NO. 17-3104

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal From the United States District Court
for the District of New Jersey (Civ. No. 17-cv-04317-ABS-KMW)

BRIEF OF *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 CHAPTER, IN SUPPORT OF APPELLEES URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union is a District of Columbia nonprofit corporation. The American Civil Liberties Union of New Jersey is a private, nonprofit corporation organized under the laws of the State of New Jersey, affiliated with the national American Civil Liberties Union. Neither entity issues stock, and thus there is no publicly held corporation that owns 10% or more of its stock.

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RULE 29(a)(4)(E) STATEMENT

Amici represent that (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person or organization, other than *amici curiae* themselves, contributed money that was intended to fund preparing or submitting the brief.

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PRELIMINARY STATEMENT

Appellants seek to turn back the clock on New Jersey's trailblazing pretrial justice reform. The Criminal Justice Reform Act ("CJRA") removes money bail as a condition of first-resort and creates a legal presumption of pretrial release for the vast majority of criminal defendants, regardless of their wealth or poverty. Appellants argue that this system violates Brittan Holland's Eighth Amendment right to be free from excessive bail, by insisting that that amendment confers him a constitutional right to purchase his pretrial liberty, specifically through a commercial bond. They further allege that the public interest will be disserved unless a money bail system is reinstated. Appellants' arguments are misguided and harmful.

First, appellants cannot succeed on the merits of their Eighth Amendment claim because they have invented a right to money bail; no such constitutional right exists. Second, appellants cannot succeed because they have chosen the wrong test case: Holland's conditions were not imposed to ensure his appearance but rather out of a concern for public safety. Finally, a preliminary injunction would egregiously harm the public interest. Across the United States, money bail has proven to be discriminatory and has fueled mass incarceration. New Jersey's historic bail reform eliminated the state's harmful reliance on money bail, keeps thousands of New Jerseyans out of jail, and is lauded as an exemplar around the country. Importantly, the CJRA does so while affording robust procedural protections to criminal

defendants and, for almost all of them, a legal presumption of pretrial release. *Amici* believe these procedural protections and the release presumption are a civil rights imperative.

Amici devote their brief to appellants' Eighth Amendment arguments as the most obviously untenable (Points I and II). Because of the tremendous harm that would result from a return to the money bail system, *amici* also address the public interest prong of the preliminary injunction analysis (Point III). For these reasons, in addition to those enumerated by the District Court, the denial of appellants' motion should be affirmed.

INTEREST OF AMICI

Amici curiae the American Civil Liberties Union ("ACLU"), American Civil Liberties Union of New Jersey, Drug Policy Alliance ("DPA"), Latino Action Network, and National Association for the Advancement of Colored People – New Jersey State Conference are civil rights organizations committed to the rights of criminal defendants. Fixing New Jersey's criminal justice system and fighting racial injustice are core institutional missions of all *amici*.

Amici long recognized that New Jersey's pretrial release and speedy trial mechanisms were broken and disproportionately impacted communities of color. *Amici* therefore were – and are – stalwart supporters of the CJRA and believe, if properly implemented, the CJRA can ensure that the criminal justice system

becomes more racially just. Individually and collectively, *amici* have participated on the Joint Committee on Criminal Justice ("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.

The District Court granted *amici* leave to appear in *Holland v. Rosen* below, where they supported defendants' motion to dismiss and opposed plaintiffs' motion for preliminary injunction through submission of an *amici* brief and presentation of oral argument.

As laid out in the accompanying Motion, *amici* file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) with consent of all parties. Pursuant to Rule 29(a)(8), the ACLU of New Jersey seeks leave to present oral argument on behalf of *amici*, should this Court schedule argument. For the following reasons, the ACLU of New Jersey can serve as a unique resource to the Court in its determination of this appeal.[1]

[1] For example, the District Court acknowledged that the record is difficult to interpret with respect to Appellant Holland's Public Safety Assessment score. Op. 25 n.9 ("It is not clear from the record how Holland received such low PSA scores, but still received a flag for NVCA."). The ACLU of New Jersey is well placed to clarify the operation of the CJRA scoring system, as *amici* do with respect to Holland's NVCA flag in section II(A) of their brief below.

The ACLU of New Jersey has particular expertise in the history, structure, and, critically, implementation of the CJRA and related *New Jersey Rules of Court*. Specifically, the ACLU of New Jersey has participated as *amicus* in each of the six cases related to bail reform that have gone to the New Jersey Supreme Court since the CJRA took effect on January 1, 2017. Indeed, undersigned counsel for the ACLU of New Jersey is the only attorney to have argued every CJRA case at the Supreme Court thus far. *See State v. Robinson*, 229 N.J. 44 (2017) (scope of discovery required at detention hearing); *State v. Ingram*, 230 N.J. 190 (2017) (type of evidence required at detention hearing); *State v. S.N.*, 230 N.J. 585 (2017) (interim order) (abuse of discretion in decision to detain); *State v. Dickerson*, 230 N.J. 544 (2017) (granting leave to appeal) (scope of discovery required at detention hearing); *State v. Travis*, 230 N.J. 587 (2017) (granting leave to appeal) (constitutionality of Court Rule allowing pretrial services recommendation of detention to serve as *prima facie* evidence sufficient to overcome presumption of release); *State v. Mercedes*, 230 N.J. 586 (2017) (granting leave to appeal) (circumstances under which court can consider the weakness of proofs in determining whether to detain or release). In addition to participating in a number of those cases before they reached the Supreme Court, the ACLU of New Jersey has filed *amicus* briefs – and, where the court heard argument, has argued (or will argue) – in six additional cases before the Superior Court, Appellate Division concerning issues of interpretation of the CJRA and *Rules* that

are relevant to the present appeal. *See State v. C.W.*, 449 N.J. Super. 231 (App. Div. 2017) (appropriateness of conditions in a specific case); *State v. Moore*, 450 N.J. Super. 578 (App. Div. 2017) (role of Preliminary Law Enforcement Information Report in pretrial discovery and detention motion); *State v. Gaines*, No. A-1836-16, 2017 N.J. Super. Unpub. LEXIS 476 (App. Div. Mar. 1, 2017) (type of evidence required at detention hearing); *State v. Fanniel*, No. A-001873-16 (App. Div. 2017) (appropriateness of conditions in a specific case; dismissed as moot prior to argument); *State v. Tinsley*, No. A-002774-16 (App. Div. 2017) (opinion pending) (discovery requirements and court's role vis-à-vis rebuttable presumption of detention in murder case); *State v. Stewart*, No. A-000562-17 (App. Div. 2017) (argument scheduled for Dec. 18, 2017) (defendant's right to call adverse witnesses at detention hearing). In addition to serving as *amicus curiae*, the ACLU of New Jersey has been actively engaged in educating lawyers and the general public about the CJRA.[2]

[2] The ACLU of New Jersey is principal author of *The New Jersey Pretrial Justice Manual*, co-published with the National Association of Criminal Defense Lawyers and the New Jersey Office of the Public Defender and relied upon by the District Court. Additionally, the ACLU of New Jersey provides trainings on bail reform to lawyers around the state and has spoken and published extensively on the topic. *See, e.g.*, Alexander Shalom, *ACLU-NJ: N.J. bail reform praised, but mass incarceration persists*, Newark Star Ledger (Dec. 5, 2017), http://www.nj.com/opinion/index.ssf/2017/12/aclu-nj_the_problem_with_njs_a_grade_on_bail_refor.html; Alexander Shalom, *ACLU: Why N.J.'s new pretrial justice system is fairer and smarter*, Newark Star Ledger (Apr. 20, 2017), http://www.nj.com/opinion/index.ssf/2017/04/

ARGUMENT

I. APPELLANTS MISUNDERSTAND THE U.S. CONSTITUTION: THERE IS NO RIGHT TO PRETRIAL LIBERTY THROUGH MONEY BAIL.

A. The Constitutional Prohibition Against Excessive Bail Does Not Create an Affirmative Right to Money Bail.

Appellants assert that the Eighth Amendment's prohibition on excessive bail implies an affirmative right to money bail. They therefore contend that by denying Holland the opportunity to purchase his freedom from restrictive release conditions, New Jersey has violated his right to money bail. This position is untenable.

The Excessive Bail Clause requires neither that bail necessarily be offered nor that money bail – secured or unsecured – be the means thereof. *See United States v. Perry*, 788 F.2d 100, 112 (3d Cir. 1986) ("[E]ighth [A]mendment does not grant an absolute right to bail."); *United States v. Salerno*, 481 U.S. 739, 752 (1987) ("[Eighth Amendment] says nothing about whether bail shall be available at all."). Rather, the Excessive Bail Clause provides only that where the State does impose conditions of release, whether monetary or non-monetary, the conditions must be *necessary* to achieve the legitimate government purposes.[3] *See Stack v.*

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aclu_why_njs_new_pretrial_justice_system_is_fairer.html; Alexander Shalom, *Bail Reform as a Mass Incarceration Reduction Technique*, 66 Rutgers L. Rev. 921 (2014).

[3] The District Court held that "bail" in the Eighth Amendment is not limited to money bail; instead, the clause prohibits all unwarranted custody pending trial. Op. 70-71. *Amici* support such a reading and would argue further that pretrial release

Boyle, 342 U.S. 1, 5 (1951) ("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.").

As the District Court noted, in all their filings appellants did not cite a single post-*Salerno* bail case mandating money bail. Op. 74. Unsurprisingly, their appellate brief is no exception; *amici* are aware of no case that recognizes such a right. Indeed, the District Court of New Mexico considered the same question in a recent challenge to that state's pretrial release system. The court found no absolute right to money bail and relied on *Salerno* in rejecting the argument that, as a matter of constitutional right, a bailable defendant must be afforded the option of money bail. *Collins v. Daniel*, No. 1:17-cv-00776-RJ-KK, Slip Op. 19-23 (D.N.M. Dec. 11, 2017) (dismissing Eighth Amendment Claim under Fed. R. Civ. P. 12(b)(6)).

Here, appellants dig their heels in and argue that without an underlying right to bail, the prohibition of excessiveness would be logically meaningless. They

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conditions that are not narrowly tailored and the least restrictive means of furthering a compelling government interest violate the Excessive Bail Clause, just as unaffordable money bail does. However, this issue was not central to the District Court's conclusion, and this Court need not reach it to dispose of the present appeal.

analogize to the Sixth Amendment right to a speedy trial and the Fifth Amendment right to just compensation and conclude that the State "cannot evade the Eighth Amendment protection against excessive bail by offering no bail." Appellants' Br. 33-34.

This argument ignores the function and format of each amendment, and the difference between negative prohibitions and affirmative guarantees. The Sixth Amendment does not require the right to a trial to be inferred. It does not prohibit extremely slow trials; it explicitly and affirmatively guarantees the right to a speedy and public trial. Similarly, the Fifth Amendment does not prohibit unjust compensation; it requires as an explicit, affirmative right to just compensation when a taking occurs. By contrast, the Eighth Amendment provides only a prohibition: excessive bail shall not be required. The clause says nothing about whether bail – specifically, money bail – is affirmatively guaranteed.

Appellants invent a right to money bail and then acknowledge its exceptions. In fact, despite appellants' quoted language above, they concede that the State may offer no bail in certain circumstances. Compl. ¶ 26; Appellants' Br. 35 (citing *Salerno*). Moreover, release on one's own recognizance – clearly the least restrictive form of pretrial release – would technically be an offer of no bail as appellants have conceived of it. Yet no one could logically argue the Excessive Bail Clause requires a money bond in such cases. Recognizing that these exceptions are inescapable,

appellants line-draw arbitrarily: they maintain that the Eighth Amendment prohibition implies an affirmative right, but then, conceding it is not absolute, insist that that right applies only to certain defendants like Holland – namely, those who could not be legitimately detained pretrial, and presumably who would not otherwise be released with lesser restrictions such as a personal recognizance or unsecured bond. There is simply nothing in the Eighth Amendment to suggest a right to money bail that has been so contoured, and convoluted.[4]

B. Where Courts Seek to Protect Public Safety, Money Bail Serves No Legitimate Purpose.

Appellants' Eighth Amendment argument rests on the mistaken assumption that a court may only consider public safety in the threshold decision of whether to release or detain a defendant pretrial. In fact, appellants appear to ignore the plain language of the CJRA, which explicitly includes "protection of the safety of any other person or the community" as one of the three interests a court should consider in fashioning terms of release. N.J.S.A. 2A:162-17(d)(2). Appellants' assumption relies on a fundamental undervaluing of *Salerno* and subsequent cases and a miscasting of why the Superior Court judge imposed certain conditions on Holland. In circumstances in which courts seek to protect public safety in formulating

[4] Even if there were, as examined in Point II, Holland does not fit into the space appellants have carved out.

conditions of release, money bail does not serve that purpose and is never appropriate.

i. Dangerousness Is a Legitimate Consideration in the Regulation of Pretrial Release.

While ensuring appearance is certainly a typical purpose of pretrial release conditions, the U.S. Supreme Court has "reject[ed] the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through the regulation of pretrial release." *Salerno*, 481 U.S. at 753. As the District Court noted below, *Salerno* is the U.S. Supreme Court case directly on point and controls the issues in this case.[5] Op. 71. *Salerno* stands not just for the holding appellants would limit it to, that some people may be detained pretrial without bail. *See* Appellants' Br. 38. It also stands for the proposition that the government may legitimately consider public safety in its regulation of pretrial release. 481 U.S. at 753-54, 747 ("Nothing in the text of the Bail Clause limits permissible considerations solely to questions of flight"; "There is no doubt that preventing danger is a legitimate regulatory goal.")

[5] Until the last paragraph, the entire Eighth Amendment section of appellants' brief before this Court does not cite a single post-*Salerno* bail case, but for one 2010 case that appellants identify solely for the uncontested point that the Eighth Amendment was incorporated to apply to the states. Appellants' Br. 32. In that last paragraph, appellants' citation to *Foucha v. Louisiana*, 504 U.S. 71 (1992), and *Steele v. Cicchi*, 855 F.3d 494 (3d Cir. 2017), is misleading: neither case held that *Salerno* was limited in the way appellants contend. *See* Appellants' Br. 38; *see also* Appellees' Br. 28 n.18 (distinguishing *Foucha* and *Steele* from the present case).

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. This principle is followed as a matter of course in the federal system. *See* 18 U.S.C. §§ 3142(c)(1)(B) (release on conditions to ensure appearance and public safety); 3154(1) (pretrial services recommends appropriate release conditions based on individual case); *see also United States v. Norman*, No. 14-cr-412, 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*, No. 2:08-cr-145, 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 v. Gatto*, 750 F. Supp. 664, 672, 676 (D.N.J. 1990) (granting defendants bail with stringent conditions, including house arrest with electronic surveillance and wiretaps on their telephones).

This principle is equally applicable in New Jersey state courts and was the practice before the CJRA, where courts could impose non-monetary conditions tailored to protect public safety, separate and apart from money bail. *See N.J. Ct. 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."); *State v. Steele*, 430 N.J. Super. 24, 35-36 (App. Div. 2013) (rejecting use of money bail to protect the public but noting that "to address concerns about community safety, the court may resort to reasonable non-monetary conditions."); *State v. Korecky*, 169 N.J. 364, 384 (2001) (holding that when "[u]sed with caution . . . conduct-related conditions may be appropriate.").

The CJRA continues this long practice of allowing judges to consider public safety in setting release conditions, while adding significant procedural protections and requiring the conditions to be the least restrictive necessary to achieve the stated purpose. The removal of money bail from the prioritized list of conditions to ensure appearance – an entirely separate purpose – cannot somehow undermine the legitimacy of public safety as a purpose in and of itself.

ii. Money Bail Does Not Contribute to Public Safety.

There is no sound evidence that money bail promotes public safety. First, a person's ability to pay money bail is entirely unrelated to any safety threat that person may present. Second, neither logic nor credible research suggests that, having paid some amount of money – particularly when unrecoverable through use of a commercial bond company – a person is therefore deterred from any future dangerous activity, or otherwise that his or her alleged dangerousness decreases. *See* American Bar Association Standard 10-5.3(a) (commentary) (recognizing "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."); Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, Pretrial Justice Institute, 3, 10 (Oct. 2013) (finding no statistically significant difference between unsecured bonds and security money bonds in safeguarding public safety); Report of the Joint Committee on Criminal Justice, 47-50 (Mar. 10, 2014), http://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf (outlining difficulty of addressing community danger through the then-current money bail system); Justice Policy Institute, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, 22 (Sept. 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf.

If not inappropriate in all circumstances, money bail is certainly ineffective in protecting public safety. At most, it can only arguably serve the purpose of ensuring appearance. It is so envisaged as a last resort in the CJRA scheme. N.J.S.A. 2A:162-17(c)(1). Appellants appear to accept this principle at least implicitly, inasmuch as they pretend Holland's conditions were imposed only to secure his appearance and therefore that money bail would have served that end.

C. Appellants' Position Requires Absurd Results.

Appellants' posit that, with the exception of certain unbailable offenses, criminal defendants must be given the opportunity to pay money in lieu of any pretrial deprivation of liberty. Compl. ¶ 126; Appellants' Br. 35. This position

requires absurd results. Taken most literally, it would mean that that no one could be released on his or her own recognizance or on an unsecured appearance bond. It would also mean that courts could never impose conditions including no-contact orders without giving a criminal defendant the opportunity to purchase the ability to contact witnesses or alleged victims. Such a reading of the Eighth Amendment would undermine states' authority to impose conditions that actually address public safety.

By asserting that Lexington National Insurance Corporation has Article III standing, appellants also imply that their claimed right to money bail includes a right to use a commercial bond agent.[6] However, Oregon, Illinois, Kentucky, and Wisconsin all effectively prohibit commercial bail bonds, and those prohibitions have all withstood constitutional challenge. *See Burton v. Tomlinson*, 527 P.2d 123 (Or. Ct. App. 1974); *Schilb v. Kuebel*, 404 U.S. 357 (1971) (upholding constitutionality of Illinois bail reform statute); *Johnson Bonding Co. v. Kentucky*, 420 F. Supp. 331 (E.D. Ky. 1976); *Stephens v. Bonding Ass'n of Kentucky*, 538 S.W.2d 580 (Ky. 1976); *Benboe v. Carroll*, 494 F. Supp. 462 (W.D. Ky. 1977); *Kahn v. McCormack*, 299 N.W.2d 279 (Wis. Ct. App. 1980). In suggesting a right to commercial bonds, appellants ask this Court to declare those state schemes

[6] Appellants were not explicit in this contention in their filings before the District Court either, but the premise is required to assert Lexington's third-party standing. Because the contention is so problematic, *amici* address it here briefly.

unconstitutional and that jurisprudence mistaken. As the Oregon Court of Appeals has aptly concluded,

> Nowhere does [the constitutional provision] say that lawful release of a defendant may be 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, 527 P.2d at 126.

II. APPELLANTS CHOSE THE WRONG TEST CASE: HOLLAND'S CONDITIONS WERE MEANT TO PROTECT PUBLIC SAFETY, NOT TO ENSURE APPEARANCE.

A. Because Money Bail Does Not Protect Public Safety, It Cannot Be a Substitute for Holland's Conditions.

If money bail has any efficacy, it can only be in circumstances where judges seek to ensure appearance. The CJRA recognizes this in placing money bail as a condition of last resort and limiting it to serve the purpose of "reasonably assur[ing] the eligible defendant's appearance" only. N.J.S.A. 2A:162-17(c)(1). However, the District Court found that Holland's conditions were not imposed with that purpose in mind:

> [F]light risk was not a primary consideration for Holland's conditions of pretrial release. Rather, Holland was considered to be a potentially-dangerous defendant from whom the community deserved some degree of protection by certain non-monetary conditions of release or, indeed, by his detention.

Op. 75. That fact finding is entitled to deference on appeal. *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015) (explaining clear error standard of review for fact findings).

The District Court considered significant evidence that the state court imposed conditions on Holland to protect public safety, not to ensure his appearance in court. As the trial court noted, Holland's Public Safety Assessment ("PSA") scores were: two (out of six) on the Failure to Appear ("FTA") scale; two (out of six) on the New Criminal Activity ("NCA") scale; and a flag for an elevated risk of New Violent Criminal Activity ("NVCA").[7] Op. 24-25. Critically, looking only at Holland's FTA score and NCA score, the Decision Making Framework ("DMF") would have recommended that the court release Holland without conditions. ACLU of New Jersey, NACDL, & New Jersey Office of the Public Defender, *The New Jersey Pretrial Justice Manual*, 11 (Dec. 2016), https://www.nacdl.org/NJPretrial/. That is, excluding consideration of the risk that Holland would commit another violent crime – his dangerousness – the DMF recommended the court release Holland on his own recognizance. However, once the DMF added consideration of Holland's flag for NVCA, the recommendation shifted from release without conditions to detention.

[7] *Amici* examine Holland's PSA as the basis for the imposition of his release conditions. In so doing, *amici* do not take a position on whether the constituent PSA scores and Decision Making Framework recommendations, including his NVCA flag, were proper.

Id. at 10 (explaining that where a criminal defendant has the NVCA flag and is charged with a crime of violence, release is not recommended, regardless of PSA scores).

The District Court wondered how Holland could have received the NVCA flag with FTA and NCA scores that were relatively low. Op. 25 n.9. The answer is illustrative of the motivation behind the conditions imposed on Holland. As the District Court deduced, Holland received a raw score of four on the NVCA scale: two points because the current charge was violent, one point for a prior conviction (simple assault), and one point because the prior conviction was for a violent offense (same). *The New Jersey Pretrial Justice Manual* at 9. Holland's low FTA score of two reflects a raw score of one on the FTA score conversion. *Id.* at 8. That point appears based on Holland's single prior conviction. *Id.* His NCA score of two could have come from a raw score of either one or two. *Id.* at 9. It appears that Holland's only point for NCA came from the same prior simple assault conviction. *Id.*

Thus, under New Jersey's risk assessment calculations, Holland – who had never failed to appear before and who had only once been convicted of an offense – was deemed a very low risk offender *except* for the risk that he would commit a new, violent crime. Because Holland's conditions therefore clearly serve more than assurance of appearance, money bail would be inappropriate as a substitute even if

it were available, as appellants urge, "on equal footing" with other options to secure his release.[8] Appellants' Br. 66.

Appellants are incorrect as to their constitutional argument, but even if they were not, they chose the wrong case in which to make it: Holland's risk assessment scores suggest that public safety was a concern – indeed, likely the foremost concern – in his case, and money bail cannot serve to protect that interest.

B. New Jersey's System Requires the Least Restrictive Non-Monetary Conditions and Affords Robust Procedural Protections.

If appellants were truly concerned that Holland's conditions were too restrictive, then they could have vindicated (and can still try to vindicate) his liberty interests through the procedural channels afforded by the CJRA and *New Jersey Rules of Court*.

New Jersey's bail reform provides greater protection to criminal defendants than the Eighth Amendment. While the Excessive Bail Clause only prohibits conditions that are not necessary to achieve the regulatory goals, New Jersey's system creates a legal presumption of pretrial release in the vast majority of cases

[8] Because a favorable decision requiring money bail to ensure appearance would not address the alleged injury of Holland's release conditions, appellees argue that Holland also lacks Article III standing. Appellees' Br. 19. Further, appellees point out that appellants' claimed injury evolved over the course of their District Court filings. *Id.* at 23-24. For the first time in their District Court reply brief (and again before this Court), appellants claim to be injured by not being afforded a hearing that places monetary bail on equal footing with non-monetary release conditions. *See id.*; *see also* Pls.' Rep. Br. 3; Appellants' Br. 43 n.2, 66.

and requires that release conditions be "the least restrictive condition, or combination of conditions, that the court determines will [achieve the three legitimate purposes of the CJRA]." N.J.S.A. 2A:162-17(d)(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 prior to imposing a condition on any criminal defendant.

New Jersey also affords robust procedural protections if a criminal defendant asserts that the court failed to follow the statutory (or constitutional) requirements. He or she may file either a motion to reconsider the conditions with the Superior Court, alleging a material change in circumstances, *N.J. Ct. R.* 3:26-2(c)(2), or an interlocutory appeal to the Appellate Division "in the interest of justice," *N.J. Ct. R.* 2:2-4.

In their support of the CJRA, *amici* have consistently warned against over-conditioning. *Amici* agree with appellants that home confinement and GPS monitoring have substantial liberty implications and are incredibly onerous. *Amici* support the right of criminal defendants, including Holland, to seek modification of their conditions. Indeed, as organizations committed to individual liberties and civil rights, *amici* can only tolerate the CJRA's inclusion of pretrial detention and conditions based on dangerousness because there are also built-in procedural

protections for defendants to challenge their detention or over-conditioning. *Amici* emphasize Holland's right to do so in New Jersey courts.[9]

III. THE PUBLIC INTEREST WOULD BE EGREGIOUSLY HARMED BY A PRELIMINARY INJUNCTION.

Appellants seek a preliminary injunction effectively to halt the implementation of the CJRA. The fourth factor the District Court properly considered in ruling on their motion is the public interest. *See S. & R. Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 374 (3d Cir. 1992) (enumerating four factors). Although it is sufficient to dispose of the Eighth Amendment argument that appellants cannot claim a constitutional right to money bail and that they have chosen the wrong test case, their failure on the fourth preliminary injunction factor extends to all appellants' claims. It is well-documented that money bail causes enormous harm to individuals and families – without, as Point I outlines, protecting the public – and has a discriminatory impact, including on communities of color.

A. Money Bail Has a Demonstrated History of Harmful, Discriminatory Impact.

Appellants' true purpose in this lawsuit is to undo the CJRA. It is significant, then, that New Jersey overhauled its bail system precisely to cure the liberty restrictions and constitutional errors that had become endemic to the money bail

[9] Appellees point out that Holland never sought judicial determination of his conditions. *See* Appellees' Br. 40-41. The District Court determined that Holland waived his right to challenge the conditions. Op. 76.

system – here in New Jersey and around the country.

In 2013, a report by DPA revealed that on a single day more than 5,000 people – 38.5 percent of the total jail population – were held in New Jersey jails, eligible for release on bail but remaining in custody, solely due to a lack of resources. Marie VanNostrand, Ph.D., *New Jersey Jail Population Analysis* 13 (Mar. 2013), https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf. The report also showed the disparate impact on people of color: 71 percent of the population in New Jersey jails was composed of Black and Latino people. Twelve percent of the jail 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 the JCCJ, whose findings ultimately resulted in the Legislature's passage and the Governor's signature of the groundbreaking bail reform legislation challenged here.

It is not disputed among criminal justice practitioners, jurists, advocates, and those with firsthand experience that the money bail system is deeply harmful. For those who remain jailed pretrial simply because they cannot afford their bond, the system means potential loss of employment, housing, child custody, and much more. Pretrial detention is also clearly correlated with worse case outcomes and has devastating impact on children and other family members. *See, e.g.*, Paul Heaton, et.

al., *The Downstream Consequences of Misdemeanor Pretrial Detention* (July 2016) at 1; Christopher T. Lowenkamp, Marie VanNostrand, Ph.D, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Arnold Foundation (Nov. 2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf. Even those who can pay for their liberty, through use of a bail bonds company such as Lexington National Insurance Corporation, often spend months or longer paying off the bond amount, sometimes at the sacrifice of other financial obligations and necessities. Color of Change & ACLU, *Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System* (May 2017), https://colorofchange.org/bail-industry-report/.

Moreover, it is well-documented that the money bail system disproportionately impacts people of color. "[N]early 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). 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* (2014), http://projects.pretrial.org/racialjustice/.

By removing money bail as a first-resort condition of release, the CJRA recognizes this harmful and discriminatory history, without sacrificing the legislative purposes of safeguarding appearance and public safety and avoiding obstruction of justice. *See Robinson*, 229 N.J. at 52-56 (summarizing history of CJRA); Report of the Joint Committee on Criminal Justice at 1-2 (outlining problems with New Jersey's money bail system as of 2014). The CJRA does so while prioritizing individual liberty interests, by ensuring that the due process protections of criminal defendants facing pretrial restrictions are robust and that, except for the most serious crimes, the legal presumption is for release. To pretend that the public interest would be served by a return instead to the harmful, discriminatory money bail system is just that: a pretense.

B. New Jersey's Historic Bail Reform Keeps Thousands Out of Jail.

New Jersey's historic bail reform has resulted in a decrease in the jail population and has become an exemplar for other states seeking to implement pretrial justice reform. As Judge Glenn Grant, Acting Administrative Director of the New Jersey Courts, summarized to the Senate Budget and Appropriations Committee in May 2017: "Before January 1, we had a pretrial release system predicated on access to money. Defendants were detained or released based upon

their ability to make cash bail. . . . Under Criminal Justice Reform, we have removed money from the equation. . . .” Hon. Glenn A. Grant, *Remarks Before the Senate Budget and Appropriations Committee*, at 3 (May 4, 2017), http://www.judiciary.state.nj.us/pressrel/2017/SenateBudgetCommitteeRemarks_ May_4_ 2017.pdf.

That removal resulted in a 17 percent decrease in the jail population in the first ten months of bail reform implementation. In 2013, nearly 11,000 people were detained pretrial statewide. VanNostrand, *New Jersey Jail Population Analysis* 1, 11. By the beginning of 2017, in anticipation of the implementation of the CJRA, that number had already dropped to 7,173. By October 31, the jail population was down to 5,942.[10] *Criminal Justice Reform Report*, New Jersey Administrative Office of the Courts, Chart C, http://www.judiciary.state.nj.us/courts/assets/ criminal/cjrreport.pdf. In the first three months alone, almost 88 percent of defendants who appeared before judges were released, either on their own recognizance or on different levels of monitoring. Grant, *Remarks Before the Senate Budget and Appropriations Committee* at 4-5.

Around the country, New Jersey’s bail reform has been heralded as a success story and a model for other states. Alan Feuer, *New Jersey Is Front Line in a*

[10] The District Court cited to statistics published by the New Jersey Courts through June 30, 2017. Op. 23-24. The data cited here reflect the same statistics, with four more months of information.

National Battle Over Bail, N.Y. Times (Aug. 21, 2017), https://www.nytimes.com/2017/08/21/nyregion/new-jersey-bail-reform-lawsuits.html; Jon Schuppe, *POST BAIL*, NBC News (Aug. 22, 2017), https://www.nbcnews.com/specials/bail-reform. Of course, *amici* continue their work to ensure that the CJRA is implemented fairly and that criminal defendants do in fact receive the "least restrictive condition, or combination of conditions" required to serve the purposes of the statute. N.J.S.A. 2A:162-17(b)(2). But whether Holland's conditions were the least restrictive necessary to ensure the CJRA purposes of appearance *and* public safety is an individualized question that he had the opportunity to raise before the Superior Court. The question does not require a return to money bail as a condition of first-resort, and appellants' attempts to argue otherwise only show their true hand: the effort of the for-profit bail bond industry to reclaim its business at the literal expense of criminal defendants who cannot afford the price of their freedom. Appellants do so at real risk to the public interest.

CONCLUSION

Because there is no right to money bail and Holland's conditions were imposed for public safety reasons, the District Court properly concluded that appellants fail to state a claim under the Eighth Amendment for which relief may be granted. The relief appellants do seek – effectively, a return to the money bail system – would significantly injure the public interest. As part of its preliminary injunction

analysis, this Court may consider the well-documented harms of the money bail system and the historic achievements of New Jersey's bail reform that appellants seek to undo. This Court should dismiss appellants' interlocutory appeal and affirm the District Court's denial of the preliminary injunction.

Respectfully submitted,

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December 14, 2017

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am counsel of record and I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

December 14, 2017 /s/Alexander Shalom
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CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEFS

I hereby certify that the text of the electronic and hard copies of this brief are identical.

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I certify that the electronic file of this brief was scanned with Sophos AntiVirus software.

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Alexander Shalom

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because the brief (as indicated by word processing program, Microsoft Word 2016, Version 16.0.4591.1000) contains 5,967 words, exclusive of the portions excluded by Rule 32(f). I further certify that this brief complies with the typeface requirements of Rule

32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

December 14, 2017 /s/Alexander Shalom
Alexander Shalom

CERTIFICATE OF SERVICE

I hereby certify that I am filing the foregoing Brief of *Amici Curiae* electronically via this Court's ECF system and am serving the foregoing Brief of *Amici Curiae* via this Court's ECF and by electronic mail, upon all counsel of record for the Appellants and Appellees.

December 14, 2017 /s/Alexander Shalom
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