

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

DARLENE COLLINS, *et al.*,
Plaintiffs,

v.

CHARLES W. DANIEL, *et al.*,
Defendants.

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No. 1:17-CV-00776-RJ

ORDER DENYING PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION

BEFORE THE COURT is Plaintiffs Darlene Collins, on behalf of herself and others similarly situated, Bail Bonds Association of New Mexico (“BBANM”), Senator Richard Martinez, Senator Bill Sharer, Senator Craig Brandt, Representative Bill Rehm, and Representative Carl Trujillo’s (collectively, “Plaintiffs”) Corrected Motion and Brief in Support for a Preliminary Injunction. (Doc. 11). After due consideration, Plaintiffs’ motion for preliminary injunction shall be **DENIED**.

I. BACKGROUND

Plaintiffs ask the Court to enjoin provisions of the New Mexico Supreme Court Rules regarding pretrial release and detention in criminal proceedings adopted pursuant to Supreme Court Order No. 17-8300-005 effective on July 1, 2017 (“2017 Rules”). Plaintiffs filed their Complaint on July 28, 2017, alleging that Defendants Charles W. Daniel, Edward L. Chavez, Petra Jimenez Maez, Barbara J. Vigil, Judith K. Nakamura, the New Mexico Supreme Court, Nan Nash, James Noel, the Second Judicial District Court, Henry A. Alainz, Robert L. Padilla, Bernalillo County Metropolitan Court, Julie Morgas Baca, and Bernalillo County (collectively, “Defendants”) modified statutory law without legislative authority, approval or action. (Doc. 1). In addition, Plaintiffs argue that the 2017 Rules violate the Eighth Amendment, the Due Process Clause, and the Fourth Amendment of the United States Constitution as well as Article 2, Section 13, of the New Mexico Constitution “by subjecting presumptively innocent criminal defendants to severe restrictions of pre-trial liberties—including home detention and 24-hour electronic monitoring through an ankle bracelet—without

providing them the constitutionally-protected option of bail.” (Doc. 11 at 8). Further, Plaintiffs contend that the 2017 Rules violate “the mandate of separation of powers provided for in the Federal and State constitutions as it impermissibly treads into the purview of the legislature and ultimately the citizenry to pass laws or constitutional changes.” (*Id.*).

On August 3, 2017, Plaintiffs filed their Amended Complaint. (Doc. 7). On August 4, 2017, Plaintiffs filed their Motion for a Preliminary Injunction. (Doc. 9). On August 5, 2017, Plaintiffs filed their Corrected Motion for a Preliminary Injunction. (Doc. 11). Plaintiffs seek an injunction preventing the application of the 2017 Rules by the Second Judicial District Court, Bernalillo County Metropolitan Court, and Bernalillo County that allegedly violate Plaintiffs’ constitutional rights through the use of the Public Safety Assessment court-based pretrial risk assessment tool developed by the Laura and John Arnold Foundation (the “Public Safety Assessment Tool”). On August 18, 2017, Defendants filed their Response in Opposition to Plaintiffs’ Corrected Motion for Preliminary Injunction. (Doc. 15). On September 1, 2017, Plaintiffs filed their Reply. (Doc. 24). This matter is now ready for disposition.

A. Pretrial Release of Plaintiff Darlene Collins

Darlene Collins was arrested on charges of aggravated assault, a violent fourth-degree felony, on Sunday, July 2, 2017 at 5:54 a.m. (Doc. 15-3 at ¶ 3). Because Collins was charged with a violent felony, she was required to appear before a Metropolitan Court judge. *See* Rules 5–408 NMRA, 7–408 NMRA. Collins appeared before Metropolitan Judge Courtney Weaks on July 5, 2017. (*Id.* ¶ 4). Judge Weaks ordered Collins released on her own recognizance, subject to certain limited conditions set forth in a written order, conditions to which Collins affirmatively agreed. (*Id.*). Under the 2017 Rules, the court was required to conduct a hearing and issue an order setting conditions of release within “three. . . days after the date of arrest if the defendant is being held in the local detention center,” Rule 7–401(A) NMRA. Collins’s hearing was held and the order of release was issued within the required timeframe. (Doc. 15-3).

B. The Historical Development of Bail

Originating in medieval England, bail allowed untried prisoners to remain free before conviction in criminal cases:

In 1275, the English Parliament enacted the Statute of Westminster, which defined bailable offenses and provided criteria for determining whether a particular person should be released, including the strength of the evidence against the accused and the accused's criminal history. *See Note, Bail: An Ancient Practice Reexamined*, 70 *Yale L.J.* 966, 966 (1961); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 *Syracuse L. Rev.* 517, 523–26 (1983). In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could obtain a timely bail hearing. In 1689, Parliament enacted an English Bill of Rights that prohibited excessive bail. *See Carbone, supra*, at 528. Early American constitutions codified a right to bail as a presumption that defendants should be released pending trial. *See Note, Bail, supra*, at 967.

ODonnell v. Harris Cnty, Tex., — F. Supp. —, 2017 WL 1735456, at *11 (S.D. Tex. 2017). New Mexico's Constitution, like the United States Constitution, forbids "excessive bail." N.M. Const., art. II, § 13. Article II, Section 13 enshrines the principle that a person accused of a crime is entitled to retain personal freedom "until adjudged guilty by the court of last resort." *State v. Brown*, 338 P.3d 1276, 1282 (N.M. 2014) (internal quotation marks and citations omitted). "Once released, a defendant's continuing right to pretrial liberty is conditioned on the defendant's appearance in court, compliance with the law, and adherence to the conditions of pretrial release imposed by the court." *Id.* at 1282.

"At the federal level, the Judiciary Act of 1789 provided an absolute right to bail in noncapital cases and bail at the judge's discretion in capital cases." *ODonnell*, 2017 WL 1735456, at *15. The first Congress also proposed the Eighth Amendment to the United States Constitution, which, like the New Mexico Constitution and the English Bill of Rights, prohibits excessive bail. U.S. Const. amend. VIII; N.M. Const., art. II, § 13. However, neither the United States Constitution nor the New Mexico Constitution explicitly guarantees a right to bail. *Id.* Rather, the United States Constitution and the New Mexico Constitution only forbid "excessive bail." *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952) (the Eighth Amendment does not provide a "right to bail").

C. Federal Bail Reform

The Bail Reform Act of 1966 became “the first major reform of the federal bail system since the Judiciary Act of 1789.” *Brown*, 338 P.3d at 1286; Bail Reform Act of 1966, 80 Stat. 214 (repealed 1984). The stated purpose of the Bail Reform Act of 1966 was “to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges. . . when detention serves neither the ends of justice nor the public interest.” *Id.* at Sec. 2. The Act included the following key provisions to govern pretrial release in noncapital criminal cases in federal court: (1) a presumption of release on personal recognizance unless the court determined that such release would not reasonably assure the defendant’s appearance in court, (2) the option of conditional pretrial release under supervision or other terms designed to decrease the risk of flight, and (3) a prohibition on the use of money bail in cases where nonfinancial release options such as supervisory custody or restrictions on “travel. . . or place of abode” are sufficient to reasonably assure the defendant’s appearance. *Id.* at Sec. 3. “By emphasizing nonmonetary terms of bail, Congress attempted to remediate the array of negative impacts experienced by defendants who were unable to pay for their pretrial release, including the adverse effect on defendants’ ability to consult with counsel and prepare a defense, the financial impacts on their families, a statistically less-favorable outcome at trial and sentencing, and the fiscal burden that pretrial incarceration imposes on society at large.” *Brown*, 338 P.3d at 1287.

Congress again revised federal bail procedures with the Bail Reform Act of 1984, enacted as part of the Comprehensive Crime Control Act of 1984. *See* Bail Reform Act of 1984, Pub. L. No. 98–473, § 202, 98 Stat. 1837, 1976 (codified at 18 U.S.C. §§ 3141–3150 (2012)). The legislative history of the 1984 Act states that Congress wanted to “address the alarming problem of crimes committed by persons on release” and to “give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.” S. Rep. 98–225, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185. The 1984 Act, as amended,

retains most of the 1966 Act but “allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions ‘will reasonably assure. . . the safety of any other person and the community.’” *United States v. Salerno*, 481 U.S. 739, 741 (1987) (omission in original) (quoting the Bail Reform Act of 1984) (upholding the preventive detention provisions in the 1984 Act).

D. The New Mexico Pretrial Release Rules

The New Mexico Rules of Criminal Procedure provide the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution. *See* Rule 5–401 NMRA (providing procedures for district courts); Rule 6–401 NMRA (providing procedures for magistrate courts); Rule 7–401 NMRA (providing procedures for metropolitan courts); Rule 8–401 NMRA (providing procedures for municipal courts). New Mexico modeled its bail rules, which were first adopted in 1972, on the federal Bail Reform Act of 1966. *See* NMSA 1978, Crim. P. Rule 22 (Repl. Pamp. 1980; including the May 1972 New Mexico Supreme Court order); *see also* Committee commentary to Rule 5–401 NMRA (explaining that the rule is modeled on the Bail Reform Act of 1966). Like the Bail Reform Act of 1966, the New Mexico bail rules establish a presumption of release by the least restrictive conditions and emphasize methods of pretrial release that do not require financial security. *See* Rule 5–401(A) NMRA; *Brown*, 388 P.3d at 1288; *State v. Gutierrez*, 140 P.3d 1106, 1110 (recognizing “that the purpose of the Federal Bail Reform Act of 1966, from which [the New Mexico] rule is derived, was to encourage more releases on personal recognizance”).

Originally, the only valid purpose of bail in New Mexico was to ensure the defendant’s appearance in court. *State v. Ericksons*, 746 P.2d 1099, 1100 (“[T]he purpose of bail is to secure the defendant’s attendance to submit to the punishment to be imposed by the court.”). To further incentivize appearance in court, in the early 1970s, the New Mexico Legislature granted courts statutory authority to order forfeiture of bail upon a defendant’s failure to appear, *see* NMSA 1978, §

31–3–2(B)(2) (1972, as amended through 1993), and enacted separate criminal penalties for failure to appear, *see* NMSA 1978, § 31–3–9 (1973, as amended through 1999). Following recognition in the federal Bail Reform Act of 1984 that public safety is a valid consideration in pretrial release decisions, the New Mexico Supreme Court amended the rules to require judges to consider not only the defendant’s flight risk but also the potential danger that might be posed by the defendant’s release to the community in fashioning conditions of release. *See* Rule 5–401 NMRA (1990) (prescribing that judges consider “the appearance of the person as required” and “the safety of any other person and the community”).

The 1972 New Mexico rules specifically incorporated the evidence-based, rather than money-based, procedures that are statutorily required for federal courts. (Doc. 15-1 at 2). Significantly, the New Mexico rules since 1972 have: (a) required release conditions to be set during and not before the defendant’s initial court appearance; (b) required release on nonfinancial conditions unless the court makes specific findings that no nonfinancial conditions will reasonably assure court appearance; and (c) directed courts to impose various restrictions of liberty on released defendants that are appropriate in the circumstances of particular cases. (*Id.* at 3). Regardless, many New Mexico state courts drifted into unlawful reliance on a growing money-bond industry and practices of routinely requiring money bonds that did not require judicial determinations of individual risk or ability to pay, in apparent violation of Rule 5–401 and New Mexico’s constitution, and in contrast to the practice of federal courts. *Brown*, 338 P.3d at 1289.

In 2014, bail reform was sparked in New Mexico by the *State v. Brown*, 338 P.3d 1276 (N.M. 2014) decision of the New Mexico Supreme Court holding that the use of bail to detain a defendant when less restrictive conditions of release would protect the public violated New Mexico’s constitution. *Brown*, 338 P.3d at 1278. As a result of the *Brown* litigation, the New Mexico Supreme Court formed a broad-based ad hoc pretrial release advisory committee (the “Committee”) to study pretrial release and detention practices in New Mexico and to make recommendations both

for improving compliance with existing law and for making remedial changes in the law. (Doc. 15-1 at Exhibit 2). On recommendation of the Committee in August 2015, the New Mexico Supreme Court submitted to the New Mexico Legislature a proposed amendment to Article II, Section 13 of the New Mexico Constitution that would facilitate a shift from money-based to risk-based release and detention. (*Id.* at Exhibits 3 & 4).

New Mexico voters amended the New Mexico Constitution in 2016 to enshrine the *Brown* holding, with Chief Justice Charles Daniels lending active support to the campaign. (*Id.* at 6). State constitutional amendments in New Mexico require passage by both houses of the New Mexico Legislature and passage of a majority of New Mexico voters in a general election. (*Id.* at 5). After the proposed constitutional amendment was considered and passed by both chambers of the New Mexico Legislature and placed on the general election ballot, it was approved by an overwhelming majority of New Mexico voters. (*Id.* at 6).

Following the passage of the amendments to Article II, Section 13 of the New Mexico Constitution, the Committee recommended and the New Mexico Supreme Court agreed that the procedural rules governing release and detention in New Mexico must be updated to comply with and effectuate the new constitutional mandates. (*Id.* at 6). Consistent with its rulemaking procedure, the New Mexico Supreme Court published all proposed rules for public comment in early 2017, and after considering all input and making resulting revisions, unanimously promulgated on June 5, 2017, the 2017 Rules that are the subject of this lawsuit with an effective date of July 1, 2017. (*Id.*).

E. The Challenged Risk Assessment Instrument

Although the fundamental provisions of Rule 5–401, requiring judges to set conditions of release based on assessments of individual danger and flight risk remained unchanged, the New Mexico Supreme Court promulgated several new procedural rules in 2017:

- Rule 5–409 administers the new detention-for-dangerousness authority that the constitutional amendment conferred on the district courts.

- Rule 5–408 provides early release mechanisms for low-risk defendants in place of the fixed bail schedules that had been created in various localities in apparent violation of the individual judicial risk assessment required by Rule 5–401 and principles of constitutional law.
- The rules were amended to clarify unequivocally that local courts had no authority to create fixed money bail schedules in violation of Rule 5–401 and equal protection requirements.
- Rule 5–403 clarifies and strengthens the authority of courts to amend conditions of release or revoke release entirely for defendants who commit new crimes on release or otherwise will not abide with release conditions.
- Other rules provide expedited appeals by both the prosecution and the defense to review release and detention rulings.
- The New Mexico Supreme Court promulgated equivalent rules for the Magistrate Courts, the Metropolitan Courts, and the Municipal Courts.

(Doc. 15-1 at 6–7). The 2017 Rules contain two provisions authorizing use of validated risk assessment instruments in determining the likelihood of a particular defendant’s risk for committing new offenses on release or failing to appear at future court appearances. First, Rule 5–401(C) provides in relevant part:

In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information concerning [reciting a list of additional factors the court should consider taken from the 1972 federal pretrial release statutes].

(*Id.* at Exhibit 10).

Currently, Bernalillo County is the only county in New Mexico authorized by the New Mexico Supreme Court to use a risk assessment instrument in order to conduct a pilot project to determine the effectiveness of the Arnold Foundation Public Safety Assessment Tool. (*Id.* at 7–8). Following completion of this pilot project, the New Mexico Supreme Court will decide whether to authorize a statewide use of the Public Safety Assessment Tool or any other risk assessment instrument under Rule 5–401 as an additional discretionary tool in pretrial release decisions. (*Id.*) Rule 5–408(C), which authorizes early release of low-risk defendants, may also allow the future use of a risk assessment instrument. (*Id.* at 8). The New Mexico Supreme Court has not yet approved

any risk assessment instrument for use under that rule and is not expected to consider such an authorization until after it has a chance to assess Bernalillo County's completed experience with the Arnold Foundation Public Safety Assessment Tool pilot project. (*Id.*). Importantly, like the federal release and detention provisions on which New Mexico's rules are modeled, New Mexico has not precluded consideration of financially-secured bonds, including commercial bail bonds, where a court determines a money bond is necessary in a particular case to reasonably assure a defendant's return to court, as provided textually in Rule 5-401.

II. LEGAL STANDARD

To obtain a preliminary injunction, the moving party must establish: "(1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) ("As a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal.").

While any preliminary injunction is an extraordinary remedy, the United States Court of Appeals for the Tenth Circuit has identified "three types of specifically disfavored preliminary injunctions" and "a movant must satisfy an even heavier burden" in those instances." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004). The three types of injunctions that are particularly disfavored include: "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *Id.* These

disfavored injunctions “must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.” *Id.*

As a preliminary matter, the court must determine whether the requested injunction falls within one of the disfavored categories in order to evaluate Plaintiffs’ Motion for a Preliminary Injunction under the proper standard. The Court finds that the injunction sought by Plaintiffs would alter the status quo by enjoining lawfully promulgated rules of the New Mexico Supreme Court. In addition, the Court is of the opinion that by granting the preliminary injunction, Plaintiffs would receive an immediate ruling in their favor on every form of relief included in their Amended Complaint, with the exception of their claim for money damages. “The burden on the party seeking a preliminary injunction is especially heavy when the relief sought would in effect grant plaintiff a substantial part of the relief it would obtain after a trial on the merits.” *GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984). Accordingly, the preliminary injunction sought by Plaintiffs is “disfavored” and “warrants a heightened standard of proof. . . to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.” *Logan v. Pub. Emps. Ret. Ass’n*, 163 F. Supp. 3d 1007, 1027 (D.N.M. 2016) (internal quotation marks and citations omitted).

III. DISCUSSION

Plaintiffs allege that Defendants have attempted to “re-write the New Mexico Constitution and change legislation without the benefit [of] debate and consideration required when changing law and impacting individual rights.” (Doc. 11 at 8). Plaintiffs claim that Defendants have denied “pre-trial defendants of the option of monetary security to appear at trial b[y] posting bonds, in favor of the curtailment or elimination of liberty rights[.]” (*Id.* at 9). According to Plaintiffs, the Public Safety Assessment Tool does not provide for the consideration of attendance security by posting bond unless no mix of non-monetary, liberty restrictions would provide for likely attendance at trial.

(*Id.*). In response, Defendants argue that Plaintiffs lack standing to bring their claims,¹ Plaintiffs are unlikely to succeed on the merits of their claims, Plaintiffs will not suffer any irreparable harm if the preliminary injunction does not issue, Defendants will suffer irreparable harm if the Court grants the Motion for Preliminary Injunction, and the public interest favors denying the Motion for Preliminary Injunction. (Doc. 15).

A. Likelihood of Success on the Merits

As previously stated, the preliminary injunction sought by Plaintiffs would alter the status quo and in effect grant Plaintiffs a substantial part of the relief they seek in this action. Thus, Plaintiffs must make a heightened showing of the likelihood of success on the merits. *Logan*, 163 F. Supp. 3d at 1027; *GTE Corp.*, 731 F.2d 676 at 679. Because Plaintiffs are not likely to succeed on the merits of their claims in this case, Plaintiffs are not entitled to a preliminary injunction.

1. Eighth Amendment Claims

Plaintiffs ask the Court to create a constitutional right to “the option of monetary security to appear at trial b[y] posting bonds,” which does not currently exist under binding precedent. (Doc. 11 at 2). While the United States Constitution and the New Mexico Constitution forbid excessive bail, they do not provide for an absolute right to bail or money bail. *See* U.S. Const., amend. VIII; N.M. Const., art. II, § 13; *United States v. Salerno*, 481 U.S. 739, 752 (1987) (“The Eighth Amendment addresses pretrial release by providing merely that ‘excessive bail shall not be required.’ This Clause, of course, says nothing about whether bail shall be available at all.”); *Carlson v. Langdon*, 342 U.S. 524, 545–46 (1952) (holding that the Eighth Amendment does not provide for an absolute “right to bail.”).

The 2017 Rules do not forbid commercial bail. In fact, the 2017 Rules explicitly contemplate that courts may require secured bonds for a criminal defendant’s release. Rule 5–401(E) & (F), Rule

¹ The substance of Defendants’ argument regarding standing is contained within their Motion to Dismiss. Accordingly, the Court will address the standing issue by future order when ruling on the pending Motion to Dismiss.

5-401.2 NMRA. Plaintiffs' assertion that the 2017 Rules replace "a system that guaranteed a monetary bail determination to all defendants" is false. (Doc. 11 at 20). The 1972 Rules presumptively required that a criminal defendant "shall be released pending trial on [her or his] personal recognizance or upon the execution of an unsecured appearance bond," unless the court made written findings that those conditions would be insufficient to ensure the defendant's appearance. (Doc. 15-1 at Exhibit 1). Only if the court made a written determination that release on personal recognizance or an unsecured appearance bond would not ensure the defendant's appearance or would endanger the safety of another person or the community, would the court proceed to consider a secured bond requirement prior to the 2017 Rules. (*Id.*). There is no provision in the 1972 Rules, or any other source of law, guaranteeing the option of money bail to criminal defendants. Accordingly, Plaintiffs are not likely to succeed on their Eighth Amendment Claims.

2. Fourth Amendment Claims

Plaintiffs argue that the non-monetary restrictions that a court could impose on a criminal defendant seeking pretrial release constitute a "seizure." (Doc. 11 at 32). However, the Tenth Circuit has expressly declined to adopt a "continuing seizure" analysis that would deem pretrial release conditions a "seizure" under the Fourth Amendment. *See Becker v. Kroll*, 494 F.3d 904, 915 (10th Cir. 2007) ("To extend liability in cases without a traditional seizure would expand the notion of seizure beyond recognition. . . . [I]f the concept of a seizure is regarded as elastic enough to encompass standard conditions of pretrial release, virtually every criminal defendant will be deemed to be seized pending the resolution of the charges against him."). Therefore, Plaintiffs' Fourth Amendment claim fails under applicable Tenth Circuit law and Plaintiffs cannot demonstrate any likelihood of prevailing on this claim.

3. Procedural or Substantive Due Process Claims

Plaintiffs contend that Defendants' actions have transgressed Darlene Collins's rights under the Due Process Clause of the Fourteenth Amendment. Unquestionably, the Due Process Clause

applies to pretrial detention. *See United States v. Cos*, 198 F. App'x 727, 732 (10th Cir. 2006) (“[A]t some point due process may require a release from pretrial detention”); *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986) (“Although pretrial detention is permissible when it serves a regulatory rather than a punitive purpose, we believe that valid pretrial detention assumes a punitive character when it is prolonged significantly.”). Criminal defendants routinely assert their due process rights in arguing for pretrial release as opposed to continued detention. *See, e.g., United States v. Gonzales*, 995 F. Supp. 1299, 1303–04 (D.N.M. 1998). However, Plaintiff Darlene Collins was not subject to pretrial detention; rather, she was released on her own recognizance with minimal conditions. (Doc. 15-3 at ¶ 4).

A condition of release can violate due process if it prevents the courts from evaluating and setting relevant conditions of pretrial release for criminal defendants on an individual basis. *United States v. Torres*, 566 F. Supp. 2d 591, 596 (W.D. Tex. 2008). Yet, the 2017 Rules require courts to evaluate and set appropriate conditions of release on a case-by-case basis. Further, Plaintiffs do not argue that Collins’s conditions of release are vague or unintelligible. In fact, Plaintiffs do not complain about Collins’s conditions of release in any manner. Rather, Plaintiffs take issue with hypothetical conditions that might apply to other, unnamed individuals. (Doc. 11 at 20) (complaining of pretrial release conditions like “home detention” and “electronic monitoring with an ankle bracelet”). Because Plaintiffs cannot bring a claim for due process violations relating to conditions of release that were not imposed on any Plaintiff in this case, Plaintiffs’ due process claim is not likely to succeed.

Moreover, purchasing pretrial release with monetary bail does not implicate fundamental rights under a substantive due process analysis. *See Broussard v. Parish of Orleans*, 318 F.3d 644, 657 (5th Cir. 2003). In addition, the Supreme Court of the United States has made clear that the government has a legitimate interest in regulating pretrial release and detention. *Salerno*, 481 U.S. at 753, 749 (rejecting “the proposition that the Eighth Amendment categorically prohibits the

government from pursuing other admittedly compelling interests through regulation of pretrial release,” and noting that the government’s interest in public safety “is both legitimate and compelling.”). For all of these reasons, Plaintiffs cannot show a likelihood of success on their due process claims.

4. Separation-of-Powers Claim

Plaintiffs claim that by promulgating the 2017 Rules, the New Mexico Supreme Court has “infringe[d] upon the power of the Legislature to make law.” (Doc. 7 at ¶¶ 81). Yet, Plaintiffs fail to specifically identify any legislative enactment upon which Defendants have encroached. Plaintiffs generally state that the 2017 Rules “infringe[] upon the authority of the New Mexico Legislature to pass laws preserving the public peace.” (*Id.* at 31–32). However, under New Mexico law, the New Mexico Supreme Court retains “ultimate rule-making authority” to enact procedural rules for the New Mexico state courts. *Albuquerque Rape Crisis Ctr. v. Blackmer*, 120 P.3d 820, 822 (N.M. 2005); *see also State v. Roy*, 60 P.2d 646, 660 (N.M. 1936) (discussing the New Mexico Supreme Court’s “exercise of an inherent power. . . to prescribe such rules of practice, pleading, and procedure as will facilitate the administration of justice”).

The New Mexico Legislature has long recognized the New Mexico Supreme Court’s rule-making authority, which encompasses the authority to promulgate rules of criminal procedure. NMSA 1978, § 38-1-1(A) (providing that “[t]he supreme court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico.”). Thus, Plaintiffs’ claims that the New Mexico Supreme Court “sought to and did modify statutory law without legislative authority” and “essentially rew[ro]te the New Mexico Constitution and change[d] legislation without the benefit [sic] debate and consideration required when changing law and impacting individual rights,” are meritless. (Doc. 11 at 1).

Again, Plaintiffs fail to specifically identify any “statutory law” or “legislation” that the 2017 Rules supposedly contravene. The 1972 Rules in existence prior to the 2017 Rules directed courts to apply a presumption of release on nonfinancial conditions, unless a court made specific findings that no non-financial conditions would assure court appearance. Thus, criminal defendants have never been guaranteed the option of monetary bail under New Mexico law in existence before and after the 2017 Rules. Accordingly, Plaintiffs cannot show a substantial likelihood of success on this claim.

5. Public Safety Assessment Tool Claims

Plaintiffs claim that the Public Safety Assessment Tool developed by the Laura and John Arnold Foundation authorized by the New Mexico Supreme Court for use in a pilot program in Bernalillo County “deprive[s] presumptively innocent pre-trial defendants of their liberty rights. . . [and] provides no room for discretion and consideration of bail instead of such deprivations.” (Doc. 11 at 21). Plaintiffs mischaracterize the 2017 Rules and the purpose of the Public Safety Assessment Tool. First, there is no constitutionally-protected liberty interest in securing release from pretrial detention through a commercial bond or in obtaining release prior to arraignment. Second, the 2017 Rules provide that the court “shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction,” in evaluating the least restrictive conditions of release that will reasonably ensure the appearance of a criminal defendant. Rule 5–401(C) NMSA. While trial courts may consider the Public Safety Assessment Tool, it does not displace the discretion of judges. Therefore, Plaintiffs are unlikely to succeed on their claims that the Public Safety Assessment Tool in Bernalillo County is unconstitutional.

B. Irreparable Injury

To obtain injunctive relief, Plaintiffs must show that they will suffer irreparable injury if their request for injunctive relief is denied. *See Schrier*, 427 F.3d at 1258. “To constitute irreparable harm, an injury must be certain, great, actual ‘and not theoretical.’” *Heideman v. S. Salt Lake City*,

348 F.3d 1182, 1189 (10th Cir. 2003) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Irreparable harm is more than “merely serious or substantial” harm. *Id.* (citation omitted). The party seeking the preliminary injunction “must show that ‘the injury complained of is of such imminence that there is a clear and present need for equitable relief’ to prevent irreparable harm.” *Id.* (citation omitted). Therefore, Plaintiffs “must establish both that harm will occur, and that, when it does, such harm will be irreparable.” *See Vega v. Wiley*, 259 F. App’x 104, 106 (10th Cir. 2007). Here, Plaintiffs have failed to demonstrate that they are likely to experience more than “merely serious or substantial harm.” *Heideman*, 348 F.3d at 1189.

1. Bail Bonds Association of New Mexico

Plaintiffs allege that the membership of BBANM “will continue to lose business and revenue” absent a preliminary injunction. (Doc. 11 at 37). However, it is “well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm.” *Heideman*, 348 F.3d at 1189. Furthermore, BBANM offers no evidence that its member companies have lost business and revenue as a result of the 2017 Rules. BBANM’s unsupported allegation that the 2017 Rules caused its member companies to lose “business by dramatically reducing the number of defendants given the option of a secured monetary bond” is too speculative to establish irreparable injury. Therefore, BBANM is not entitled to preliminary injunctive relief.

2. Criminal Defendant Darlene Collins

Plaintiffs assert that absent relief, “Plaintiff Collins and other presumptively innocent criminal defendants. . . will continue to be subjected to severe restrictions of liberty.” (Doc. 11 at 37). Plaintiffs do not object to Collins’s actual conditions of release to which Collins agreed in writing. (Doc. 11 at 20) (objecting to pretrial release conditions like “home detention” and “electronic monitoring with an ankle bracelet,” which have not been imposed on Collins). The actual conditions of release applicable to Collins include routine conditions such as “[n]ot to buy, sell, consume, or possess illegal drugs,” “[t]o avoid all contact with the alleged victim or anyone who may

testify in this case,” to “appear at all Court settings” unless excused by the presiding judge, and “[n]ot to violate any federal, state or local criminal law.” (Doc. 15-3 at Exhibit 1). Because these minimal conditions of release do not rise to the level of irreparable injury, Collins is not entitled to a preliminary injunction.

3. New Mexico State Legislators

Plaintiffs claim that Plaintiffs Senator Richard Martinez, Senator Bill Sharer, Senator Craig Brandt, Representative Bill Rehm, and Representative Carl Trujilo (collectively, the “State Legislator Plaintiffs”) are “harmed as their constitutionally confirmed powers continue to be usurped.” (Doc. 11 at 37). However, this conclusory statement does not constitute irreparable harm. *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004). As discussed above, the New Mexico Supreme Court acted pursuant to its lawful rule-making authority in promulgating procedural rules to give effect to the 2016 constitutional amendment and did not intrude on the exclusive domain of the New Mexico Legislature. Accordingly, the State Legislator Plaintiffs are not entitled to a preliminary injunction.

C. Potential Harm to Defendants

Granting the relief Plaintiffs seek in their motion for preliminary injunction would preclude the New Mexico Supreme Court from exercising its established rule-making authority. Further, the preliminary injunction would forbid New Mexico state courts from carefully considering the most effective means of assessing risk for pretrial release. The Court finds that enjoining the New Mexico Supreme Court from effectuating the constitutional amendment lawfully enacted by the New Mexico Legislature and the voters of New Mexico would cause the Defendants in this case irreparable harm. *Maryland v. King*, — U.S. —, 133 S.Ct. 1, 3 (2012). Because the relief sought by Plaintiffs would disrupt the functioning of the judicial branch in New Mexico, Plaintiffs’ request for preliminary injunction shall be denied.

D. Public Interest

The public interest would be adversely affected by a preliminary injunction enjoining the 2017 Rules because the public interest favors the preservation of lawfully-enacted constitutional amendments and court rules. Plaintiffs actively participated in the legislative and judicial rule-making process that resulted in the 2017 Rules. However, Plaintiffs were unsuccessful in persuading lawmakers and voters of the merits of their position at the state level. Because public interest favors the rule of law over the interests of a few, the preliminary injunction shall be denied.

IV. CONCLUSION

The Court concludes that Plaintiffs are not likely to succeed on the merits of their claims, they have not shown that they will suffer irreparable harm if the injunction is denied, Defendants would be irreparably harmed by the requested injunction, and the public interest favors denying the preliminary injunction. For the foregoing reasons, Plaintiffs' Corrected Motion and Brief in Support for a Preliminary Injunction (Doc. 11) shall be **DENIED**.

It is therefore **ORDERED** that Plaintiffs' Corrected Motion and Brief in Support for a Preliminary Injunction (Doc. 11) is hereby **DENIED**.

It is so **ORDERED**.

SIGNED this 7th day of September 2017.



ROBERT A. JUNELL
Senior United States District Judge