreme Court’s rules requires no greater showing and provides no greater procedural protections before the state imposes house arrest with 24-hour monitoring than when it requires weekly check-in calls. The one condition the court may not consider at this second stage is the imposition of monetary bail in combination with, or in lieu, of non-monetary conditions.

Finally, if the court finds that release subject to *any combination* of the onerous non-monetary measures outlined above will not “reasonably ensure

the appearance of the defendant as required", the Court then, *and only then*, "may require a secured bond for the defendant's release." NMRA Rule 5-401(E). Thus, the New Mexico Supreme Court's rules, contrary to the New Mexico Constitution, indicate that monetary bail may be considered only to address flight risk and only after the Court has already concluded that house arrest with 24-hour monitoring is insufficient to address flight risk. This is to say nothing of the impacts to fundamental liberties like the right to bear arms or to be free from the invasive searches of drug and alcohol testing or required psychological treatment. *See* NMRA Rule 5-504(D).

B. The District Court Proceeding

Having reviewed the law concerning immunities extensively and being extensively familiar² with the standards for standing, Petitioner Darlene Collins, having unnecessarily and nearly fatally suffered as a result of the then brand new Supreme Court rules, implemented only hours after her arrest, embarked upon litigation in the Federal District Court of New Mexico with the assistance of Petitioners Bail Bond Association of New Mexico and several concerned citizen legislators³ to address unconstitutional bail

² Trial Counsel A. Blair Dunn had over 10 years' experience litigating in federal Courts and Dori E. Richards had more than 20 years' experience litigating in Federal Courts, 18 of which had been as an attorney for the Federal government.

³ The citizen legislators have consistently maintained that they were not exercising any claim under institutional injury on behalf of the legislature, instead they sought declaration of the violation by the judiciary of the New Mexico Constitution as citizens

reform policy legislated without lawful authority by the New Mexico Supreme Court. Petitioners, all of them, have consistently maintained that not only did they have standing and a colorable argument as to why Respondents enjoyed no immunities, but they have consistently maintained that their position on immunities, standing and the unconstitutionality of the New Mexico Supreme Court's rules could be vindicated without a modification or change in existing law. Petitioners also erroneously believed that if ever they could exercise their First Amendment rights to speech and to petition the courts for redress without fear of retaliation, that a case involving the courts should be safe to do so. Instead, almost immediately, Judicial Respondents sought to drive the case from the courts by seeking Rule 11 sanctions against Petitioners' counsel, which resulted in sanctions inexplicably against only one of their counsel, when their legal team refused to abandon their good faith claims.

Ultimately, the District Court determined on the merits that "there is no right to money bail implied within the Eighth Amendment," Pet.App.93a despite the continued proffer by Petitioners that in keeping with *Stack* and *Salerno* that any bail other than the least restrictive necessary, which must include the availability of money bail, would be excessive and therefore subject to scrutiny against the protection of the Eighth Amendment. The District Court, then, took this reasoning further to state that "purchasing pretrial release with monetary bail does not implicate fundamental rights under a substantive due process

representing their constituents by exercising their own standing as citizens to have their government follow the law.

analysis,” Pet.App.100a despite a clear history of sufficient sureties by money bail in New Mexico and the recent retention of the same in the New Mexico Constitution by the voters of New Mexico.

The District Court went on to decide that, inconsistent with this Court’s and the Tenth Circuit’s precedent, that Petitioners Bail Bonds Association of New Mexico and the Legislator Petitioners lacked standing. The District Court did determine that Petitioner Collins did have standing, but went on to find that Respondents enjoyed sovereign immunity for their official act because prospective relief was not applicable as there was not an “ongoing violation of Federal law.” Pet.App.109a Respondents enjoy “legislative immunity” for their rule-making that allegedly “intruded on the exclusive province of the New Mexico Legislature,” Pet.App.111a. And finally, the District Court determined that that other judicial Respondents enjoyed judicial immunity for the administrative action of setting policy and contracting for a tool that arguably further infringes upon the right to bail that least restricts pretrial liberty. Pet.App.110a-112a.

Importantly, in a later decision, the District Court extrapolated that because the matter was a political issue that the actions of one of the counsel (who was not the only attorney that signed the pleadings taking those actions) of Petitioners, concerning that the lack of standing of some Petitioners and the immunities of Respondents, warranted Rule 11 sanctions. Pet.App.43a-64a.

C. The Tenth Circuit Decision

The Tenth Circuit affirmed. Pet.App.1a-39a. But unlike the District Court, the Tenth Circuit did not address the merits of whether or not the New Mexico Supreme Court rules at issue were constitutional. Pet.App.24a. Instead, the Tenth Circuit determined that Petitioner Bail Bonds Association of New Mexico lacked both first party associational standing and third-party standing, Pet.App.12a-14a and determined that the Legislator Petitioners lacked standing to pursue a claim for institutional injury. Pet.App.14a-15a. The Tenth Circuit did, likewise, affirm the standing of Petitioner Collins, by also affirmed the dismissal of her claims on the basis of sovereign,⁴ judicial and legislative immunities. Finally, the Tenth Circuit affirmed the sanctions against undersigned counsel, whose only differentiating fact from his co-counsel, who also signed the pleadings naming the various parties to the proceeding, was a letter that undersigned counsel sent to a committee of the New Mexico Legislature in response to a letter from the New Mexico Supreme Court Justice responsible for the bail reform movement discussing this litigation with the same Legislative Committee.

⁴ The Tenth Circuit chastised Petitioners for not “adequately present(ing)” (App .19a and 21a) argument on sovereign immunity but ignored that Petitioners sought a word extension to adequately address the complex constitutional arguments and Rule 11 arguments in a consolidated appeal which the Tenth Circuit largely denied.

REASONS FOR GRANTING THE PETITION

As the self-described bail reform movement continues its march around the United States the conflict and controversy surrounding the movement grows in its wake. In New Mexico, aside from the significant constitutional issues and the matter of yet another unique split on the bail issue among the circuits, New Mexicans are left frustrated dealing with the consequences such as high profile murders perceived to be perpetuated by a catch and release criminal justice system of questionable constitutionality established by rules that are the subject matter of this lawsuit. Far from being limited to the pure constitutionality question present in other recent petitions to this court representing a circuit split between the Third, Sixth and now Tenth Federal Courts of Appeals, New Mexicans face a perfect storm of unique and novel dimensions for which review by this Court is the only feasible hope for redemption.

The history of bail by sufficient sureties has been presented *ad nauseum* in complete and appropriate thoroughness by recent petitions and briefing to this Court by *amici* to establish inarguably that bail and how our courts handle this fundamental liberty is critical to our system of justice. There is no argument amongst the divergent viewpoints that excessive bail is the denial of bail, but the circuit split between the Third Circuit (*Holland*) and the Sixth Circuit (*Walker*) about what may be required or allowed as sufficient surety for the posting of bail so as not to be excessive is at the heart of the controversy facing the county. Essentially the question becomes, isn't requiring the poor to sit in jail because they lack the financial means to post monetary secured bail unjust and excessive, versus the

alternative to make the system fair by eliminating secured money bail from the system and requiring all persons to secure pretrial freedom by imposing on them non-monetary conditions of release that are arguably greater deprivations of liberty with impacts appearing to eliminate the presumption of innocence in favor of treating all people as guilty even though they no longer face full incarceration before trial.

The balance between protecting the liberty interest of the poor from injustice because they are poor and subjecting all persons unnecessarily to unconstitutional restrictions on their liberty has already been struck by the New Mexico Legislature in a Constitutional Amendment overwhelmingly adopted by the voters of New Mexico. A balance that further ensured that the Eighth Amendment right, to avoid excessive bail by allowing a person without financial means to file a motion to be excused from posting secured monetary bail, is precisely what the voters adopted into the New Mexico Constitution, thus the questions for this Court's review do not stem from the bail reform duly adopted by the State of New Mexico; but rather from the ensuing policy reform legislated by the New Mexico Supreme Court through their rulemaking outside of the authority to adjudicate disputes vested in them by the New Mexico Constitution and outside of the legislative authority delegated to them by the New Mexico Legislature.⁵

⁵ In addressing the worthiness and timeliness of certiorari review by this Court it is respectfully offered that this matter appears set to become at issue in an identical fashion in other jurisdictions. *See* <https://www.ksfb.com/news/state/missouri/missouri-supreme-court-sets-new-rules-on-bail-conditions> and <https://www.courts.mo.gov/sup/index.nsf/d45a7635d4bfdb8f8625662000632638/beec23ef4487304b86258367006ca1c6?OpenDocument>

I. THE APPLICATION OF LEGISLATIVE IMMUNITY TO THE ACTIONS OF THE NEW MEXICO SUPREME COURT, THE APPLICATION OF JUDICIAL IMMUNITY TO THE NON-ADJUDICATORY ACTIONS AND THE APPLICATION OF SOVEREIGN IMMUNITY WERE IN ERROR AND SERVED TO INCORRECTLY AVOID A CRITICAL AND FUNDAMENTAL QUESTION REGARDING BAIL IN NEW MEXICO'S CRIMINAL JUSTICE SYSTEM

In avoiding the merits of whether or not Petitioner Collins has suffered a deprivation of her rights based upon the incorrect determination of the application of immunities, the Tenth Circuit erred by affirming the District Court's determination that the New Mexico Supreme Court's bail reform rules, which authorize monetary bail, but affirmatively require the exhaustion of more restrictive non-monetary conditions prior to release on monetary bail, did not impermissibly restrict pre-trial liberty in violation of the Eighth Amendment, the Due Process Clause and contrary to the 2016 adopted Amendment to the New Mexico Constitution. The Tenth Circuit's decision leaves a question that is critical and fundamental to New Mexicans unanswered, and further confounds a circuit split on the issue impacting all Americans.

A. The Tenth Circuit’s Decision on Legislative Immunity Conflicts with this Court’s Decision in *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*

The Tenth Circuit’s decision regarding legislative immunity is at odds with this Court’s precedent by incorrectly holding that the New Mexico Legislature delegated complete legislative authority to the Supreme Court to pass procedural rules as well as the legislative authority to enact policy by rules that impacted the substantive rights of litigants appearing before the courts. In fact, the opposite is true, as 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 Tenth Circuit thus erred in affirming the District Court’s decision 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. Read against this Court’s decision in *Supreme Court of Virginia v. Consumers Union of U.S., Inc.* the Tenth Circuit’s decision conflicts with that precedent by failing to recognize that if the New Mexico Supreme Court does not hold exclusive legislative jurisdiction⁶ (in this instance they

⁶ “In any event, in this case the Virginia Court claims inherent power to regulate the Bar, and as the dissenting judge below indicated, the Virginia Court is exercising the State’s entire legislative power with respect to regulating the Bar, and its

hold no jurisdiction over rules affecting the substantive rights of litigants) then they are not entitled to legislative immunity. “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 v. Brandhove*, 341 U.S. 367, 378 (1951). Under NMSA Section 38-1-1 it is obvious that the Legislature retained exclusive legislative authority over the substantive rights of litigants by expressly not delegating that authority to the supreme court.

B. The Tenth Circuit’s Decision on Judicial Immunity Conflicts with this Court’s Decision and Other Courts of Appeals

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

members are the State’s legislators for the purpose of issuing the Bar Code. Thus the Virginia Court and its members are immune from suit when acting in their legislative capacity. *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 466 U.S. 719, 734 (1980). (*emphasis added*)

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. None of the conduct complained of fits within the *Mireles* definition of judicial conduct warranting absolute judicial immunity.

C. The Tenth Circuit’s Decision on Sovereign Immunity Conflicts with this Court’s and Other Courts of Appeal’s Decisions

The District Court’s decision that “bail set at a figure higher than the amount reasonably calculated to fulfill” the government’s interests in the return of the accused to trial “is excessive” (implicating the Eighth Amendment) is not impacted by the exclusion of monetary bail from consideration is profoundly wrong.

Stack v. Boyle, 342 U.S. 1, 4 (1951). Further, the District Court’s decision that the Due Process Clause is not implicated in the abolition of the monetary bail is wholly inconsistent with this Court’s and other Courts of Appeal’s decisions on the subject. Thus, the incorrect holding of the District Court and the refusal of the Tenth Circuit to perform a merits analysis turns the reasoning of the applicability of sovereign immunity to this case on its head.

The lower courts correctly recognized that while “states 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) Further, the lower courts recognized that 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.” Both Petitioner Collins, as a putative class representative, alleging an ongoing violation of the Eighth Amendment and the Due Process Clause, and Petitioner BBANM, as a putative class representative, alleging continuing violation of the Due Process Clause through the continued destruction of their industry sought prospective relief enjoining the Respondents from continuing the violation of federal law. Thus, it was appropriate, to ask “a federal court, consistent with the Eleventh Amendment, [to] enjoin state officials to conform their future conduct to the requirements of federal law.” *Id.*

Notably, it is the lower courts’ decisions inconsistent with this Court’s and other Courts of Appeal’s decisions on the issues of the Eighth Amendment and the Due Process Clause that

confounds a proper sovereign immunity analysis. A correct decision on the impacts of the abolition of monetary bail under the Eighth Amendment and the Due Process Clause yields no immunity to Respondents under *Ex parte Young*.

Monetary bail has been the mechanism for preserving the “traditional right to freedom before conviction.” *Stack*, 342 U.S. at 4. Thus, this 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.* 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” presuppose a right to *bail*. Indeed, “[l]ogic defies any other resolution of the question.” *Hunt v. Roth*, 648 F.2d 1148, 1157. 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.). 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). Indeed, this 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 lower courts’ decisions with regard to the applicability of sovereign immunity also run afoul of the Due Process Clause’s protection of liberty as it applies to presumptively innocent individuals awaiting trial (*Pugh*, 572 F.2d at 1056). 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 run afoul of 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.*

The NM Supreme Court’s rules represent a continued violation New Mexicans 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. This 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,” *United States v. Barber*, 140 U.S. 164, 167 (1891).

II. THE TENTH CIRCUIT'S DECISION REGARDING THE SANCTIONS AGAINST ONE OF THE ATTORNEY'S RESPONSIBLE FOR THE INITIATION OF THE LITIGATION CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER COURTS OF APPEALS

Undersigned counsel has consistently maintained that there is not just an objectively reasonable good-faith basis to argue that Petitioners Bail Bonds Association of New Mexico should be granted standing, but under the jurisprudence of this Court and the Tenth Circuit they already enjoy standing. Likewise, undersigned counsel maintained that the Legislator Petitioners should have been afforded standing to address the violations of the State Constitution and statutorily delegated authorities as citizen legislators addressing the violation as citizens themselves on behalf of their citizen constituents. As to immunities, undersigned counsel has consistently maintained (with the support of other learned counsel) that judicial immunity was inapplicable to the non-adjudicatory actions of any of the Respondents and that legislative immunity was inapplicable to the New Mexico Supreme Court Respondents because they acted outside of their delegated legislative authority and their legislative authority was not exclusive; precluding legislative immunity under this Court's decision in *Supreme Court of Virginia v. Consumers Union of U.S., Inc.* Both the decisions in this regard may be accurately reduced to the holding that it is unacceptable to sue the judiciary in any circumstance regardless of whether or not they are acting unconstitutionally.

As is demonstrated in this Petition and extensively throughout the briefing below, which was signed by multiple attorneys, Petitioners had a well-researched objective basis for filing the litigation and including both the Petitioner BBANM and the Legislator Petitioners.

For instance, the Tenth Circuit relied heavily on the failure of all Appellants' counsel to recognize *Kowalski v. Tesmer*, 543 U.S. 125 (2004) before joining Petitioner BBANM to the suit but provided no rationale as to why undersigned counsel is solely responsible for not recognizing precedent that was never cited to by either the District Court or the Respondents. Moreover, Petitioners cited and distinguished *Kowalski* in their Reply Brief.

Likewise, the Tenth Circuit upheld the concept that joining Legislator Respondents 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). Petitioners 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 and immunities that is not necessarily currently accepted, but that is colorable. There is nothing in the record to justify affirming sanctions against just one of the trial counsels bringing this case with these parties, 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)

In the situation, wherein an attorney advances a case that criticizes the actions of the judiciary and in turn tests the balance between judicial independence and judicial accountability, the Tenth Circuit understandably erred on the side of judicial independence. This lawsuit represented 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 to following the laws of the State and the State Constitution, not to mention the will of the voters in adopting an Amendment that sets out a different process than the one legislated by the NM Supreme Court.⁷

⁷ "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 Tenth Circuit, thus, in affirming sanctions against counsel seeking to hold the State Judiciary accountable through a petition to the court for redress 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.

Moreover, this danger of an unaccountable judiciary that Petitioners' counsel sought to address by the filing of the lawsuit 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

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>

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.

...

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 controul? This power in the judicial, will enable them to mould the government, into almost any shape they please. *(emphasis added)*

Robert Yates, “Essay No. 11,” *Anti-federalist Papers*, first published in the *New York Journal*, March 20, 1788. Available at www.constitution.org.

A. The Tenth Circuits Decision Regarding Standing Conflicts With Decisions From This Court and the Tenth Circuit and Therefore Cannot Form the Basis for Upholding Sanctions.

The Tenth Circuit 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 Petitioner BBANM 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 was reached despite the fact that neither the District Court nor the Respondents cited to *Kowalski*⁸. In fact, Petitioners were the first to cite to and discuss *Kowalski* to instead distinguish that third-party standing is recognized in Tenth Circuit under *Aid for Women v. Foulston*, 441 F.3d 1101 (10th Cir. 2006)(approving third-party standing in patient physician context). In this regard the Tenth Circuit erred by ignoring the Circuit’s own 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 Peitioner BBANM, the Tenth Circuit erred concerning the first party standing of BBANM plaintiffs on associational grounds by incorrectly limiting their analysis to the fact that BBANM’s members are not criminal defendants. These Petitioners however, cited precedent and supported the notion that Petitioners were asserting first-party associational standing with regard to the

⁸ *Kowalski* was relied upon by the Third Circuit in *Holland v. Rosen*, 895 F.3d 272 (3d Cir. 2018) for a different result.

destruction of their industry. This was supported by the precedent supplied to the Tenth Circuit 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.”). Petitioners correctly pointed out to the Tenth Circuit 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. This Court has opined as to the constitutionally protected property interest in engaging in one’s chosen profession. *Barry v. Barchi*, 443 U.S. 55 (1979). Petitioner BBANM has both third and first party standing and the Tenth Circuit erred by failing to recognize their standing. Importantly for the Tenth Circuit to hold otherwise with regard to associational standing conflicts with this Court’s decision in *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333 (1977).

Going yet further with respect to first-party standing the Tenth Circuit erred in failing to recognize that the first-party standing of the Legislator Respondents was not derived from institutional injury but rather from the direct injury to the citizens of New

Mexico of having one branch of their government usurp the powers delegated exclusively to the Legislature. The Tenth Circuit's reliance on *Kerr v. Hickenlooper*, 824 F.3d 1207 (10th Cir. 2016) was misplaced and this case presents a distinguishable situation warranting first impression review. Petitioners' claim for legislator standing is premised on the New Mexico Supreme Court's complete usurpation of power in violation of the separation of powers. Unlike in any of the other cases cited or recognized by the Tenth Circuit, 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 have been 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 high court of New Mexico from the New Mexico Legislature. The extra-judicial action of the New Mexico Judiciary, and the Tenth Circuits's affirmance serves to cut off the New Mexico citizens' ability, including her citizen legislators, to seek review of the unconstitutional extra-judicial actions of her courts.

Petitioners 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.

This 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). This 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 Federal Courts 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 Tenth Circuit failed to properly consider that the Respondents’ actions invading the province of the Legislature protected by New Mexico’s separation of powers, and in failing to recognize bail as a substantive right of New Mexico citizens, failed to properly consider that the Respondents’ actions were violative of the prohibition contained in the delegation to the New Mexico Courts by the Legislature in NMSA §38-1-1.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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