December 21, 2016

Hon. John S. Sweeney, A.J.S.C. (ret.), Chairman and the Council Members
State of New Jersey Council on Local Mandates
135 West Hanover Street, 4th Floor
P.O. Box 627
Trenton, NJ 08625-0627
Via email at: filings-clmand@treas.state.nj.us

Re: In the Matter of a Complaint Filed By the New Jersey Association of Counties Challenging Provisions of the Criminal Justice Reform Act as an Unfunded Mandate

Dear Chairman and Councilmembers:

Please accept this letter in lieu of a more formal brief on behalf of *amici curiae*, American Civil Liberties Union of New Jersey, the Drug Policy Alliance, the Latino Action Network, the National Association for the Advancement of Colored People – New Jersey State Conference, and the New Jersey Institute for Social Justice (collectively *amici*). The law at issue, *N.J.A.C.* 2A:162-15, *et seq.* is not an unfunded mandate. *Amici* oppose the New Jersey Association of Counties (NJAC)'s request for injunctive relief and support the Attorney General's motion to dismiss the Complaint.

PLEADING SUMMARY

In the summer of 2014, the New Jersey Legislature passed and the Governor signed landmark legislation designed to reform New Jersey's broken system of pretrial release and to give meaning to constitutional speedy trial protections. These comprehensive reforms, collectively referred to as the Criminal Justice Reform Act (CJRA), implemented constitutional provisions. Specifically, it implemented Article I, paragraph 10, that existed at the time the

CJRA was passed, and Article I, paragraph 11, that was amended as part of the Legislature's overall justice reform package and was adopted by the voters months after the CJRA was passed. The Legislature made clear that CJRA would not take effect unless and until the constitutional amendment was adopted.

Because the legislation implemented constitutional provisions – Article I, paragraph 11 and Article I, paragraph 10 of the New Jersey Constitution – it is not an unfunded mandate and is immune from consideration by the Council on Local Mandates (Council) (Point I). However, even if the Council determined that the CJRA did not implement constitutional provisions, it would still not be an unfunded mandate (Point II). In support of its Complaint, the NJAC speculates that there will be costs to counties associated with implementing the CJRA. However, absent actual (rather than speculative) evidence that there are required costs to counties, the law does not create an unfunded mandate (Point II, A). Moreover, while some counties may choose to implement the CJRA is a way that costs money, they need not do so. Where a county opts to utilize a method of implementation with a price tag when it need not do so, no unfunded mandate exists (Point II, B). Finally, the NJAC fails to acknowledge the significant savings that counties will enjoy when they implement CJRA. Where a county may enjoy a net savings, no unfunded mandate exists (Point II, C).

INTEREST OF *AMICI CURIAE*

The CJRA created a Pretrial Services Program Review Commission (the Commission) charged with reviewing the annual reports from the courts, examining the existing law concerning pretrial release and detention, researching criminal justice pretrial release and detention programs from other states and jurisdictions, and making recommendations for

legislation related to the issues in its charge. *N.J.S.A.* 2A:162-26. *Amici* are the five legislatively designated *ex-officio* public members. *N.J.S.A.* 2A:162-26a.

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

Individually and collectively, *amici* have participated on the Joint Committee on Criminal Justice (JCCJ), testified before legislative bodies, provided testimony on proposed *New Jersey Court Rules*, and participated as *amicus curiae* before the New Jersey Supreme Court on issues regarding pretrial release and speedy trial. In short, *amici* have "a real stake in the outcome of the litigation." *NJ Citizen Action v. Riviera Motel Corporation*, 296 *N.J. Super.* 402, 416 (App. Div. 1997) (quoting *Crescent Pk. Tenants Ass'n v. Realty Equities Corp.*, 58 *N.J.* 98, 109 (1971)).

PROCEDURAL HISTORY

On December 6, 2016, the NJAC filed the Complaint with the Council, alleging that the CJRA constituted an unfunded mandate. The Attorney General's Answer (or Motion to Dismiss) is due on December 22, 2016. This Request to Participate as *Amici Curiae* and brief on behalf of *amici* is filed before that date.

STATEMENT OF FACTS

Pretrial Release

In November 2014, more than 60 percent of New Jersey voters approved a constitutional amendment that impacted pretrial release for the criminal accused. State of New Jersey, Department of State, OFFICIAL LIST PUBLIC QUESTION RESULTS, FOR 11/04/2014 – GENERAL ELECTION, Dec. 2, 2014, available at: http://nj.gov/state/elections/2014-results/2014-official-general-public-question-1.pdf (891,373 votes – or 61.8% of votes cast – in support of Ballot Question 1). Voter support for the reform was overwhelming: supporters of the constitutional amendment outnumbered opponents in each of New Jersey's 21 counties. *Id.*

Prior to the amendment, New Jersey's system of pretrial release was "resource based," which means it relied on a defendant's ability to post money bail to secure his or her release after arrest. REPORT OF THE JOINT COMMITTEE ON CRIMINAL JUSTICE (March 2014) (JCCJ 2014 Report) at 1, *available at* https://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf. That system resulted in massive injustice: on any given day more than 5,000 people were in New Jersey jails, able to be released on bail but remaining in custody, simply because they lacked resources to post bail. Marie VanNostrand, Ph.D., NEW JERSEY JAIL POPULATION ANALYSIS (March 2013), p. 13, *available at* https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf. The system had a tremendously disparate impact on people of color: 71 percent of the population in New Jersey jails were blacks and Latinos. *Id.* at 9. As of 2013, of the total jail population, 38 percent were held solely due to their inability to meet the conditions of the bail set for them. *Id.* at 13. And 12 percent of the population (more than 1,500 people) were held because of their inability to pay

$2,500 or less. *Id.* The average length of stay in jail pending trial – while presumed innocent – was about 10 months. *Id.* at 14.

But those were not the only problems: New Jersey's resource-based bail system risked "dual system error," because:

> defendants charged with less serious offenses, who pose little risk of flight or danger to the community, too often remain in jail before trial because they cannot post relatively modest amounts of bail, while other defendants who face more serious charges and have access to funds are released even if they pose a danger to the community or a substantial risk of flight.
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> [JCCJ 2014 Report at 3.]

In light of those dual problems, the Legislature sought to fundamentally change the way pretrial release and speedy trial functioned. However, in order to create a system of pretrial release that focused on risk rather than resources, a constitutional amendment was required. *Id.* at 5 ("Implementation of a risk-based approach in New Jersey will require constitutional and statutory amendments."). Without changing the State Constitution, a risk-based system of pretrial release was impossible because defendants in New Jersey, other than some of those charged with capital crimes, were entitled to release on bail in every case. *N.J. Const.* Art. I, para 11. The November 2014 amendment to the Constitution allowed, for the first time, New Jersey to implement the risk-based system envisioned by the CJRA.

Under the CJRA, defendants will receive a risk assessment and have conditions of release determined by a judge within 48 hours. *N.J.S.A.* 2A:162-16b(1). Before the passage of CJRA, defendants in custody appeared before a judge within 72 hours of arrest, excluding holidays. *R.* 3:4-1(a)(2).

Speedy Trial

Defendants in New Jersey have always had a right to a speedy trial. *U.S. Const.*, amend.VI; *N.J. Const*. art. I, para. 10. For four decades, New Jersey courts have used a multi-prong test to determine whether speedy trial violations have occurred. *State v. Szima*, 70 *N.J.* 196, 200-01 (1976). With the passage of the CJRA, New Jersey sought to join the large majority of states that delineate specific timeframes that constitute limits within which cases must be prosecuted. JCCJ 2014 Report at 4. In other words, the speedy trial provisions in the CJRA created a new way to implement long-existing constitutional speedy trial protections; one that would better ensure against violations of that right.

LEGAL ARGUMENT

I. BECAUSE THE CRIMINAL JUSTICE REFORM ACT IMPLEMENTS CONSTITUTIONAL PROVISIONS, IT IS IMMUNE FROM A DECISION BY THE COUNCIL

The constitutional provision that mandates the creation of the Council specifically excludes certain categories of legislation from consideration as unfunded mandates. *N.J. Const.* Art. VIII, Sect. II, para. 5(c). Specifically, "those [statutes] which implement the provisions of this Constitution" (*id.* at Art. VIII, Sect. II, para. 5(c)(5)) "shall not be considered unfunded mandates[.]" *Id.* at Art. VIII, Sect. II, para. 5(c). The question is, what does it mean to "implement the provisions of this Constitution"? The NJAC takes a narrow view of what it means to implement a constitutional provision: only legislation that does explicitly what the State Constitution requires implements the Constitution. *See* Complaint ¶¶ 62-66. Such an interpretation is absurd and has been previously rejected by the Council.

Legislation implementing constitutional provisions is always more specific than the constitutional provision itself. In *In the Matter of a Complaint Filed by the Township of Medford*,

(Council on Local Mandates, June 1, 2009), the Council considered a suggestion by a municipality that the exemption in *N.J. Const.*, Art. VIII, Sec. 2, para. 5(c)(5) applies only to statutory or regulatory provisions that are "necessary" to satisfy a constitutional command. *Id.* at 7. The Council's renunciation of that position could not be any more plain: "The language of the paragraph 5(c)(5) exemption does not include or suggest any such limitation; to the contrary, it exempts from Council action all statutes and regulations that 'implement' the New Jersey Constitution, not just those that are themselves constitutionally necessary." *Id.* Separation of powers concerns demand the rejection of the narrow view of the exemption suggested by the NJAC. *Id.* at 7-8 ("The Council cannot pass judgment on what is constitutionally 'necessary,' a responsibility of the judiciary."); *see also id.* at 8 ("Nor should the Council presume to narrow the discretion traditionally entrusted to the legislative and executive branches to fashion remedies for constitutional problems.").

While the Council has properly rejected a narrow reading of the 5(c)(5) exemption, it has likewise rejected a reading of the exemption that is so broad as to render the entire purpose of the Council meaningless. *In the Matter of a Complaint Filed by the Borough of Shiloh* (Council on Local Mandates, December 12, 2008) ("if every provision of every annual appropriation act were read as 'implementing' the Constitution, the 'State mandate/State pay' principle could be sidestepped simply by including an unfunded mandate in an annual appropriations act"). Indeed, in a series of cases regarding schools, the Council has rejected the contention that the challenged statutes "implement" the thorough and efficient clause of the State Constitution simply because the statute addresses public education. *See, e.g.*, *In the Matter of a Complaint Filed by the Allamuchy Township Board of Education* (Council on Local Mandates, May 1, 2012) at 7 (no sufficient showing that anti-bullying law implements the thorough and efficient clause); *In the*

Matter of a Complaint Filed by the Monmouth-Ocean Educational Services Commission, et al. (Council on Local Mandates, August 20, 2004) at 13-14 (in education cases, legislature must explicitly state that mandate imposed in furtherance of thorough and efficient clause or State bears burden of "making a specific, precise, fact-based showing that the mandate in question furthered an element of a thorough and efficient education," as that term had previously been defined).

As discussed below, the CJRA does not merely occupy the same field as constitutional provisions, it puts them into effect. In other words, under the plain meaning of the word "implement" and under this Council's interpretation of it, the CJRA implements provisions of the New Jersey Constitution. As a result, it is beyond the reach of the Council.

A. The Risk-Assessment Timeframe

The NJAC frames the issue improperly. The Complaint contends that: "A change from bail to the imposition of non-monetary conditions to ensure that a defendant appears in court does not address the creation of an accelerated procedure [for risk assessments]." Complaint ¶ 63. The question is not whether a constitutional provision addresses the challenged portion of a statute, but whether the challenged statute implements a constitutional provision. There is little doubt that it does.

The amendment to Art. I, para. 11 does several things: First, it removes the right to bail. Second, it creates a right to pretrial release. Third, it creates an exception to that right to release, where the Court finds that the purposes of the law cannot be achieved through any conditions of release. In short, the 2014 constitutional amendment allowed New Jersey to transform from a resource-based system of pretrial release to a risk-based system. The CJRA implements that transformation. The amendment requires courts to make risk assessments (because, in order to

detain a defendant the court must find that the risks cannot be managed by conditions of release); the portion of the CJRA that determines how quickly that assessment must be conducted implements that constitutional requirement.

Voters knew that the amendment on which they would vote in November, 2014 would be implemented by the CJRA. Just before voters overwhelmingly authorized the amendment, the Asbury Park Press published a summary of the proposed constitutional amendment. Michael Symons, ASBURY PARK PRESS, *Don't forget bail reform and open space on NJ ballot*, November 4, 2014, available at: http://www.app.com/story/news/politics/new-jersey/2014/11/02/nj-ballot-questions-bail-open-space/18265653/. The voter guide explained that: "The state enacted legislation *implementing* the amendment that also eliminates the need for cash bail to be posted for some nonviolent offenders." *Id.* (emphasis added). The League of Women Voters' analysis of the ballot question explained "The new amendment would also make it lawful for the Legislature to establish procedures, terms, and conditions by law which are applicable to pretrial release and the denial thereof authorized under this provision." LWVNJ ANALYSIS OF STATEWIDE BALLOT QUESTIONS – QUESTION 1, October 2014, available at: http://www.lwvnj.org/camdencounty/voter/14/Voter_2014_10.pdf (page 8). Put differently, the Legislature set the period of time within which risk assessments must be conducted – the action challenged by the NJAC as an unfunded mandate – as part of its charge to establish procedures applicable to pretrial release pursuant to the amendment approved by a supermajority of New Jersey voters.[1]

[1] While the Council does not concern itself with the policy rationales animating legislative decisions, *see In the Matter of a Complaint Filed by Deptford Township* (Council on Local Mandates, April 20, 2016), it is worth noting that the Legislature did not choose to reduce the risk assessment timeframe on a whim: there a significant body of research that supports the contention that forcing defendants – presumed innocent – to wait even seventy-two hours in jail has significant negative public safety consequences. *See, e.g.*, Lowenkamp, C.T., & VanNostrand, M. (2013). *Hidden Costs of Pretrial Detention*. New York: Laura and John Arnold

B. The Speedy Trial Requirements

The CJRA also addressed speedy trial requirements and the NJAC challenges those provisions as unfunded mandates. The speedy trial sections of the CJRA, however, implement the speedy trial guarantees that appear in Art. I, para. 10, which provides "In all criminal prosecutions the accused shall have the right to a speedy and public trial. . . ." *N.J. Const.*, Art. I, Para. 10. For years, New Jersey courts have applied a four-part test to determine whether speedy trail rights have been violated. *Szima*, 70 *N.J.* at 201; *see also State v. Cahill*, 213 *N.J.* 253, 267 (2013) (applying four-part test in municipal court matters). The use of that test had been criticized for its fickleness: what was deemed a violation in one case would be tolerated in another. *See, e.g.*, *Cahill*, 213 *N.J.* at 263 ("*Amicus curiae* American Civil Liberties Union of New Jersey (ACLU) criticizes the use of the *Barker* analysis in the municipal court as unpredictable.").

A large majority of states (and the District of Columbia and the federal government) have adopted specific time frames in which the prosecution must bring a defendant to trial. JCCJ 2014 Report at 4. Of the 38 states that implemented their constitutional speedy trial guarantees prior to the passage of the CJRA, 21 had done so by statute and 17 adopted court rules to implement the provision. *Id.* The states that passed such laws and rules have frequently acknowledged that their statutory or regulatory speedy trial schemes implement the speedy trial guarantees found in the United States Constitution and in their state constitutions. *See, e.g.*, *People v. Chapman*, 261 *Cal.*

Foundation, p. 3, available at: http://www.pretrial.org/download/research/The%20Hidden%20Costs%20of%20Pretrial%20Detention%20-%20LJAF%202013.pdf ("Detaining low- and moderate-risk defendants, even just for a few days, is strongly correlated with higher rates of new criminal activity both during the pretrial period and years after case disposition"); *id.* at 4 ("The longer low-risk defendants are detained, the more likely they are to have new criminal activity pending trial. Defendants detained 2 to 3 days are 1.39 times more likely to [recidivate] than defendants released within a day.").

App. 2d 149, 157 (Cal. App. 3d Dist. 1968) ("Federal and state constitutional guaranties of a speedy trial in criminal cases are implemented by" speedy trial statute); *People v. Deason*, 670 *P.*2d 792, 796 (Colo. 1983) ("The speedy trial statute is intended to implement the constitutional right to a speedy trial"); *People v. Eblin*, 114 *Ill. App.* 3d 891, 892 (Ill. App. Ct. 2d Dist. 1983) ("The statutory speedy-trial provisions are a legislative interpretation and implementation of the constitutional right to a speedy trial."); *State v. Higby*, 210 *Kan.* 554, 556 (Kan. 1972) ("the purpose of [the speedy trial act] is to implement and define the constitutional guarantee of speedy trial"); *Brooks v. Peyton*, 210 *Va.* 318, 321 (Va. 1969) ("The statute was designed to implement the constitutional guarantee of a speedy trial under . . . the Constitution of Virginia"); *State ex rel. Farley v. Kramer*, 153 *W. Va.* 159, 171 (W. Va. 1969) ("basic policy underlying the constitutional guarant[ee] and the statutes enacted to implement it is to protect the accused from having criminal charges pending against him an undue length of time"); *see also Shields v. State*, 456 *N.E.*2d 1033, 1036 (Ind. Ct. App. 1983) ("The right to a speedy trial is rooted in the Indiana Constitution and our Criminal Rule 4 is the implementation of that right").

By including speedy trial provisions in the CJRA, New Jersey sought to join the majority of states that – by statute or rule – include specific timeframes for indictment and trial. Like those states, New Jersey's mechanism serves to implement the constitutional speedy trial protection. It has now adopted parameters designed to reduce the number of violations of the constitutional speedy trial mandate. As a result, the speedy trial provisions of the CJRA "shall not be considered unfunded mandates[,]" because they "implement the provisions of this Constitution[.]"*N.J. Const.* Art. VIII, Sect. II, para. 5(c)(5).

II. EVEN IF THE COUNCIL COULD ADDRESS THE CRIMINAL JUSTICE REFORM ACT, IT DOES NOT CREATE AN UNFUNDED MANDATE

As explained above, because the contested portions of the CJRA implement constitutional provisions, they are not unfunded mandates and are outside the purview of the Council. However, even if the Council had the authority to consider the challenged provisions, they are not unfunded mandates.

A. The Costs Projected by the Counties are Speculative

With nothing more than the unsupported assertions of its members, the NJAC alleges that the two contested provisions of CJRA will impose costs on counties of between $1,000,000 and $2,000,000 per county. Complaint ¶¶ 23-50. The Council "does not have the authority to determine whether the funding of any statute is adequate" because the Legislature wanted to avoid having the Council become "involved in fiscal policymaking." *In the Matter of Complaint Filed by Ocean Township (Monmouth County) and Frankford Township* (Council on Local Mandates, August 2, 2002) at 12. Notwithstanding that, the Council need not give blind deference to the Legislature's funding methods and can strike down statutes where the funding method "is seriously flawed to the point of being illusory." *Borough of Shiloh* at 12 (citing *Ocean Township* at 12). Still, the Council has never determined that a statute or regulation creates an unfunded mandate where the costs associated with the mandate are contested[2] and the

[2] In some cases where the Council stuck down regulations, it did so based only on the costs as estimated by the complainants. But in those cases, the issue was not whether there existed costs or how much those costs were. Instead, those cases examined whether the contested regulations were the undisputed cause of the additional costs. *See In the Matter of Complaint Filed by Atlantic County* (Council on Local Mandates, November 16, 2011); *In the Matter of Complaint Filed by the Counties of Morris, Warren, Monmouth, and Middlesex* (Council on Local Mandates, October 31, 2006); *In the Matter of Complaint Filed by the Highland Park Board of Education and the Borough of Highland Park* (Council on Local Mandates, May 11, 2000). The Council also accepted complainant's estimate of costs where the question was simply whether

complainant relied exclusively on its own unsupported estimates. *See, e.g.*, *Allamuchy Township Board of Education* at 5-6 (citing actual costs of the anti-bullying program *and* an acknowledgment from the Office of Legislative Services that the costs would be variable); *Monmouth-Ocean Educational Services Commission, et al.* at 7 (relying on actual costs to complainants *and* estimates of costs provided by respondent Department of Education).

While seeking to avoid costly fact-finding proceedings, the Council has refused to accept generalized estimates as the sole basis to invalidate laws. Thus, in *In the Matter of Complaint Filed by the Special Services School Districts of Burlington, Atlantic, Cape May and Bergen Counties* (Council on Local Mandates, July 26, 2007) at 6, the Council "directed that each Claimant separately submit, by affidavit or certification, a *detailed accounting* of the additional direct expenditure it would incur. . . ." (emphasis added). Such an accounting is absent here and the NJAC's conclusory allegations are woefully inadequate.

Amici are mindful of the Council's admonition that where future costs are "neither speculative nor hypothetical" *Deptford Township* at 3, and where the estimated costs are far less than expected, such that there will still exist a large gap between costs and revenue, "the authorized funding is, on its face, constitutionally inadequate." *Id.* at 5. As discussed below, neither of the contested provisions is similar to the statute at issue in *Deptford.* Here, counties can avoid *all* expenses associated with the 48-hour risk-assessment timeframe and the speedy trial requirements.

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the contested regulations enforced federal law. *In the Matter of Complaint Filed by Roxbury Township* (Council on Local Mandates, December 21, 2011).

1. The risk-assessment timeframe

The CJRA requires a first appearance within 48, rather than 72 hours. *Compare N.J.S.A.* 2A:162-16b(1) *with R.* 3:4-1(a)(2). The NJAC explains the costs associated with the CJRA's risk-assessment timeframe as follow:

> the PSP [(Pretrial Services Program)] must complete and present the risk assessment to the court within 48 hours after the defendant's commitment to the jail. This new procedure will force county court facilities to open on weekends and will generate the following clear, substantial and ongoing costs which are unfunded mandates under the Act:
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> - To provide security at county court facilities on weekends, county sheriffs must hire new officers and pay overtime to current officers;
> - To operate and maintain county court facilities on weekends, counties will incur additional maintenance and utility expenses; and
> - To accommodate additional staff for the PSP, county governing bodies must make costly improvements to existing court facilities.
> - To effectively process the intake of defendants issued a complaint warrant, county prosecutors and sheriffs must hire additional staff to effectively manage the increased caseload.
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> [Complaint ¶ 24].

The costs projected by the NJAC, however, are not required. The Complaint assumes that courthouses will need to be kept open on weekends to conduct risk assessments within 48 hours. That is simply incorrect.

By Executive Order No. 211, Governor Christie ordered the Attorney General to "evaluate the costs, savings, and administrative challenges associated with the reforms to our pretrial release system set forth in the State Constitution, implementing legislation, and the forthcoming Attorney General Law Enforcement Directive, with specific focus on County Prosecutors' Offices, county jails, and local police departments." *Executive Order* 211 (June 30,

2016). The result of that evaluation was a study that analyzed the "potential challenges and benefits of Criminal Justice Reform." *New Jersey Attorney General*, EXECUTIVE ORDER NO. 211 STUDY: AN ANALYSIS OF THE POTENTIAL CHALLENGES AND BENEFITS OF CRIMINAL JUSTICE REFORM, Nov. 30, 2016, (hereinafter: "EO 211 Study"), available at: https://assets.documentcloud.org/documents/3233955/Executive-Order-211-FINAL-REPORT-11-30-16.pdf. The Attorney General concluded that *if* "actual appearance in court is necessary, the first appearance represents an additional challenge to ensure that the courthouse is opened and properly staffed and that all requisite parties are able to attend." *Id.* at 36. But, critically, it added that "a first appearance may take place remotely with video conferencing." *Id.* Indeed, "[a]ll county jails indicated that video conferencing capabilities currently exist at the facility." *Id.*

The universal availability of videoconferencing renders the costs associated with opening facilities on weekends optional, rather than mandatory. The benefit of video conferencing is that it allows: "first appearance hearings to take place outside of a physical courtroom, deferring the cost of opening the courthouse, staffing the courthouse, and transporting the defendant to court." *Id.*

The NJAC's contention that it will need to make costly improvements to existing court facilities to house staff for the Pretrial Services Program lacks any support in the record. It is simply speculative to suggest that such costs will be incurred. The NJAC has presented nothing beyond its bare allegation to suggest that existing space is insufficient to accommodate employees (funded by the state) necessary to conduct risk assessments.

The NJAC's final contention about costs associated with the risk-assessment timeframe is not simply speculative: it is wrong. There will be no increased caseload. As the Attorney General explained, "it must be recognized that the constitutional amendment, law, court rules, and

Directive will not cause a single additional offender to be arrested or a single additional criminal case file to be opened." *Id.* at 5. Indeed, the Attorney General's Directive to law enforcement (Attorney General Law Enforcement Directive No. 2016-6), which provides guidance on both pre-case screening and the issuance of Complaint-Summonses in lieu of Complaint-Warrants, promises to decrease, not increase, caseloads. EO 211 Study at 28 ("Evidence exists in New Jersey that pre-complaint screening processes may significantly lessen the caseloads for Prosecutors' Offices and increase operating efficiencies").

2. The Speedy Trial Requirements

The NJAC explains the costs associated with the speedy trial requirements as follow:

> the Act also establishes three (3) separate speedy trial time standards and generally requires county prosecutors to be ready for trial within two (2) years of a defendant's initial commitment to the county jail. The new process will produce the following significant and continuing expenses. . . :
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> - To process defendants pursuant to the newly established timeframes, county prosecutors must hire new assistant prosecutors, investigators and administrative staff; and
> - To accommodate additional prosecutorial staff, county governing bodies must make expensive improvements to county buildings and grounds.
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> [Complaint ¶26].

Such a contention reflects two profound misunderstandings of the ways in which the speedy trial portions of the CJRA will change the functioning of the criminal justice system.

First, the speedy trial requirements apply only to a small subset of defendants. Defendants charged by way of Complaint-Summons are not entitled to statutory speedy trial protections, even if later arrested on a bench warrant; defendants charged on a Complaint-Warrant who are released on conditions are also not entitled to statutory speedy trial protections. EO 211 Study at 43. Thus, the requirements only apply to defendants who are arrested on

Complaint-Warrants and detained in county correctional facilities until their case is tried or otherwise resolved.

Second, with respect to the small number of cases where the speedy trial limits apply, prosecutors can address these cases without additional staff by reallocating priorities and processes. In other words, prosecutors should focus first on those cases where the speedy trial clock is running; and, in those cases, they should not delay in seeking appropriate resolutions. *Id.* If need be, cases where defendants are not incarcerated can be moved to later dates to make time for those under pressure from the speedy trial timeframes set forth in the CJRA. Further, as the Attorney General has explained, where prosecutors make defendants the most favorable offers at the outset – that is, stick to an escalating plea policy as has been required by Directive – cases will settle sooner, "clearing the docket for cases that truly need to proceed to trial." *Id.* [3]

B. Counties Have a Duty to Minimize Costs Before Seeking Relief From Council

As noted above, counties can choose to implement both the risk-assessment timeframe and the speedy trial requirements in ways that either add costs or ways that do not. The essence of an unfunded mandate is that it is mandatory. Where costs are discretionary, a "mandate" does not exist. If a county chooses to open a courthouse, despite alternative methods for conducting prompt risk assessments that do not cost money, it cannot challenge the statute, because the costs are attributable to the county's decision not the CJRA's requirements.

[3] It is also worth noting that the remedy for a speedy trial violation is not the dismissal of the complaint or indictment: it is release from pretrial incarceration. So, even if a prosecutor's office failed to prosecute an occasional defendant in the allotted time, the remedy would not be dismissal. *Id.* at 42. In this way, the Complaint here differs from *Roxbury Township*, wherein the Council rejected interpretations of the contested regulations that suggested the town could simply avoid enforcement. *Roxbury Township* at 7-8 ("Neither DEP nor Roxbury can properly treat the enforcement with benign neglect").

The NJAC has not alleged – no less demonstrated – that there would be any costs associated with the 48-hour risk-assessment timeframe if counties opted to conduct weekend first appearances using existent videoconferencing technology. Similarly, the NJAC has neither alleged nor demonstrated that speedy trial requirements would impose any costs if counties reprioritized cases rather than hiring additional prosecutors to handle them.[4]

C. The Counties Fail to Consider Savings

The NJAC does not simply ignore ways to mitigate costs associated with the accelerated risk-assessment timeframe and the speedy trial requirements; it also ignores the larger savings that counties will enjoy from other provisions of the CJRA. There exist significant opportunities for savings built into the CJRA. Indeed, the NJAC itself has acknowledged as much. As the *South Jersey Times* reported:

> President of the New Jersey Association of Counties, John Donnadio, spent time at the Statehouse last week as the Assembly mulled the legislation, and said he anticipates it having a *positive ripple effect on county budgets*.
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> "*There's some significant cost savings involved there*," said Donnadio, adding if populations are reduced by the numbers some have anticipated, it's likely more and more counties would look to either do what Gloucester did and outsource, or follow Salem County's model and take in prisoners to fund and grow their operations.
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> [Michelle Caffrey, SOUTH JERSEY TIMES, *N.J. bail reform could help county budgets, bring changes to corrections services*, August 4, 2014, available at: http://www.nj.com/gloucester-county/index.ssf/2014/08/bail_reform_could_be_a_boon_to_count

[4] Additionally, the counties ignore that the speedy trial portion of the statute does not replace a scheme where defendants had no right to a speedy trial. Even before the passage of the CJRA, defendants in New Jersey were entitled to a speedy trial. *See, e.g.*, *Szima*, 70 *N.J.* at 200-01. If bringing incarcerated defendants to trial within two years is as onerous as the NJAC contends, it begs the question: how long did prosecutor's offices believe they could wait before trial with an incarcerated defendant under the prior scheme without violating constitutional bounds?

y_budgets_change_landscape_of_corrections_services.html (emphasis added)].

Several county officials have acknowledged the likelihood that the CJRA will reduce jail populations and save counties significant amounts of money. *See, e.g., id.* (Gloucester County Administrator anticipating saving from a reduction of the inmate population of between 15 and 20 percent); Spencer Kent, SOUTH JERSEY TIMES, *Bail reform legislation in N.J. would slash Cumberland, Salem jail populations*, July 14, 2014, available at: http://www.nj.com/cumberland/index.ssf/2014/07/proposed_bail_reform_could_empty_about_40_percent_of_cumberland_county_jail_officials_say.html (Cumberland County Jail warden anticipating a population reduction of up to 40 percent); *id.* (Salem County Jail Warden calling CJRA "more cost efficient" and anticipating 20 percent population reduction); *id.* (Gloucester County Freeholder explaining that he "think[s] it will greatly reduce costs"); Michelle Brunetti Post, THE PRESS OF ATLANTIC CITY, *Cape May County to build new $37 million jail*, May 8, 2016, available at: http://www.pressofatlanticcity.com/news/cape-may-county-to-build-new-million-jail/article_4c5f60f0-13da-11e6-9c77-3be1e16bd005.html (Cape May County Jail Warden anticipating 10 to 20 percent reduction in jail population).

While large population reductions allow for tremendous costs savings because jails can close units or even the entire facility, *see* Caffrey, *N.J. bail reform could help county budgets, bring changes to corrections services* (noting $10,000,000 annual savings from the closing of the Gloucester County Jail), even incremental population reductions provide cost savings in the form of reduced food and medical costs. EO 211 Study at 35 ("there will likely be a considerable decrease among the long-term pretrial population. This long-term decrease is a considerable benefit to jails as it will likely result in the reduction of associated costs relevant to feeding, clothing, and keeping inmates in good health"). Medical costs are a significant burden on jails

and incremental reductions promise opportunities for significant savings. Kristina Scala, BURLINGTON COUNTY TIMES, *Handcuffed by health care: Burlington County taxpayers on the hook for unpredictable medical costs at county jails*, Feb. 21, 2016, available at: http://www.burlingtoncountytimes.com/news/local/handcuffed-by-health-care-burlington-county-taxpayers-on-the-hook/article_19ca8c58-c9d6-11e5-bf87-6379d3095ae9.html (noting that health care accounts for 18 percent of the county's corrections budget).

Jails are not the only county stakeholders that stand to enjoy cost savings. Under the bail system that was in place prior to the passage of the CJRA, prosecutors spent significant time dealing with the mechanics of money bail. "Hearings on the reduction and source and sufficiency of bail are a frequent occurrence. In 2015, the AOC reported 10,552 bail hearings were completed statewide." EO 211 Study at 35. As the Attorney General explained: "Because Criminal Justice Reform severely restricts the use of monetary bail, agencies, especially Prosecutors' Offices, will likely experience a dramatic reduction in workload in terms of hearings pertaining to bail." *Id.*

Simply put, the NJAC overstates the costs associated with the CJRA, ignores opportunities to reduce any costs to zero, and disregards the savings it is likely to enjoy from the rest of the statute.

CONCLUSION

The Council on Local Mandates serves a critical role in our state. But, in order to avoid a constitutional conflict, its authority is cabined to avoid it striking down statutes that implement other provisions of the New Jersey Constitution. Both the risk-assessment timeframe and the speedy trial provisions implement provisions of the Constitution, are therefore not unfunded mandates, and are beyond the reach of the Council. Even if such a constitutional limitation did

not exist, the statute does not contain an unfunded mandate because the NJAC failed to do more than speculate about costs, ignored opportunities to mitigate costs, and discounted savings its own members have acknowledged will inure to the counties. As a result, the Council should deny the NJAC's request for injunctive relief and grant the Attorney General's Motion to Dismiss.

Respectfully submitted,

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