

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

DARLENE COLLINS, individually and)
on behalf of all others similarly situated;)
BAIL BOND ASSOCIATION)
OF NEW MEXICO;)
SENATOR RICHARD MARTINEZ;)
SENATOR BILL SHARER;)
SENATOR CRAIG BRANDT;)
REPRESENTATIVE BILL REHM; and)
REPRESENTATIVE CARL TRUJILLO;)
Plaintiffs,)

v.)
CHARLES W. DANIEL,)
Individually and in His Official Capacity;)
EDWARD L. CHAVEZ,)
Individually and in His Official Capacity;)
PETRA JIMENEZ MAEZ,)
Individually and in Her Official Capacity;)
BARBARA J. VIGIL;)
Individually and in Her Official Capacity;)
JUDITH K. NAKAMURA,)
Individually and in Her Official Capacity; and)
THE NEW MEXICO SUPREME COURT,)
Defendants.)

**CLASS ACTION COMPLAINT; COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiff Darlene Collins, on behalf of herself and all others similarly situated, Plaintiff Bail Bonds Association of New Mexico (“BBANM”), Plaintiff Senators Richard Martinez, Bill Sharer and Craig Brandt, and Plaintiff Representatives Bill Rehm and Carl Trujillo (collectively “Plaintiffs”), bring this action against Defendants Charles Daniels, Edward Chavez, Petra Maez, Barbara Vigil, Judith Nakamura and the New Mexico Supreme Court (collectively “Defendants”), and allege the following:

PRELIMINARY STATEMENT

1. Plaintiff Collins stands accused but unconvicted of a crime. Under bedrock principles of American law, she is presumed innocent. And like all innocent people, she is presumptively entitled to liberty from any pre-trial or pre-arraignment restraint. In fact, denial of that pre-arraignment liberty almost cost her very life and cost the State of New Mexico significant amounts of money in medical care.

2. For centuries, the mechanism for ensuring a defendant’s liberty from pre-trial restraint was monetary bail. A person accused but unconvicted of a bailable offense could not be subject to any pre-trial or pre-arraignment deprivation of liberty without the option of bail, unless the government showed that no amount of money would serve the government’s interest in securing the defendant’s future appearance (or, more recently, that detention was necessary to protect the community from danger). Bail is thus a liberty-preserving mechanism as old as the Republic.

3. The availability of bail is enshrined in the Bill of Rights. The Eighth Amendment forbids “[e]xcessive bail,” a protection that presupposes the option of bail. And the vast majority of state constitutions throughout American history, including New Mexico’s, have likewise guaranteed defendants (in all but capital cases) the option of bail before being subjected to pre-

trial deprivations of liberty.

4. The option of bail to avoid pre-trial deprivations of liberty no longer exists in New Mexico, despite the fact that the New Mexico Legislature did not pass a change in the law or adopt a public policy modifying the law regarding bail found at NMSA 1978 § 31-3-1 *et. seq.* Instead, under the recently passed and effective July 1, 2017 New Mexico Supreme Court Rules regarding pretrial release and detention in criminal proceedings, adopted pursuant to Supreme Court Order No. 17-8300-005¹ (“Supreme Court Rules”), *See* EXHIBIT A, New Mexico courts may not consider releasing a defendant on bail unless they first conclude and provide a written opinion within two days of the appearance of the Defendant before them that no combination of non-monetary conditions - including substantial deprivations of pre-trial liberty like home detention, being prevented from returning to their home or some sort of 24-hour electronic monitoring for instance through an “ankle bracelet” - will ensure the defendant’s appearance at trial. Thus, no matter how much an accused would prefer posting bail or might need to obtain pretrial or pre-arraignment liberty because of needs like medical conditions, the Supreme Court rules mandate that release on her own recognizance with home detention, an electronic monitoring device or some other liberty depriving condition be imposed instead. Further, as a result of the Supreme Court Rules, obtaining needed or desired pre-arraignment release is no longer an option.

5. Plaintiff Collins’s experience is illustrative of just how damaging the changes these

¹ IT IS THEREFORE ORDERED the amendment of Rules 5-106, 5-204, 5-401, 5-402, 5-403, 5-405, and 5-406 NMRA of the Rules of Criminal Procedure for the District Courts, Rules 6-401, 6-403, 6-406, 6-506, and 6-703 NMRA of the Rules of Criminal Procedure for the Magistrate Courts, Rules 7-401, 7-403, 7-406, 7-506, and 7-703 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts, Rules 8-401, 8-403, 8-406, 8-506, and 8-703 NMRA of the Rules of Procedure for the Municipal Courts, Rules 12-204, and 12-205 NMRA of the Rules of Appellate Procedure, and For s 9-302, 9-303, 9-307, 9-308, and 9-309 NMRA of the Criminal Forms is APPROVED;

rules can be even before the alleged violator can be arraigned. She was arrested on July 1, 2017, after a domestic dispute and charged with aggravated assault with a deadly weapon. Plaintiff Collins is 61 years old, she is handicapped, diagnosed with mental health issues and other major health issues all requiring medications, but has supportive family, and a residence in the community. However, despite the fact that her family secured the bond necessary from a local bond agency to have her released on bail from the Metro Detention Center prior to arraignment, because of the Defendants newly enacted rules she was denied release. She could have paid a non-excessive amount of bail to secure her future appearance for arraignment. In fact, Plaintiff Collins' family had reached an agreement with an Albuquerque bond company that is a member of Plaintiff BBANM. Had the new rules not prevented the posting of a jailhouse bond, she then would have enjoyed her full pre-arraignment liberty necessary to take care of her medical needs without placing her life in jeopardy, just like any other presumptively innocent member of society.

6. Instead, under the Supreme Court Rules, neither the courts nor the jailhouses ever had the option to set a pre-arraignment jailhouse bond or the realistic option to set pre-trial secured bond, let alone to give Plaintiff Collin's family the opportunity to post it. Instead, relying on new rules the detention center concluded that pre-arraignment secured bonds are not allowed under the new Supreme Court Rules, and that Plaintiff Collin's appearance for arraignment could not be secured by a non-excessive jailhouse bond requiring her continued incarceration prior to arraignment. Further, even upon her arraignment the lower court was required to consider non-monetary conditions (including the condition imposed that she was not to return to her home while she was awaiting trial) or an unsecured cash bond disallowing her the option of obtaining a non-excessive secured bond that allowed her to continue her daily life, with her particular needs free from liberty restricting conditions.

7. Thousands of other New Mexico defendants have been, and will continue to be, subjected to similar life-altering, liberty-restricting conditions without ever receiving the option of a secured non-excessive bond. And they are not the only ones harmed. The Supreme Court Rules largely eliminates the business of secured appearance bonds like those provided by the members of Plaintiff BBANM, which help criminal defendants obtain their pre-arraignment and pretrial freedom without infringing on their civil liberties.

8. The New Mexico Supreme Court Rules deviate from centuries of American criminal practice. The Supreme Court believes its new approach will reduce the number of detained defendants who cannot afford bail, and Plaintiffs have no quarrel with that general objective. But the state can achieve that goal while offering both monetary bail and other conditions, as appropriate. What the New Mexico Supreme Court may not do is restrict the liberty of presumptively innocent defendants without offering the one alternative to substantial pre-trial deprivations that the Constitution expressly protects—monetary bail.

JURISDICTION AND VENUE

9. This action seeks declaratory and injunctive relief, damages, and other relief pursuant to 28 U.S.C. §§2201 and 2202 and 42 U.S.C. §§1983 and 1988.

10. This Court has subject-matter jurisdiction over Plaintiffs' federal constitutional claims pursuant to 28 U.S.C. §§1331 and 1343(a)(3).

11. This Court has pendent jurisdiction to hear Plaintiff's state constitutional claims.

12. Venue is proper pursuant to 28 U.S.C. §1391(b)(2).

13. There is an active, justiciable controversy between the parties over whether Defendants' imposition of liberty-restricting conditions of pre-arraignment and pre-trial release on Plaintiff Collins and other presumptively innocent criminal defendants - including prospective

clients of bond agents like the members Plaintiff BBANM — without providing the option of secured non-excessive bond violates the Constitution. Further, there is a justiciable controversy concerning whether the actions of Defendants violate the New Mexico Constitution's separation of powers found at N.M. Const. art. III, § 1 by impermissibly invading the powers delegated to New Mexico Legislature in N.M. Const. art. IV, § 1.

14. Declaratory relief will resolve this controversy and eliminate the burden imposed on Plaintiffs' constitutional rights as well as the economic harms imposed by the unconstitutional actions and by restoring the law-making authority of the New Mexico Legislature to decide the highly important public policy issue.

15. A preliminary injunction preventing the New Mexico Courts Defendants from enacting the challenged New Mexico Supreme Court Rules will shield Plaintiffs' constitutional rights from ongoing harm while this litigation is pending.

16. A permanent injunction against Defendants, preventing them from enacting the challenged New Mexico Supreme Court Rules, will protect Plaintiffs' rights prospectively after final resolution of this matter and will restore the legislative power to address this public policy matter for the preservation of the public peace, health or safety.

PARTIES

17. Plaintiff Darlene Collins is a citizen of New Mexico who resides in Albuquerque. Plaintiff was arrested July 1, 2017, for aggravated assault, based on her alleged role in a domestic disturbance. Plaintiff is handicapped, suffering mobility limitations incurred after being in a collision caused by a drunk driver, is on medications for psychological issues and for blood pressure issues, she has a supportive family, and a residence in the community, and her family was willing to pay a non-excessive amount of bail for secured bond required to assure her future

appearance for arraignment and trial. Under the new Supreme Court Rules, however, neither the jailhouse nor the court could not offer her that option, but instead could not consider a secured bond to release her pre-arraignment and had to consider whether non-financial conditions or unsecured monetary conditions would assure her appearance before considering a secured bond. The court determined that the non-financial conditions of not returning to her home would secure the community upon her release on her own recognizance and that pretrial service could determine any other conditions to secure her return - which ultimately resulted in no additional conditions, however, Plaintiff Collins was denied the option of posting a secured bond so that she could return to her home.

18. Plaintiff Bail Bond Association of New Mexico (BBANM) is a professional membership organization comprised of bail bond businesses licensed to do business and operating throughout New Mexico. The membership of BBANM stands ready, willing, and able to issue and post a secured bond to Plaintiff Collins and others similarly situated. The membership of BBANM has experienced almost total devastation of their businesses, through the deprivation of the protections of the 8th Amendment to a reasonable bond for their potential customers. Madrid Enterprises, Inc., DBA Gerald Madrid Bail Bonds is a member of BBANM and licensed bail bond agent in the State of New Mexico, Gerald Madrid Bail Bonds is owned by Gerald Madrid who is the President of Plaintiff BBANM.

19. Plaintiff Senator Richard Martinez is a duly elected Senator to the New Mexico Legislature.

20. Plaintiff Senator Bill Sharer is a duly elected Senator to the New Mexico Legislature.

21. Plaintiff Senator Craig Brandt is a duly elected Senator to the New Mexico

Legislature.

22. Plaintiff Representative Carl Trujillo is a duly elected Representative to the New Mexico Legislature.

23. Plaintiff Representative Bill Rehm is a duly elected Representative to the New Mexico Legislature

24. Defendant Charles Daniels is a Justice of the New Mexico Supreme Court. Defendant Daniels is sued for declaratory and injunctive relief in his official capacity and for damages in his personal capacity.

25. Defendant Edward Chavez is a Justice of the New Mexico Supreme Court. Defendant Chavez is sued for declaratory and injunctive relief in his official capacity and for damages in his personal capacity.

26. Defendant Petra Maez is a Justice of the New Mexico Supreme Court. Defendant Maez is sued for declaratory and injunctive relief in her official capacity and for damages in her personal capacity.

27. Defendant Barbara Vigil is a Justice of the New Mexico Supreme Court. Defendant Vigil is sued for declaratory and injunctive relief in her official capacity and for damages in her personal capacity.

28. Defendant Judith Nakamura is the Chief Justice of the New Mexico Supreme Court. Defendant Nakamura is sued for declaratory and injunctive relief in her official capacity and for damages in her personal capacity.

29. Defendant New Mexico Supreme Court is sued in its official capacity for declaratory and injunctive relief as a co-equal branch of the tripartite New Mexico government established by the New Mexico Constitution.

FACTUAL ALLEGATIONS

A. HISTORICAL AND CONSTITUTIONAL BACKGROUND

30. “Bail ... is basic to our system of law.” *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971). With roots tracing to the “ancient practice[s]” of English common law and the Magna Carta, bail has preserved the “traditional right to freedom before conviction” for almost a thousand years. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

31. The defining documents of English liberty—the Statute of Westminster of 1275, the Petition of Right of 1628, the Habeas Corpus Act of 1679, and the English Bill of Rights of 1689—all recognize a defendant’s right to bail. *See Cobb v. Aytch*, 643 F.2d 946, 958 n.7 (3d Cir. 1981) (en banc).

32. Early American authorities likewise recognized the right to bail. The Northwest Ordinance, adopted by the Continental Congress in 1787, provided that “[a]ll persons shall be bailable, unless for capital offenses where the proof should be evident, or the presumption great.” 1 Stat. 50, 52. The Judiciary Act of 1789, adopted on the same day that Congress proposed the Bill of Rights to the States for ratification, directed that “upon all arrests in criminal cases, bail shall be admitted except where the punishment may be death.” 1 Stat. 73, 91.

33. Against this backdrop in which the right to bail was presumed, the People ratified the Eighth Amendment, which provides “[e]xcessive bail shall not be required.”

34. State constitutions, too, have overwhelmingly recognized a right to bail as an option to avoid pre-trial deprivations of liberty. “[E]very state that entered the Union after 1789, except West Virginia and Hawaii, guaranteed a right to bail in its original state constitution.” Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 Colum. L. Rev. 328, 351 (1982).

35. The right to bail is not absolute. Courts may deny bail to a defendant if no amount

of money will assure his appearance at trial or the safety of the community. *United States v. Salerno*, 481 U.S. 739, 746-55 (1987). And legislatures may define categories of crimes, such as capital offenses, or other “special circumstances” in which detention without bail may be permitted. *Id.* at 749.

36. But outside such “carefully limited” exceptions, *id.* at 755, the Constitution has always guaranteed a defendant the opportunity to avoid pre-trial deprivations of liberty through non-excessive monetary bail.

B. BAIL IN NEW MEXICO

37. Non-excessive bail is a long-established tradition in New Mexico contained the New Mexico Constitution’s Bill of Rights stating that “[a]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. N.M. Const. art. II, § 13.

38. On November 8, 2016, following the passage of 2016 Senate Joint Resolution 1, the voters of New Mexico voted to amend the New Mexico Constitution by adding the following, removing some of the language and adding the following language as recommended by SJR 1:

Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community. An appeal from an order denying bail shall be given preference over all other matters.

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

N.M. Const. art. II, § 13

39. The New Mexico voters in the adoption of the amendment to the Constitution therein sent the undeniable signal to the New Mexico Legislature concerning their views on the public policy in New Mexico concerning bail. Bail in New Mexico was historically a matter of law providing for the preservation of the public peace, health or safety delegated to the New Mexico Legislature which was acted upon by the New Mexico Legislature in the passage of law found at NMSA 1978 § Ch. 31, art. 3.

C. THE CHALLENGED LAW

40. In 2016, following the New Mexico Supreme Court's decision in *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276, Justice Daniels the author of the *Brown* opinion petitioned the Legislature for a change in the law regarding bail in New Mexico. His quest for that change culminated in compromise that was passed as SJR 1 and was ratified by the voters in November of 2016.

41. Following the adoption of the amendment by the voters in November 2016, the New Mexico Supreme Court convened an *ad hoc* committee for the adoption of modified rules concerning bail in New Mexico. The resultant changes to the Rules of Criminal Procedure for the Districts Courts, specifically the redline changes to NMRA 5-401, are included as EXHIBIT B, for example. The result of the *ad hoc* committee was the recommendation of the sweeping bail reforms sought but denied to Justice Daniels in the New Mexico Legislature following the 2014 *Brown* decision. On June 5, 2017, presumably under the auspices of the New Mexico Supreme Courts constitutional authority of superintending control over the inferior courts of New Mexico, the New Mexico Supreme Court usurped the powers of the New Mexico Legislature to pass a sweeping public policy reform not as law, but through rule.

42. The new Supreme Court Rules created hierarchy effectively prohibiting the lower courts from considering secured bonds without placing untenable work requirements on the lower court judges therein effectively removing the option from consideration by judges and a de facto situation wherein jailhouse bonds were completely extinguished as an option for pre-arraignment release. Specifically, the new rules as adopted contained the following language:

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

...

In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

43. *Most importantly*, the Supreme Court Rules in establishing the hierarchy only allowed for the lower courts to consider the posting of secured bonds “[i]f the court makes findings of the reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.” And then the Supreme Court Rules require the already overworked lower court judges to write and file written findings of the individualized facts justifying the secured bond, effectively ensuring that no defendant could elect or be offered the alternative to post a non-excessive secured bond in lieu of suffering infringement upon their pre-trial liberties.

44. In sum, the new Supreme Court Rules change the landscape of the State's criminal justice system replacing a system that guaranteed a monetary bail determination to all defendants except those in certain capital cases with a system that authorizes pre-trial detention based on perceived dangerousness and imposition of severely restrictive conditions such as electronic monitoring, home detention, drug and alcohol prohibition, and travel limitations without any opportunity to instead post non-excessive secured bond.

D. THE IMPACT OF THE CHALLENGED LAW

45. The New Mexico Supreme Court's new pretrial release rules took effect July 1, 2017. They are similar if not largely identical to the Criminal Justice Reform Act that was adopted by New Jersey's legislature as New Jersey's new pre-trial release and detention procedures which took effect January 1, 2017.

46. Because New Mexico's new rules are nearly identical to New Jersey's new law, and because Supreme Court Rules are so recently adopted such that no reliable accounting or collection of data has yet been completed, it is appropriate to consider New Jersey statistics of the impacts to its citizenry in forecasting the impact to New Mexico.

47. According to New Jersey's preliminary statistics, in the first three months of 2017, New Jersey courts granted 1,262 pre-trial detention motions from prosecutors—a procedural mechanism that allows detention without the consideration of bail and that did not exist before the new law. N.J. Courts, *Criminal Justice Reform Statistics: January 2017-March 2017*, Chart A, <http://bit.ly/2q68u9Y>.

48. According to the same statistics, approximately 7,579 individuals were released subject to non-monetary conditions in the first three months of 2017, including 1,286 who were released subject to the most severe conditions including home detention and electronic monitoring.

Id.

49. Although New Jersey appears not to have issued official statistics on the number of defendants released on monetary bail under the new law, one prominent newspaper reported that of “the 3,382 cases statewide that were processed in the first four weeks of January, judges set bail only three times.” Lisa W. Foderaro, *New Jersey Alters its Bail System and Upends Legal Landscape*, N.Y. Times (Feb. 6, 2017), <http://nyti.ms/2llmeMR>.

50. Thus, in New Jersey (as in New Mexico) while bail or secured bond remains a theoretical option, “the reality is that judges have nearly done away with it.” *Id.*; see also Nicole Hong & Shibani Mahtani, *Cash Bail, a Cornerstone of the Criminal-Justice System, Is Under Threat*, Wall St. J. (May 22, 2017), <http://on.wsj.com/2qHz5hb> (describing impact on bail industry).

51. Plaintiff BBANM’s membership is the many bail bond companies that have been severely harmed by the drastic reduction in the number of defendants given the option of jailhouse bonds or secured bonds under the new law.

52. If New Mexico criminal defendants had the option of secured bonds or jailhouse bonds, the members of Plaintiff BBANM would help them to take advantage of that option.

53. Plaintiff BBANM thus asserts both its members own constitutional rights and those of their potential customers. See, e.g., *Dep’t of Labor v. Triplett*, 494 U.S. 715, 720 (1990).

E. THE CHALLENGED LAW APPLIED TO PLAINTIFF COLLINS

54. On July 1, 2017, Plaintiff Darlene was arrested for aggravated assault arising out of a domestic dispute.

55. Plaintiff Collins was then transported to the Metro Detention Center in Albuquerque, NM.

56. Plaintiff Collins suffers from a handicap from a previous accident cause by a drunk driver, a mental condition requiring medication, and a medical condition requiring medication. She

was denied access to necessary medications as a result of her incarceration, ultimately resulting in her care in the jail's infirmary, Lovelace Hospital and UNM-Hospital at taxpayer expense.

57. Plaintiff Collins is retired and lives in the community.

58. Plaintiff Collins has no prior criminal record.

59. Plaintiff Collins has a supportive family.

60. Under the system of jailhouse bonds and secured bonds that existed for a century in New Mexico before July 1, 2017, the jailhouse could have set a reasonable, non-excessive monetary bail to ensure Plaintiff Collin's appearance at arraignment and then for trial.

61. If a jailhouse bond had been allowed, Plaintiff Collin's family was prepared to use their own financial resources with the assistance of a member of Plaintiff BBANM to pay the required amount for pre-arraignment release.

62. The new Supreme Court Rules barred the jailhouse and the Court from setting a secured bond unless a Court first determined that no combination of non-monetary conditions would reasonably assure Plaintiff Collin's appearance at arraignment.

63. As result of the denial of the ability of her family to post bail to secure her freedom, Plaintiff Collins was incarcerated for almost 5 full days and was required to be hospitalized.

64. The Metro Detention Center (MDC) did not—and could not, under the new Supreme Court Rules consider releasing Plaintiff Collins subject to monetary bail.

65. Ultimately, no conditions were imposed upon her release post-arraignment and pre-trial other than a verbal order from the Court that she was being released, but she was not allowed to return to her home. The loss of liberty pre-arraignment imposed upon on Plaintiff Collins was severely disruptive, causing her medical problems, causing concerns for post-traumatic stress disorder, to disrupt her family life causing her daughters to fear for her life, and make her feel that

her life was in jeopardy.

66. Yet under the Supreme Court Rules, the MDC was not even allowed to consider the liberty-preserving if not potentially life-preserving option of monetary bail before requiring the continued incarceration of Plaintiff Collins.

F. THE CHALLENGED LAW WAS PROMULGATED IN VIOLATION OF THE NEW MEXICO CONSTITUTION'S SEPERATION OF POWERS

67. Plaintiffs Senator Martinez, Senator Sharer, Senator Brandt, Representative Trujillo and Representative Rehm are currently serving legislators in the New Mexico Senate and House respectively. As duly elected members of the New Mexico Legislature they are charged as members of the body with the power and the responsibility of that branch of government to pass "laws providing for the preservation of the public peace, health or safety." N.M. Const. art. IV, § 1

68. The Defendants have the ability to write rules for the administration of justice in the lower courts pursuant to the Supreme Court's authority under the New Mexico Constitution to "have superintending control over all inferior courts." N.M. Const. art. VI, § 3

69. In New Mexico's tripartite government, the respective powers are separated and cannot be executed by a branch not possessing those powers under the New Mexico Constitution. The New Mexico Constitution expressly states:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

N.M. Const. art. III, § 1. Article III provides for the division of government into three distinct branches, the legislative, executive, and judicial branches, each responsible for performing a different function. The separation of powers provision of Article III, Section 1, generally bars one

branch of government from performing a function reserved for another branch of government. *Old Abe Co. v. New Mexico Mining Commission*, 908 P.2d 776, 787 (1995); citing *State ex rel. Clark v. Johnson*, 904 P.2d 11, 22 (1995).

70. The question at hand is, therefore, does the Supreme Court's new pretrial release rules make or change law for the preservation of the public peace, health or safety. "The test is whether the [Supreme Court's] action disrupts the proper balance between the [judicial] and legislative branches." *State ex rel. Clark*, 904 P.2d at 23. "If the Supreme Court's actions infringe upon "the essence of legislative authority the making of laws then the [Supreme Court] has exceeded [its] authority." *State ex rel. Clark*, 1995-NMSC-051, 120 N.M. at 573, 904 P.2d at 22.

71. The New Mexico Legislature has clearly exercised its legislative authority to pass laws to preserve the public peace with regard to bail and pretrial release as evidenced by the existence of statutes directed to the issue. Thus, such a major public policy change undertaken by the New Mexico Supreme Court in adopting the new Supreme Court Rules infringes upon the power of the Legislature to make law.

CLASS ACTION ALLEGATIONS

A. GENERAL CLASS ACTION ALLEGATIONS

72. Plaintiff Collins brings this action, on behalf of herself and all others similarly situated, for the purpose of asserting the claims alleged in this complaint on a common basis.

73. A class action is a superior means, and the only practicable means, by which Plaintiff Collins and unknown class members can challenge the New Mexico Supreme Court's unconstitutional rules restricting the liberty of Plaintiff Collins and similarly situated class members without providing the constitutionally required option of monetary bail.

74. This action is brought and may properly be maintained as a class action pursuant

to Federal Rule of Civil Procedure 23(a), 23(b)(2), and 23(b)(3).

75. This action satisfies the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b)(2) and (b)(3), where applicable.

76. Plaintiff Collins proposes a class seeking declaratory and injunctive relief and a class seeking damages relief.

77. The Declaratory and Injunctive Relief Class is defined as: All New Mexico criminal defendants who are or will be subject to the liberty-restricting conditions of pre-trial release permitted by the Supreme Court Rules without having the opportunity to be considered for release on secured bond.

78. The Damages Class is defined as: All New Mexico criminal defendants who were denied the opportunity for pre-arraignment liberty and criminal defendants who are or who were (but are no longer) subject to the liberty-restricting conditions of pre-trial release permitted by the Supreme Court Rules without having the opportunity to be considered for release on a secured bond, and who have suffered compensable harm as a result.

B. RULE 23(A)(1): NUMEROSITY

79. The class is so numerous that joinder is impracticable.

80. The vast majority of these individuals were denied the opportunity for pre-arraignment liberty and were subjected to liberty-restricting conditions of pre-trial release without having the opportunity to be considered for release on a secured bond.

81. The total number of individuals subjected to the challenged law—either in the past, currently, or in the future—will likely number in the tens of thousands.

C. RULE 23(A)(2): COMMONALITY

82. Common questions of law or fact exist as to all members of the class.

83. All class members seek relief on the common legal question whether New Mexico's law violates their constitutional rights by subjecting them to liberty-restricting conditions of release without providing them with an opportunity to be considered for release on monetary bail.

84. All class members also present a common factual question in that they were denied release pre-arraignment and were released subject to liberty-restricting conditions without a consideration of secured bond.

85. All members of the declaratory and injunctive relief class seek relief on the common legal question whether a declaratory judgment and injunctive relief are appropriate relief for the asserted constitutional violation.

86. All members of the damages class seek relief on the common legal question whether damages are available for the asserted constitutional violation.

D. RULE 23(A)(3): TYPICALITY

87. Plaintiff Collin's claims are typical of the claims of other members of the class.

88. Like all members of the class, Plaintiff Collins was denied a jailhouse bond pre-arraignment and was released subject to liberty-restricting conditions without having the opportunity to be considered for release on secured bond.

89. Like all members of the class, Plaintiff Collins claims that the New Mexico Supreme Court's rules barring consideration of secured bond before imposing liberty-restricting conditions violates her constitutional rights.

90. Like all members of the declaratory and injunctive relief class, Plaintiff Collins seeks a declaratory judgment that the law is unconstitutional and an injunction preventing the New

Mexico Courts from enforcing it.

91. Like all members of the damages class, Plaintiff Collins suffered compensable harm as a result of the liberty-restricting conditions imposed on her and seeks damages to remedy that harm.

92. There is nothing distinctive about Plaintiff Collins's claim for declaratory relief, injunctive relief, or damages that would lead to a different result in her case than in any case involving other class members.

E. RULE 23(A)(4): ADEQUACY

93. Plaintiff Collins is an adequate representative of the class because her interest in the vindication of her constitutional rights is entirely aligned with the interests of the other class members, each of whom has the same constitutional claims.

94. Plaintiff Collins is a member of the class, and her interests do not conflict with those of the other class members with respect to any claims.

95. Plaintiff Collins is represented by attorneys from Western Agriculture, Resource and Business Advocates, LLP and Preston Law Offices, who have extensive experience litigating complex civil rights matters in federal court and detailed knowledge of New Mexico's law and other relevant issues.

96. Class counsel has undertaken a detailed investigation of New Mexico's policies, practices, and procedures as they relate to federal constitutional requirements.

97. Class counsel has developed and continues to develop relationships with Plaintiff Collins and others similarly situated. The interests of the members of the class will be fairly and adequately represented by Plaintiff Collins and her attorneys.

F. RULE 23(B)(2): DECLARATORY AND INJUNCTIVE RELIEF CLASS

98. A class action is appropriate for the declaratory and injunctive relief class under Rule 23(b)(2) because Defendants have acted on grounds that apply generally to the class—namely the new Supreme Court Rules effectively prohibiting consideration of secured bond if any combination of non-monetary conditions and non-secured monetary conditions would reasonably assure a defendant's appearance at trial.

99. The class seeks declaratory and injunctive relief to enjoin enforcement of the unconstitutional provisions of the Supreme Court Rules. That relief will necessarily apply to every member of the class and is thus appropriate, respecting the class as a whole.

100. Class status is particularly appropriate because there is an acute risk that any individual class member's claim for declaratory and injunctive relief will become moot before the litigation is finally resolved.

G. RULE 23(B)(3): DAMAGES CLASS

101. A class action is appropriate for the damages class under Rule 23(b)(3) because questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

102. The predominant question in the case is whether the provisions of the Supreme Court Rules allowing liberty-restricting conditions of release to be imposed without consideration of secured bond is consistent with the Constitution. This question of law and the most important questions of fact—that the class members were subjected to denial of pre-arraignment liberty and liberty-restricting conditions without consideration of secured bond—are common to all members of the class. These questions predominate over any questions affecting only individual members,

such as potential variations in damages.

103. A class action is a superior mechanism for fairly and efficiently adjudicating the controversy because individual damage claims are likely to be relatively small, which would severely limit any individual class member's ability to obtain relief (especially considering that many class members are unlikely to be able to retain attorneys to pursue their small civil claims).

104. A class action is also superior because litigating thousands of individual damages claims would be unnecessarily burdensome for the state and the courts and could produce unfair and inconsistent results.

105. Individual members of the damages class do not have a strong interest in controlling the prosecution of separate lawsuits. *See* Fed. R. Civ. P. 23(b)(3)(A). To the contrary, given the small claims at issue, they are unlikely to obtain any relief at all without aggregation. And the class members' interests are wholly aligned with Plaintiff Collin's. Finally, class counsel is highly experienced and competent to represent the members' individual and collective interests.

106. Class counsel is not aware of any other pending litigation on the same issue. *See* Fed. R. Civ. P. 23(b)(3)(B).

107. It is desirable to concentrate this litigation in the District of New Mexico because the lawsuit concerns the constitutionality of New Mexico Supreme Court Rules, all of the operative events take place in New Mexico, and any relevant evidence is likely to be found in New Mexico. *See* Fed. R. Civ. P. 23(b)(3)(C).

108. Class litigation would be manageable. The Class is not so large as to be unwieldy, common questions predominate over individual issues, the Class is geographically concentrated, and aggregation will not present any difficulties related to notice. *See* Fed. R. Civ. P. 23(b)(3)(D).

**COUNT ONE VIOLATION OF RIGHT TO BAIL
(Eighth and Fourteenth Amendments)**

109. Plaintiffs hereby re-allege and incorporate by reference the allegations in paragraphs 1-108.

110. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

111. The Supreme Court has held that the Eighth Amendment protection against excessive bail applies to the States. *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 763 (2010).

112. The Eighth Amendment’s protection against “excessive bail” has always been understood to refer to monetary bail. *See, e.g., Salerno*, 481 U.S. at 754 (“bail must be set by a court *at a sum* designed to ensure” statutory objective) (emphasis added); *Stack*, 342 U.S. at 5 (describing bail as a “bond or the *deposit of a sum of money* subject to forfeiture”) (emphasis added).

113. The Eighth Amendment protection against pre-trial deprivation of liberty through “[e]xcessive bail” necessarily implies the option of bail to avoid a pre-trial deprivation of liberty in the first place, just as the Sixth Amendment right to a speedy trial implies the option of a trial. Otherwise, the prohibition on excessive bail could be rendered superfluous by denying bail in all cases.

114. The only way to give meaning to the Eighth Amendment protection against excessive bail is to recognize the logically antecedent “right to bail before trial.” *Stack*, 342 U.S. at 4; *see United States v. Motlow*, 10 F.2d 657, 659 (7th Cir. 1926) (Butler, Circuit J.) (Eighth Amendment “implies, and therefore safeguards, the right to give bail”); *Sistrunk*, 646 F.3d at 70 n.23 (“The constitutional right to be free from excessive bail thus shades into a protection against a denial of bail.”).

115. In other words, the Eighth Amendment “bail clause should be interpreted to protect

and ratify the ... right to bail as a fundamental principle of American criminal jurisprudence.” Verrilli, *Right to Bail*, 82 Colum. L. Rev. at 354.

116. Although a court may deny bail when no amount of money will reasonably assure the defendant’s presence at trial or when releasing the defendant would endanger the community, the Eighth Amendment requires that the option of bail remain available before a defendant is deprived of pre-trial liberty outside such “carefully limited exception[s].” *Salerno*, 481 U.S. at 753-55.

117. The Supreme Court Rules violate the Eighth Amendment by permitting judges to consider secured bond only when it is determined that no other conditions of release will reasonably assure the eligible defendant’s appearance in court when required.”

118. Moreover, because the permissible “conditions of release” that courts must consider before offering monetary bail include extremely restrictive conditions like electronic monitoring and home detention, the law not only subordinates secured bond to other conditions (which are not constitutionally protected), but effectively takes secured bonds off the table as an option entirely.

119. By imposing substantial deprivations of pre-trial liberty on Plaintiff Collins and other presumptively innocent defendants without offering the option of non-excessive bail to assure their appearance at arraignment and trial, Defendants violate Plaintiffs’ Eighth Amendment rights.

120. Defendants’ violation of Plaintiffs’ Eighth Amendment rights has caused them substantial damages.

**COUNT TWO DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS OF LAW
(Fourteenth Amendment)**

121. Plaintiffs hereby re-allege and incorporate by reference the allegations in paragraphs 1-120.

122. The Fourteenth Amendment Due Process Clause provides that no State shall

“deprive any person of life, liberty, or property, without due process of law.”

123. The Due Process Clause’s protection of “liberty” has “always ... been thought to encompass freedom from bodily restraint and punishment.” *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977).

124. The protection against bodily restraint includes not only freedom from “government custody, detention, or other forms of physical restraint,” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), but also “the right to move freely about one’s neighborhood or town,” *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990); see also 1 William Blackstone, *Commentaries* *134 (“personal liberty consists in the power of locomotion, of changing situation, or moving one’s person to whatsoever place one’s own inclination may direct, without imprisonment or restraint, unless by due course of law”).

125. The Due Process Clause’s protection of liberty applies to criminal defendants awaiting trial, who “remain clothed with a presumption of innocence and with their constitutional guarantees intact.” *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc).

126. Under the Due Process Clause, “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *Salerno*, 481 U.S. at 755.

127. As a “general rule,” therefore, “the government may not detain a person prior to a judgment of guilt in a criminal trial.” *Id.* at 749.

128. By subjecting Plaintiff Collins and other presumptively innocent criminal defendants to denial of pre-arraignment release, restrictive conditions of release, including home detention and GPS monitoring through an ankle bracelet, Defendants intrude on the constitutionally protected right to liberty - “freedom from bodily restraint.” *Ingraham*, 430 U.S. at 674.

129. “Every confinement of the person is an imprisonment, whether it be in a common

prison or in a private house, ... and when a man is lawfully in a house, it is imprisonment to prevent him from leaving the room in which he is.” *Wallace v. Kato*, 549 U.S. 384, 388-89 (2007) (quotation marks omitted).

130. By imposing liberty-restricting conditions on Plaintiff Collins and other presumptively innocent criminal defendants without offering them the historically-required option of non-excessive monetary bail that would reasonably assure their appearance at arraignment and trial and protect the community, Defendants violate the procedural component of the Due Process Clause.

131. Defendants also violate Plaintiffs’ substantive rights under the Due Process Clause because the option of non-excessive bail for a bailable offense is “fundamental to *our* scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition.” *McDonald*, 561 U.S. at 767.

132. The Supreme Court has held that bail is “basic to our system of law,” *Schilb*, 404 U.S. at 365, and a “constitutional privilege” to which pre-trial defendants are “entitled,” *United States v. Barber*, 140 U.S. 164, 167 (1891).

133. The Supreme Court has equated the “traditional right to freedom before conviction” with the “right to bail before trial.” *Stack*, 342 U.S. at 4.

134. The Third Circuit has similarly held that “bail constitutes a fundament of liberty underpinning our criminal proceedings” that “has been regarded as elemental to the American system of jurisprudence.” *Sistrunk*, 646 F.2d at 70.

135. Likewise, bail is deeply rooted in this Nation’s history and tradition. The right to bail predates the Constitution, having been recognized in the Massachusetts Body of Liberties in 1641 and other fundamental documents of the Founding Era; having been protected by federal law

since the Northwest Ordinance of 1787 and the Judiciary Act of 1789; and having been protected in the overwhelming majority of state constitutions.

136. The right to bail enjoys a historical pedigree that is as well-established - if not more so - than other rights protected by the Due Process Clause. For example, when the Fourteenth Amendment was ratified in 1868, 22 of 37 state constitutions included the right to keep and bear arms that the Supreme Court found protected by the Due Process Clause in *McDonald*, 561 U.S. at 777. An even greater number - 29 state constitutions - protected a right to bail. *See* Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 934-35 (2013).

137. In sum, if a defendant's right to be free from restrictions on his liberty without first being offered the option of non-excessive monetary bail is not directly protected by the Eighth Amendment, it must be protected by the Due Process Clause of the Fourteenth Amendment.

138. Defendants' violation of Plaintiffs' rights under the Due Process Clause has caused them substantial damages.

COUNT THREE UNREASONABLE SEARCH AND SEIZURE
(Fourth and Fourteenth Amendments)

139. Plaintiffs hereby re-allege and incorporate by reference the allegations in paragraphs 1-138.

140. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

141. The Fourth Amendment applies against the States through the Fourteenth Amendment. *See, e.g., Camara v. Mun. Ct. of City & Cty. of S.F.*, 387 U.S. 523, 528 (1967).

142. Subjecting a person to a GPS-tracking electronic monitor constitutes a Fourth Amendment "search." *Grady*, 135 S. Ct. at 1369.

143. Likewise, pre-trial release conditions such as home detention and mandatory reporting to pre-trial services constitute a Fourth Amendment “seizure.” *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984) (a “meaningful interference, however brief, with an individual’s freedom of movement” is a seizure).

144. A criminal defendant who has been released before trial “does not lose his or her Fourth Amendment right to be free of unreasonable” searches and seizures. *United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2006).

145. Moreover, a defendant’s consent to Fourth Amendment searches or seizures as a condition of release does not immunize the restrictions from constitutional scrutiny. *Id.* at 866.

146. The reasonableness of a Fourth Amendment search or seizure is determined “by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

147. The intrusion on Plaintiff’s privacy is particularly severe because it reaches into her home, where her interest in privacy is “at its zenith.” *Scott*, 450 F.3d at 871; *see United States v. Karo*, 468 U.S. 705, 714 (1984).

148. On the other side of the balance, Defendants cannot show that intrusive electronic monitoring of the kind imposed on Plaintiffs in New Mexico is “*needed* for the promotion of” their “legitimate governmental interest[]” in securing a defendants appearance at trial when Supreme Court Rules prohibited consideration of a less restrictive mechanism that has been used to promote precisely that governmental interest for almost the entire history of Anglo-American law: monetary bail. *Houghton*, 526 U.S. at 300 (emphasis added).

149. It is particularly unreasonable to prohibit consideration of monetary bail to fulfill

the state's legitimate governmental interest when monetary bail is *protected by the Constitution*.

150. Defendants' search and seizure violates the Fourth Amendment.

151. Defendants' violation of Plaintiffs' Fourth Amendment rights has caused them substantial damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Enter judgment in their favor;
- B. Certify a class as described above, pursuant to Plaintiff Collins's forthcoming class certification motion;
- C. Declare that the Supreme Court Rules violate the Eighth Amendment right of Plaintiff Collins and other presumptively innocent criminal defendants to the option of non-excessive monetary bail that will reasonably assure their appearance at arraignment and trial before being subjected to severe restrictions of their pre-trial liberty;
- D. Declare that the Supreme Court Rules violate the procedural and substantive due process rights of Plaintiff Collins and other presumptively innocent criminal defendants to the option of non-excessive monetary bail that will reasonably assure their appearance at arraignment and trial before being subjected to severe restrictions of their pre-trial liberty;
- E. Declare that the Supreme Court Rules violate the Fourth Amendment rights of Plaintiff Collins and other presumptively innocent criminal defendants to be free from unreasonable searches and seizures;
- F. Declare that the Supreme Court Rules violate the New Mexico Constitution's Art. III, § 1 separation of powers by infringing upon the authority of the New Mexico Legislature to pass laws preserving the public peace;

G. Enter a preliminary injunction preventing Defendants and their inferior courts from enforcing the provisions of the Supreme Court Rules that allow them to impose severe restrictions on the pre-trial liberty of Plaintiff Collins and other presumptively innocent criminal defendants without offering the option of non-excessive monetary bail or a secured bond that will reasonably assure their appearance at arraignment or trial;

H. Enter a permanent injunction preventing Defendants and their inferior courts from enforcing the provisions of the Supreme Court Rules that allow them to impose severe restrictions on the pre-trial liberty of Plaintiff Collins and other presumptively innocent criminal defendants without offering the option of non-excessive monetary bail that will reasonably assure their appearance at arraignment or trial;

I. Award Plaintiffs damages to compensate for the injuries they have suffered as a result of Defendants' unconstitutional conduct;

J. Award Plaintiffs the costs of their suit, including attorney fees and costs, pursuant to 42 U.S.C. §1988;

K. Grant any other and further relief that the Court deems just and proper.

Respectfully submitted this 28th day of July 2017.

**WESTERN AGRICULTURE, RESOURCE
AND BUSINESS ADVOCATES, LLP**

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Attorneys for Plaintiffs

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

DARLENE COLLINS; BAIL BOND ASSOCIATION OF NEW MEXICO; SENATOR RICHARD MARTINEZ; SENATOR BILL SHARER; SENATOR CRAIG BRANDT; REPRESENTATIVE BILL REHM; AND REPRESENTATIVE CARL TRUJILLO

(b) County of Residence of First Listed Plaintiff

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

WESTERN AGRICULTURE, RESOURCE AND BUSINESS ADVOCATES, LLP;
400 GOLD AVE SW, SUITE 1000, ALBUQUERQUE, NM 87102
(505) 750-3060

DEFENDANTS

JUDGE CHARLES W. DANIEL, JUDGE EDWARD L. CHAVEZ, JUDGE PETRA JIMINEZ MAEZ, JUDGE BARBARAJ. VIGIL, JUDGE JUDITH K. NAKAMURA, AND THE NEW MEXICO SUPREME COURT

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. 1983

Brief description of cause:
CONSTITUTIONAL RIGHTS

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

JULY 28, 2017

SIGNATURE OF ATTORNEY OF RECORD

/S/ A. BLAIR DUNN,

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. **Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. **Origin.** Place an "X" in one of the seven boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
- Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
- PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

June 5, 2017

NO. 17-8300-005

**IN THE MATTER OF AMENDMENTS
TO THE RULES GOVERNING PRETRIAL
RELEASE AND DETENTION IN CRIMINAL
PROCEEDINGS IN NEW MEXICO STATE COURTS**

ORDER

WHEREAS, this matter came on for consideration by the Court to revise the rules governing pretrial release and detention in criminal proceedings in New Mexico state courts by amendment, adoption, withdrawal, and recompilation of certain rules and forms in the Rules of Criminal Procedure for the District Courts, Rules of Criminal Procedure for the Magistrate Courts, Rules of Criminal Procedure for the Metropolitan Courts, Rules of Procedure for the Municipal Courts, Criminal Forms, and Rules of Appellate Procedure, and the Court having considered the recommendations of its Ad Hoc Pretrial Release Committee and public comments received by the Court during the publication for comment process and being otherwise sufficiently advised, Chief Justice Charles W. Daniels, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Barbara J. Vigil, and Justice Judith K. Nakamura concurring;

IT IS THEREFORE ORDERED the amendment of Rules 5-106, 5-204, 5-401, 5-402, 5-403, 5-405, and 5-406 NMRA of the Rules of Criminal Procedure for the District Courts, Rules 6-401, 6-403, 6-406, 6-506, and 6-703 NMRA of the Rules of Criminal Procedure for the Magistrate Courts, Rules 7-401, 7-403, 7-406, 7-506, and 7-703 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts, Rules 8-401, 8-403, 8-406, 8-506, and 8-703 NMRA of the Rules of Procedure for the Municipal Courts, Rules 12-204, and 12-205 NMRA of the Rules of Appellate Procedure, and Forms 9-302, 9-303, 9-307, 9-308, and 9-309 NMRA of the Criminal Forms is APPROVED;

IT IS FURTHER ORDERED that the amendment and recompilation of Rule 5-401A as 5-401.1 NMRA and Rule 5-401B as 5-401.2 NMRA of the Rules of Criminal Procedure for the District Courts, Rule 6-401A as 6-401.1 NMRA and Rule 6-401B as 6-401.2 NMRA of the Rules of Criminal Procedure for the Magistrate Courts, Rule 7-401A as 7-401.1 NMRA and Rule 7-401B as 7-401.2 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts, and Rule 8-401A as 8-401.1 NMRA and Rule 8-401B as 8-401.2 NMRA of the Rules of Procedure for the Municipal Courts is APPROVED;

IT IS FURTHER ORDERED that new Rules 5-408 and 5-409 NMRA of the Rules of Criminal Procedure for the District Courts, new Rules 6-408 and 6-409 NMRA of the Rules of Criminal Procedure for the Magistrate Courts, new Rules 7-408 and 7-409 NMRA of the Rules of Criminal Procedure for the Metropolitan Courts, new Rule 8-408 NMRA of the Rules of Procedure for the Municipal Courts, and new Form 9-301A NMRA of the Criminal Forms are ADOPTED;

IT IS FURTHER ORDERED that Forms 9-303A and 9-310 NMRA of the Criminal

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Forms are WITHDRAWN;

IT IS FURTHER ORDERED that the above-referenced amendments shall be **effective for all cases pending or filed on or after July 1, 2017;**

IT IS FURTHER ORDERED that the Clerk of the Court is authorized and directed to give notice of the above-referenced amendments by posting them on the New Mexico Compilation Commission website and publishing them in the *Bar Bulletin* and *New Mexico Rules Annotated*.

IT IS SO ORDERED.

WITNESS, Honorable Charles W. Daniels, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 5th day of June, 2017.

(S E A L)

Joey D. Moya, Chief Clerk of the Supreme Court
of the State of New Mexico

5-401. [Bail] Pretrial release.

A. Hearing.

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

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

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

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

[A.]B. Right to [bail] pretrial release; recognizance or unsecured appearance bond. Pending trial, any [person bailable] defendant eligible for pretrial release under Article [2,] II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the [person's] defendant's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, [~~subject to any release conditions imposed pursuant to Paragraph C of this rule,~~] unless the court makes [~~a written finding that such~~] written findings of particularized reasons why the release will not reasonably [assure] ensure the appearance of the [person] defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. Factors to be considered in determining conditions of release. In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information concerning

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

(2) the weight of the evidence against the defendant;

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;

(4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

EXHIBIT B

(5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

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

(1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment, or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode, or travel;

(5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify concerning the offense;

(6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;

(10) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(11) submit to a drug test or an alcohol test on request of a person designated by the court;

(12) return to custody for specified hours following release for employment, schooling, or other limited purposes;

(13) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

[B:]E. Secured ~~[bonds]~~ bond. If the court makes [a written finding that] findings of the reasons why release on personal recognizance or [upon execution of an] unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably [assure] ensure the appearance of the [person] defendant as required, the court may require a secured bond for the defendant's release. [or will endanger the safety of any other person or the community, in addition to any release conditions imposed pursuant to Paragraph D of this rule, the court shall order the pretrial release of such person subject to the first of the following types of secured bonds which will reasonably assure the appearance of the person as required and the safety of any person and the community.]

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

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

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

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

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

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

(a) Percentage bond. ~~[the execution of a bail]~~ The court may require a secured appearance bond executed by the defendant in [a] the full amount specified in the order setting conditions of release, ~~[specified amount executed by the person and]~~ secured by a deposit ~~[of]~~ in cash of ten percent (10%) of the amount ~~[set for bail]~~ specified, ~~[or secured by such greater or lesser amount as is reasonably necessary to assure the appearance of the person as required.]~~ The deposit may be returned as provided in Paragraph M of this rule. ~~[The cash deposit may be made by or assigned to a paid surety licensed under the Bail Bondsmen Licensing Law provided such paid surety also executes a bail bond for the full amount of the bail set;]~~

(b) Property bond. The court may require the execution of a ~~[bail]~~ property bond by the defendant or by unpaid sureties in the full amount ~~[of the bond]~~ specified in the order setting conditions of release, secured by ~~[and]~~ the pledging of real property ~~[as required by]~~ in accordance with Rule ~~[5-401A]~~ 5-401.1 NMRA ~~[or]~~.

(c) Cash or surety bond. The court may give the defendant the option ~~[the execution]~~ of [a] either

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

(ii) a ~~[bail]~~ surety bond ~~[with]~~ executed by licensed sureties in accordance with Rule 5-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release. ~~[as provided in Rule 5-401B NMRA or execution by the person of an appearance bond and deposit with the clerk of the court, in cash, of one-hundred percent (100%) of the amount of the bail set, such deposit to be returned as provided in this rule.~~

Any bail, property or appearance bond shall be substantially in the form approved by the Supreme Court.

C. — ~~Factors to be considered in determining conditions of release.~~ The court shall, in determining the type of bail and which conditions of release will reasonably assure appearance of the person as required and the safety of any other person and the community, take into account the available information concerning:

~~(1) — the nature and circumstances of the offense charged, including whether the~~

offense is a crime of violence or involves a narcotic drug;

(2) — the weight of the evidence against the person;

(3) — the history and characteristics of the person, including:

(a) — the person's character and physical and mental condition;

(b) — the person's family ties;

(c) — the person's employment status, employment history and financial resources;

(d) — the person's past and present residences;

(e) — the length of residence in the community;

(f) — any facts tending to indicate that the person has strong ties to the community;

(g) — any facts indicating the possibility that the person will commit new crimes if released;

(h) — the person's past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings; and

(i) — whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law;

(4) — the nature and seriousness of the danger to any person or the community that would be posed by the person's release; and

(5) — any other facts tending to indicate the person is likely to appear.

D. — ~~Additional conditions; conditions to assure orderly administration of justice.~~

The court, upon release of the defendant or any time thereafter, may enter an order, that such person's release be subject to:

(1) — the condition that the person not commit a federal, state or local crime during the period of release; and

(2) — the least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community and the orderly administration of justice:

(a) — a condition that the person remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(b) — a condition that the person maintain employment, or, if unemployed, actively seek employment;

(c) — a condition that the person maintain or commence an educational program;

(d) — a condition that the person abide by specified restrictions on personal associations, place of abode or travel;

(e) — a condition that the person avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(f) — a condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(g) — a condition that the person comply with a specified curfew;

(h) — a condition that the person refrain from possessing a firearm;

~~destructive device or other dangerous weapon;~~

~~(i) — a condition that the person refrain from excessive or any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;~~

~~(j) — a condition that the person undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;~~

~~(k) — a condition that the person submit to a urine analysis or alcohol test upon request of a person designated by the court;~~

~~(l) — a condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes;~~

~~(m) — a condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.]~~

[E.]F. [Explanation of conditions by court:] Order setting conditions of release; findings regarding secured bond.

(1) Contents of order setting conditions of release. The [release order of the court] order setting conditions of release shall

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

~~[(2)] (b)~~ advise the [person] defendant of

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

~~[(b)] (ii)~~ the consequences for violating a condition of release, including the immediate issuance of a warrant for the [person's] defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

~~[(c)] (iii)~~ the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice[; and

~~(3) — unless the defendant is released on personal recognizance, set forth the circumstances which require that conditions of release be imposed].~~

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

[F.]G. [Detention] Pretrial detention. ~~[Upon motion by the state to detain a person without bail pending trial, the court shall hold a hearing to determine whether bail may be denied pursuant to Article 2, Section 13 of the New Mexico Constitution.] If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 5-409 NMRA.~~

[G.]H. [Review] Case pending in district court; motion for review of conditions of release. ~~[A person for whom bail is set by]~~

(1) Motion for review. If the district court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody ~~[and who after]~~ twenty-four (24) hours ~~[from the time of transfer to a detention facility continues to be detained]~~ after the

issuance of the order setting conditions of release as a result of the [person's] defendant's inability to ~~[meet the bail set]~~ post the secured bond or meet the conditions of release in the present case, the defendant shall, ~~[upon]~~ on motion of the defendant or the court's own motion, be entitled to ~~[have]~~ a hearing to review the ~~[amount of bail set]~~ conditions of release.

(2) ***Review hearing.*** The district court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the ~~[release]~~ order setting conditions of release is amended and the ~~[person]~~ defendant is thereupon released, the court shall state in the record the reasons for ~~[continuing the amount of bail set]~~ declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) ***Work or school release.*** A ~~[person]~~ defendant who is ordered released on a condition ~~[which]~~ that requires that the ~~[person]~~ defendant return to custody after specified hours~~[-upon application]~~ shall, on motion of the defendant or the court's own motion, be entitled to ~~[have]~~ a hearing to review the conditions imposed. Unless the requirement is removed and the ~~[person]~~ defendant is ~~[thereupon]~~ released on another condition, the court shall state in the record the reason for the continuation of the requirement. A hearing to review conditions of release ~~[pursuant to this paragraph]~~ under this subparagraph shall be held by the district court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) ***Subsequent motion for review.*** The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

~~[H.]I. Amendment of conditions.~~ The court ~~[ordering the release of a person on any condition specified in this rule]~~ may amend its order setting conditions of release at any time ~~[to increase the amount of bail set or impose additional or different conditions of release]~~. If ~~[such]~~ the amendment of the ~~[release]~~ order ~~[results]~~ may result in the detention of the ~~[person as a result of the person's inability to meet such conditions or in the release of the person on a condition requiring the person to return to custody after specified hours, the provisions of Paragraph G of this rule shall apply]~~ defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the a condition of release, the court shall follow the procedures set forth in Rule 5-403 NMRA.

~~[F.]J. Record of hearing.~~ A record shall be made of any hearing held by the district court ~~[pursuant to]~~ under this rule.

~~[J.] Return of cash deposit.~~ If a person has been released by executing an appearance bond and depositing a cash deposit set pursuant to Subparagraph (1) or (3) of Paragraph B of this rule, when the conditions of the appearance bond have been performed and the defendant's guilt for whom bail was required has been adjudicated by the Court, the clerk

shall return the sum which has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.]

K. **Cases pending in magistrate, [or] metropolitan, or municipal court; petition for release or review by district court.**

(1) **Case within magistrate, metropolitan, or municipal court trial jurisdiction.** A defendant charged with an offense that is within magistrate, metropolitan, or municipal court trial jurisdiction may file a petition in the district court for review of the magistrate, metropolitan, or municipal court's order setting conditions of release only after the magistrate, metropolitan, or municipal court has ruled on a motion to review the conditions of release under Rule 6-401(H) NMRA, Rule 7-401(H) NMRA, or Rule 8-401(G) NMRA. The defendant shall attach to the district court petition a copy of the magistrate, metropolitan, or municipal court order disposing of the defendant's motion for review.

(2) **Felony case.** A [person] defendant charged with [an] a felony offense [which is not within magistrate or metropolitan court trial jurisdiction and] who has not been bound over to the district court may file a petition in the district court for release under this rule at any time after the [person's] defendant's arrest. [with the clerk of the district court for release pursuant to this rule Jurisdiction of the magistrate or metropolitan court to release the accused shall be terminated upon the filing of a petition for release in the district court. Upon the filing of the petition, the district court may:

(1) — continue the bail set and any condition of release imposed by the magistrate or metropolitan court;

(2) — impose any bail or condition of release authorized by Paragraphs A, B or D of this rule;

(3) — continue any revocation of release imposed pursuant to Rule 5-403 NMRA; or

(4) — after a hearing, revoke the release of a defendant pursuant to Subparagraph (2) of Paragraph A of Rule 5-403 NMRA.]

(3) **Petition; requirements.** A petition under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

(a) file a copy of the district court petition in the magistrate, metropolitan, or municipal court;

(b) serve a copy on the district attorney; and

(c) provide a copy to the assigned district court judge.

(4) **Magistrate, metropolitan, or municipal court's jurisdiction pending determination of the petition.** Upon the filing of a petition under this paragraph, the magistrate, metropolitan, or municipal court's jurisdiction to set or amend the conditions of release shall be suspended pending determination of the petition by the district court. The magistrate, metropolitan, or municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate, metropolitan, or municipal court while the district court petition is pending. The magistrate, metropolitan, or municipal court's order setting conditions of release, if any, shall remain in effect unless and until the district court issues an order amending the conditions of release.

(5) **District court review.** The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one

of the following actions:

(a) set a hearing no later than ten (10) days after the filing of the petition and promptly transmit a copy of the notice to the magistrate, metropolitan, or municipal court;

(b) deny the petition summarily; or

(c) amend the order setting conditions of release without a hearing.

(6) **District court order; transmission to magistrate, metropolitan, or municipal court.** The district court shall promptly transmit to the magistrate, metropolitan, or municipal court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

L. Expedited trial scheduling for defendant in custody. The district court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release.

M. Return of cash deposit. If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

[E.]N. Release from custody by designee. ~~[Any or all of the provisions of this rule, except the provisions of Paragraphs F, G and K of this rule, may be carried out by responsible persons designated in writing by the]~~ The chief judge of the district court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 5-408 NMRA. A designee shall release a defendant from custody prior to the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 5-408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if ~~[such]~~ the person or ~~[such]~~ the person's spouse is

~~[(1)]~~ related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state. ~~[or~~

~~(2) — employed by a jail or detention facility unless designated in writing by the chief judge of the judicial district in which the jail or detention facility is located.]~~

[M.]O. Bind over [in] to district court. ~~[The]~~ For any case that is not within magistrate or metropolitan court trial jurisdiction, upon notice to that court, any bond shall ~~[remain in the magistrate or metropolitan court, except that it shall]~~ be transferred to the district court upon the filing of an information or indictment ~~[or bind over to that]~~ in the district court.

[N.]P. Evidence. Information ~~[stated in, or]~~ offered in connection with or stated in any proceeding held or order entered ~~[pursuant to]~~ under this rule need not conform to the New Mexico Rules of Evidence.

[O.]Q. Forms. Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

[P.]R. Judicial discretion; disqualification and excusal. Action by any court on any matter relating to ~~[bail]~~ pretrial release shall not preclude the subsequent statutory ~~[or constitutional]~~ disqualification of a judge. A judge may not be excused from setting initial conditions of release or reviewing a lower court's order setting or revoking conditions of release

unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective January 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; September 1, 2005; as amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; by Supreme Court Order No. 10-8300-033, effective December 10, 2010; as amended by Supreme Court Order No. 14-8300-017, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — [Under Section 13 of Article 2 of the New Mexico Constitution, every accused, except a person accused of first degree murder where the proof is evident or the presumption great, is entitled to bail. Paragraph E was added in 1990 to recognize the amendment of Article 2, Section 13 of the New Mexico Constitution which permits the denial of bail for 60 days by an order entered within 7 days after incarceration if:

(1) — the defendant is accused of a felony and has been previously convicted of two or more felonies within the state; or

(2) — the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction within this state.]

This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution.” *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely due to financial inability to post a secured bond. This rule was derived from the [Federal Bail Reform Act of 1966, as amended] federal statute governing the release or detention of a defendant pending trial. [Under the federal bail law, the right to bail is restated as the right to have conditions of release set by the court.] See 18 U.S.C. §[§] 3142. [et seq. The 1990 amendments to Paragraphs B and C of this rule were taken from Subsections (g) and (c), respectively, of 18 USCA § 1342.]

[In 1990 this rule was amended to encourage more releases on personal recognizance. Release conditions may now be imposed in addition to the execution of a unsecured personal appearance bond or a secured bond. Because bail and additional conditions of release will usually be set initially by a magistrate or metropolitan court judge, Rules 6-401 and 7-401 NMRA govern the procedure in those courts. The magistrate, municipal and metropolitan court bail rules were derived from and are substantially identical to this rule.] This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court’s holding in *Brown*, 2014-NMSC-038. Corresponding rules are located in the Rules of Criminal Procedure for the Magistrate Courts, see Rules 6-401 NMRA, the Rules of Criminal Procedure for the Metropolitan Courts, see Rule 7-401 NMRA, and the Rules of Procedure for the Municipal Courts, see Rule 8-401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 5-104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5-409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (H)(2), and (H)(3) of this rule provide that assistance of counsel is required in a proceeding that

may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that such release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. See Brown, 2014-NMSC-038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions prior to a court appearance, the judge should review the conditions at the defendant's first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination as to whether the defendant can afford to pay all or a portion of the cost, or whether the court has the authority to waive the cost, because detaining a defendant due to inability to pay the cost associated with a condition of release is comparable to detaining a defendant due to financial inability to post a secured bond.

[Under this rule, the types of bonds authorized to be posted are set forth] As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. See State v. Ericksons, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 ("[T]he purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court."); see also NMSA 1978, § 31-3-2(B)(2) (authorizing the forfeiture of bond upon the defendant's failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant's financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant's appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. See Brown, 2014-NMSC-038, ¶ 53 ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release."); see also Stack v. Boyle, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant's appearance in court "is 'excessive' under the Eighth Amendment"). A felony defendant who poses a danger that cannot be mitigated through the imposition of non-monetary conditions of release under Paragraph D of this rule should be detained under Article II, Section 13 and Rule 5-409 NMRA.

The court should consider the authorized types of secured bonds in the order of priority [they are to be considered by the judge or designee] set forth in Paragraph E. [The first priority is release upon the execution of a personal recognizance or unsecured appearance bond. If the court determines that release on personal recognizance or upon the execution of an unsecured bond will not reasonably assure the appearance of the defendant as required, the court may require a secured bond.]

If a secured bond is required to assure the appearance of the defendant, the judge or designee] The court must first consider requiring an appearance bond [with] secured by a cash deposit of 10% [or such other percentage of the amount of the bond]. If this is inadequate, the court then must consider a property bond where the property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court [has not authorized a cash deposit of less than 100% of the amount of bond set,] requires a cash or surety bond, the defendant [may] has the option either to execute an appearance bond and deposit [one hundred percent (100%)] of the amount of the bond with the court [Last of all the defendant may] or to purchase a bond from a paid surety. A paid surety may execute a [corporate] surety bond or a real or personal property bond [-A real or personal property bond may only be executed by a paid surety] only if the conditions of Rule [5-401B] Rule 5-401.2 NMRA are met. [Under the 1990 amendments to Rule 5-401B NMRA, a bond which has as collateral real or personal property is authorized only in those districts in which an order has been entered finding that the pledging of an irrevocable letter of credit will result in the detention of persons otherwise eligible for release.]

Paragraph F governs the contents of an order setting conditions of release. See Form 9-303 NMRA (order setting conditions of release). [Although bail hearings are not required to be a matter of record in the magistrate, metropolitan, or municipal courts, Form 9-302A] Paragraph F also requires [the judge or designee to set forth] the court to make written findings justifying the imposition of [the reasons why] a secured bond, if any [was required rather than release on personal recognizance]. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make such supplemental findings in a separate document within two days of the conclusion of the hearing.

[The provision allowing the court to set additional conditions of release in order to assure "the orderly administration of justice" was derived from American Bar Association Standards Relating to Pretrial Release, Section 5.5 (Approved Draft 1968) and 18 USCA § 3142 and Rule 46(b) of the Federal Rules of Criminal Procedure.]

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13. If the defendant poses a danger to the safety of any other person or the community that cannot be addressed through the imposition of non-monetary conditions of release, the prosecutor may file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the district court must follow the procedures set forth in Rule 5-409 NMRA.

Paragraphs H and K provide avenues for a defendant to seek district court review of the conditions of release. Paragraph H applies to a defendant whose case is pending before the district court. Paragraph K sets forth the procedure for a defendant whose case is pending in the magistrate, metropolitan, or municipal court. Article II, Section 13 requires the court to rule on a motion or a petition for pretrial release "in an expedited manner" and to release a defendant who

is being held solely due to financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or petition for pretrial release may present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph L requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody due to inability to post bond or meet the conditions of release. See generally *United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act, 18 U.S.C. § 3161”); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”).

[Pursuant to] Under NMSA 1978, Section 31-3-1 [NMSA 1978], the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph N, a designee [Designees] must be [named in writing] designated by the chief district court judge in a written court order. A person may not be appointed as a designee if such person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may [not] be appointed as a designee. Paragraph N and Rule 5-408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody prior to that defendant’s first appearance before a judge.

Paragraph O requires the magistrate or metropolitan court to transfer any bond to the district court upon notice from the district attorney that an information or indictment has been filed. See Rules 6-202(E)-(F), 7-202(E)-(F) NMRA (requiring the district attorney to notify the magistrate or metropolitan court of the filing of an information or indictment in the district court).

Paragraph [M] P of this rule dovetails with [Subparagraph (2) of Paragraph D of] Rule [11-1101] 11-1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in [either the magistrate or] district court with respect to matters of pretrial release [or bail]. Like other types of proceedings where the Rules of Evidence do not apply, at a pretrial release hearing the court is responsible “for assessing the reliability and accuracy” of the information presented. See *United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); see also *United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence).

Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. See NMSA 1978, § 38-3-9. Paragraph R of this rule does not prevent a judge from being recused under the provisions of the New Mexico

Constitution or the Code of Judicial Conduct either on the court's own motion or motion of a party. See N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[As amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; as amended by Supreme Court Order No. 17-8300-005, effective July 1, 2017.]