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STATE OF NEW JERSEY
COUNCIL ON LOCAL MANDATES

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FEB 21 2017
COUNCIL ON LOCAL MANDATES

IN 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 :

Location: State House Annex
125 West State Street
Trenton, New Jersey 08608
Date: Wednesday, February 15, 2017
Commencing at: 10:37 a.m.

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3 ROBERT R. SALMAN, Chairman

4 VICTOR R. MCDONALD, III

5 ROBERT R. PACICCO

6 MICHAEL KELLY, PH.D.

7 JACK TARDITI

8 CHRISTOPHER PIANESE

9 EDWARD P. ZIMMERMAN

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1 A P P E A R A N C E S :

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3 R E S P O N D E N T :

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5 S T A T E O F N E W J E R S E Y

6 D E P A R T M E N T O F L A W A N D P U B L I C S A F E T Y

7 B Y : J O S E P H C . F A N A R O F F , A A G

8 R i c h a r d J . H u g h e s J u s t i c e C o m p l e x

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14 C L A I M A N T :

15 G E N O V A B U R N S , E S Q S .

16 B Y : A N G E L O J . G E N O V A , E S Q .

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12 SHAWN D. SLAUGHTER, Council on Local Mandates

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1 MR. SALMAN: Good morning,
2 everybody. Thank you all for being here. My
3 name is Robert Salman. I am the Acting, Acting
4 Assistant Chair. Judge Sweeney has a severe case
5 of bronchitis, and at a rump meeting a few
6 minutes ago, I guess because I practiced law
7 forever, I was given the honor and I -- so with
8 the help of all of my colleagues, I will try to
9 get us through this.

10 And I think we'll begin with the
11 parties who are moving to dismiss the complaint
12 and we'll hear from the opposition. We will let
13 each of the Amicae have some time as well and so
14 will the movement begin.

15 MR. FANAROFF: Good morning, sir.
16 Do you prefer if I stand or sit?

17 MR. SALMAN: Whatever you're more
18 comfortable doing.

19 MR. FANAROFF: I will sit. Good
20 morning, sir, and distinguished members of the
21 Council and Local Mandates. I'm Assistant
22 Attorney General, Joe Fanaroff, on behalf of
23 Respondents, the State of New Jersey and the
24 Administrative Office of the Courts. I have some
25 brief prepared remarks, or if the Council would

1 prefer that we get right into questioning, I'd
2 certainly defer to your --

3 MR. SALMAN: You can begin with your
4 overview.

5 MR. FANAROFF: Thank you, sir. And
6 again, good morning. The complaint filed by the
7 New Jersey Association of Counties, on behalf of
8 several of its member counties, must be
9 dismissed. Because of the provisions of the Bail
10 Reform Act, the counties are challenging are
11 procedures, terms and conditions, the
12 Constitutional Amendment expressly authorized and
13 empowered the legislature to enact.

14 Under the Constitution, the
15 provisions cannot be deemed an unfunded mandate.
16 Therefore, the question before the Council today
17 is limited. If you find that the bail reform
18 provisions implement the Constitutional
19 Amendment, no further inquiry is appropriate.
20 The complaint must be dismissed.

21 MR. SALMAN: Counsel, the counties
22 under the Bail Amicae contend that since Article
23 1, Paragraph 11 did not exist upon inception of
24 the Act, the law fails to improve the necessary
25 constitutional reference. What is your response

1 to that position?

2 MR. FANAROFF: Well, to be clear,
3 there is a reference in the Public Law, and
4 that's in Section 21 of the Public Law to the
5 Constitutional Amendment, and that is referenced
6 in our reply brief, sir, and I can give you the
7 specific language if you would bear with me one
8 second.

9 In Section 21 of the Public Law, it
10 says that the law shall take effect on the same
11 day that a Constitutional Amendment to Article 1,
12 paragraph 11 of the New Jersey Constitution
13 authorizing the courts to deny pretrial release
14 of certain defendant takes effect.

15 MR. SALMAN: Even though it came
16 three months prior to the Constitutional
17 Amendment, you find that to be a sufficient
18 nexus?

19 MR. FANAROFF: I don't want to
20 characterize the complainant's position, but I
21 don't think that they made the argument that
22 because the law proceeded the Constitutional
23 Amendment, that it's null and void. That was an
24 argument that was advanced by the Amicus Bail
25 Bonds Consortium. I think that there's a

1 separate question as to whether or not arguments
2 brought before the Council, by a party that would
3 not otherwise be able to bring a complaint before
4 the Council, as that would be the Bail Bonds
5 Consortium.

6 They're not a county or
7 municipality. They couldn't file their own
8 complaint. Whether or not the Council should be
9 considering arguments advanced by Amicus that are
10 outside the four corners of what the complaint
11 references, but in addition to the Section 21
12 reference that I just mentioned, we noted that
13 these two other points during the debate and
14 amendment of the Bail Reform Act where the
15 legislature made clear that a law would not
16 become operative or effective unless a
17 Constitutional Amendment was passed.

18 And in fact, the law itself did not
19 become effective until January 1st of this year,
20 which is the same day that the Constitutional
21 Amendment itself became effective, so the law was
22 dormant, for lack of a better term, prior to the
23 enactment of the amendment. And had the
24 amendment failed, then the law would have been
25 inoperative.

1 MR. SALMAN: Your essential argument
2 is that the Constitutional Amendment Article 1,
3 Paragraph 11 says that procedures, terms and
4 conditions may be used to implement the
5 Constitutional Amendment. Does that entail the
6 kind of lengthy process that has been developed?

7 MR. FANAROFF: Sir, it does. The
8 complainants reference at least one of the
9 provisions as a procedure in their complaint.
10 It's in paragraph 63 of the complaint, and the
11 Bail Bonds Consortium on page 10 of the brief
12 that they submitted on February 7th, refer to the
13 provisions at issue here as rules of criminal
14 procedure. That is a direct quote, and so what
15 the Constitutional Amendment provides for is that
16 it shall be lawful for the legislature to
17 establish, by law, procedures, terms and
18 conditions applicable to pretrial release and the
19 denial thereof.

20 Defendants have to be brought before
21 a judge at some point, and as the complainants
22 noted, before the amendment to the Constitution,
23 that was done by court rule. Now it's done by a
24 law that was passed by the legislature in
25 furtherance of a Constitutional Amendment

1 permitting them to do so. Similarly, placing a
2 temporal limit on the amount of time a defendant
3 who has been remanded to jail can be detained
4 therein, prior to indictment or trial, is also a
5 term, not of release, but of detention, so those
6 things are clearly connected.

7 And again, I would just point to the
8 fact that nothing in the law that we're looking
9 at today could have been enacted under the prior
10 Article 1, Paragraph 11 that guaranteed bail to
11 everybody except those who were accused of
12 capital crimes. So the amendment to the
13 Constitution that changed Article 1, Paragraph 11
14 was necessary for the implementation of all of
15 the provisions within the Bail Reform Act, not
16 just the ones that are at issue here today, and
17 if I could just -- I wanted to follow up if I
18 can, sir.

19 Let's be clear about how the Council
20 has analyzed these questions in the past. What
21 the Constitution says is that, notwithstanding
22 anything in this paragraph, and this paragraph
23 being the section of the Constitution that
24 created the Council, enumerated laws, including
25 those which implement the provisions of this

1 Constitution, shall not be considered unfunded
2 mandates, period, false stop.

3 The complainant's suggestion that
4 there needs to be this balancing test, between
5 the connection between the law and the
6 Constitutional Amendment versus the impact on
7 counties and municipalities, is not supported in
8 the language of the Constitution itself and
9 indeed also in the Council's decision in the
10 Medford case, the June 1st 2009 Medford case,
11 where the Council noted that the constitutional
12 exemption deprives the Council of authority to
13 nullify laws deemed to implement a constitutional
14 provision even if they constitute an unfunded
15 mandate.

16 And what we need to show, and I
17 think we have, are specific fact based showings.
18 That's the criteria that the Council uses,
19 specific fact based showings that the law
20 implements a provision of the Constitution. And
21 again, here you have the Senate Budget and
22 Appropriations Committee stated on June 5th. You
23 have the statement to the Senate Bill, the second
24 reprint on July 31st, and then you have Section
25 21 of the Public Law as well, all stating that

1 this law will not become effective unless and
2 until the Constitutional Amendment passes.

3 Moreover, you have the 120 page
4 report that was sent to the Chief Justice of the
5 State Supreme Court advising him that all of the
6 recommendations that were being put forth, with
7 respect to criminal justice reform, required an
8 amendment to the Constitution changing the way
9 that bail was done in the state. Lastly, you
10 have the public statements of the Governor, and
11 again, I note, and as was noted in our brief, who
12 called a special session of the legislature,
13 which is an extraordinarily rare thing for him to
14 do, to discuss this very topic.

15 There can be no question that the
16 nexus between the law that is at issue here today
17 and the Constitutional Amendment that the voters
18 passed by a nearly two to one margin are
19 inextricably entwined. The one cannot exist
20 without the other, and so the Council's analysis
21 of these questions is pretty straight forward.
22 The showing of the specific fact based evidence
23 that a law implements a provision of the
24 Constitution is the threshold question.

25 If that answer is in the

1 affirmative, the Council must find that the law
2 is not considered an unfunded mandate. And in
3 this case, that has what has happened, and that's
4 why the motion to dismiss should be granted.

5 MR. SALMAN: Irrespective of the
6 constitutional implementation at issue, do you
7 maintain, as the New Jersey State Bar
8 Association, that the Act does provide a funding
9 mechanism? And if so, what do you maintain is
10 that funding mechanism?

11 MR. FANAROFF: We do not join in the
12 filings of the Amicus. We stand on the papers
13 that we submitted, sir, and as I noted in our
14 brief, if the Council were to deny our motion to
15 dismiss, we would certainly request the
16 opportunity to argue on the merits with regard to
17 whether or not this is an unfunded mandate, but
18 the fact is, the Council does not get to that
19 question because, as I stated earlier, these
20 provisions do implement a constitutional
21 provision.

22 The state has provided multiple
23 examples of specific fact based showings by the
24 legislature that the provisions of this law were
25 intended to implement the Constitutional

1 Amendment and the analysis is at an end, once you
2 have made that determination, the case is
3 dismissed. Because regardless of whether or not,
4 and we're not conceding, but whether or not, the
5 law does provide an unfunded mandate to counties
6 and municipalities is rendered moot and is noted
7 in the Medford decision that the Council issued
8 in 2009. The Council is without the authority to
9 nullify laws of that nature even if they
10 constitute an unfunded mandate.

11 MR. SALMAN: Is that also your
12 position with respect to Article 1, Paragraph 10
13 in the speedy trial?

14 MR. FANAROFF: Well, again, the
15 challenge that the complainants make, and the
16 question that they drew as to whether or not
17 those two provisions implement the speedy trial
18 provision, are not appropriately before the
19 Council. If the complainants want to challenge
20 that provision, they can do so in a court of
21 competent jurisdiction, and I would note that the
22 Amicus Bail Bonds Consortium has indicated that
23 they intend to file a complaint in the Superior
24 Court challenging, not just the constitutionality
25 of the Bail Reform Act itself, but the

1 Constitutional Amendment that amended the
2 Constitution.

3 And so, one of the concerns that the
4 Council articulated, in the first Highland Park
5 case back in 1998, was a concern that the
6 complainant would not have a forum to make their
7 challenge if their complaint was dismissed before
8 the Council. We don't have that concern here.

9 Not only has the Bail Bonds
10 Consortium indicated, and I'm Council for the
11 state in that case as well, so I'm speaking from
12 personal knowledge, has indicated that they plan
13 on suing the state, challenging the
14 Constitutional Amendment, challenging the Bail
15 Reform Act and also seeking an injunction against
16 the Attorney General asking that a court order
17 the AG not to implement a directive that he
18 issued back in October to the county prosecutors.

19 That is where these matters can be
20 challenged, and there's nothing precluded the
21 complainants, or members of the group of
22 complainants that are before the Council, to join
23 in that lawsuit, and that is also true of any
24 challenge that they might have to the bail
25 question or the interpretive statement, which are

1 two other things that the bail bonds group is
2 indicating that they are going to challenge in
3 the Superior Court in the Chancery Division.

4 That is where those questions are
5 appropriately handled, not before the Council.
6 But again, if the legislature has implemented --
7 excuse me, has passed a law that implements a
8 provision of the Constitution. And in this case,
9 there is nothing that says that the legislature
10 cannot put temporal limits on the length of time
11 an individual can be detained prior to indictment
12 or trial, that is the end of the inquiry.

13 MR. SALMAN: Any of my colleagues
14 have any questions for the State?

15 MR. MCDONALD: I have a question.
16 On the speedy trial requirement, most of the
17 briefs have focused on the amendment that was
18 passed last November. I was digging in the
19 archives and we've had the right to a speedy
20 trial within the Constitution of 1844 and then it
21 was carried over to the Constitution of 1947, so
22 now this language is going into the statute
23 saying it implements that provision of the
24 Constitution, but we were under that right.
25 Would you go and explain how we function without

1 this statute?

2 MR. FANAROFF: Sure. And, you know,
3 under current case law, there's not a temporal
4 limit. There's not a statement that says that if
5 you do not bring this case with any certain
6 period of time, that is a de facto or de jure
7 violation of the right to a speedy trial. Here,
8 what you have, is the creation of a temporal
9 limit placed on the length of time a person can
10 be detained prior to trial if they are not
11 indicted or brought to trial, and then a total
12 outside limit of two years that the case has to
13 be brought.

14 So again, the reference that I would
15 point you to, Mr. McDonald, is in our reply brief
16 regarding the fact that the Constitution asylum
17 as to whether or not the legislature can create
18 such a temporal limit, so our position is that
19 because it is silent on that question, there is
20 nothing that precludes the legislature from doing
21 so, and if the complainants or the Bail Bonds
22 Consortium or others want to question whether or
23 not that is a permissible thing for the
24 legislature to do, the appropriate place for them
25 to do that is in the Superior Court.

1 MR. MCDONALD: My question was, or I
2 was puzzled because we've had this right for so
3 long. We've lived under it obviously, and now
4 it's being codified in the statute or written out
5 in the statute. Theoretically, if this part of
6 the law had not been enacted, how would that have
7 impacted on the removal of the bail system?

8 MR. FANAROFF: Well, again, if
9 you're asking what the regimen was prior to the
10 enactment of the Bail Reform Act with regard to
11 speedy trial provisions, there was case law, and
12 if I'm not mistaken, I believe the complainants
13 have some of this information in their brief that
14 references sort of the three or four part test
15 that courts evaluate whether or not the speedy
16 trial provision or the requirement that a person
17 have a speedy trial be done as it is and so --

18 MR. MCDONALD: The Bar Association
19 ACLU actually went into the history nicely also
20 in their brief.

21 MR. FANAROFF: Again, I don't want
22 to characterize their positions, or more likely
23 mischaracterize them, if I were to speak on their
24 behalf, so I would certainly defer to them in
25 terms of the positions that they take. Again, my

1 position is that the silence permits the
2 legislature to do so unless and until somebody
3 were to challenge this in court to say that this
4 goes beyond what the current standards are based
5 on case precedent for that to be done.

6 MR. PACICCO: Talk to me about this
7 concept of the public safety that we hear
8 regarding how the Bail Reform Act is being
9 implemented. They say it's a computer generated
10 score on how individuals are determined whether
11 to be a threat or not so and how then their bail
12 is determined.

13 MR. FANAROFF: And forgive me for
14 pleading some amount of ignorance on that, sir.
15 That is not an aspect of the Bail Reform Act that
16 I was intimately involved in. My understanding,
17 from my involvement in this case, is what you
18 have represented as being true, and if I'm not
19 mistaken, I believe the ACLU referenced this in
20 their brief that the creation of this algorithm
21 was done based on what other jurisdictions have
22 done throughout the country.

23 And indeed, also the federal
24 government uses a similar algorithm to make these
25 types of assessments and that the success rate of

1 it, and I may be misquoting here, but I believe
2 it's somewhere in the 90 percent range in terms
3 of the predicted value of it, but I personally
4 was not involved in either the creation of that
5 algorithm. I believe it was done with the
6 partnership of some entity that does this as part
7 of their business models.

8 So I would be reluctant to make
9 representations about how the algorithm is done
10 other than frankly your very accurate
11 representation of it, that it takes into account
12 certain things like your prior criminal history,
13 the offense that you were arrested for and then
14 generates a calculation for the likelihood that
15 you are, and again, I hate to sort of keep
16 circling back to this.

17 But one of the enumerated concerns
18 that is articulated in the ballot question, and
19 is also just four square with what the
20 legislature talked about, was flight risk, risk
21 to the community and risks that you're going to
22 obstruct justice. Those are things that were
23 referenced in the ballot question. Those are
24 things that are referenced in the Bail Reform Act
25 itself and are certainly part of the calculation

1 that are done when a defendant is arrested. And
2 then that calculation is done by the trial
3 services group within the ASC.

4 MR. PACICCO: Thank you.

5 MR. SALMAN: The algorithm is not
6 dispositive. It doesn't take away the discretion
7 of the judge.

8 MR. FANAROFF: That's my
9 understanding, sir, that the judge retains
10 discretion even if the algorithm either says that
11 the recommendation is to detain or not to detain,
12 that the judge retains discretion to essentially
13 overrule or override that recommendation.

14 MR. SALMAN: Anybody else for the
15 State? Anything else you wish to add at this
16 point?

17 MR. FANAROFF: If I can reserve a
18 minute or two of rebuttal if necessary, I would
19 imagine it might be, but that would be my only
20 request. Thank you, sir, and thank you for your
21 time.

22 MR. SALMAN: Thank you. If the New
23 Jersey Association of Counties.

24 MR. GENOVA: Good morning,
25 gentlemen. My name is Angelo Genova. I'm with

1 the Law Firm of Genova Burns. With me today is
2 my colleague, Anthony Anastasio. We welcome, on
3 behalf of our client, the New Jersey Association
4 of Counties, the opportunity to present to you
5 and to respond to the State's motion to dismiss,
6 our pending petition for your consideration
7 calling into question whether or not an amendment
8 for the New Jersey Constitution providing for
9 bail reform imposes an unfunded mandate on the 21
10 counties that we represent.

11 MR. SALMAN: Mr. Genova, before you
12 do this substantively, I'm a little confused, and
13 maybe it's just my ignorance of the procedure.
14 As I read the complaint, Paragraph 7 on the five
15 counties resolution authorized lawsuit, there are
16 affidavits from 14 counties of the 21. Is the
17 Association here today on behalf of five, 14 or
18 21 counties?

19 MR. GENOVA: The Association is here
20 on behalf of its member, institution, the New
21 Jersey Association of Counties, so when the
22 Association acts, it acts in the name of the 21
23 counties. Given the nature of the applications
24 that were made, associated with securing
25 information, we provided resolutions and

1 information to that effect, but under its bylaws
2 and its Constitution, it's the principal advocacy
3 organization for the counties in the state of New
4 Jersey and you should presume we're advancing the
5 interest of the counties that are members.

6 What we are not here doing, and I
7 want this to be clear, not only to you, but as a
8 matter of public record, we're not challenging
9 the policy considerations that might support the
10 notion of bail reform. Our focus is to the
11 extent that those have been embraced either by
12 Constitutional Amendment or statute, that there
13 are costs associated with those and that we're
14 here arguing that those costs are unfunded, they
15 have effectively mandates and that we're seeking
16 re-dress under your constitutional authority to
17 resolve that dispute.

18 MR. SALMAN: I understand that.
19 Your brief made that very clear. I just was
20 wondering about the seven counties who did not
21 submit an affidavit. Do you have any
22 representation as to their position?

23 MR. GENOVA: I can represent to you
24 that when the Association of Counties acts, it
25 acts on behalf of its bylaws, and if its members,

1 a majority of its members allow for its advancing
2 of the position, then it's the position of the
3 counties and all of its members.

4 MR. SALMAN: Was there a vote where
5 the majority said go forward?

6 MR. GENOVA: Yeah. With me today is
7 its Executive Director, Mr. Donnadio, and I'm
8 advised that there was a vote that authorized
9 this application on behalf of the Association.

10 MR. SALMAN: Okay. Thank you. I
11 just wanted to clear that up.

12 MR. GENOVA: Sure. I appreciate the
13 opportunity to clarify it. My colleague from the
14 State focused on the exemption and its
15 application, but from our perspective, you don't
16 get to that until you resolve certain threshold
17 issues. And the first threshold issue is the
18 burden that resides on the State, convince you
19 that we are, at this stage, that the procedural
20 posture in this stage would allow for the
21 dismissal of this action.

22 I know you are not a court of law.
23 Some of you are familiar with the standards
24 applicable to a motion to dismiss. I would
25 suggest to you that they have equal application

1 here, but a motion to dismiss is by the courts,
2 generally, rarely granted. It is highly suspect.
3 It deprives, if granted, the opportunity for a
4 party to have a plenary hearing for all of its
5 matters and all of its facts to be presented to
6 the adjudicative body, so it's a severe request
7 that is sought here.

8 What is sought here to effectively
9 kill our application at its inception, depriving
10 you, as the Council, and the public, through you,
11 the opportunity to assess whether in fact this is
12 genuinely an unfunded mandate.

13 MR. SALMAN: This is actually the
14 second bite that you're getting at this. You had
15 your motion for a preliminary injunction which we
16 denied.

17 MR. GENOVA: Right. However, that
18 burden resided with us. If you go to the order
19 that was issued by this board, it denied our
20 application for the reasons stated in that order,
21 but never got to the underlying factual issues
22 that we hope to present to you, or the underlying
23 facts that we've asserted in our complaint.

24 MR. SALMAN: The issue is whether or
25 not we get to the facts or whether or not the

1 Constitution prohibits us, precludes us.

2 MR. GENOVA: Right. But there is a
3 different standard, with all due respect, Mr.
4 Salman. There is a different standard. There is
5 a different standard for injunctive relief.

6 MR. SALMAN: I'm well aware of that.

7 MR. GENOVA: Right. Which you
8 determined, you electively determined, that was
9 not meant by us and we hold our burden. Now
10 we're at a different phase, and the phase is a
11 motion to dismiss, and the standard to be applied
12 is a different standard. And the burden resides,
13 not with us, but with the state. And what I'm
14 suggesting to you is that, much like our courts,
15 our complaint is to be accorded all favorable
16 inferences.

17 Our complaint is presumed that the
18 facts in our complaint are presumed to be
19 accurate as pled and that we have set forth the
20 statement of facts sufficient to and entitle us
21 to relief. Now, that means that you should, and
22 we respectfully request that you should, you're
23 required to assume the allegations in the
24 complaint are true and you're required to assume,
25 and draw all reasonable inferences by that

1 complaint, and that the facts that we've alleged,
2 then suggest a cause of action.

3 Now, what does that mean in the
4 context of the Council of Unfunded Mandates when
5 you're charged and your authority is derived from
6 an equally compelling constitutional mandate.
7 We're going to spend a lot of time here today
8 talking about an exemption that purportedly
9 resides in a constitutional derivative provision
10 which allows for the Criminal Justice Reform Act.

11 But let's not lose site of the fact
12 that there's an equally compelling constitutional
13 provision from which your authority is derived,
14 and that's the provision that says you exist and
15 it says you're charged with the responsibility of
16 resolving disputes when the legislature adopts a
17 law after 1996 or 1997, sometimes I forget, that
18 imposes unfunded mandates on county government.

19 And the test under that
20 constitutional provision at Article 8, Section 2,
21 Paragraph 5, in what we lawyers would call the
22 elements of a cause of action are, it makes it
23 clear that an unfunded mandate on a county, we
24 represent county governments, are those that,
25 one, do not authorize resources, other than the

1 property tax, to offset additional direct
2 expenditures to implement the law, in which case,
3 that shall cease to be mandatory in its effect
4 and will expire if you so determine.

5 So what does our complaint have to
6 say to satisfy this threshold and warrant the
7 presumptive legitimacy to its allegations. Does
8 the mandate authorize resources other than the
9 property tax to offset additional direct
10 expenditures. Not only does it not do that, I
11 would suggest to you that the fact that the state
12 seeks to apply the exemption proves the point
13 that they wouldn't seek to apply the exception if
14 they didn't think this was a mandate or that it
15 wasn't an unfunded mandate.

16 MR. SALMAN: So the position of the
17 New Jersey State Bar Association that there is
18 funding, you maintain, is incorrect?

19 MR. GENOVA: That funding goes to
20 one stakeholder in the process. It goes to the
21 judiciary. It's by virtue of fees. There's
22 express indication of where those fees are to be
23 derived. To the extent that there's funding,
24 it's not funding for the county government, it's
25 funding for the prosecutor offices, it's not

1 funding for the sheriffs, so they're half -- and
2 half a loaf is not a full loaf in terms of what
3 we believe a funded mandate in fact is.

4 And the mandates that we believe
5 exist as a consequence of this legislation are
6 those principally derived from the 48 hour risk
7 assessment and those derived from the speedy
8 trial.

9 MR. SALMAN: Is that our
10 responsibility as a Council to consider 50
11 percent funding or 80 percent funding or
12 20 percent funding, or are we precluded from
13 looking into the adequacy of the funding?

14 MR. GENOVA: So my colleague reminds
15 me of the Deptford case which dealt with the dash
16 cams, and I think you reached a conclusion in
17 that case that there was an inadequacy of
18 funding, so the question --

19 MR. SALMAN: The losery.

20 MR. GENOVA: Was losery the word?
21 Then I apologize. Whether a losery, or this is
22 the point being that the concept of, you know,
23 and the continuum of funding, I think your
24 opinion in that case suggests that funding means
25 full funding. It doesn't mean anything less than

1 full funding, and I can represent to you today
2 that I'm not aware of any check that's drawn from
3 the State of New Jersey to my client to satisfy
4 the obligations that they now have imposed upon
5 them to implement the 48 hour risk assessment
6 provision and the speedy trial provision.

7 MR. SALMAN: I certainly can --
8 especially Mr. McDonald, Mr. Tarditi. I don't
9 recall that we require full funding, but --

10 MR. GENOVA: You'll deliberate on
11 that. I'm suggesting to you that the Deptford
12 case suggested --

13 MR. SALMAN: That's the case I was
14 here for, and clearly it was a losery.

15 MR. GENOVA: Sure. And candidly,
16 Mr. Chairman Salman, when you go to the
17 constitutional provision, it doesn't draw
18 distinctions. It says unfunded mandates, and if
19 you go down the path that partial funding
20 satisfies that, then I think you will render a
21 losery, the constitutional provision that imposes
22 an obligation on you to ensure that legislation,
23 after the effective date of that amendment of the
24 Constitution, indeed funds that because then it
25 just becomes a paper tire.

1 MR. SALMAN: We also have an
2 obligation not to be involved in the financial
3 analysis in any rate. That's certainly been the
4 history of the Council, but go ahead.

5 MR. GENOVA: Which argues for, not
6 getting into is it fully funded or under funded.
7 To me, me the bright line is it funded or is not
8 funded to its full.

9 MR. SALMAN: I understand.

10 MR. GENOVA: So to summarize, we
11 meet the elements, and our complaint alleges the
12 elements required of us under the unfunded
13 mandate, unfunded mandate statute. We're a
14 county government. The Criminal Justice Reform
15 Act makes no provision for resources, other than
16 the property tax, to fund or to offset. We have
17 identified direct expenditures required to be
18 implemented, and I won't belabor our complaint,
19 but there is a high degree of detail in our
20 complaint laying out the expenditures.

21 There were certifications that were
22 filed, in connection with the injunction, that
23 are part of the record here identifying
24 specifically, at the early stages of this
25 process, the costs associated with implementing

1 the risk assessments and the speedy trial
2 requirements

3 MR. SALMAN: Mr. Genova, I have to
4 stop you at that point although it's really not
5 that germane. Some of these affidavits are
6 really, charitable, not very forthcoming. In the
7 affidavit of Shannon Taylor for Hunterdon County.
8 There are statements of X amount of dollars not
9 specified.

10 It's almost an incomprehensible
11 affidavit and Exhibit F on the injunction
12 proceedings. I just didn't want it to go not
13 mentioned on the record that these affidavits are
14 less than what you just represented that they
15 were.

16 MR. GENOVA: Well, with all due
17 respect, Chairman Salman, I dispute your
18 characterization of the affidavit number one, but
19 more importantly than you and I, or this board
20 and I having an exchange on your observations of
21 that affidavit, what I'm suggesting to you, at
22 this phase of the proceeding, you may have ample
23 opportunity to ask in a plenary hearing.

24 In fact, your point makes for the
25 argument that we should have a hearing; that that

1 being said, at this phase of the process, the
2 appropriate rule or standard be applied in the
3 motion to dismiss that you are collectively, as
4 the judicial function in this process, we're
5 suggesting to you that your obligation --

6 MR. SALMAN: We're not a judicial
7 body. We are a separate constitutionally created
8 body. Some of us are attorneys, some of us are
9 not. I understand your position arguing that the
10 judicial rules for motion to dismiss should apply
11 here. Let's move on and let's get to the central
12 point as to whether or not the exemption provided
13 in the Constitution that sets us up exists or
14 doesn't exist. Address that, please.

15 MR. GENOVA: Right. Thank you. If
16 I can conclude on the last point. We're
17 suggesting that the facts be viewed in the best
18 light of the petitioner. That's the point we're
19 making. Now, to the point that you raised, so
20 first, as I pointed out to you before, the state
21 argues that this mandate is exempt and that would
22 appear, in my estimation, to concede that it is
23 in fact a mandate.

24 Otherwise, why would they seek to
25 apply the exemption. The second point on the

1 exception, whether or not the exception applies.
2 It's not purely a question of law from our
3 vantage point. We believe we're entitled to a
4 plenary hearing to produce evidence on matters of
5 voter intent, what was behind the adoption of the
6 underlying constitutional provision that the
7 Criminal Justice Reform Act reports apply upon,
8 evidence of the reasons for the absence of these
9 mandates in the underlying Constitutional
10 Amendment itself and the interpretive statement
11 and the why.

12 Now, the Council is charged with
13 ensuring the broad remedial purposes of the
14 unfunded mandate constitutional provision at
15 Article 8, Section 2, Paragraph 5, which is the
16 point I made earlier is that your role is not
17 purely ministerial. You are a creature of the
18 Constitution. You're charged with the
19 enforcement of the constitutional provision.

20 I can see you're not a judicial
21 body, in a traditional sense, but you are
22 constitutionally empowered to apply another
23 section of the Constitution just as you are
24 constitutionally empowered to attempt to
25 interpret the section that purports to be an

1 exemption.

2 Now, you've addressed the exemption
3 in the past in a variety of context, and I
4 applaud my colleague for adopting what I think is
5 the central standard that appears in the cases
6 that you've decided before, but at the same
7 token, I think he misses the mark in terms of
8 whether or not the state has met that standard,
9 so he has said to you that he as an obligation,
10 as I heard him, to make a specific fact based
11 showing, and that is the burden that the state
12 has.

13 And where that comes from is in the
14 case that you decided involving Monmouth Ocean
15 Educational Services. That was a thorough and
16 efficient education case, but in that context,
17 you said that when that exemption is to applied,
18 you said several things. You said the burden is
19 on the state and the burden is on the state to
20 make a specific precise fact based showing that a
21 law implements a constitutional clause.

22 And I think the point that my
23 colleague made is that the facts derived from
24 that juris prudence or that body of law that
25 you've created. Now, a fact based showing is

1 more than counsel's conjecture. It's more than
2 my argument, it's more than his argument. It's
3 more than any legal argument. It's more than
4 particularly in the context of a motion to
5 dismiss. It's more than just the exchange of
6 affidavits.

7 It's a specific fact based showing
8 which, quite frankly, you will not have to make
9 your determination upon the application of the
10 exception until you have a plenary hearing, and
11 you will deprive yourself of the very standard of
12 which you adopted in the Monmouth case and why do
13 you have to have that? Because, as my colleague
14 also said, because there has to be a nexus
15 between the 48 hour assessment period and the
16 speedy trial requirement and the principal
17 objectives of the Constitutional Amendment.

18 You have to conclude that there's an
19 intersection that the Constitutional Amendment
20 and these requirements are integral to each
21 other, and he cites for you Senate committee,
22 Senate bills. He purports to Section 21, which
23 is only a temporal consideration, and he points
24 you to public statements. Those are not the
25 father of what a plenary hearing where all

1 parties have an opportunity to present facts and
2 why --

3 MR. SALMAN: Mr. Genova, he also
4 cites paragraph 63 of the complaint where it
5 appears that the change from bail to non monetary
6 conditions, at least, is described as an
7 accelerated procedure. Now, if this change is a
8 procedure, doesn't that fit the Constitutional
9 Amendment that specifically authorizes
10 legislature, quote, "to establish by law
11 procedures, terms and conditions," end of quote,
12 under the amendment?

13 MR. GENOVA: Yeah, I would suggest
14 to you that that language of the last sentence of
15 the section that you just read is quite -- you
16 could apply to every Constitutional Amendment in
17 any law that's adopted that it's superfluous,
18 that the legislature is always charged with the
19 responsibility to implement Constitutional
20 Amendments or the Constitution, so number one,
21 it's superfluous.

22 And number two, if you go down that
23 slope, then you could say that the exemption,
24 you're opening the door to the exemption to apply
25 in connection with any legislation that is

1 adopted because all legislation, and the power to
2 adopt the legislature, to adopt it, is derived
3 from the Constitution itself, so if the exemption
4 is, quite frankly, poorly drafted, but if the
5 exemption is -- if the statute is derived from
6 the Constitution, name me a statute in New Jersey
7 that isn't derived from the Constitution.

8 Why is it that there has to be a
9 specific fact showing? I will suggest to you
10 several reasons. One, so that the exemption is
11 used sparingly as to not undermine the remedial
12 purposes of the unfunded mandate provision. Two,
13 so the exemption doesn't swallow the equally
14 compelling constitutional provision prohibiting
15 the unfunded mandate. Three, to avoid the very
16 argument advanced here today effectively that all
17 and any state laws would be said to implement the
18 Constitution from which our legal authority is
19 derived.

20 MR. SALMAN: Mr. Genova, the statute
21 was passed that you're challenging, it was passed
22 three months prior to the Constitutional
23 Amendment, so it was there. It was laid out what
24 the procedures, terms and conditions were going
25 to be.

1 MR. GENOVA: But the statute, where
2 I do concur with my colleague, is that the
3 statute was intended to be run in tandem and
4 would only be effective upon the adoption of the
5 Constitutional Amendment. We don't join in the
6 argument that has been advanced by others that
7 that is some kind of infirmity. I would concur
8 that it is intended to be in tandem, and when you
9 look at Section 21, that's what it says. It was
10 a temporal component.

11 MR. MCDONALD: Because it went
12 through, it changed our bail system. The
13 legislature had the charge to implement it. Are
14 you essentially saying if you went through the
15 statute and redrafted it, it would then not -- it
16 would meet your objection? It would somehow get
17 out of the Article 5 exemption where it no
18 longer -- to me, it's implementing a provision of
19 the Constitution. Is that what the State's
20 arguing. And I know you're focused on the costs,
21 but that Constitutional Amendment had to be
22 implemented, correct?

23 MR. GENOVA: That's correct, and
24 what I'm saying to you is nowhere in that
25 Constitutional Amendment does it say it should be

1 a 48 hour risk assessment. Nowhere in that
2 Constitutional Amendment does it turn on its
3 head, and you asked this question before.
4 100 years of Sixth Amendment speedy trial rights
5 have been defined by the federal courts and
6 various criminal laws where a decision is made to
7 impose considerations that, turn on its head, the
8 ability of the prosecutor's office to advance
9 prosecutions because there are time constraints.

10 I mean, just look at the two year
11 cap on the time constraints. 21 prosecutors in
12 New Jersey, if they can't get a case to trial in
13 two years, have to abandon the prosecution.
14 That's not in the amendment, and I would
15 encourage you to read the proposed amendment and
16 to read the interpretive statement and to read
17 the amendment as drafted, and you tell me where
18 it says that that voter understood at that time
19 that the obligations associated with it would
20 translate into a 48 hour risk assessment period
21 or a --

22 MR. MCDONALD: But the grant to the
23 legislature -- it should be lawful for the
24 legislature to establish, by law, procedure,
25 terms and conditions applicable to pretrial

1 release in the denial thereof authorized under
2 this provision. I mean, it's a broad grant of
3 power to the legislature to act. It doesn't --
4 there aren't any specific prohibitions to time
5 schedule that is traditionally not included.

6 MR. GENOVA: I would agree with you
7 that it's a broad statement, but what I suggested
8 before, I'll give it another shot and then I'll
9 focus on what I think is the focus, is that that
10 sentence, that language is superfluous to the
11 extent that every Constitutional Amendment
12 invests in the legislature of the power to
13 implement.

14 Our point in all of this is that
15 their implementation imposed unfunded costs and
16 those unfunded costs are a consequence of the
17 Criminal Justice Reform Act, and it's those
18 unfunded costs that we're entitled to a hearing
19 to present to you and show why they are unfunded
20 mandates and why they exceed the mandate of the
21 underlying Constitutional Amendment. That's our
22 argument.

23 MR. PACICCO: Are you saying that
24 constitutional provision on procedures, terms and
25 conditions, that that exemption could be easily

1 applied in almost any scenario when it has to do
2 with unfunded mandates? You're saying that you
3 could claim that exemption in order not to fund
4 what you have created as an additional cost to an
5 entity, to a county, to a municipality, to a
6 school board. Is that what you're telling us?

7 MR. GENOVA: I am telling you that.
8 I'm also saying, going down that path renders --
9 the other provision of the Constitution that says
10 you shouldn't have unfunded mandates. I'm
11 suggesting to you this is not an issue as simple
12 as does this square peg fit into this round hole
13 on the exception; that if you interpret the
14 exemption in the matter that's being suggested
15 here today, then you'll have to answer the
16 questions, what does the other section of the
17 Constitution mean which talks about unfunded
18 mandates, when we presented to you mandates that
19 are unfunded and that there are obligations to
20 pay and there's no resources to pay.

21 MR. MCDONALD: We've dealt with that
22 in the past where the TNE argument has been
23 advanced several times and the state has advanced
24 the argument when they have the classroom, the
25 age size, for the classes, the Council said no.

1 It doesn't meet -- you haven't proven to us that
2 it's TNE. The charter school case also, so just
3 because the Council has granted the exception
4 applied sometimes, doesn't mean that it's going
5 to just apply all the time.

6 MR. GENOVA: I think in those
7 courses though you did it after a plenary hearing
8 which is why I go back to -- I think.

9 MR. MCDONALD: I don't think so.
10 There are only a couple plenary hearings. Most
11 of these have been swiftly decided.

12 MR. ZIMMERMAN: I have a question of
13 clarification.

14 MR. GENOVA: If I can just draw a
15 distinction. The other distinction I would make
16 is we're talking about the imposition of huge
17 costs associated with implementation of this law
18 which may be different than some of the other
19 cases that you've had.

20 MR. ZIMMERMAN: You said something
21 that's a little opposite of how I understand
22 something. You said that if the trial isn't
23 brought within two years they have to drop the
24 prosecution. My understanding was they don't
25 drop the prosecution. They just have to let them

1 out of jail.

2 MR. GENOVA: That's what I meant.
3 I'm looking at the questions that were posed to
4 see if I didn't address them in my comments.
5 Unless there are any other questions.

6 MR. SALMAN: One thing we were
7 kicking around. Why did it take you so long to
8 bring this challenge?

9 MR. GENOVA: Why did it take the
10 Association of Counties?

11 MR. SALMAN: Yeah. We received a
12 number of poorly written e-mails. I don't know
13 if you are aware of them. Aside from the English
14 being not too good, they complain that it took
15 three years for the legislature to pass this
16 emergency bill giving 20 million dollars added
17 additional judges to deal with the Bail Reform
18 Act. My question is, and one that I think we all
19 have, is why did it take almost three years to
20 challenge this Act?

21 MR. GENOVA: Well, I think you know
22 that old adage, sausage getting made and all of
23 that. I would not assume, Chairman Salman, that
24 efforts went under way to resolve some of these
25 things, and in the absence of those efforts

1 reaching resolution that they culminated with
2 this application, so not having been there, I
3 can't tell you the details of that, but that's my
4 suspicion, and I would think that that's probably
5 the rationale for that.

6 I also don't think we should be
7 prejudiced by making an application on the heels
8 of the application of the enforcement date, if
9 those things couldn't get resolved, if efforts
10 couldn't get resolved to find funding or find
11 alternatives.

12 MR. SALMAN: It's not a question of
13 being prejudiced. I think the New Jersey State
14 Bar Association said it would be disastrous at
15 this late date to the judicial system, the
16 Criminal Justice System, to reverse the new law,
17 so that's the concern that we have. It's not a
18 question of suggesting that you did anything
19 inappropriate.

20 MR. GENOVA: First of all, I think
21 we started out with it's not our job here today
22 to talk about the pros and cons of the objectives
23 of the bail reform. We're talking about costs
24 associated to implement the law, but that being
25 said, there are systems in place that existed

1 prior to January 1st.

2 And Mr. McDonald alluded to the
3 speedy trial rule that has existed in New Jersey,
4 so the notion of disaster, would it be upsetting
5 and disturbing, and would people who have relied
6 on this change be disturbed by an outcome to that
7 effect? Sure, but the notion of bail has existed
8 for decades.

9 MR. MCDONALD: Bail no longer exists
10 in New Jersey as we traditionally used to employ.
11 January 1st the old bail system went out the
12 window.

13 MR. GENOVA: I understand. You've
14 decided not to enjoin this, so the status quo
15 maintains. Again, I don't want to lose sight of
16 the remedy we seek here today. What we're
17 seeking, we're saying to you, at this stage of
18 the proceeding, we don't believe you can dismiss
19 our application. We're saying that we believe
20 we're entitled to a plenary hearing.

21 We believe that you should defer
22 your judgment on the ultimate outcome until all
23 evidence is presented to you, both pro and con,
24 by all stakeholders. That's what we're saying.
25 We're at the earliest stages of this proceeding.

1 Your ruling today on that does not disrupt or
2 disturb the status quo because you've already
3 decided to address that constitutional concern,
4 to the extent you believe it exists, by denying
5 our injunction.

6 MR. MCDONALD: If we struck down
7 this statute today, what would happen?

8 MR. GENOVA: I don't know if you
9 have the authority to strike down the statute.
10 What you have the authority to do is to say it's
11 an unfunded mandate.

12 MR. MCDONALD: It expires. Then
13 it's dead. It goes off the books.

14 MR. GENOVA: Right. But you also
15 have a lot of revenues, and if you would choose
16 to say it's an unfunded mandate and then withhold
17 or direct the parties to negotiate its funding,
18 that's one solution. There are a variety of
19 different solutions, but you're correct, that the
20 statute says if you determine it's an unfunded
21 mandate, then it will expire.

22 MR. MCDONALD: What would happen to
23 a defendant, a person is arrested, what are their
24 rights? The old right of bail is gone. Where
25 would the judicial system -- where would the

1 justice system end up with the old system is
2 dead, the new system is dead. We can't restore
3 what the Constitutional Amendment in November
4 took away.

5 MR. GENOVA: Well, if the statute
6 expires, and what's in the Criminal Justice
7 Reform Act expires, by virtue of that, then the
8 question is what does the Constitutional
9 Amendment require. It doesn't eliminate the
10 notion that a judge has the option to not give
11 bail or give bail. That's been bedded in the
12 constitution. What it would eliminate is the 48
13 hour risk assessment and it would eliminate the
14 speedy trial provisions.

15 We would resort back to the speedy
16 trial provisions of the Constitution because the
17 90 day, 100 day, two year provisions are
18 creatures of regulation. And in terms of the
19 risk assessment, we wouldn't be undoing the
20 constitutional provision that gives the court the
21 discretion. What we might be undoing is the
22 process that has been adopted, which we don't
23 think is grounded in that constitutional
24 provision, and which we think is an unfunded
25 mandate.

1 MR. ZIMMERMAN: Question for you.
2 Taking it from the opposite standpoint of instead
3 of what happens if we take it away. It's been in
4 place six weeks. Are the counties compliant at
5 this point?

6 MR. GENOVA: I can only -- I can't
7 say these are in the record, but I can give you
8 anecdotally some comments that we've gotten.
9 They're compliant to the extent that they are
10 implementing.

11 MR. ZIMMERMAN: And the question I
12 have is we've got a list of how many sheriff
13 officers have these new -- I think they needed to
14 hire 90, 91 officers to implement. Have they all
15 been hired?

16 MR. GENOVA: I don't know the answer
17 to that.

18 MR. ZIMMERMAN: And if not, are they
19 in breach of the law?

20 MR. GENOVA: No, no because the law
21 requires that we implement a 48 hour assessment
22 period and the law requires a speedy trial
23 provision as it presently exists, so how those
24 things get accomplished without funding has been
25 the province of the authorities to have the

1 responsibility, whether it's a county government,
2 prosecutor's office or the like, so we have not
3 submitted direct evidence to you, which is one of
4 the reasons why we want a plenary hearing of how
5 it's been implemented, what its cost is to
6 implement it.

7 I can't say sitting here today that
8 those 99 sheriffs officers have been hired. I
9 can tell you anecdotally some things that we have
10 gotten back. There may be solutions of which I
11 can't represent to you one way or the other, and
12 I'm got going to represent to you, but I will
13 tell you that the forecast being only three weeks
14 into this is that there are going to be burdens
15 associated with this.

16 MR. ZIMMERMAN: Thank you.

17 MR. GENOVA: If I can sum up?

18 MR. SALMAN: Sure.

19 MR. GENOVA: So in summary, it's our
20 contention that you have to read the unfunded
21 mandate constitutional provision, along with the
22 exemption, providing for, purportedly providing
23 for, the implementation of the statute, and you
24 have to read it also in the context of other
25 statutes, like the two percent CAP Law or the

1 interest arbitration CAPs and the like, to
2 understand that the underlying unfunded -- that
3 there is an environment in our state, whether by
4 statute and by the Constitution itself, to manage
5 costs and to manage unfunded costs.

6 And when you read these in
7 combination, and you read them in combination
8 with the actual language of this Constitutional
9 Amendment, we think the risk assessment
10 provisions to speedy trial provisions don't draw
11 their core from the Constitutional Amendment and
12 therefore don't qualify for the exemption. And
13 you asked the question about Paragraph 21.

14 I would like to highlight for you,
15 unlike what you saw in Medford under the Fair
16 Housing Act or whatever, you would think that
17 this law was, at its core, derived from the
18 Constitutional Amendment, the first sentence in
19 the statute would say we're implementing a law in
20 order to comply and apply the Constitutional
21 Amendment.

22 I also suggest to you that the
23 interpretive statement actually proposes a more
24 harsh approach than what has been approached, and
25 again, without suggesting on a policy date

1 whether that's good or bad, there's a distinction
2 between what the voter was looking at with
3 reading how it ultimately got into the law.

4 So for all of those reasons, we
5 would ask you to deny the motion to dismiss,
6 grant us an opportunity for a plenary hearing, to
7 present to you facts that address a number of the
8 questions that you've had, and that this is of
9 such consequence that the Council owes it to the
10 public and owes it to the record to have that
11 kind of plenary hearing. Thank you.

12 MR. SALMAN: Thank you.

13 MR. FANAROFF: Maybe I should have
14 asked for more time, but I will try to be brief
15 because what Mr. Genova did primarily, he read
16 verbatim from the first part of the
17 Constitutional Amendment that created the
18 Council. He skipped the part at the bottom
19 though that starts with notwithstanding anything
20 in this paragraph to the contrary, so everything
21 that he read, ignored.

22 The following categories of laws or
23 rules, regulations issued pursuant to a law shall
24 not be considered unfunded mandates. And then we
25 get down to number five, which is those which

1 implement the provisions of this Constitution.
2 So, much of Mr. Genova's argument balancing and
3 considerations and there are these two percent
4 CAPs and other aspects of the Constitution,
5 frankly, are irrelevant.

6 And the Council has so held, and
7 again, in the Medford case, the Council's
8 decision specifically states that the
9 constitutional exemption precludes the Council
10 from nullifying laws even if they constitute
11 unfunded mandates, if they implement a provision
12 of the Constitution. And so, I don't really --
13 it was interesting. He also said that what I
14 just read, this exemption, it purportedly exists.

15 Now, I wrote that down because
16 purportedly is a great adverb, but it's also an
17 incredibly radical interpretation of what the
18 Constitution actually says. The suggestion that
19 this is not an actual thing that is enshrined in
20 the Constitution is really quite remarkable, and
21 I think that Mr. Genova buttress that radical
22 interpretation by stating, basically, that
23 because every law the legislature passes
24 implements the Constitution, that exemption that
25 is in the Constitution is moot and that cannot be

1 why that exemption exists and cannot be why it
2 was put in there in the first place, if the
3 interpretation that Mr. Genova is advancing is
4 accurate.

5 Because if that's the case, then no
6 law is exempt from the Council's reach and there
7 would be no reason to have that exemption in the
8 Constitution in the first place. I just wanted
9 to make a couple of other quick points. First,
10 with regard to this question of summary
11 disposition, the threshold question is whether or
12 not the law implements the Constitutional
13 Amendment. If it does, that's it.

14 And the facts that you have before
15 you, the information you have before you from the
16 briefs, allows you to make that decision without
17 regard or need for a plenary hearing. And in
18 fact, a plenary hearing would be inappropriate
19 based on the fact that you have that evidence
20 before you. Two other quick points I wanted to
21 make. And I just wanted to be clear because I
22 know we sort of drifted between Sections 10 and
23 11, the speedy trial and the Bail Reform
24 Amendment.

25 Our argument is that all of the

1 provisions that they challenge are covered under
2 Paragraph 11 and that the 90 day and 180 day
3 provisions are also covered under the speedy
4 trial, and that's in our original letter brief.
5 I just wanted to make that clear because I know
6 that we sort of went back and forth a little bit
7 about that.

8 One other concession that Mr. Genova
9 made, that I thought was very interesting, was
10 his admission that these two things ran in
11 tandem. He used that term, they ran in tandem.
12 Again, no clearer expression of intent could be
13 made if you have a law that is passing through
14 the legislature at the same time that it is then
15 going to pass a concurrent resolution putting a
16 Constitutional Amendment on the ballot for the
17 voters to consider. And so that, to me, was an
18 important concession on Mr. Genova's part.

19 And then just two other quick
20 points. I wanted to talk briefly about this
21 thorough and efficient clause, these cases that
22 the complainant rely on. I think the more
23 appropriate analogy, if you were going to use
24 those cases, would be if the thorough and
25 efficient clause of the Constitution was amended

1 and said the legislature shall now be empowered
2 to pass laws regarding the schools, the frequency
3 with which schools need to exchange in radon
4 testing or the policies they need to put in place
5 with regard to anti bullying, which were at issue
6 before the Council.

7 I think the results of those cases
8 would have been different because there, a
9 Constitutional Amendment would have actually
10 changed and empowered the legislature to do
11 certain things, to enact certain policies, which
12 is what happened here. And then lastly, Mr.
13 Genova sort of pooh-poohed the chaos that would
14 ensue if the Council were to rule against the
15 respondents here, and again, they may have only
16 challenged a couple of provisions.

17 But I think as Mr. Genova
18 acknowledged, or it might have been a member of
19 the Council, the whole Act would arguably expire
20 even though they've only requested that several
21 of the provisions be struck. You would have
22 chaos. The Attorney General directive that went
23 out to every county prosecutor would be rendered
24 moot.

25 Every vicinage within the state

1 would then have to come up with their own
2 determinations as to when defendants had to be
3 brought before judges, or the Supreme Court would
4 have to act on an emergent basis to come up with
5 rules that would comply with this Council's
6 decision. And of course the chaos that would
7 ensue within courtrooms would occur as well.

8 What is happening in Somerset County
9 might look different than what is happening in
10 Mercer, which might look different than what's
11 happening in Essex. Hundreds of people have been
12 hired and trained and thousands of hours of work
13 were put into the implementation of this Bail
14 Reform Act for the last two plus years.

15 And again, I'm getting a little
16 further afield than what I am asking the Council
17 to do today because the question is whether or
18 not you should dismiss this complaint, but
19 because the issue was raised and the question was
20 asked, I do think it is important for the Council
21 to understand the consequences that would occur
22 if it determined that this law was an unfunded
23 mandate and it was struck. It would not be, no
24 big deal, sort of representation that Mr. Genova
25 made.

1 As the Bail Reform Act radically
2 changed the entire Criminal Justice System in one
3 way, the striking of this law would do it 180
4 degrees in the other direction but without the
5 benefit of two plus years to actually do the
6 changes. You would essentially be trying to fix
7 a plane mid flight, so I just wanted to make that
8 point, although, again, it goes again a bit
9 beyond what we are asking the Council here to do
10 today.

11 I'd be happy to answer any further
12 questions that the Council has, and I appreciate
13 your willingness to allow me to go a little over
14 my two minute request.

15 MR. SALMAN: I know we have various
16 Amicae here today. I know you wish to be heard.
17 More than happy to give you an opportunity. Sir.

18 MR. SHALOM: I'd like to be briefly,
19 if the Council permits.

20 MR. SALMAN: Would you identify
21 yourself?

22 MR. SHALOM: Sure. My name is
23 Alexander Shalom. I'm with the ACLU of New
24 Jersey, and I'm here representing the five civil
25 rights Amicae. Thank you members of the Council,

1 Mr. Chairman. I appreciate the opportunity to
2 present very briefly. I want to just clarify a
3 few things, some that came up today and some that
4 came up in the papers. Starting with the scope
5 of what is at issue. The complaint filed by Mr.
6 Genova challenges two provisions of the law.

7 It challenges a speedy trial
8 provision and it challenges the 48 hour risk
9 assessment provision. Now, the Bail Amicae, the
10 industry Amicae, have raised some other things.
11 Those are beyond the reach of this Council
12 because, as others alluded to, Council can hear
13 complaints from municipalities, from counties and
14 from school boards, but not from the bail
15 industry.

16 And so while it may be that there
17 are costs associated with apprehending fugitives,
18 that is not in the county's complaint and it
19 should not be considered by this Council. What's
20 at issue here really today is do these provisions
21 implement portions of the Constitution. We
22 believe that they do, and as Mr. Fanaroff just
23 referenced, that they implement Article 1,
24 Paragraph 10.

25 And I want to just draw some

1 distinctions between what we're dealing with here
2 and what the Council has previously dealt with in
3 the thorough and efficient education cases.
4 Those were cases where the statute at issue
5 occupied the same field, arguably, as the
6 constitutional provision which is to say
7 education broadly, and what this Council had
8 repeatedly said, but it doesn't put it into
9 effect.

10 It doesn't put that constitutional
11 provision into effect. It just touches on the
12 same thing, and in fact, the state had pushed so
13 hard on these TNE arguments, that the Council
14 said, let's clear some things up here. If you
15 want to implement the thorough and efficient
16 clause through statute, tell us you're doing
17 that. In Monmouth, Ocean, they put this explicit
18 rule in, but I don't think Mr. Genova's
19 characterization is true.

20 It's not true that for any statute
21 to implement any constitutional provision, it
22 must explicitly reference it. That dealt only
23 with the TNE cases in the education sphere. What
24 we have here, and on the timing, Chairman Salman,
25 you asked earlier about the three month lag which

1 is to say the statute and then the three months
2 later came the Constitutional Amendment, but it
3 was anticipated. The amendment had to be voted
4 on in November. That's when the elections were.

5 We weren't going to call a special
6 election for the purposes of that, but when the
7 legislature passed the statute, they also passed
8 the language that was going to be used, going to
9 be voted on by the voters. And instead, the
10 statute does not go into effect until January 1,
11 2017 and until such time as the Constitution is
12 amended, so they were linked from the beginning
13 and they've been linked throughout explicitly and
14 implicitly.

15 I want to just also say what we're
16 not talking about here. In addition to not
17 talking about the kind of extra arguments raised
18 by the bail industry, if either the counties or
19 the bail industry believe that the Constitutional
20 Amendment was unfair because the interpretive
21 statement was inaccurate, there are processes set
22 forth by statute through which they can challenge
23 that.

24 They can say this did not comport
25 with the statutory requirements for a

1 Constitutional Amendment and they can go into
2 Superior Court, as they've indicated they will,
3 and challenge it, but what they can't do is use
4 this Council as a back door method to say, we
5 think the voters got duped. This Council has
6 broad authority, but not to determine whether the
7 voters were voting on what they thought they were
8 voting on. The Superior Court, by statute, has
9 the authority to address that.

10 I will say though, I think the issue
11 squarely today is about the implementing of the
12 constitutional provisions, if Mr. Genova concedes
13 that there is a funding mechanism, but his view
14 is that it is inadequate, that is not what this
15 Council measures. And Deptford said, while we
16 don't get into inadequacy, we will not allow a
17 lossy funding. That's different.

18 That's to say if it's a sham amount
19 of funding, if it clearly couldn't reach it, but
20 you're not going to get into a dollars and cents
21 accounting in every case because that's not what
22 you've been charged with doing. Finally, and
23 very tangentially, Mr. Zimmerman, in response to
24 your question, not only is it not true that 21
25 county prosecutors would have to abandon the

1 prosecution after two years, as you correctly
2 pointed out, they would merely have to release.

3 I should also point out that the
4 rules of court, as written by the Supreme Court,
5 say two years subject to excludable time, so in
6 fact, the period of time at which they would need
7 to dismiss is far longer than two years. For
8 example, if the defendant files a motion, happens
9 in every single case, that time doesn't count
10 against the two year clock. I think it's just
11 worth noting as we're considering all of this.
12 Unless the Council has any questions, I thank you
13 for the opportunity.

14 MR. MCDONALD: Your TNE discussion,
15 could you foresee an event happening in the
16 future, say this statute goes into effect, it
17 stays into effect, it's not struck down, the bail
18 system changes. A bail, a future legislature
19 passes a statute which impacts on the way
20 county -- say, counties are ordered to do an
21 assessment, a weekly report where they have to go
22 through all the paperwork that was done for each
23 assessment and produce reports and generate and
24 hire employee to do that, would you see that as
25 not falling under this particular exemption, but

1 becoming a tangential one like the other one?

2 MR. SHALOM: So I think it would
3 depend what those provisions were, and you laid
4 out several reporting requirements and so forth.
5 I think the constitutional provision deals with
6 the rights of criminal defendants, and the
7 statute therefore, with the process applicable to
8 those criminal defendants. And so I think if
9 they made certain changes, if they said instead
10 of 48 hours we want it be 24 or 96 --

11 MR. MCDONALD: But on a tangential
12 where you would impose another burden not
13 effecting the way the Constitutional Amendment is
14 implemented, but an additional report.

15 MR. SHALOM: Then I think it would
16 be beyond the scope of the exemption and within
17 the purview of this Council to decide, based on
18 the proofs, whether it was an unfunded mandate.
19 Thank you.

20 MR. SALMAN: Any other Amicae here?

21 MR. MOTZENBECKER: My name is Doug
22 Motzenbecker. I with Gordon Rees in Florham
23 Park, New Jersey. I represent First Indemnity of
24 America Insurance Company and a number of bail
25 bond organizations. We have been graciously

1 granted permission to appear as Amicus in this
2 proceeding, and my clients wish to thank the
3 Council for indulging our request to appear.
4 I'll be brief.

5 The bail format landmark
6 legislation, it's breathtaking in the scope
7 and -- and its burden on local government, and
8 one point that was made just a moment ago was
9 whether we have inadequate funding, losery
10 funding. Neither of the above. We have no
11 funding in this provision.

12 Nothing has been allocated to any
13 of -- neither the counties nor the municipalities
14 who have had to make a dramatic adjustment in
15 their operating procedures to comply. As usual,
16 we're seeing with the legislature regrettably
17 adopting a statute, a rule, a regulation that
18 basically seeks to shift statewide obligations
19 upon counties, upon local governments, school
20 districts without so much as a tribute of
21 funding, and the Council was created to curb
22 that.

23 So far as the merits go, I have no
24 doubt that if this matter proceeds to hearing,
25 Mr. Genova, as well as other Amicus, would be

1 able to introduce substantial and far reaching
2 evidence demonstrating just how unfunded this is,
3 but even intuitively, the Attorney General 2016-6
4 states, quote, that the new law will quote,
5 "strain existing law enforcement resources."

6 Well, no kidding.

7 The prosecutors have been urged to
8 devote, quote, "more resources to cases." Right
9 off the bat. We're going to have weekend
10 hearings, we're going to have live cam
11 fingerprinting, we're going to have loss of
12 revenue from bail forfeitures. We're going to
13 have sheriffs handling bail recoveries. We won't
14 have private sureties and bail bondsmen handling
15 that.

16 That burden will all fall on the
17 state when handled privately before. It's
18 intuitive that unsecured defendants will fail to
19 appear at a substantially higher rate. History,
20 my clients already have people who secured don't
21 show up. When they don't show up in the future,
22 they have nothing to lose, so its only fault
23 stands to reason that defendants are going to not
24 appear at a higher rate and that the counties are
25 going to have to send sheriffs out to have to

1 recover.

2 Prosecutors and local police
3 departments will be affected by that as well.
4 Turning now to the constitutional exemption. In
5 the two cases, Monmouth Ocean Educational
6 Services as well as the Shiloh case and others
7 that preceded it. This Council has made clear
8 that the constitutional exemption, it's not
9 absolute. It's not a -- and that there's got to
10 be a nexus.

11 Now, here, we have a statute, a new
12 statute that was -- before the Constitutional
13 Amendment was even in place. They have nothing
14 to tie it to. They cannot tie something to a
15 possible hypothetical law that may become into
16 being in the future. That is the problem with
17 this statute. Then what we get to have with a
18 statute and the public question is presented on
19 the referendum, we see a -- all I can say is to
20 call it gently, Council members, it was a very,
21 very dishonest and incomplete presentation.

22 The voters are told that this is a
23 get tough on crime measure, that there's going to
24 be -- that bad actors, people who are prone to
25 violence, people who are a threat of flight,

1 people who could obstruct justice by intimidating
2 witnesses and others, these are the kind that we
3 can incarcerate. Well, that's it in theory and
4 practice we're seeing that when there's a law
5 that comes into effect is now to eliminate bail
6 to permit a vast amount of defendants to be
7 released on a totally unsecured basis, unsecured,
8 no bail at all and bail has worked so well and
9 makes so much sense and practiced some reform is
10 needed, some abuses of -- in some cases.

11 But in the vast majority of our
12 experience with bail is that it serves an
13 important function to ensure the defendant
14 appears. If the defendant commits a crime while
15 out on bail there's a 40 percent forfeiture of
16 the bail, so this provides the defendant a
17 serious and substantial reason, an incentive not
18 to violate the terms of this bail.

19 I think right now my client are
20 prepared to show you a hearing they have written
21 about three to five bails in the month or 45 days
22 since this statute took effect. Bail has largely
23 been eliminated, so this follows that there is
24 going to be recoveries that are going to be
25 shifted to sheriffs to handle. So far as the

1 statute goes, this was a denial of rights. This
2 statute says that before anybody had a right to
3 bail, it could be no matter how heinous the
4 offense, anyone could had a right to bail. It
5 was just set high.

6 Now, if you had a very violent, very
7 dangerous offender, a Manson type figure we'll
8 call it, the judge would just set the bail at an
9 astronomically high level and that defendant
10 would be detained. The new law says in those
11 cases, let's call it what it is. He's too
12 dangerous to be released. He doesn't have a
13 right to bail, pretrial release. We'll amend the
14 Constitution and admit detention in that case.

15 Now, we see though that following
16 from that, that's all the statute did and that's
17 all the voters were told that they were
18 authorizing was that bad actors could be
19 detained. They were never told to get this
20 amendment into place. They were never told that
21 there was an entire law passed just three months
22 earlier that was extant, was ready to go and
23 would be authorized on the basis of this
24 inadequate, incomplete and misleading public
25 question.

1 And so the statute to that kind of
2 constitutional level, I would submit that, in
3 this case, requires the Council to adopt, if it
4 can't do it on the basis of existing juris
5 prudence and Shiloh and in the Monmouth Ocean
6 case. If they can't do it on the basis of that,
7 a new and special rule on the unique and
8 compelling facts of this case warrant that the
9 corrective -- let the legislature expressly
10 declare that they are -- exemption.

11 If they want to go that way, as they
12 have in so many cases that have appeared before
13 this Council and have imposed upon local
14 government, if they want to go that way, let them
15 state expressly in the statute that they are
16 invoking and then let them have a good faith
17 basis, a real and tangible basis to do it as
18 opposed to in the Shiloh where the appropriations
19 that, it would boot strap, it was weak and hangs
20 by a thread.

21 That kind of authorization will not
22 suffice and there must then be a direct
23 relationship. There was a quick observation
24 earlier about whether it's going to be disastrous
25 for the state. I don't know if this is the forum

1 to weigh the wisdom of the new law. The
2 legislature will handle that, but in terms of
3 what we have right now, we have seen no bails
4 written. We have an individual in Bergen County
5 who was released on -- he was detained after
6 being caught with seven pounds of
7 methamphetamine, half a pound of cocaine and nine
8 ounces of marijuana for good measure. He was
9 released without bail so that saying --

10 MR. SALMAN: I think we're giving
11 you a lot of latitude to make your argument. Try
12 to stick --

13 MR. MOTZENBECKER: I understand. I
14 don't want to go too far. In terms of whether it
15 was disastrous, I think the current status is --
16 I don't think the Council needs to worry that
17 there would be any adverse impact on the Criminal
18 Justice System if this statute would be declared
19 unconstitutional. So with that, I thank you very
20 much for your time. If there are any follow ups,
21 I'm happy to address them.

22 MR. SALMAN: Are there any other
23 Amicae?

24 MR. PROL: Good morning. I'm Thomas
25 Prol. We're a few minutes before noon, so I can

1 still say good morning. I'm here as the
2 president of the New Jersey State Bar Association
3 on behalf of our 18,200 members. I'll be brief.
4 We appear as an Amicus party in many matters
5 between the Supreme Court, the Appellate Division
6 and Third Circuit, and we take it as a solemn
7 obligation. We're here as a friend of the
8 tribunal.

9 What I'm going to tell you is if you
10 declare this law expired, you're going to reach
11 in and rip the heart out of the judiciary and its
12 core constitutional functions, and those extend
13 beyond the Paragraph 10 or Paragraph 11. They go
14 to the heart of what the Constitution has set up
15 with the judiciary and its ability to run its
16 function.

17 You're going to deliver chaos to the
18 Criminal Justice System if you declare this law
19 expired and that's of grave concern to our
20 membership. What I'll tell you is we all see
21 from when we're kids this image of justice being
22 blind and the Criminal Justice Reform propels us
23 toward the constitutional mandate of a more
24 perfect union because it implements that notion
25 that justice is blind.

1 I won't get into more detail, but I
2 want you to understand the magnitude of what this
3 has done to our justice system and where it is
4 taking us, and I encourage you to keep that in
5 the back of your mind as you make your really
6 weighty decision here today. It does, and I
7 think you have to engage in some intellectual
8 gymnastics to get away from the notion that this
9 does implement the Constitution because it goes
10 beyond just Paragraph 11.

11 And I understand, Council McDonald,
12 there was concerns about we've always had a
13 speedy trial right. This is the first time a
14 statute has actually implemented that provision.
15 The same with due process rights. This now
16 augments the due process rights, and like no
17 other statute that's ever been written, this goes
18 to the heart of what our judiciary does under our
19 system of government here in New Jersey, and on
20 its faith it absolutely clearly implements
21 numerous provisions.

22 It implements the Constitution
23 itself, and so I just want to come forward today
24 to offer that perspective. To declare this law
25 expired at this moment, after it's already been

1 six weeks in operation, would leave us in such a
2 state of disarray in terms of the Criminal
3 Justice System for no reason, for no reason at
4 all. If there's questions about funding, that
5 can be addressed through the judicial process and
6 by the constitutional provision that set up this
7 body.

8 This is a political body, and it's
9 only question, once it gets past the threshold
10 issue, which in my opinion it does not, would be
11 to get into other areas of funding where there is
12 already funding here. So with that, I'm not
13 going to take up anymore of your time. I think
14 that's the message we want to deliver from the
15 State Bar. We are practitioners of the law,
16 numerous criminal attorneys there and the effect
17 and the ramifications this would have on us and
18 the system itself. Thank you.

19 MR. PACICCO: I hear the word chaos.
20 It's an insightful word and I find it so
21 interesting, very theatric. It's a wonderful
22 word to use. So tell me, if we granted a plenary
23 hearing and we wanted to review the case, would
24 the law then be suspended immediately? I would
25 think not, and if in fact the law was struck down

1 because of inadequate funding what would happen
2 to the rules and regulations that were in place
3 prior to the law being enacted?

4 MR. PROL: The first question, I
5 don't think that it would declare the law expired
6 immediately to grant a plenary hearing. However,
7 it would send shock waves throughout the state,
8 and I think you're going to, just by granting
9 that hearing, create a situation which is
10 untenable in our legal world.

11 MR. PACICCO: Tell me what that
12 means.

13 MR. PROL: We won't know how to
14 navigate. There will be an outpouring of
15 litigations. There will be a state of disarray
16 with what will this Council be doing.

17 MR. PACICCO: By just having a
18 hearing?

19 MR. PROL: Yes.

20 MR. MCDONALD: If we had the hearing
21 without suspending the law, you would still
22 function. This would still be valid --

23 MR. PROL: Correct, but I think that
24 will send a message of concern. You know when
25 things get recited into a news article, that will

1 cause some significant concerns around the state.
2 I agree with you, the law will remain intact
3 until it's formally declared expired. Hopefully
4 it won't, but I believe we're not over the
5 threshold of getting to a plenary hearing. As I
6 said before, clearly this implements the entire
7 Constitution, the entire article of the judiciary
8 as well as due process, speedy trial and Section
9 11, which is a new provision for bail reform.

10 MR. SALMAN: Aren't there 38
11 jurisdictions in this country that have
12 implemented the speedy trial requirements both
13 the federal and state Constitution, won by
14 legislation, 17 by court rule?

15 MR. PROL: I'm not sure the exact
16 number, but I can tell you this was a process
17 that they did not arrive at lightly. The Arnold
18 Foundation collected massive amounts of data.
19 They synthesized it. They came up with an
20 algorithm that really takes away a lot of the
21 human frailty of this situation, where a judge
22 looks at a defendant and often times they have
23 their preconceived notion.

24 But what this does is it helps us
25 impose some order and some discipline that takes

1 away a lot of the human frailty in the system
2 that now sort of allows justice to function with
3 the blinders on, as its intended to do, and
4 that's the beauty of what this does. But I think
5 we're getting a little far afield, but that's the
6 back drop of what this law does.

7 It's an elegant noble purpose in our
8 system of government, and people can debate the
9 net effect of that, but I believe that's its
10 intention, and what we're seeing is now that's
11 what's happening with that and you can make
12 little shots about this is going wrong or that's
13 going wrong, but at the end of the day, that is
14 its noble feature is that it's to blind justice.

15 MR. SALMAN: Thank you. I don't
16 believe there are any other Amicae. Because of
17 the apparent obvious importance of this, I'm
18 going to give the Council, Mr. Genova, Mr.
19 Fanaroff, an opportunity to say anything else
20 they would like to say before we deliberate the
21 motion to dismiss. Mr. Fanaroff, anything else
22 you would like to add?

23 MR. FANAROFF: Chair, thank you
24 again for your patience. The questioning and the
25 conversation today has been very thoughtful.

1 It's obvious that you have taken this matter
2 under serious consideration. You've read the
3 briefs. I just wanted to, this point about the
4 impact of a plenary hearing or chaos being sort
5 of a theatrical term.

6 Sometimes theatrical terms are
7 appropriate, and I think the point that I would
8 return to is the question of whether or not a
9 plenary hearing is necessary is obviated by the
10 fact that if the finding is that the Bail Reform
11 Act implements the Constitutional Amendment,
12 there is no need for a plenary hearing. The
13 facts before you and the briefing that's been
14 provided give you all of the information that is
15 necessary.

16 You had all three branches of
17 government here coming together which is a rare
18 thing. I think any of us that have lived in New
19 Jersey more than six months appreciate that if
20 the legislature or the judiciary and the
21 executive branch all get four square behind a
22 public policy issue, that is a rare thing. What
23 is an even rarer thing is that if the consensus
24 of the three branches of government are then put
25 before what is essentially a public referendum,

1 and the voters then validate the decision of the
2 three branches of government, which is what
3 happened here.

4 You had a Constitutional Amendment
5 put on the ballot and you had a passage of that
6 Constitutional Amendment by a 62 to 38 percent
7 margin in addition to the voters having the very
8 law that would be implemented before then for
9 more than three months so that they understood
10 what the Constitutional Amendment would provide.
11 The question again, is implementation. Here you
12 have that.

13 Nothing that is going to be allided
14 in a plenary hearing is going to change the fact
15 that the legislature clearly intended for the
16 Bail Reform Act to implement the Constitutional
17 Amendment and that the provisions that are at
18 issue here are procedures that the legislature
19 was specifically empowered to enact.

20 That's all I had. Again, I thank
21 you, Mr. Chairman, and members of the Council for
22 hearing us today and we look forward to your
23 decision.

24 MR. PACICCO: And I think I was
25 averted throughout the term chaos.

1 MR. FANAROFF: I used it as well, so
2 I wanted to take ownership of it myself, but
3 thank you.

4 MR. SALMAN: Mr. Genova?

5 MR. GENOVA: First of all, I'd like
6 to acknowledge your staff person, Shawn
7 Slaughter, who during, I know the last several
8 weeks, has been quite responsive to the
9 litigants, so I wanted to do that.

10 (Applause)

11 MR. FANAROFF: I echo that.

12 MR. GENOVA: I'm not going to repeat
13 my arguments, but I do want to highlight
14 essentially three things. I think Member Pacicco
15 nailed it on the question of why we're here and
16 what this application is. Ultimately, you're
17 going to get to the merits. The state would like
18 to have you get to the merits sooner than we
19 would like you to get to the merits.

20 But we all know ultimately you're
21 going to get to the merits, so the procedural
22 posture of the case is really important. And I'm
23 suggesting to you that things like Chairman
24 Salman's concern with the efficacy of affidavits
25 for instance that we submitted --

1 MR. SALMAN: That was a concern
2 unrelated to the motion to dismiss. I want to
3 make that very clear. I made a representation
4 about the quality of the affidavits which I was
5 not prepared to go unchallenged. That has
6 nothing to do with the motion to dismiss.

7 MR. GENOVA: I understand that.
8 Please, I'm not being -- what I'm saying is to
9 the extent there are even questions about those,
10 one of the roles of a plenary hearing is to allow
11 the adjudicative body to probe to make your own
12 assessments of those kind of things.

13 MR. SALMAN: That has nothing to do
14 with whether or not the law implements the
15 Constitution, which is essential argument of the
16 State and the Bar Association.

17 MR. GENOVA: Correct. I understand
18 that. The Bar Association having no standing to
19 be in this proceeding as a party, but that being
20 said --

21 MR. SALMAN: We heard them as Amicae
22 as we heard the bail people Amicae and the ACLU.

23 MR. GENOVA: I understand that. But
24 I'm also suggesting that given the gravity of the
25 circumstance and your constitutional duty as a

1 body to uphold the unfunded mandates provision,
2 it strikes me that there would be a reticence to
3 conduct a plenary hearing to have a complete
4 record of the many, many things that could be
5 presented to you on the issue of costs and
6 whether or not the interpretive statement did in
7 fact make the appropriate representations as to
8 whether it would even refer to an Act that would
9 embrace those things.

10 So I just want the body to
11 understand that we're not asking for a
12 disposition today of the outcome. We're asking
13 for you to create a record to allow you to
14 satisfy your constitutional mandate to render a
15 decision with a complete record in which time we
16 would have an opportunity to present evidence
17 supporting what we think are serious and
18 burdensome expenditures associated with this and
19 address the many, many issues that were raised
20 today. So thank you for your time and I wanted
21 to be clear in terms of what we're seeking to
22 accomplish today.

23 MR. MOTZENBECKER: I omitted one
24 thing from my presentation is basically the
25 Constitution provides that the counties and the

1 municipalities are to be -- the Constitution is
2 to be interpreted liberally in favor of the
3 counties and the municipalities. That's right in
4 the Article 4, Section 7, Paragraph 11 that on
5 issues of interpretation, they are to get the
6 benefit of that, so I think that point is -- I
7 think that is certainly worth stressing. That's
8 all I have.

9 MR. SALMAN: We appreciate the input
10 of all the Amicae and the movement and the
11 opposition. And at this point, we will
12 deliberate. We will act as promptly as we can
13 and I can assure you that we will take our
14 constitutional responsibility very, very
15 seriously. We have all read of the materials
16 quite carefully and we will reach a decision as
17 promptly as we can.

18 We thank you again. I think Mr.
19 McDonald makes an excellent suggestion. Because
20 of the importance of this, all involved, we will
21 take a break. We have had deliberations before
22 the hearing began and we will try to have it a
23 decision, not an opinion. Because as I stated at
24 the outset, I'm acting, acting so we're going to
25 have to get somebody to write the opinion and

1 that usually takes us a couple of months to do
2 that, but given the seriousness and the
3 importance, we can reach a decision, I think we
4 will at least confer to see whether we can reach
5 a decision.

6 We've all read the voluminous papers
7 submitted to the -- submitted on the motion to
8 dismiss, so if you will give us this opportunity.
9 You can stay here. We have the room next door,
10 and with that, we'll return for now.

11 (Whereupon a break was taken.)

12 MR. SALMAN: Good afternoon. The
13 Council has deliberated again, and we have
14 decided that the motion to dismiss is granted.
15 There was a descent. We will try to have an
16 opinion in any descending opinion, or opinions,
17 issued as promptly as we can get people to assist
18 us and that it was a very thorough and
19 enlightening argument.

20 We commend Council for the State and
21 Council for the counties and the Amicae for being
22 as thorough and careful in their presentations.
23 The vote was four to three. And would anyone
24 else wish to say anything? Again, thank you very
25 much. The vote is on the record, four to three

1 in favor of the motion to dismiss. The motion to
2 dismiss is granted. An opinion or opinions will
3 be forthcoming as soon as we can get all of the
4 appropriate personnel to assist us.

5 As I'm sure you all know, we are
6 essentially, we are a pro bono group. I think
7 our conversation today is 92 dollars after taxes.
8 This is a labor of love for all of us, and as Mr.
9 Genova said before, we are grateful to Shawn
10 Slaughter, our Executive Director, who pulls us
11 together from the far corners of the state to do
12 our contributions of public service, and we're
13 happy to do so. And again, we thank you for your
14 participation.

15 MR. PACICCO: One quick comment for
16 the Attorney General.

17 MR. FANAROFF: You promoted me.
18 Thank you.

19 MR. PACICCO: It's interesting you
20 mention that the three branches of government
21 were instrumental in putting together this
22 legislation, and as you know, the Council on
23 Local Mandates is in fact appointed by all three
24 branches of government, so it's an interesting
25 segue to this conversation.

1 MR. FANAROFF: Thank you, sir.

2 MR. PACICCO: And thank you all for
3 your presentations.

4 MR. GENOVA: When we will be
5 anticipate an opinion? A couple months or so?

6 MR. SALMAN: I would say a couple
7 months.

8 MR. GENOVA: Will you issue an order
9 pending the opinion so there will be a document
10 commemorating it?

11 MR. SALMAN: We'll let the judge --
12 about that, but you can take it as a final
13 decision. The motion to dismiss is granted.

14 MR. GENOVA: Thank you.

15 MR. FANAROFF: Thank you, Mr.
16 Chairman.

17 (Hearing Concluded at 12:43 p.m.)
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C E R T I F I C A T E

I, LAUREN ETIER, a Certified Court Reporter, License No. XI 02211, and Notary Public of the State of New Jersey, that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action.

Lauren M. Etier



Notary Public of the State of New Jersey
My Commission Expires June 14, 2018
Dated: February 20, 2017

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