UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BRITTAN B. HOLLAND, individually and on behalf of all others similarly situated, and **LEXINGTON NATIONAL INSURANCE CORPORATION**; *Plaintiffs*, v. **KELLY ROSEN**, Pretrial Services Team Leader; **MARY E. COLALILLO**, Camden County Prosecutor; **CHRISTOPHER S. PORRINO**, Attorney General of New Jersey; *Defendants*.	Case No. 1:17-cv-04317 (JBS-KMW) Honorable Jerome B. Simandle, U.S.D.J.

BRIEF OF PROPOSED *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, DRUG POLICY ALLIANCE, LATINO ACTION NETWORK, AND NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules and Regulations

Other Authorities

PRELIMINARY STATEMENT

This brief is submitted on behalf of proposed *amici curiae* American Civil Liberties Union, American Civil Liberties Union of New Jersey, Drug Policy Alliance, Latino Action Network, and National Association for the Advancement of Colored People – New Jersey State Conference (*amici*) in support of Defendants' motion to dismiss and in opposition to Plaintiffs' motion for a preliminary injunction. *Amici* are civil rights organizations concerned with the individual rights of criminal defendants. *Amici* believe that increased reliance on money bail is neither constitutionally required nor desirable.

Amici work to protect the statutory and constitutional rights of criminal defendants, including Plaintiff Holland, to be released on the least restrictive conditions possible, but acknowledge that those conditions must be able to achieve all of the permissible goals of pretrial release conditions. In this case, Plaintiffs imagine a right to money bail implicit in the Eighth Amendment and in so doing ignore the role that conditions of release can play in ensuring the protection of the community.

Indeed, in an effort to obtain third-party standing on behalf of Lexington National Insurance Corporation ("Lexington National"), Plaintiffs implicitly argue that there is not only a constitutional right to *money* bail, but also a right to a *commercial bail bond*. As several states have recognized, no such

right is enshrined in the United States Constitution. Because there exists no right to use a commercial entity to post a bail bond, Lexington National cannot demonstrate that criminal defendants have a legal entitlement to form a relationship with Lexington National or other bonding companies and therefore cannot satisfy the requirements of third-party standing.

The Eighth Amendment does not provide a right to money bail. New Jersey's Criminal Justice Reform Act ("CJRA"), like many other pretrial justice schemes around the country, including the federal system, allows consideration of dangerousness in setting terms of release. Three decades ago the United States Supreme Court approved of the consideration of public safety in making release and detention decisions in the federal system. In the intervening years, many jurisdictions have followed suit without offending the Eighth Amendment. New Jersey's system, which requires that conditions of release be the least restrictive conditions that achieve the purposes of the statute, does not offend the Eighth Amendment.

There is no evidence that the posting of money bail achieves the public safety results that the court sought to achieve in Plaintiff Holland's case.

Finally, if Plaintiffs' fundamental contention – that a criminal defendant who is not ordered detained has a right to pay money bail to avoid a pre-trial deprivation of liberty in the first

place – were correct, courts could never impose conditions like no-contact orders without giving a criminal defendant the opportunity to purchase the ability to contact witnesses or victims. Such a result is plainly untenable.

BACKGROUND

In March 2013, the Drug Policy Alliance released a study that confirmed what many New Jersey state court criminal law practitioners had known for a long time: New Jersey's jails were filled with low-risk pretrial detainees who sat in jail simply because they lacked small amounts of money necessary to secure release. Marie VanNostrand, Ph.D., NEW JERSEY JAIL POPULATION ANALYSIS (March 2013) available at: https://www.pretrial.org/download/research/New%20Jersey%20Jail%20Population%20Analysis%20-%20VanNostrand%202013.pdf. Specifically, the study revealed that on a single day more than 5,000 people were in New Jersey jails, eligible for release on bail but remaining in custody, solely due to a lack of resources. *Id.* at 13. The report also showed the disparate impact on people of color: 71% of the population in New Jersey jails was composed of Black and Latino people. *Id.* Twelve percent of the population (more than 1,500 people) was held because of their inability to pay $2,500 or less. *Id.*

Prompted by that report, among other things, in the summer of 2013, New Jersey Supreme Court Chief Justice Stuart Rabner established and chaired a special committee of the Supreme Court,

the Joint Committee on Criminal Justice ("JCCJ"), which included the Attorney General, the Public Defender, private attorneys, judges, court administrators, and representatives of the Legislature and the Governor's Office. Hon. Glenn A. Grant, CRIMINAL JUSTICE REFORM, REPORT TO THE LEGISLATURE, JAN. 1, 2015 – DEC. 31, 2015, available at: http://www.njcourts.gov/courts/assets/criminal/2015cjrannual.pdf. The JCCJ was tasked with examining issues relating to bail and the right to a speedy trial to determine if reforms were needed. Drawing on data from the Administrative Office of the Courts, the JCCJ determined that New Jersey's wealth-based bail system, in which defendants must pay for their release, risks a "dual system error," in that it leads to a system in which poor defendants who pose little risk to the community are unable to pay for release, while more dangerous individuals who have more substantial resources remain in the community. *Id.* at 26.

After a period of study of New Jersey's existing system as well as systems that had implemented risk-based pretrial practices, the Committee concluded that reducing the number of pretrial detainees through the use of a more objective risk-based approach could lead to substantial cost savings, as well as a "society that is freer, fairer and safer." *Id.* at 12. The JCCJ ultimately recommended significant changes to the criminal justice system. The recommendations, memorialized in a March 2014 report, "represented the most comprehensive set of proposed reforms to the

state's criminal justice system since the adoption of the 1947 constitution." *Id.* at 1.

Specifically, the JCCJ recommended a shift from the wealth-based system of pretrial detention and release to a risk-based system, the creation of a system of pretrial supervision, the approval of preventive detention in rare circumstances where no condition or set of conditions could adequately protect the public and ensure that a defendant would appear in court, and the enactment of a statutory speedy trial scheme. *Id.* at 9.

Building on the JCCJ Report, in the summer of 2014 the Legislature passed and the Governor signed groundbreaking bail reform and speedy trial legislation – the CJRA – that adopts many of the recommendations of the JCCJ, which took effect on January 1, 2017. In November 2014, New Jersey voters approved a constitutional amendment, which also took effect on January 1, 2017, to allow certain defendants to be detained pretrial without bail.

Less than four months into the new pretrial justice scheme, Plaintiff Brittan Holland was arrested and charged with second-degree aggravated assault, N.J.S.A. 2C:12-1b(1). Compl. ¶ 7. According to press accounts, police arrested Holland for his alleged role in the beating of a 36-year-old man that rendered the man unconscious, with a head injury and multiple facial fractures. Jeff Goldman, NJ.com, "Bloody bar fight over Eagles leads to arrest

of father, son" April 7, 2017, available at: http://www.nj.com/camden/index.ssf/2017/04/2_arrested_after_bloody_bar_fight_among_eagles_cow.html.

Plaintiff Holland was arrested and brought to the Camden County Correctional Facility. Compl. ¶ 60. Prosecutors sought to detain Holland pursuant to N.J.S.A. 2A:162-19. *Id.* at ¶ 69. Before the trial court determined the appropriateness of detention, Plaintiff Holland, who was represented by counsel, agreed to certain conditions of release; in exchange, the State agreed not to seek detention. *Id.* at ¶¶ 60-70. Consequently, the trial court ordered Plaintiff Holland released subject to home detention and electronic monitoring through a GPS-tracking device. *Id.* at ¶ 70.

Plaintiff did not challenge the conditions of release in state court. Instead, he filed this class-action challenge to the CJRA. In addition to the challenge raised by Plaintiff Holland, Plaintiff Lexington National challenges the CJRA, contending that it has standing because under a money bail system "Plaintiff Holland would have used . . . financial resources . . . (likely with a surety company such as Plaintiff Lexington National) to pay the required amount for release." *Id.* at ¶ 67. Plaintiffs sought a preliminary injunction. *Id.* at p. 40. Defendants opposed the issuance of the preliminary injunction and will file a motion to dismiss the Complaint. Document 14 (scheduling order).

INTEREST OF *AMICI*

Amici are civil rights organizations committed to the rights of criminal defendants, all of which believe that New Jersey's transition away from money bail promotes fairness while sufficiently protecting individual rights by ensuring that conditions of release are no more onerous than necessary.

The **American Civil Liberties Union The American Civil Liberties Union** is a nationwide, nonprofit, nonpartisan organization with more than 1.6 million members dedicated to the principles of liberty and equality embodied in the Constitution and the Nation's civil rights laws. Since its founding in 1920, the American Civil Liberties Union has appeared in numerous cases before state supreme courts, both as counsel representing parties and as *amicus curiae*.

The American Civil Liberties Union of New Jersey is the state affiliate of the American Civil Liberties Union. The ACLU-NJ was founded in 1960 and has more than 40,000 members in New Jersey. The ACLU-NJ was involved in the legislative process and continues to work to ensure the reform is fairly implemented.

The **Drug Policy Alliance** is a nonprofit advocacy organization that works to advance policies that are grounded in science, compassion, health and human rights. DPA has a strong interest in protecting the rights of all New Jerseyans and in maintaining a fair and safe criminal justice system. In 2013, the DPA published

a New Jersey jail population analysis that spurred conversations about bail reform in the state. The organization was involved in the legislative process and continues to work to ensure the reform is fairly implemented.

The **New Jersey Latino Action Network** is a grassroots organization composed of individuals and organizations that are committed to engaging in collective action at the local, state and national level in order to advance the equitable inclusion of the diverse Latino community in all aspects of American society. The organization was involved in the legislative process and continues to work to ensure the reform is fairly implemented.

The **National Association for the Advancement of Colored People – New Jersey State Conference** is the State conference of the nation's oldest and largest Civil Rights organization in the country. It is committed to equality and justice for all. The organization was involved in the legislative process and continues to work to ensure the reform is fairly implemented.

Amici had long recognized that New Jersey's pretrial release and speedy trial mechanisms were broken and *amici* therefore were – and are – stalwart supporters of the CJRA. *Amici* recognized that New Jersey's failed systems of pretrial release and speedy trial disproportionately impacted communities of color throughout New Jersey and therefore view the CJRA as a statute that can ensure that the criminal justice system becomes more racially just. Fixing

New Jersey's criminal justice system and fighting racial injustice are core institutional missions of all *amici*.

Individually and collectively, *amici* have participated on the JCCJ, testified before legislative bodies, provided testimony on proposed New Jersey Court Rules, and participated as *amicus curiae* before the New Jersey Supreme Court on issues regarding pretrial release and speedy trial.

ARGUMENT

Where a party moves for a preliminary injunction, the party must show four things:

> When ruling on a motion for preliminary injunctive relief, the district court must consider four factors: (1) the likelihood that the applicant will prevail on the merits at final hearing; (2) the extent to which the plaintiffs are being irreparably harmed by the conduct complained of; (3) the extent to which the defendants will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest.

S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 374 (3d Cir. 1992). For the reasons discussed herein, *Amici* focus on Plaintiffs' inability to show the likelihood of success on the merits or that the public interest favor granting an injunction.

Motions to dismiss should be granted where plaintiffs cannot establish the legal sufficiency of a complaint, that is, where plaintiffs do not state a claim upon which relief can be granted. F.R.C.P. 12(b)(6). The burden falls on defendants to show that

plaintiffs have failed to state a claim. *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). Dismissal is appropriate only where, accepting the facts alleged in the complaint as true, Plaintiffs fail to plead "enough facts to state a claim to relief that is plausible on its face," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "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). As discussed below, because – even when the facts in the Complaint are accepted as true – the behavior complained of does not violate the Constitution, Plaintiffs fail to state a claim upon which relief may be granted.

I. PLAINTIFF LEXINGTON NATIONAL LACKS STANDING.

According to the Complaint, "Plaintiff Lexington National is a Florida corporation based in Maryland and licensed to do business and operating (sic) extensively in New Jersey." Compl. ¶ 17. It "operates through [licensed] independent bail bondsmen" and "stands ready, willing, and able to issue and post a bail bond to Plaintiff Holland and others similarly situated." *Id.* In arguing that such a tenuous relationship to Plaintiff Holland's case provides Lexington National standing, Lexington National argues that "[i]f New Jersey criminal defendants had the option of monetary bail, Plaintiff Lexington National would help them to

take advantage of that option." *Id.* at ¶ 57. Therefore, Lexington National claims to "assert[] both its own constitutional rights and those of potential customers." *Id.* at ¶ 58 (citing *Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990)).

These arguments misconstrue the doctrines of ordinary standing and third-party standing.

A. Lexington Does Not Assert Violations of Its Own Constitutional Rights.

Count One of Plaintiffs' Complaint alleges a violation of the right to bail as found in the Eighth Amendment and made applicable on the states through the Fourteenth Amendment. Compl. ¶¶ 119-131. Count Two of Plaintiffs' Complaint alleges a violation of both procedural and substantive due process based on the contention that criminal defendants are deprived of liberty if denied the opportunity to pay to avoid supervision. *Id.* at ¶¶ 132-149. Count Three of the Plaintiffs' Complaint alleges violations of the Fourth Amendment's prohibition on unreasonable searches and seizures, as made applicable on the states through the Fourteenth Amendment. ¶¶ 150-164.

Merits aside, none of those claims directly addresses the rights of Lexington National. The Eighth Amendment's bail clause protects the rights of criminal defendants, not corporations. *See Johnson Bonding Co. v. Kentucky*, 420 F. Supp. 331, 337 (E.D. Ky. 1976) ("It is obvious that [corporate] plaintiff does not seek to

vindicate its right to be free from excessive bail. A corporation cannot go to jail."); *see also United States v. Chaplin's, Inc*., 646 F.3d 846, 851 (11th Cir. 2011) (noting that in the context of the Eighth Amendment's excessive fines clause, the "Supreme Court has never held that this amendment applies to corporations"). The Fourteenth Amendment's *liberty* clause is likewise inapplicable to corporate sureties in this context. And the search or seizure burdens Plaintiffs allege relate to the requirement that Plaintiff Holland wear a GPS monitor. Those burdens, too, are borne by criminal defendants, not corporate entities. Therefore, Lexington National is patently incorrect when it contends that it "asserts . . . its own constitutional rights. . . ." Compl. at ¶ 58. The only rights asserted by Lexington National in each of the three causes of action are "those of potential customers." *Id.*

B. Lexington Cannot Satisfy the Requirements of Third-Party Standing.

In support of its contention that it nonetheless has standing, Lexington National cites to *Triplett*, 494 U.S. at 720. Compl. ¶ 58. *Amici* generally support a broad conception of standing, especially to vindicate violations of constitutional rights. However, in the present case, Lexington National fails to meet the standing requirements. As the United States Supreme Court explained in that case: "Ordinarily, of course, 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." *Triplett*, 494 U.S. at 720 (internal citations omitted). The requirement that a plaintiff must assert a violation of his own rights and interests applies equally where "the very same allegedly illegal act that affects the litigant also affects a third party." *Triplett*, 494 U.S. at 720 (citing *United States v. Payner*, 447 U.S. 727, 731-732 (1980)).

Third-party standing exists as an exception to the general standing requirements. 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), third-party standing has been held to exist." *Triplett*, 494 U.S. at 720 (citing *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 954-958 (1984)). Lexington National cannot meet the standard for third-party standing.

1. *Even if the Constitution Provided a Right to Money Bail, it Does Not Provide a Right to a Commercial Bail Bond.*

Plaintiffs' entire claim hinges on a contention – disputed at length below – that the United States Constitution provides an implicit guarantee of money bail, except in rare cases where courts detain defendants. Compl. ¶¶ 123, 126. But the Eighth Amendment

does not provide a right to money bail, and it certainly does not create a right to a money bail *posted by a commercial bond company.*[1]

Several states prohibit the use of commercial bail bond companies. For example, Oregon's statutes do not provide a mechanism for the use of commercial sureties. ORS § 135.265. When bail bondspeople challenged the statutory scheme contending that it violated Oregon Constitution, Art I, § 14, which requires that "Offences [sic] . . . shall be bailable by sufficient sureties[,]" (a provision absent from both the New Jersey Constitution and the United States Constitution) the Oregon Court of Appeals flatly rejected the argument: "Nowhere does [the constitutional provision] say that lawful release of a defendant may be

[1] A brief look at the history of bail establishes quite the opposite. In the colonies and early U.S. history, bail was meant to ensure the liberal release of people accused of non-capital crimes, without judicial discretion or input, as a keystone of our right to be presumed innocent until proven guilty. Caleb Foote, *The Coming Constitutional Crisis in Bail: I and II*, 113 UNIV. PA. L. REV. 959, 975–76. The mechanics of monetary bail bonds have changed in the last century: in our original bail system, a security bond would only be owed *after* an accused person failed to show up for court (often referred to now as an "unsecured bond"), not before release. *See Rational and Transparent Bail Decision Making*, Pretrial Justice Institute and the MacArthur Foundation (March 2012), at 11. Only as the United States expanded west, and it became more difficult to find friends and family members to serve as an arrestee's "surety", did a commercial bail bonds industry began to emerge. Timothy R. Schnacke, et al., *The History of Bail and Pretrial Release* (Sept. 23, 2010) at 6–7. Commercial bonds, never allowed in the English system, started to flourish after the westward expansion of the mid-nineteenth century; in their current form they would not have been recognizable to the drafters of the Eighth Amendment.

accomplished only through the medium of sureties. Were this contention sound, release of a defendant on his own recognizance or by any other means would be constitutionally prohibited – an obvious absurdity." *Burton v. Tomlinson*, 527 P.2d 123, 126 (Or. Ct. App. 1974).

Illinois, too, eliminated the use of commercial bail bond companies. Illinois did so by allowing criminal defendants to post money bail with courts, in exchange for a small fee. *Schilb v. Kuebel*, 404 U.S. 357, 372 (1971) (Marshall, J., concurring) ("All agree that the central purpose of the statute was to restrict severely the activities of professional bail bondsmen who had customarily collected 10% of the amount of each bond as a fee and retained all of it regardless of what happened."). The United States Supreme Court explained how the system worked in Illinois prior to the reforms adopted by their Legislature:

> Prior to 1964 the professional bail bondsman system with all its abuses was in full and odorous bloom in Illinois. Under that system the bail bondsman customarily collected the maximum fee (10% of the amount of the bond) permitted by statute, and retained that entire amount even though the accused fully satisfied the conditions of the bond. Payment of this substantial "premium" was required of the good risk as well as of the bad. The results were that a heavy and irretrievable burden fell upon the accused, to the excellent profit of the bondsman, and that professional bondsmen, and not the courts, exercised significant control over the actual workings of the bail system.

Schilb 404 U.S. at 359-360 (internal citations omitted). After the reforms were enacted, "bail bondsman abruptly disappeared in Illinois 'due primarily to the success of the ten percent bail deposit provision.'" *Id.* at 360 (quoting John S. Boyle, *Bail Under the Judicial Article*, 17 DE PAUL L. REV. 267, 272 (1968)).

Kentucky explicitly outlaws commercial bail bond companies from doing business in the state. KRS § 431.510. Commercial bail bond companies brought a series of constitutional challenges to the statutory prohibition, all of which were rejected. *See, e.g., Johnson Bonding Co.*, 420 F. Supp. at 337; *Stephens v. Bonding Asso. of Kentucky*, 538 S.W.2d 580, 584 (Ky. 1976) (rejecting constitutional challenge to legislation that "[i]nstead of letting commercial sureties 'die on the vine,'" determined to force "commercial bonding companies as surety for profit to go quickly and 'gently into that good night.'"); *Benboe v. Carroll*, 494 F. Supp. 462, 466 (W.D. Ky. 1977) (awarding attorneys' fees to defendants as a result of plaintiff bail bond companies repeated, unsuccessful constitutional challenges to Kentucky's prohibition of commercial bail bond companies).

In Wisconsin, the Legislature amended a statute to preclude sureties from receiving compensation for serving as sureties, which effectively put commercial bail bonds companies out of business. *Kahn v. McCormack*, 299 N.W.2d 279, 281 (Wis. Ct. App. 1980). In Wisconsin, too, the commercial bail industry challenged

the amended statute as a violation of due process and equal protection. *Id.* The Wisconsin Court of Appeals held that the Legislature "could in the exercise of its police power, reasonably conclude that outlawing the bail bonding business [advanced] . . . the public welfare." *Id.* at 282.

That four states effectively prohibit commercial bail bonds – and that those prohibitions have survived constitutional challenges – is persuasive evidence that there exists no right to commercial bail bonds. And, indeed, Plaintiffs point to no authority to support the proposition that such a right exists. Finding a right to commercial bond would prevent states from exploring alternative forms of pretrial release. This seems especially imprudent given recent revelations about widespread abuses by bail bond agents. Color of Change & ACLU, *Selling off our Freedom: How Insurance Corporations Have Taken Over Our Bail System*, May 2017, available at: https://colorofchange.org/bail-industry-report/.

2. As a Result, Lexington National Lacks Standing Under the Third-Party Standing Doctrine.

Triplett establishes the test for third-party standing. There, an attorney challenged a Department of Labor regulation that limited his ability to collect certain fees from clients seeking recompense under the Black Lung Benefits Act of 1972. 494 U.S. at 717. In that case, no one disputed that the clients in the

Black Lung Benefits Act action had a regulatory (20 CFR §§ 725.362, 725.363(a) (1989)), statutory (30 U.S.C. § 932(a)) and constitutional right (through the Due Process Clause of the Fifth Amendment) to be represented by counsel in those proceedings. *Triplett*, 494 U.S. at 717-718. Thus, the client (the rights holder) had an unquestionable right to form a relationship with the attorney (third-party litigant), and so the attorney was found to have standing.

As demonstrated above, Plaintiff Holland and other criminal defendants have no constitutional entitlement to engage Lexington National or any other commercial surety (*supra*, Point I.B.1). Because no such entitlement exists, Lexington National cannot meet the standard set forth in *Triplett* for third-party standing.

There exist other exceptions to general prohibition on standing for parties who can claim no violation of a right – not raised by Plaintiffs – that are equally inapplicable. For example, in *Sullivan v. Little Hunting Park, Inc.*, the United States Supreme Court allowed a third party to challenge racial discrimination in housing where he was "the only effective adversary." 396 U.S. 229, 237 (1969) (quoting *Barrows v. Jackson*, 346 U.S. 249, 259 (1953)). The same cannot be said for Lexington National: Holland has standing and an ability to assert all the claims raised by Lexington National.

In cases addressing the rights of individuals to obtain contraception lawfully and other instances, courts have recognized the right of third-parties to challenge the contested laws because impacted people would otherwise be denied access to the courts or third parties would face criminal liability. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972) (allowing clinic owner to challenge prohibition on distribution of birth control to unmarried people because unmarried people, who were not subject to criminal prosecution under the statute, would otherwise be denied a forum in which to assert their own rights); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (noting that Planned Parenthood Director had "standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime."); *Craig v. Boren*, 429 U.S. 190, 195-196 (1976) (holding that where a beer vendor who faced a loss of license if he violated a law that treated young men and young women differently, he had third-party standing to challenge the statute on equal protection grounds). In this case there is neither a risk that there will be no forum for the litigation of the issues nor a threat of criminal prosecution.

Under neither the standard for third-party standing relied upon by Plaintiffs, nor any of the other third-party standing justifications, does Lexington National have standing to challenge the CJRA.

II. COURTS ARE PERMITTED TO CONSIDER DANGEROUSNESS IN SETTING TERMS OF RELEASE.

Turning to the merits of Plaintiffs' claims, Plaintiffs rely on a misunderstanding of the role dangerousness can play and has played in pretrial release determinations.[2] Specifically, Plaintiffs contend that "[c]onsistent with the historic purpose of bail to ensure the appearance of the defendant at trial, New Jersey for more than three centuries did not permit courts to consider a defendant's potential dangerousness in setting bail." Compl. at ¶ 32. Such a contention overstates the historical prominence of assurance of appearance as a consideration for pretrial release and takes too narrow a view of the authority of New Jersey judges to consider dangerousness in the pretrial context.

In *United States v. Salerno*, the United States Supreme Court considered whether the Eighth Amendment's prohibition on excessive bail "grants [criminal defendants] a right to bail calculated solely upon considerations of flight." 481 U.S. 739, 752 (1987). In support of that contention, the criminal defendants relied upon "*Stack v. Boyle*, 342 U.S. 1, 5 (1951), in which the Court stated that 'bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is

[2] Plaintiffs concede that there exists no absolute right to bail. Compl. ¶ 26. *See also United States v. Perry*, 788 F.2d 100, 112 (3d Cir. 1986) ("[E]ighth [A]mendment does not grant an absolute right to bail.

"excessive" under the Eighth Amendment.'" *Salerno*, 481 U.S. at 752. Despite their reliance on *Stack*, the defendants in *Salerno* acknowledged that "a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses." *Id.* at 753. The *Salerno* defendants therefore contended that there existed a singular purpose of bail: "to ensure the integrity of the judicial process." *Id.*

While acknowledging that the predominant role of bail is to safeguard a defendant's appearance, 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.* Specifically, the Court approved the consideration of "preventing danger to the community" as a legitimate regulatory interest of the government. *Id.* at 747. The Court explicitly rejected the claim advanced by Plaintiffs here: "Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight." *Id.* at 754.

Salerno remains good law and, despite Plaintiffs' suggestion to the contrary, does not merely stand for the proposition that some people may be detained without bail. *See* Compl. ¶ 126. It also makes clear that the government may legitimately consider public safety in the regulation of pretrial release. 481 *U.S.* at 753. The regulation of pretrial release is not simply the question

of whether a criminal defendant shall be released, but also on what terms such release should be granted. *See*, *e.g.*, *United States v. Norman*, 2014 U.S. Dist. LEXIS 107976, at *6-7 (E.D. Pa. Aug. 6, 2014) (imposing "onerous obligations that severely restrict Defendants' freedom and fully address the issues of dangerousness raised by the Government."); *United States v. Farris*, 2008 U.S. Dist. LEXIS 36937, at *47 (W.D. Pa. May 1, 2008) (finding that "the combination of conditions being imposed serve to provide a reasonable assurance of safety to the community against the risk posed by defendant's release"); *United States ex rel. Savitz v. Gallagher*, 800 F. Supp. 228, 233 (E.D. Pa. 1992) (denying petition for writ of habeas corpus where court used risk of future criminal conduct as a factor in setting the conditions of bail); *United States v. Gatto*, 750 F. Supp. 664, 672 (D.N.J. 1990) (granting defendants bail with stringent conditions, including house arrest with electronic surveillance and wiretaps on their telephones); *United States v. Giampa*, 755 F. Supp. 665, 670 (W.D. Pa. 1990) (imposing a series of liberty-restricting conditions as a condition of pretrial release).

That principle is equally applicable in New Jersey state courts. Prior to amendments approved in 2014, the New Jersey Constitution provided for an affirmative right to bail. N.J. Const., art. I, ¶11. Under that state constitutional provision, New Jersey courts prohibited consideration of potential

dangerousness in setting bail but courts were empowered to consider dangerousness in setting conditions of release. *State v. Steele,* 430 *N.J. Super.* 24, 35-36 (N.J. Super. Ct. App. Div. 2013) (rejecting use of monetary bail to protect the public but noting that "to address concerns about community safety, the court may resort to reasonable non-monetary conditions."), appeal dismissed as improvidently allowed by *State v. Steele*, 223 N.J. 284 (2014). *See also State v. Korecky*, 169 N.J. 364, 384 (2001) (holding that when "[u]sed with caution . . . conduct-related conditions may be appropriate.").

Indeed, the *New Jersey Rules of Court* that existed prior to amendments designed to implement the CJRA explicitly provided that courts could set non-monetary conditions tailored to protect public safety. *R.* 3:26-1(a) (effective Sept. 1, 2013) ("The court may also impose terms or conditions appropriate to release including conditions necessary to protect persons in the community"). The *Rules* did not limit courts' authority to set non-monetary conditions of pretrial release to situations where money bail had been set. *Id.* It would make little sense to allow no-contact orders and other safety-protecting conditions when money bail is set but to disallow those conditions when it is not.

Thus, while Plaintiffs are technically correct that "New Jersey for more than three centuries did not permit courts to consider a defendant's potential dangerousness in setting bail[,]"

Plaintiffs ignore the critical issue: courts' ability to set non-monetary conditions of pretrial release to protect public safety independently, and, indeed, instead of money bail has been long-accepted, both in New Jersey and elsewhere.

III. MONEY BAIL DOES NOT PROTECT PUBLIC SAFETY AND RESULTS IN DISPROPORTIONATE HARM.

A. No Credible Evidence Suggests that the use of Money Bail Contributes to Public Safety.

It is now well-established that an upfront deposit of money bail does little to nothing to advance public safety goals. The ability to pay bail bears no relation to the safety threat a person presents. *See, e.g.*, Charles V. Bagli and Kevin Flynn, NEW YORK TIMES, *"Durst Jumps Bail, and a Nationwide Dragnet Is On,"* (Oct. 17, 2001) available at: http://www.nytimes.com/2001/10/17/nyregion/durst-jumps-bail-and-a-nationwide-dragnet-is-on.html.

The American Bar Association ("ABA") formally recognizes the lack of evidence to justify the imposition of pretrial financial conditions. *See* ABA Standard 10-5.3(a) (commentary) ("The policy reasons underlying this philosophy. . . include *the absence of any relationship* between the ability of a defendant to post a financial bond and the risk that a defendant may pose to public safety.") (emphasis added).

A 2013 study demonstrates the disconnect between an upfront money bond and public safety. Researchers analyzed nearly two thousand bond decisions and corresponding pretrial outcomes based

on 16 months' worth of data in Colorado's most populous counties. Michael R. Jones, Pretrial Justice Inst., *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* at 6 (Oct. 2013) (hereinafter "*Unsecured Bonds*"). Drawing comparisons across risk levels, the study found no statistically significant difference between unsecured bonds and secured money bonds in safeguarding public safety. *Id.* at 3, 10. Moreover, the study concluded that "[h]igher monetary amounts of secured bonds are associated with more pretrial jail bed use but not increased court appearance rates." *Id.* at 3.

By way of illustration, jurisdictions that have effectively abolished or severely deprioritized money bail have done so while maintaining both public safety and the integrity of the court system. In 1992, Washington, D.C. abolished setting money bail that would lead to pretrial detention, and since then crime rates have only continued to decline (*see, e.g.* Matthew Friedman, et. al., *Crime Trends: 1990-2016*, THE BRENNAN CENTER FOR JUSTICE (Apr. 18. 2017) at 27), while the pretrial success rate remains high. Approximately 88 percent of defendants in Washington D.C. are released on non-financial conditions, with the remaining population detained. Pretrial Services Agency for the District of Columbia, Research and Data, Performance Measures (hereinafter "Performance Measures"), available at: https://www.psa.gov/?q=data/performance_measures. Between 2007

and 2012, over 91 percent were not rearrested — for any reason — while in the community prior to their trial. *Id.* Of particular note, 98 percent of released defendants remained free of arrest for a violent crime while in the community awaiting trial. *Id.*

Similarly, the federal pretrial system demonstrates that money is not necessary to protect public safety. *See* 18 U.S.C. § 3142(a)–(b). Between 2001 and 2007, in the federal criminal system, just over 96 percent of the persons released pretrial — across all risk levels — had no documented conduct presenting a "danger to the community." Marie VanNostrand, Ph.D. and Gena Keebler, *Pretrial Risk Assessment in the Federal Court* (April 14, 2009) at 22–3. Even considering the highest risk level identified by the Office of Probation and Pretrial Services, over 84 percent of persons released had complete success during the period before trial, meaning no failures to appear and no rearrests for dangerous conduct. *Id.*

Research advanced in contradiction of these principles is misleading. Proponents of money bail often rely on a 2007 Bureau of Justice Statistics ("BJS") report that analyzed State Court Processing Statistics ("SCPS") data to claim that secured money bail affords public safety benefits. Thomas H. Cohen & Brian A. Reaves, U.S. Dep't of Justice, Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts* at 8 (2007). However, in 2010, the BJS released an advisory warning specifically

in response to abuses of its 2007 report, stating that, "[a]ny evaluative statement about the effectiveness of a particular program in preventing pretrial misconduct based on SPCS data is misleading." Bureau of Justice Statistics, *Data Risk Advisory: State Court Processing Statistics Data Limitations*, March 2010, available at: https://www.bjs.gov/content/pub/pdf/scpsdl_da.pdf. Finally, the authors of a more recent study took care to note shortcomings in past research purporting to demonstrate the efficacy of money bail, from methodological or data concerns to failure to account for alternate explanations.[3] *See* Jones *Unsecured Bonds* at 4. There is simply no sound evidence that money bail promotes public safety.

[3] As the authors of the Jones study explain, several such prior publications exhibit (a) "data or methodological limitations that limit the generalizability of the findings to other jurisdictions," (for example, Robert G. Morris, Pretrial Release Mechanisms in Dallas County, Texas (Jan. 2013); Krahl & New Direction Strategies, An Analysis of the Financial Impact of Surety Bonding on Aggregate and Average Detention Costs and Cost Savings in the State of Florida for 2010 (2011)); (b) do not sufficiently account for possible alternate explanations of their findings (see, for example, Michael K. Block, The Effectiveness and Cost of Secured and Unsecured Pretrial Release in California's Large Urban Counties, 1990-2000 (2005)); and/or (c) are "limited to measuring the effect of various forms of pretrial release on a singular outcome - court appearance, but not on. . . two [other] important pretrial outcomes - public safety and jail bed use" (see, for example, Helland & Tabarrok, The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping, Journal of Law & Economics, April 2004). *See also* Kristen Bechtel, et. al., Dispelling the Myths: What Policymakers Need to Know About Pretrial Research, Pretrial Justice Institute (Nov. 2012).

B. Money Bail has a Demonstrated History of Harmful, Discriminatory Impact.

Not only does the imposition of a monetary bail requirement fail to advance the goal of public safety, but such an imposition has well-documented disparate and devastating effects on low-income communities, People of Color, and the LGBT community.

Pretrial detention due to money bail requirements carries massive consequences for those unable to pay the bond, from the potential loss of employment, housing and child custody to the added difficulty of presenting a defense in one's case. *See* Paul Heaton, et. al., *The Downstream Consequences of Misdemeanor Pretrial* Detention (July 2016) at 1. Courts across the country have recognized that operating systems of pretrial justice based on access to money contravenes the Fourteenth Amendment's promise of equal protection. *See Burks v. Scott County, Miss.*, 3:14-cv-00745-HTW-LRA (S.D. Miss. June 27, 2017) ("In the pretrial context, it is well settled that jailing someone solely because they cannot satisfy a financial condition 'is invidious discrimination and not constitutionally permissible.'") (citing *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978)); *ODonnell v. Harris Cty.*, --- F. Supp. 3d ---, 2017 WL 1735456, at *3 (S.D. Tex. Apr. 28, 2017) ("[U]nder federal and state law, secured money bail may serve to detain indigent misdemeanor arrestees only in the narrowest of cases, and only when, in those cases, due process safeguards the

rights of the indigent accused."); *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM (N.D. Ga. June 16, 2017) (enjoining city from detaining indigent arrestees who are otherwise eligible for release but are unable, because of their poverty, to pay secured money bail); *Rodriguez v. Providence Cmty. Corr.*, 155 F. Supp. 3d 758, 786-69 (M.D. Tenn. Dec. 17, 2015) (enjoining a policy of detaining probationers who could not pay a predetermined amount of bail); *Thompson v. Moss Point*, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015) ("If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond."); *see also State v. Blake*, 642 So. 2d 959, 966 (Ala. 1994) ("Putting liberty on a cash basis was never intended by the founding fathers as the basis for release pending trial").

Moreover, "nearly every study on the impact of race in bail determinations has concluded that African Americans are subjected to pretrial detention at a higher rate and are subjected to higher bail amounts than are white arrestees with similar charges and similar criminal histories." Cynthia E. Jones, *"Give us Free": Addressing Racial Disparities in Bail Determinations*, 16 LEGISLATION & PUB. POL'Y 919, 938 (2013). A meta-analysis of 25 studies on the impact of race in bail determinations published between 1970 and 2000 noted that 18 studies found black defendants were subjected

to harsher treatment than whites. *Id.* at 940 *(citing* Marvin D. Free, Jr., *Race and Presentencing Decisions: The Cost of Being African American*, *in* Racial Issues in Criminal Justice: The Case of African Americans 137, 140-41 (Marvin D. Free, Jr. Ed., 2003). And the Pretrial Justice Institute reports that bond amounts are 35 percent higher for Black male defendants and 19 percent higher for Latino male defendants than similarly situated white male defendants. Pretrial Justice Institute, *Race & Bail in America,* available at http://projects.pretrial.org/racialjustice/.

Finally, LGBT people are also disproportionately impacted by the money bail system. In a 2015 survey of 1,118 incarcerated LGBT people, 74 percent of those being held in jail pretrial claimed it was because they could not afford to post bail, as compared to the 40 percent of the overall New Jersey jail population who were incarcerated due to an inability to pay bail. Jason Lydon et al., Black & Pink, Coming out of Concrete Closets: A Report on Black & Pink's National LGBTQ Prisoner Survey 6 (2015). In the LGBT survey, over half of those incarcerated pretrial were held for a year or longer. *Id.*

In summary, money bail as an upfront requirement prior to release bears no relationship to public safety. Rather than serving a public goal, the use of secured money bail discriminates against those who cannot afford it, and disproportionately harms People of Color and the LGBT community.

IV. WHERE COURTS SEEK TO PROTECT PUBLIC SAFETY, THEY NEED NOT OFFER CRIMINAL DEFENDANTS AN OPPORTUNITY TO PURCHASE THE ABILITY TO AVOID SUPERVISION.

Plaintiffs do not merely allege that the trial court failed to specifically tailor conditions in Plaintiff Holland's case to ensure that they were the least restrictive conditions that would protect the public and ensure his presence in court when required. Instead, they go much further and contend that unless a court finds that the case represents one of the "carefully limited exception[s]" to pretrial release, criminal defendants *must* be given an opportunity to pay money in lieu of *any* pretrial deprivation of liberty. Compl. ¶ 126. Such a reading is at odds with both common sense and significant jurisprudence.

Such a reading of the Eighth Amendment would significantly hamper states' ability to confront and eliminate the inequality caused by overreliance on money bail and, critically, would undermine states' authority to impose conditions that *actually* address public safety. In New Jersey, as elsewhere, courts have long been empowered to impose conditions of pretrial release designed to protect public safety, without regard to the amount of money bail, if any. N.J.S.A. 2A:162-16b(2)(b). *See also United States v. Cachucha*, 778 F. Supp. 2d 1172, 1179 (D.N.M. 2011) (releasing defendant, who was not a flight risk but who was a threat to the community, on GPS monitoring and other conditions); *Farris*, 2008 U.S. Dist. LEXIS 36937 at *33-34 (releasing defendant

to parents' custody, with GPS monitoring, computer monitoring, and mandated mental health treatment); Burns Ind. Code Ann. § 35-46-1-15.1(a)(5) (Indiana criminal statute prohibits violations of no-contact orders and allows for the issuance of such an order when a defendant is released in his own recognizance); *Spinks v. State*, 2007 Ind. App. Unpub. LEXIS 1802 (Ind. Ct. App. July 3, 2007) (noting that defendant released on his own recognizance was placed on GPS monitoring with no-contact provision); Fla. Stat. § 903.047 (in Florida, conditions of pretrial release, including liberty-restricting conditions designed to promote public safety such as no-contact orders, attach to defendants released on surety bail bonds, on their own recognizance, or in other forms); *Edwards v. Lexington County Sheriff's Dep't*, 688 S.E.2d 125, 127 (S.C. 2010) (defendant released on his own recognizance, subject to a no-contact order); *State v. Siford*, 2003-Ohio-1588, P2-P3, 2003 Ohio App. LEXIS 1522 at *2 (Ohio Ct. App., Geauga County Mar. 28, 2003) (same).

The Eighth Amendment does not prohibit the imposition of such conditions. *See Salerno*, 481 U.S. at 753 (noting that Eighth Amendment does not foreclose the government from pursuing public safety "through regulation of pretrial release."). But, that does not mean that New Jersey – or any other state – has *carte blanche*

to impose onerous[4] conditions of pretrial release. The excessive bail clause of the Eighth Amendment prohibits the imposition of conditions – monetary or non-monetary – that are not *necessary* to achieve the legitimate purposes of pretrial release. *See Stack* 342 U.S. at 5 ("bail set at a figure higher than an amount reasonably calculated to [ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment."); *United States v. Arzberger*, 592 F. Supp. 2d 590, 605 (S.D.N.Y. 2008) ("if the Excessive Bail Clause has any meaning, it must preclude bail conditions that are (1) more onerous than necessary to satisfy legitimate governmental purposes and (2) result in deprivation of the defendant's liberty.").

The New Jersey CJRA provides greater protection than the excessive bail clause: "The non-monetary condition or conditions of a pretrial release ordered by the court . . . shall be the least restrictive condition, or combination of conditions, that . . . [achieve the three legitimate purposes of the CJRA]." N.J.S.A. 2A:162-17b(2). In other words, a court *must* make an individualized determination that specific conditions are both necessary *and* the least restrictive to achieve the purposes of the CJRA, including the protection of the community, prior to imposing a condition on any criminal defendant. New Jersey also affords robust procedural

[4] *Amici* do not dispute that GPS monitoring represents a substantial limitation on liberty. Compl. ¶¶ 75-78.

protections if a criminal defendant contends that a court failed to follow the statutory (or constitutional) requirements.[5] He or she may file either a motion to reconsider the conditions, alleging a material change in circumstances (*R*. 3:26-2(c)(2)) or an interlocutory appeal to the Appellate Division "in the interest of justice." *R*. 2:2-4.

Plaintiffs rely on a fundamental misconception about the Eighth Amendment. That constitutional provision does not provide a right to money bail and does not preclude states from imposing non-monetary conditions tailored to protect public safety.

CONCLUSION

The CJRA provides criminal defendants with constitutionally required protections by requiring that conditions of release be the least restrictive ones that satisfy the permissible justifications for limitations on pretrial liberty. There is no right to money bail under the Eighth Amendment. As a result, Plaintiffs are unlikely to succeed on the merits. Additionally, there exist compelling public interests disfavoring Plaintiffs' proposal that criminal defendants be guaranteed an option to

[5] It appears that Plaintiff Holland consented to the conditions imposed upon him. Whether or not that decision constitutes a waiver, Plaintiff Holland failed to avail himself of either of avenues for relief that exist under *New Jersey Rules of Court*. Plaintiff Holland's acceptance of the conditions imposed by the trial court also raises questions about typicality. F.R.C.P. 23(a)(3).

purchase the right not to be supervised pretrial. As a result, Plaintiffs' request for a preliminary injunction must be denied.

Indeed, even accepting all of Plaintiffs' factual assertions as true, the decision to impose specifically-tailored, least restrictive, liberty-restricting conditions of pretrial release to protect public safety does not violate the Constitution. As a result, Plaintiffs fail to state a claim upon which relief may be granted and Defendants' motion to dismiss must be granted.

Respectfully submitted,

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