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VIA E-MAIL AND FEDERAL EXPRESS

Hon. John A. Sweeney, Chair
COUNCIL ON LOCAL MANDATES
20 West State Street - 4th Floor, Suite 437
Trenton, New Jersey 08625-0627

Re: ***In The Matter of a Complaint Filed by The New Jersey Association of Counties Challenging Provisions of the Criminal Justice Reform Act as an Unfunded Mandate***
Docket No. COLM-0004-16

Dear Judge Sweeney:

This firm represents *amicus curiae* First Indemnity of America Insurance Company and various bonding agents (collectively the "Bail Parties")[1] with respect to the above-referenced matter. The Bail Parties respectfully submit this Letter Memorandum in support of their position that the Criminal Justice Reform Act of 2014 (the "Act"), P.L. 2014, C. 31, constitutes an unfunded mandate and is therefore unconstitutional for this reason and others (which the Bail

[1] The additional Bail Parties include Richard Sparano of AA Bail Bonds Inc., Yadira Lagares of Across Da Street Bail Bonds, Mohammad Mahmoud of All Out Bail Bonds, Ian Burrowes of All USA Bail Bonds, Johara Samara of Apple Bail Bonds, Martin Melendez of Around the Clock Bail Bonds, Toya Harris of Ava Bail Bonds, Eric Kaplan of Bail Monster Bail Bonds, Nelson Gonzalez of Bandit Bail Bonds, Lou Turdo of Big Lou's Bail Bonds, Lorena Abarca of Community Bail Bonds, James Mozier of County Bail Bonds, LLC, Steve Krauss of Cutting Edge Bail Bonds, Chris Blaylock of EZ Bail Bonds, Keith Mourino of Got Bail? Bail Bonds, LLC, John Viruet of John's Bail Bonds, John Ostrander of Rapid Bail Bonds, Robert Rayford of Reliable & Affordable Bail Bonds, Kirk Shaw of Shaw Bail Bonds, and Antonio Roman of Roman's Bail Bonds.

Parties are litigating separately in the Superior Court).[2] For the reasons set forth below, the Bail Parties respectfully submit that the Council should deny the motion to dismiss filed by defendant, the State of New Jersey (the "State").

I. THE ACT CONSTITUTES AN UNFUNDED MANDATE

A. The Council's Origins and Existing Jurisprudence: In the November 1995 general election, the voters approved an amendment to the New Jersey Constitution which, in effect, provides that if the State enacts a statute or imposes a regulation or rule, it must bear all costs incident to its enforcement or compliance therewith. *See* N.J. CONST., ART. VIII, § 2, ¶ 5. It is the mission of the Council on Local Mandates to uphold this constitutional principle. An unfunded mandate will be found when a state statute, regulation, or rule fails to "authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law or rule or regulation[.]" *Id.*

The Council has not hesitated to find that a state law constitutes an unfunded mandate when the record so warrants. For example, last year it struck down a law that required municipalities to equip police cars with video cameras, or that officers at least wear body cameras. *See in the Matter of a Complaint Filed by Deptford Tp.*, Council on Local Mandates (Apr. 20, 2016).[3] The new law was supposedly going to be funded by a $25 surcharge on individuals who had been convicted of drunk driving offenses. The Council found that the proposed funding mechanism was illusory, since the surcharges would generate woefully inadequate revenues to cover the cost of the equipment.

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[2] *See Bergen County Bar Ass'n, et al. v. State of New Jersey, et al.*, Superior Court of New Jersey, Mercer County, Chancery Division, Docket No.: MER-L-16.

[3] *See* http://www.state.nj.us/localmandates/decisions/Deptford-colm-0003-15.html.

In another case, the Council held that an anti-bullying statute violated the unfunded mandate provision when it required every local school district to establish policies against bullying, sponsor prevention and response programs, and designate an anti-bullying coordinator, a school safety team, and a specialist who would deal with these matters (all of whom would have to be paid cash stipends to compensate them for their additional service). *See In the Matter of a Complaint Filed by the Allamuchy Tp. Bd. of Educ.*, Council on Local Mandates (May 1, 2012).[4] In brief, the Council found that the Legislature had merely paid lip service to its obligation to fund the statute, and that the school districts would have to draw upon local property taxes to pay the substantial expense of complying with the anti-bullying statute.

In *In the Matter of a Complaint Filed by Roxbury Tp.*, Council on Local Mandates (Dec. 21, 2011),[5] the Council struck down a regulation adopted by the New Jersey Department of Environmental Protection, which required that outside dumpsters and other refuse containers exposed to storm water be covered at all times and that existing private catch basins be retrofitted in conjunction with any repair or reconstruction of private property. As in other cases, the Council found that the law put the municipality to complying with the law and did nothing to fund the cost of compliance.

Similarly, in *In the Matter of a Complaint filed by Atlantic County*, Council on Local Mandates, (Nov. 16, 2011), the Council invalidated an order issued by the Director of the State Division of Elections that required County employees, whose duties required them to access the internal components of voting machines, to attend a one-day training session, at the

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[4] *See* http://www.state.nj.us/localmandates/decisions/Allamuchy.html.

[5] *See* http://www.state.nj.us/localmandates/decisions/Roxbury.html.

unreimbursed cost of $125 per employee. Again, the law fell because it failed to reimburse counties for the cost of sending their employees for training.

B. The Act Constitutes an Unfunded Mandate: The Bail Parties join in the position cogently set forth in the Complaint filed by the NJAC, substantially for the reasons set forth in its Complaint and in its Brief in opposition to the State's pending motion. Like the NJAC, the Bail Parties maintain that the Act – given the release-or-detain analysis that courts must now conduct – violates N.J. CONST., ART. VIII, § 2, ¶ 5, because it fails to include a funding mechanism to offset the substantial costs that this process is now imposing on local governments.

The Act requires Counties and municipalities to perform myriad law administrative functions, but without allocating funding for any of these mandates. For example, law enforcement at all levels will have to find the resources to the recapture defendants who fail to appear – a function that, until now, bail bond agents have performed at their own expense. This burden, of course, will fall largely on County sheriffs and municipal police departments. And, since the State and Counties have always been the beneficiaries of bail remissions, that source of revenue will also be lost in substantial part.

Indeed, in its Directive to all law enforcement officials in the State, the New Jersey Attorney General has all but conceded that the Act constitutes an unfunded mandate, admitting that compliance with its provisions will "strain existing law enforcement resources." *See* Attorney General Law Enforcement Directive No. 2016-6, at 8 (October 11, 2016) (the "Directive"). The Attorney General admits that "[g]iven the breadth and scope of the impending reforms, police and prosecutors must work collaboratively to identify implementation problems and *devise cost-effective solutions*."). *Id.* (emphasis added). The Directive also acknowledges

that the Act will compel prosecutors "to devote *more resources* to detention cases[.]" *Id.* at 10 (emphasis added).[6]

The Attorney General is certainly correct in this one respect, since his Directive will put municipalities and Counties to new fiscal burdens, which are detailed at length in the NJAC Complaint and will not be repeated here. Even so, we note the Directive requires that an Assistant Prosecutor, Deputy Attorney General, or designated police supervisor must be on-call twenty-four hours a day to assist in determining whether a defendant will be charged by complaint-warrant or summons. All involved will have to assist in preparing the risk assessment reports that must now be completed – competently – within forty-eight hours of the defendant's incarceration. *See* N.J. STAT. ANN. § 2A:162-25(b). This process will require prosecutors to perform multiple additional tasks, all subject to strict deadlines (which, in turn, will compel Counties to hire additional staff). And municipal police officers will necessarily be entitled to overtime compensation to perform these extensive, additional duties (or, in the alternative, more officers and staff will simply have to be hired).

For example, the Attorney General has ordered that an Assistant Prosecutor must attend the first appearance of a defendant who has been charged by complaint-warrant, which will impose further upon the prosecutor's staff and resources. And the Directive states that a prosecutor may request that the police officer who made the arrest or handled the investigation must expedite the preparation of any reports or evidence that would bear upon the detention decision. This, of course, means that other police duties will go undone while these submissions

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[6] Although one Senator introduced a bill that would allow Counties a one-year exemption from the two percent cap on annual tax increases to compensate for the cost of the new law, the measure has since been withdrawn. http://www.shorenewsnetwork.com/2017/02/singer-sings-the-blues-after-lack-of-support-on-bail-reform-funding-bill.

are being prepared, which will further compound the cost of compliance. Finally, although all police officers must now undergo online training to comply with the new law, the Act does nothing to compensate local government for these expenses.[7]

However, ignoring the text of his own Directive and other evidence, the Attorney General tells the Council that the NJAC Complaint has failed to plausibly allege that the Act poses fiscal burdens for local governments. *See* Letter Memo. at 31 ("But neither provisions of the Bail Reform Act, nor the act itself, require the hiring of any additional assistant prosecutors or sheriff's deputies. There is no evidence presented in this complaint demonstrating that existing resources will be insufficient to meet the challenged provisions or that a financial hardship will befall the Complainants if the provisions at issue here are allowed to go forward."). In moving to dismiss, the State of New Jersey argues that any debits in the financial analysis are outweighed by savings the Counties will realize under the new law – which, at this early stage of the proceedings, invites the Council to engage in pure speculation. Even so, their arguments defy common sense and the realities of the matter. The Bail Parties submit that the NJAC has alleged sufficient, plausible facts in support of its allegations – which, on a motion to dismiss, must necessarily be taken as true. A plenary hearing is warranted.

II. THE EXCEPTION TO THE COUNCIL'S AUTHORITY FOR CONSTITUTIONAL MANDATES IS INAPPLICABLE IN THIS INSTANCE.

A. The Act Merely Codifies a Rule of Criminal Procedure and Is Not Immune From Council Review:

A mandate that implements a specific provision of the New Jersey Constitution, instead of one imposed by a statute, regulation, or rule, does not constitute an

[7] The foregoing is only a sampling of these new procedures, and the list of administrative burdens hardly ends here.

unconstitutional mandate. *See* N.J. CONST., ART. VIII, § 2, ¶ 5(c)(5); *see also In the Matter of a Complaint Filed by the Tp. of Medford*, Council on Local Mandates (June 1, 2009). Even so, this provision is in tension with the constitutional mission of the Council, which requires it to set aside statutes, regulations, or rules that impose unfunded mandates upon local government. *See* Art. VIII, § 2, ¶ 5(a); N.J. STAT. ANN. §§ 52:13H-1 to -22.

Recognizing this, the Council has held that the exemption for constitutional mandates must be construed narrowly, since an argument can always be made that any number of legislative actions might advance the general welfare in some respect and, thus, fall qualify as a constitutional mandate. *See* ART. I, § 2 ("Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it."); *see also Monmouth-Ocean Educ. Servs. Comm'n*, Council on Local Mandates (Aug. 20, 2004) ("The purpose of the LMA is to protect units of local government from State-imposed unfunded mandates."); *In the Matters of the Complaints of the Mayors of Shiloh Borough and the Borough of Rocky Hill*, Council on Local Mandates (Oct. 22, 2008) (holding that legislation must expressly reference and implement a specific provision of the Constitution, failing which it can be challenged as an unfunded mandate).

Were this not so, the exemption would swallow the rule. *See Shiloh Borough*, above, (opinion, Part III). Further, the Council has noted that competing provisions of the Constitution must be read *in pari materia* so as to harmonize them and give effect to both. *Id.*

B. <u>The Act Fails to Specifically Authorize an Imposition on Local Governments</u>: In addition, the amended version of Article I, ¶ 11[8] states only that the *court* must determine

[8] The amended provision reads as follows:

whether a defendant is too dangerous or flight-prone to be eligible for release. The provision is silent with respect to the role, if any, that sheriffs and local police departments would play in this process.

Significantly, the Constitution includes the caveat that its provisions must be construed liberally in favor of Counties and municipalities, which must get the benefit of the doubt on all issues of interpretation. *See* N.J. CONST., ART. IV, § 7, ¶ 11.

The Bail Parties submit that even assuming the Act may properly impose on Judges and other State employees (such as members of the newly-created Pretrial Services Program), it may not create similar fiscal burdens for local governments when the Constitution has failed to expressly authorize or direct such action, and, thus, may not find support in an implied-powers argument. Accordingly, any implied powers argument must be rejected.

C. <u>To Fall Within the Exemption for Constitutional Mandates, the Law at Issue Must Expressly Invoke its Immunity</u>: Further, the State seeks to avoid Council review on the basis that the enabling provisions of the Act authorize the Legislature to implement its

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> No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be [bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great] *eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process. It shall be lawful for the Legislature to establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision.* [The deleted text appears in brackets; the new text is in italics.]
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> N.J. CONST., ART. I, ¶ 11.

provisions. These powers are not unlimited, and the Council has previously rejected unfunded mandates that have no more than a tenuous constitutional nexus. For example, in *Monmouth-Ocean Educ. Servs. Commission*, Council on Local Mandates (Aug. 20, 2004), the Council struck down a statute which required that all public school buildings be tested for radon gas, which the Commissioner of Education defended on the basis that school safety was essential to a "thorough and efficient education," as guaranteed by ART. VIII, § 4, ¶ 1. Although the Commissioner sought refuge in ART. VIII, § 2, ¶ 5(c)(5), the Council rejected this argument, since the constitutional nexus was too attenuated to permit the statute to survive review and, in particular, that the Legislature had failed to make an "explicit legislative declaration that the radon testing mandate implements the Thorough and Efficient Clause[.]" The statute was annulled.

In *Shiloh Borough*, above, the Council refused to uphold the constitutional exemption in a case where the Fiscal Appropriations Act of 2009 required rural municipalities that did not have their own police departments to bear a portion of the cost of having the State Police provide rural patrol services. The State defended the law on the basis that it was authorized by the Appropriations Clause, ART. VIII, § 2, ¶ 2. The Council rejected the State's argument, finding that such an interpretation was too vague and attenuated to overcome the prohibition against unfunded mandates.

Not surprisingly, the Attorney General also argues that Article I, ¶ 11 insulates the Act from Council review. However, this argument and the new law cannot stand, because the Legislature – as in *Monmouth-Ocean* – failed to specifically reference the constitutional provision in question. Further, since Article I, ¶ 11 did not exist upon the inception of the Act, the law fails to include the necessary constitutional reference.

D. <u>The Constitutional Amendment Did Not Create or Confer any Constitutional Rights, and, thus, the Act Falls Outside the Exemption from Council Review</u>: Here, the Act was signed into law three months before the general election of November 2014, and, thus, was enacted without having any constitutional support in place. The ballot referendum that followed asked voters merely to approve amending the Constitution to deny release to violent or flight-prone individuals "in some situations."[9] The voters were not creating or conferring any new rights but, rather, authorizing the denial of pretrial release in compelling cases.

Therefore, because the referendum asked the voters to amend the Constitution to permit a court to abridge the defendant's right to pretrial release, the exemption for constitutional mandates is simply inapplicable in this instance. The Act establishes no more than rules of criminal procedure, not constitutional rights. Since the trial court must now perform a risk assessment before the defendant may be released, and do so within forty-eight hours, *see* N.J. STAT. ANN. § 2A:162-25(b), a defendant may now be held as much as four times longer under the new law, since bail had to be set within twelve hours of arrest. *Cf. R.*3:4-1 ("Procedure After Arrest"). However, because of the amendment, the law no longer guarantees a defendant pretrial release (under the former law, he was entitled to release as long as he could make bail). Therefore, the Act, while it arguably seeks to further public safety, merely constitutes a legislative mandate, and, thus, cannot survive on the basis of the constitutional exemption. As the Council made clear in *Shiloh* and *Monmouth-Ocean Educ. Servs. Comm'n*, a statute, regulation, or rule must do more than advance the general welfare or, in the case of a school district, ensure that students receive a thorough and efficient public education.

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[9] *See* https://votesmart.org/elections/ballot-measure/2005/constitutional-amendment-to-allow-a-court-to-order-pretrial-detention#.WFiHTf5TH5o.

E. Since the Legislature Continues to Flout the Constitution's Bar Against Unfunded Mandates, the Council is Urged to Hold that the Constitutional Exemption Is Unavailing Unless the Legislature Expressly Invokes the Exemption – and on Legitimate Grounds: Further to the rule announced in *Monmouth-Ocean*, the Bail Parties submit that, if the Senate and Assembly wish to exempt a mandate from Council review on the basis that it was enacted pursuant to a constitutional mandate, the legislation must: (a) expressly declare that the Legislature is invoking the exemption; (b) find direct and express support in the Constitution, as opposed to that which is merely general, vague, or implied; and (c) direct that even assuming the mandate fails to allocate sufficient revenue to enable a county, school district, or municipality to comply with its provisions, local governments will nevertheless be required to do so at their own expense. However, if the Council were unwilling to adopt an across-the-board rule in all cases, the deceptive manner in which Act became law warrants a more demanding approach in this instance. Failing an express declaration, the Legislature will – as it has done time and again – seek to shift fiscal burdens to local governments.

The Bail Parties submit that, given the irregular manner in which Article I, ¶ 11 was amended, the constitutional exemption should be construed even more narrowly in this case, since the Legislature won the amendment on less than full disclosure. The question and Interpretive Statement that appeared on the ballot requested authorization to eliminate the right to pretrial release in compelling cases, which would lead the voters to think that the amendment was simply a get-tough-on-crime measure.[10]

[10] Pursuant to the Governor's Executive Order No. 211, dated June 30, 2016, the Attorney General was instructed to evaluate the costs, savings, and administrative challenges associated with bail reform. In response, the Attorney General issued a Criminal Justice Report, which

This was, at best, a half-truth, for neither the question presented nor the Interpretive Statement: (a) informed the voters that the Legislature had already passed comprehensive bail reform legislation and intended to use the amendment to approve the new law retroactively; (b) summarized the provisions of the Act, their intended purpose, or the rationale for their enactment; (c) informed the voters that the Act created a presumption *against* monetary bail and, rather, had adopted a framework under which defendants could be released on their unsecured promise to appear at trial, even when facing lengthy prison terms upon conviction; (d) acknowledged that the new law would or might impose substantial fiscal and administrative burdens on county and municipal governments; or (e) disclosed that the new law failed to allocate any funding for local governments. The voters, of course, could not have expected that they were authorizing any of these measures, let alone declaring a Bastille Day for defendants.

Under N.J. STAT. ANN. § 19:3-6, any public question that appears on the ballot must be presented in simple language that can be easily understood by the average voter, and be phrased in a way that truthfully explains the intended purpose of the referendum. The ballot must also provide a brief interpretive statement that explains what the amendment is intended to accomplish and must enhance the voter's understanding of the referendum presented. *Id.*; *see also Gormley v. Lan*, 88 N.J. 26, 37 (1981).

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readily acknowledged the disparity between what the ballot question said it would accomplish versus what the legislation was actually going to do:

> Though the language of the question suggests a harsh stance on arrestees, mandating pretrial detention in some cases, the actual Criminal Justice Reform developed from this ballot measure is intended to reduce the number of individuals unnecessarily detained pretrial.

Report at 9.

As put to the voters, the ballot question of November 2014 and its Interpretive Statement were wholly inadequate, deceptive, and materially misleading. Accordingly, the ballot violated N.J. STAT. ANN. § 19:3-6 and is invalid on this additional ground (as the Bail Parties are alleging in the parallel Superior Court action). Legislating by constitutional referendum, as happened in this case, should not become the new end-run around the Council's authority or the prohibition against unfunded mandates.

The Council was created because the Legislature and the electorate recognized that it and the Executive branch have an unfortunate history of failing to fund the legislation, regulations, and rules to which they have subjected local governments. But for the Council's intervention, Counties and municipalities will have no choice but to raise property taxes to pay for these new obligations.[11] To fulfill its constitutional mission, the Council should take the minimal step of requiring the Legislature to include such an express declaration in the law if it intends to invoke the constitutional exemption for this purpose.

F. The Motion Should be Denied and the Matter Set Down for a Plenary Hearing: Motions to dismiss are disfavored as a rule. *See Printing Mart- Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 772 (1989). Decisions of the Council are final and not subject to appeal. *See* N.J. CONST., ART. VIII, § 2, ¶ 5(b); N.J. STAT. ANN. § 52:13H-18. Consequently, the Council grants motions to dismiss with great reluctance and only in the most compelling cases – and this is not one of them. *See In the Matter of a Complaint Filed by the Highland Park Bd. of Educ.*, Council on Local Mandates (Jan. 31, 2003).

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[11] Try as they may, however, the Counties will likely lack the ability to sufficiently increase taxes to pay for the costs of bail reform, since under P.L. 2010, c.44, they may not increase property taxes by more than two percent in any given year. The Act, therefore, has put the Counties in great fiscal distress.

III. CONCLUSION

For the reasons set forth above, the Bail Parties respectfully submit that the Council should deny the State's motion to dismiss the Complaint; allow the case to proceed to a plenary hearing; and, ultimately, hold that the Criminal Justice Reform Act of 2014, P.L. 2014, C. 31, is unconstitutional, null, and void on the basis that it is an unfunded mandate.

The Council's time and courtesies are greatly appreciated.

Respectfully submitted,

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DATED: February 6, 2017

-and-

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DATED: February 6, 2017

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