IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY TUCKER, JASON SHARP, NAOMI MORLEY, JEREMY PAYNE, on behalf of themselves and all others similarly situated,	)	Supreme Court No. 43922
Plaintiffs-Appellants,	)	Ada Co. Case No. CV-OC-2015-10240
vs.	)	
STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho, HON. LINDA COPPLE TROUT, DARRELL G. BOLZ, SARA B. THOMAS, WILLIAM H. WELLMAN, KIMBER RICKS, SEN. CHUCK WINDER, and REP. CHRISTY PERRY, in their official capacities as members of the Idaho State Public Defense Commission,	)	
Defendants-Respondents.	)	

APPELLANTS' BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County.

The Honorable Samuel A. Hoagland, District Judge, presiding.

Richard Alan Eppink, residing at Boise, Idaho; Jason D. Williamson, residing at New York, New York; Kathryn M. Ali and Brooks Hanner, residing at Washington, D.C.; and Andrew C. Lillie, residing at Denver, Colorado; for Appellants.

Steven L. Olsen, Michael S. Gilmore, Shasta Kilminster-Hadley, and Scott Zanzig, residing at Boise, Idaho, for Respondents State of Idaho, Hon. Linda Copple Trout, Darrell G. Bolz, Kimber Ricks, Sen. Chuck Winder, and Rep. Christy Perry.

Cally A. Younger, residing at Boise, Idaho, for Respondent Governor C.L. "Butch" Otter.

Daniel J. Skinner, residing at Boise, Idaho, for Respondents Sara B. Thomas and William H. Wellman.

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I. STATEMENT OF THE CASE

A. Nature of the Case

There is no question that Idaho's public defense system is constitutionally inadequate. Six years ago, an independent report requested by Governor Otter's Criminal Justice Commission found just that. R., p. 7, para. 1. Last year, Governor Otter declared publicly that Idaho's "current method of providing legal counsel for indigent criminal defendants does not pass constitutional muster." R., p. 7, para. 2. The district court in this case itself observed that "[w]ithout a doubt . . . there are serious problems with public defense in Idaho that need to be addressed." R., p. 492. Who bears responsibility to fix this broken system? The district court held that the Governor has "direct supervisory authority over those responsible to establish standards for a constitutionally sound public defense system," and that Idaho's statewide Public Defense Commission ("PDC") is "specifically saddled with the responsibility of creating rules" to improve public defense in Idaho. R., p. 485.

Yet, even with additional authority recently granted by statute, Defendants ("State") have failed to implement actual change on the ground—in courtrooms across the state—where the liberty of individual Idahoans hangs in the balance. Indeed, the PDC has failed to meet every one of its clear, mandatory statutory deadlines. R., p. 24–25, para. 48–49; p. 497.

Due to these systemic statewide deficiencies, Plaintiffs and the proposed class they represent have suffered the consequences of actual denial of counsel at critical stages of their criminal proceedings, as well as constructive denial of counsel under circumstances long recognized by the United States Supreme Court as "so likely to prejudice the accused that the

cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658 (1984). As a result, Plaintiffs have been locked up, forced to spend months in jail with little or no access to an attorney, denied access to meaningful—if any—investigation into their cases, delayed justice, and, in the case of the lead plaintiff, compelled to plead guilty in the face of dwindling prospects for any adequate defense. R., p. 8–12, 27–33 para. 4–7, 63–84.

The structure of Idaho's public defense system itself results in ongoing pre-trial and collateral harms to all indigent defendants in Idaho, including actual denial of counsel during initial court appearances and other critical stage proceedings, public defenders overloaded by crushing caseloads, lack of meaningful access to appointed counsel, inadequate availability of defense investigators and experts, inadequate training of public defenders, and control by county commissioners untrained in the law and unequipped to supervise criminal law practice. R., p. 14–17 para.12–20, p. 25–26 para. 53–59, p. 32 para. 101, p. 38–52 para. 103–53.

Plaintiffs allege that these problems are the result of state-level, systemic, and structural deficiencies—not that they are sporadic problems present only in some instances. R., p. 38 para. 102. Through this appeal, Plaintiffs merely seek the opportunity to pursue discovery and present substantive evidence to the trial court in support of their allegations.

Although the named plaintiffs' individual criminal cases illustrate many of the problems faced by indigent defendants across the State, at the crux of Plaintiffs' Complaint are the larger, structural deficiencies that plague Idaho's indigent defense system as a whole. The lower court's analysis hinged, mistakenly, on the Supreme Court's analysis of ineffective assistance of counsel claims in individual cases, as articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), rather

than on the Court's *Cronic* framework for analyzing structural denials of counsel. *See* R., p. 491–92. The district court held that the case was therefore not justiciable, because Plaintiffs had not yet been convicted or pursued appellate or post-conviction remedies. *See* R., p. 494.

Plaintiffs, however, pleaded in detail the pre-trial and collateral harm that Idaho's deficient statewide system had already caused them. R., p. 52–54. They alleged with particularity that those harms were a result of state-level, not county-level, failings, R., p. 55, and that the deficiencies were not limited to the counties in which the named plaintiffs were prosecuted or to those plaintiffs' specific cases. R., p. 12–17 para. 8–21, p. 25–26 para. 52–59, p. 37–52, para. 101–154. Further, Plaintiffs never alleged *Strickland* violations with regard to their individual criminal cases; they specifically alleged systemic and constructive denial of counsel under *Cronic*. R., p. 26 para. 59. Under *Cronic*, Plaintiffs have standing to bring their claims, all of which are ripe and appropriate for judicial review under the separation of powers doctrine.

The remedies Plaintiffs seek are fully within Defendants' power to provide. The district court agreed that both the Governor and the PDC had "a more than sufficiently close connection or nexus to the enforcement of public defense in Idaho." R., p. 485. The recent passage of House Bill 504 by the Idaho Legislature makes that connection and enforcement power even clearer. The district court's decision granting the State's Motion to Dismiss should be reversed.

B. Procedural History

Plaintiffs filed a Class Action Complaint for Injunctive and Declaratory Relief on June 17, 2015. Defendants filed a Motion to Dismiss. The district court heard oral argument on the Motion to Dismiss on December 16, 2015, and issued its Memorandum Decision and Order

Granting the Motion to Dismiss on January 20, 2016. Plaintiffs filed their Notice of Appeal the next business day after they received a copy of the district court's decision.

II. ISSUES PRESENTED ON APPEAL

A. Where Plaintiffs expressly plead pre-trial, post-conviction, and ongoing harm due to systemic statewide constitutional violations, caused by the Defendants' failure to act or fulfill specific duties and powers and which they have the present authority to remedy, have Plaintiffs adequately pleaded standing to sue?

B. Where harm from those systemic, statewide constitutional violations has already occurred and remains ongoing, is the case ripe for adjudication?

C. Does the separation of powers doctrine prevent Idaho courts from protecting fundamental individual constitutional rights, over which the executive and legislative branches have no discretion?

III. ATTORNEY FEES ON APPEAL

Plaintiffs seek attorney's fees from Defendants. *See* I.R.C.P. 54(e); Idaho App. R. 41. Idaho's private attorney general doctrine provides for recovery of attorney's fees in actions of widespread importance to Idahoans. *See Hellar v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 531 (1984); *see also* I.C. § 12-121. In determining whether to award attorney's fees under the doctrine, courts consider: (1) the strength or societal importance of the public policy indicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, and (3) the number of people standing to benefit. *Hellar*, 160 Idaho at 578, 682 P.2d at 531 (awarding attorney's fees under the private attorney general doctrine in a case brought to ensure that Idahoans were constitutionally represented in the state legislature).

This case is an archetype in all three categories. First, this case raises issues of such great societal importance that they have drawn attention from all three branches of government and major media outlets both within and outside of Idaho, for over five years. Second, private enforcement became necessary because Idaho officials failed for years to ensure the fulfillment of the fundamental and essential rights at stake in this case: the Governor's Commission created a committee, which recommended creating another committee, which recommended creating a statewide commission, which has failed—even after a statutory mandate—to promulgate rules or even make further recommendations. Only after Plaintiffs filed this lawsuit did Idaho see any meaningful discussion of systemic reform. The resultant burden on Plaintiffs is enormous. Plaintiffs' counsel have spent over five years investigating the scope of the statewide crisis and urging systemic reform without the need for litigation. The case calls for putative class counsel to invest considerable time and resources into ensuring these fundamental rights are vindicated as soon as possible. The number of people standing to benefit in this case includes every criminal and juvenile defendant with pending charges throughout the state, plus all future criminal and juvenile defendants in Idaho. Considering the gravity of the human and constitutional rights at stake, the fact that all Idaho courts are inextricably tied to the day-to-day protection of those rights in all of Idaho's courtrooms, and the number of Idahoans impacted, this case is among the most historic this Court has ever decided. Plaintiffs are entitled to fees under the private attorney general doctrine if they prevail on appeal.

In addition, the Civil Rights Attorney Fees Awards Act, 42 U.S.C. § 1988, exists to "ensure effective access to the judicial process for persons with civil rights grievances." *Hensley*

v. Eckerhart, 461 U.S. 424, 429 (1983) (internal quotation marks omitted). This provision was specifically intended "to authorize fee awards payable by the States when their officials are sued in their official capacities." *Hutto v. Finney*, 437 U.S. 678, 693–694 (1978). Under § 1988, plaintiffs "should ordinarily recover an attorney's fee" when they prevail on a 42 U.S.C. § 1983 claim. *Hensley*, 461 U.S. at 429 (internal quotation marks omitted). To be a "prevailing party" under this statute, a civil rights plaintiff must obtain relief on the merits of the claim. *Farner v. Idaho Falls Sch. Dist. No. 91*, 135 Idaho 337, 342, 17 P.3d 281, 286 (2000) (citing *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)). Plaintiffs will be prevailing parties if the actual relief ordered by the Court materially alters the legal relationship between the parties by modifying the State's behavior in a way that would directly benefit the Plaintiffs. *See Cunningham v. Watford*, 131 Idaho 841, 843, 965 P.2d 201, 203 (Ct. App. 1998) (quoting *Farrar*, 506 U.S. at 111–112). If Plaintiffs prevail in this case, they are entitled to recover full attorney's fees under § 1988 because their federal and state law claims are based on the same facts. *See Farner*, 135 Idaho 337, 342, 17 P.3d 281, 286 (2000) (reasoning that because a class of teachers' "federal claims relied upon the same facts as their state law claims, the Teachers are entitled to recover their attorney fees under § 1988"); *Lowder v. Minidoka Cty. Joint Sch. Dist. No. 331*, 132 Idaho 834, 840–41, 979 P.2d 1192, 1198–99 (1999) (awarding attorney's fees under § 1988 for a successful appeal of mixed state and federal claims); *Lubcke v. Boise City/Ada Cty. Hous. Auth.*, 124 Idaho 450, 454–55, 468, 860 P.2d 653, 657–58, 671 (1993) (same).

Plaintiffs' claims aim to enforce fundamental constitutional rights being denied to Idahoans to this day because of the State's prior insufficient efforts to address public defense in Idaho. Accordingly, Plaintiffs are entitled to attorney's fees if they prevail in this appeal.

IV. ARGUMENT

A. Standard of Review

This Court "makes every reasonable intendment in order to sustain a complaint against a motion to dismiss for failure to state a claim." *Orrock v. Appleton*, 147 Idaho 613, 618, 213 P.3d 398, 403 (2009) (internal quotation marks omitted). The issue at the motion to dismiss stage "is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Fuchs v. State, Dept. of Idaho State Police, Bureau of Alcohol Beverage Control*, 152 Idaho 626, 629, 272 P.3d 1257, 1260 (2012) (citation omitted). A dismissal must be reversed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Wackerli v. Martindale*, 82 Idaho 400, 405, 353 P.2d 782, 785 (1960).

The Court must liberally construe Plaintiffs' complaint and presume that all facts alleged therein are true. *Argonaut Ins. Co. v. White*, 86 Idaho 374, 376, 386 P.2d 964, 964 (1963). The Court must also draw all inferences from the record in the plaintiffs' favor. *ISEEO v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 729 (1993) [hereinafter *ISEEO I*]. Only after the Court has drawn all inferences in the plaintiffs' favor may it consider whether the complaint states a claim. *Id.* And even then, this Court views dismissals under I.R.C.P. 12(b)(6) with disfavor, "because the

primary objective of the law is to obtain a determination of the merits of the claim." *Wackerli*, 82 Idaho at 404, 353 P.2d at 784.

Justiciability issues, including standing, ripeness, and separation of powers, present questions of law over which this Court exercises free review. *In re Jerome Cty. Bd. of Comm'rs*, 153 Idaho 298, 308, 281 P.3d 1076, 1086 (2012); *see Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 761 (1989). This Court also exercises free review over the constitutional issues raised by this appeal. *Estrada v. State*, 143 Idaho 558, 561, 149 P.3d 833, 836 (2006).

B. Plaintiffs' Claims Are Justiciable

The district court's dismissal of the Complaint rested on three distinct justiciability doctrines: standing, ripeness, and separation of powers. Two of those grounds, standing and ripeness, were never raised, briefed, or argued by either side. Below, Plaintiffs explain the harm and urgency that plainly establish their standing and why the constitutionality of Idaho's public defense system is fully ripe for decision, all of which were evident from the Complaint. Further, Plaintiffs maintain that the lower court's separation of powers rationale is a jarring departure from this Court's precedents, and it is erroneous because this case is about fundamental individual rights, not the exclusive discretionary functions of other branches of government.

1. Plaintiffs Have Standing.

Unlike the federal courts, Idaho state courts are not constrained by any constitutional "case or controversy" limit on jurisdiction. *Coeur d'Alene Tribe v. Lawrence Denney*, No. 43169, 2015 WL 7421342, at *3 (Idaho Nov. 20, 2015); *see also* Michael S. Gilmore, *Standing Law in Idaho: A Constitutional Wrong Turn*, 31 Idaho L. Rev. 509, 511 (1995) ("Idaho appellate courts'

adoption of federal standing principles . . . is inconsistent with the common law, is not required by the Idaho Constitution or by Idaho statute, is poor policy, and therefore should be abandoned."). This Court, nevertheless, has looked to federal justiciability doctrine for guidance in some cases. *Coeur d'Alene Tribe*, 2015 WL 7421342 at *3.

Because the Idaho Constitution lacks any "case or controversy" limitation, this Court relaxes the standing requirements in cases raising significant constitutional questions. *Coeur d'Alene Tribe*, 2015 WL 7421342 at *3, *4. Thus, even a plaintiff who does not demonstrate standing will be allowed to proceed where otherwise there may be no one else ready and willing to enforce fundamental constitutional guarantees. *Id.* at *5. When analyzing standing at the pleading stage, "[g]eneral factual allegations of injury resulting from the defendant's conduct may suffice," and the court will "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 907 (9th Cir. 2011) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889); *see also Fort Hall Landowners All., Inc. v. Bureau of Indian Affairs*, 407 F. Supp. 2d 1220, 1225 (D. Idaho 2006) ("[T]he injury itself need be nothing more than a trifle.") (quoting *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 854 (9th Cir. 1989)); *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973) ("[A]n identifiable trifle is enough for standing to fight out a question of principle.").

Under the federal formulation, this Court has held that a petitioner must show "a distinct palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct." *Coal. for Agric.'s Future v. Canyon Cty.*, No. 42756, 2016 WL 1133369, at

*3 (Idaho Mar. 23, 2016) (citation omitted). Plaintiffs, who have been locked up and denied counsel both constructively and actually, satisfy these requirements.

a. Injury-in-Fact

The district court's analysis of the injury-in-fact prong of the standing inquiry in this case was rooted in a fundamentally flawed assumption: that a criminal defendant suffers harm as a result of inadequate legal representation only after he or she has been convicted and sentenced. The court wrote that because none of the Plaintiffs had yet been convicted or sentenced, "the Court fail[ed] to see how the Plaintiffs have suffered an injury at the time the Complaint was filed in this matter." R., p. 488–489.

This was error. First of all, the lower court was wrong as a factual matter. Before the lower court's decision, lead plaintiff Tracy Tucker had been convicted and sentenced. Indeed, Tucker expressly alleged in the Complaint that he had already pleaded guilty to a felony, after spending three months in pre-trial detention without being able to communicate effectively or consistently with his attorney and with no prospect of meaningful investigation into his case. R., p. 8, 52, para. 4, 156. Months before the district court's January 2016 decision, formal judgment was entered against Tucker and he was sentenced to a suspended prison term of two years fixed, plus two additional years indeterminate. *See State v. Tucker*, Bonner County case no. CR-2015-1172 (Aug. 3, 2015). Hence, even under the court's own erroneous standing analysis, the lead plaintiff cleared the injury-in-fact bar. *Cf. ISEEO I*, 123 Idaho at 578, 850 P.2d at 729 (holding that in deciding motions to dismiss for failure to state a claim, courts must draw all inferences from both the pleadings in the plaintiffs' favor).

Second, the Complaint expressly alleges ***actual*** denial of counsel at constitutionally significant, "critical" stages of the named Plaintiffs' criminal proceedings. R., p. 38–40, 52, 54, para. 103–114, 156, 157, 159. Actual denial of counsel at a critical stage causes such clear, constitutional harm that a defendant need not show any prejudice to establish reversible error. *United States v. Hamilton*, 391 F.3d 1066, 1070 (9th Cir. 2004). Actual denial of counsel also results in the loss of pre-trial liberty interests. *Hurrell-Harring v. New York*, 930 N.E.2d 217, 223 (N.Y. 2010). In the *Hurrell-Harring* case out of New York, as in Idaho, criminal defendants were not being represented at arraignment, when bail was first set—a "critical stage" of the criminal proceeding. *Id.* Actual denial of counsel at those critical stages has "most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents." *Id.* Idaho defendants, like those in New York, have not only constitutional rights to counsel at critical stages, including initial appearance, but express statutory rights as well. I.C. § 19-852(1)(a), (2)(a) ("An indigent person . . . is entitled . . . [t]o be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney . . . ."). Actual denial of counsel at critical stages is a sufficient injury-in-fact.

Third, Plaintiffs expressly pleaded constructive denial of counsel in the Complaint. *See* R., p. 26 para. 59. Specifically, Plaintiffs allege that structural deficiencies in Idaho's indigent defense system have created a situation in which it is functionally impossible for any public defender, no matter how well-intentioned, to provide constitutionally adequate representation. Such claims are not analyzed under the individualized ineffective assistance of counsel

framework articulated in *Strickland v. Washington*. Rather, where structural deficiencies are alleged, it is unnecessary to evaluate the outcome of any individual indigent defendant's case to determine whether the Sixth Amendment has been compromised. Instead, as the Supreme Court announced in *Cronic*, decided on the same day as *Strickland*, prejudice is *presumed* where the system itself is constitutionally deficient:

> There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. . . . Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

466 U.S. at 658–660; *see also Strickland*, 466 U.S. at 692 (acknowledging that there are instances in which prejudice is "so likely that case-by-case inquiry into prejudice is not worth the cost."). As Plaintiffs pleaded in the Complaint, Idaho's indigent defense system is emblematic of the kind of circumstances described in *Cronic*. *See, e.g.,* R., p. 25–27, para. 51–60.

Both federal and state courts that have considered constructive denial of counsel claims under similar circumstances have recognized the inevitable and irreparable injury suffered by indigent defendants as a result of systemic deficiencies in indigent defense delivery systems, irrespective of the ultimate outcome of the individual cases at issue. *See Wilbur v. City of Mount Vernon*, 989 F.Supp.2d 1122, 1131 (W.D. Wash. 2013); *Lucky v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988); *Hurrell-Harring*, 930 N.E.2d at 222; *Duncan v. Michigan*, 774 N.W.2d 89 (Mich. Ct. App. 2009), *aff'd on other grounds*, 780 N.W.2d 843 (Mich. 2010); *Phillips v. State of*

California, No. 15CECG02201, slip op. at 4–5 (Cal. Superior Ct. April 13, 2016) (appended as an Exhibit to this brief).

In *Wilbur*, the court specifically rejected the notion that the only relevant inquiry was whether the plaintiffs achieved a favorable outcome in their individual underlying criminal cases:

> The Court does not dispute the fact that many, if not the vast majority, of the plaintiff class obtained a reasonable resolution of the charges against them. ***The problem is not the ultimate disposition***: if plaintiffs were alleging that counsel had affirmatively erred and obtained a deleterious result, the Sixth Amendment challenge would have been brought under *Strickland v. Washingon*, rather than *Gideon v. Wainwright*.

989 F.Supp.2d at 1127 (internal citations omitted and emphasis added). The court emphasized that its decision was based on a "system [that] is broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned." *Id.* Hence, the court determined that the plaintiffs had "easily met" their burden of demonstrating "irreparable injury and the inadequacy of available legal remedies," as required when seeking injunctive relief. *Id.* at 1133. The court went on to explicitly explain the irreparable harm that a deficient system causes to a criminal defendant, long before conviction or sentencing, noting that "the lack of an actual representational relationship and/or adversarial testing injures both the indigent defendant and the criminal justice system as a whole." *Id.*

New York's highest court reached the same conclusion, recognizing that "the absence of representation at critical stages is capable of causing grave and irreparable injury to persons who will not be convicted. *Gideon*'s guarantee to the assistance of counsel does not turn upon a

defendant's guilt or innocence, and neither can the availability of a remedy for its denial." *Hurrell-Harring*, 930 N.E.2d at 227. The court held that under the Sixth Amendment, "the period between arraignment and trial when a case must be factually developed and researched, decisions respecting grand jury testimony made, plea negotiations conducted, and pretrial motions filed" also constitutes a critical stage during which criminal defendants will suffer irreparable harm in the absence of counsel. *Id.* at 224 (citing *Maine v. Moulton*, 474 U.S. 159, 170 (1985)).

Most recently, in *Phillips*, a California court rejected the State's argument that the plaintiffs were required to satisfy the *Strickland* test in order to demonstrate the systemic failure to provide counsel to indigent defendants. The court noted that the plaintiffs were not seeking to challenge individual convictions, but rather a range of broader deficiencies that harm indigent defendants in Fresno County, including excessive caseloads, lack of conflict-free representation, inadequate opportunity for consultation, inadequate factual investigation, and lack of meaningful adversarial testing. *Phillips*, slip op. at 5–6 (appended as an Exhibit to this brief). As such, the court found that "plaintiffs need not plead and prove the elements of ineffective assistance as to specific individuals in order to state a cause of action." *Id.* at 6.

Social science research corroborates the case law. Specifically, empirical research has concluded that pre-trial detention has a tremendous impact on the outcome of a case, thereby causing great harm to criminal defendants. For instance, a study released by the Arnold Foundation in 2013 measured the impact of pre-trial detention on the case outcomes for over 153,000 defendants booked into a Kentucky jail over a one-year period. Most significantly, the study found that pre-trial detention resulted in dramatically worse outcomes, including the fact

that those "defendants who [were] detained for the entire pretrial period were 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison" as those who were released at some point before trial or case disposition.[1] More generally, "[d]efendants who are detained for the entire pretrial period receive longer jail and prison sentences." *Id.* Hence, pre-trial detention has a negative effect on the defendant's prospects, particularly as compared to defendants who have spent less time in jail pre-trial. Plaintiffs expressly allege in the Complaint that they have spent unnecessary time in pre-trial detention due to systemic deficiencies with Idaho's public defense system. *See* R., p. 41–42, para. 115–118, p. 53–54, para. 156–159.

In concluding that pre-conviction harm is not real harm, the district court ignored the significant and palpable injuries that Plaintiffs, and putative class members, suffer as a result of a system infected with structural deficiencies. As Plaintiffs allege in the Complaint, the attorneys charged with representing indigent defendants in Idaho face overwhelming caseloads, as well as a lack of sufficient time, resources, training, and supervision. R., p. 42–47, para. 119–134. These system-wide deficiencies hinder all attorneys who provide public defense services from effectively representing their clients at critical stages of their cases. The systemic problems have led to inability to communicate with their clients effectively and on a consistent basis, if at all; to properly investigate their clients' cases, if at all; or to secure expert analysis and testimony that could be essential to their clients' cases. *See* R. p., 37–52, para. 101–154. As a result of these

[1]Christopher T. Lowenkamp, Ph.D., Marie VanNostrand, Ph.D., Alexander Holsinger, Ph.D., Laura and John Arnold Foundation, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* 4 (November 2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf.

deficiencies, Plaintiffs were deprived of effective bail advocacy at initial appearance, leading to unnecessary time spent in pre-trial detention, the inability to participate meaningfully in their own defense, and the loss of key witnesses and evidence, among other irreversible harm.

Moreover, the inability of Idaho public defenders to adequately develop cases not only leads to increased pressure to plead guilty, even where the defendant is innocent or has other compelling defenses, but also necessarily diminishes defense attorneys' ability to negotiate favorable plea agreements. *See, e.g.*, *Wilbur*, 989 F. Supp.2d at 1127. In *Maine v. Moulton*, the U.S. Supreme Court concluded that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." 474 U.S. at 170. The critical importance of pre-trial advocacy is why the right to counsel "attaches at earlier, 'critical' stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'" *Id.* (internal citations omitted). Plaintiffs allege in the Complaint, expressly and in detail, severe systemic deficiencies during these critical, pre-trial stages. *See* R., p. 13–14, para 11–14, p. 38–42, para. 103–118, p. 46–47, para. 131–134.

Plaintiffs' allegations demonstrate harm in three ways: (1) pleading guilty due to inadequate representation, resulting in conviction; (2) actual denial of counsel at critical stages; and (3) constructive denial of counsel throughout their cases due to additional systemic deficiencies with Idaho's statewide indigent defense system. These allegations far exceed the injury-in-fact threshold. Compare the circumstances in *Van Valkenburgh v. Citizens for Term Limits*, where voters challenged a law requiring that the Idaho Secretary of State publish information about candidates' adherence to term limits pledges. 135 Idaho 121, 123, 15 P.3d

1129, 1131 (2000). The petitioners there alleged that the publication requirement "greatly diminish[ed] the likelihood the candidate of their choice will prevail in the election." *Id.* at 125, 15 P.3d at 1133. That allegation, together with the claim that the law violated the petitioners' right to vote, was deemed sufficient to establish injury-in-fact. *Id.* Here, Plaintiffs plead far more, and thus adequately plead standing.

b. Causal Connection

The district court concluded that it is the State, not the counties, that "is ultimately responsible for ensuring constitutionally-sound public defense" and that "the Governor and the PDC members have a ***more than sufficiently close connection or nexus*** to the enforcement of public defense in Idaho." R., p. 472, 485 (emphasis added). But in a bizarre twist, the lower court nevertheless concluded that "[t]he connection of the claimed injury"—violation of the Plaintiffs' right to counsel—"to the Governor and the PDC [is] too remote to be fairly traceable." R., p. 490. To conclude that state officials have a sufficiently direct connection to Idaho's unconstitutional system to be proper defendants, yet that Plaintiffs' injuries are not fairly traceable to those officials' conduct in maintaining that system, is inherently contradictory. Whether there is a sufficient connection for state officials to be proper defendants and whether there is a sufficient causal connection to establish standing are "closely related—indeed overlapping—inquir[ies]"; demonstrating one connection will, for the same reasons, demonstrate the other. *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999).

Furthermore, in conducting standing analysis, the defendants' conduct need not be a "proximate" or "but for" cause of the alleged harms. *Canyon Cty. v. Syngenta Seeds, Inc.*, 519

F.3d 969, 974 n.7 (9th Cir. 2008); *Johnson v. Stuart*, 702 F.2d 193, 196 (9th Cir. 1983). Standing exists even when the defendant indirectly harms the plaintiff. *Warth v. Seldin*, 422 U.S. 490, 504 (1975); *see also Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) ("A causal chain does not fail simply because it has several 'links.'"). Indeed, the causal chain between the governor of California and litigation delays in Los Angeles County, which the Ninth Circuit acknowledged seemed "tenuous," was sufficient to establish standing. *Los Angeles Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 701 (9th Cir. 1992). Similarly, the U.S. Supreme Court found that a group of five Washington, D.C.-area law students had established standing to sue the federal government based on the causal chain between harm to the students' "use and enjoyment of natural resources in the Washington area" and an increase in federal rates for rail freight (because the rate increase might have led to increased use of non-recyclable commodities, which in turn might have resulted in greater depletion of natural resources). *SCRAP*, 412 U.S. at 686.

Here, in comparison, the links are both plausible and direct: the Governor "has direct supervisory authority over those responsible to establish standards for a constitutionally sound public defense system" and the PDC is "specifically saddled with the responsibility of creating rules" to regulate and improve public defense delivery throughout the state. R., p. 485. To the extent there was any serious question regarding this issue, the Governor and Legislature's recent enactment of House Bill 504 puts it to rest: effective July 1, 2016, the PDC, under I.C. § 19-850, is mandated to promulgate standards for public defense statewide and empowered to enforce

them in each county.[2] Moreover, under I.C. § 19-862A, the PDC may grant additional funds to individual counties and/or directly take over public defense in a particular noncompliant county, intercepting county revenue if necessary.

In addition, in failing to recognize Plaintiffs' allegations of systemic deficiencies in Idaho's public defense system, the court mistakenly suggests that the individual counties (along with the Legislature) are "the principle bodies with the power to affect the policy (political) and systemic changes Plaintiffs seek." R., p. 490. Throughout the Complaint, Plaintiffs allege longstanding, statewide deficiencies in the Idaho system, which result in actual and constructive denial of counsel across the state. R., p. 7–8, para 1–2, p. 13–17, para. 8–21, p. 20–22, para. 34–37, p. 25–26, para. 52–59, p. 37–52, para. 98–154. Absent from the court's reasoning is any explanation of how individual counties (through their county commissioners) would have the authority or practical ability to remedy these statewide deficiencies. That omission is unsurprising, because the counties cannot provide a statewide remedy. Only state officials with a sufficient connection to indigent defense delivery across the state—namely the PDC and the Governor as its supervisor—are capable of providing such a remedy.

c. Redressability

Like its treatment of the injury-in-fact inquiry, the court's redressability analysis is based on a false premise. Rather than recognizing Plaintiffs' constructive denial of counsel theory of the case and properly analyzing the case under *Gideon* and *Cronic*, the court viewed Plaintiffs'

[2] The enacted law is available at http://www.legislature.idaho.gov/legislation/2016/H0504.pdf.

claims through the inapposite prism of *Strickland.* Contrary to the court's assertion, Plaintiffs are not "seek[ing] relief in their individual cases as well as in all other indigent criminal cases in Idaho." R., p. 490. That request is nowhere to be found in Plaintiffs' prayer for relief. Plaintiffs do not seek a case-by-case review of all criminal matters currently pending across the state. Instead, Plaintiffs allege that the statewide indigent defense delivery system in Idaho is in such a state of disrepair that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. at 659–660; *see also Phillips*, p. 4 (allowing suit to go forward upon finding that plaintiffs—indigent criminal defendants seeking prospective relief from systematic deprivations of the right to counsel—were not, in doing so, challenging individual convictions.) Accordingly, Plaintiffs seek a judgment from the Court declaring the statewide system unconstitutional, and requiring the State to actually implement effective reform.

Given that the Plaintiffs allege statewide, systemic deficiencies in Idaho's indigent defense system (which must be taken as true for purposes of Defendants' motion to dismiss), and the U.S. Supreme Court's recognition of constructive denial of counsel under *Cronic*, the task before the Court is to determine whether the injuries suffered as a result of those systemic deficiencies are redressable. They are.

As the district court itself pointed out, under the law in effect at the time Plaintiffs filed suit, the PDC was "saddled with the responsibility of creating rules regarding training and education of defense attorneys and making recommendations to the legislature for improving public defense in Idaho." R., p. 485. Moreover, under the amendments to Idaho's public defense

statutes that will take effect on July 1, 2016, the PDC will now have authority to enforce performance standards, I.C. § 19-850(1)(a)(vi), (vii), provide counties with supplemental resources for the delivery of indigent defense services, I.C. § 19-862A, and take responsibility itself for ensuring that the statutory standards are met, I.C. § 19-862A(11). Standards like those, if actually implemented and enforced, could directly remedy many of the deficiencies identified by Plaintiffs in their Complaint.

The Governor, too, has the power to redress the alleged injuries, both by issuing executive orders that can impact indigent defense and by exercising his "direct supervisory authority over those responsible to establish standards for a constitutionally sound public defense system." R., p. 485. The Governor has broad executive order authority that enables him to influence statewide policies and procedures, including those relating to public defense. He has recently used that authority to task an executive branch commission, the Idaho Juvenile Justice Commission, with "ensur[ing] compliance" by local jurisdictions with the federal Juvenile Justice and Delinquency Act, including authorizing the commission to take "remedial actions for violations." Idaho Exec. Order No. 2015-11 (Oct. 1, 2015).[3] Earlier this year, he empowered an executive branch council to play an "expanded role" beyond its statutory authority and tasked it with the duty of "[a]lign[ing] policy and funding systems." Idaho Exec. Order No. 2016-01 (Jan. 28, 2016).[4] The Governor has already created, by executive order, a state Criminal Justice Commission (CJC) to identify challenges facing Idaho's criminal justice system and recommend

[3] Available at http://gov.idaho.gov/mediacenter/execorders/eo15/EO%202015-11%20Juvenile%20Justice%20and%20Delinquency.pdf
[4] Available at http://gov.idaho.gov/mediacenter/execorders/eo16/EO_2016-01.pdf

solutions. Idaho Exec. Order No. 2015-10 (Sep. 23, 2015).[5] If other bodies and procedures are failing to bring Idaho's indigent defense system up to constitutional muster, the Governor can expand the CJC's role to include enforcement powers, as he has with the Idaho Juvenile Justice Commission. *See* Idaho Exec. Order No. 2015-11. The Governor, on his own, can and has taken concrete steps to ensure that local and state government is complying with Idaho's federal and constitutional responsibilities.

Further, the U.S. Supreme Court has made clear that even under strict federal standing requirements, it is enough that the "practical consequence" of a court decision "would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redressed the injury suffered." *Utah v. Evans*, 536 U.S. 452, 464 (2002). In *Evans*, a court order for a new report from the Secretary of Commerce that the President or Congress would likely abide by was sufficient to establish standing. *Id.* at 463–464. Likewise, in *Los Angeles Cty. Bar Ass'n v. Eu*, the Ninth Circuit held that it was enough to show standing where the requested declaration would likely prompt the California legislature to act, even though its members were not parties to the case. 979 F.2d at 701. This Court, too, assumes that once it "fulfill[s] its constitutional duty to interpret the constitution the other branches of government also will carry out their defined constitutional duties in good faith and in a completely responsible manner." *ISEEO I*, 123 Idaho at 583, 850 P.2d at 734 (internal quotation marks omitted).

Plaintiffs' injuries are directly redressable by both the Governor and the PDC. To the extent the Idaho Legislature (or this Court in its administrative and rulemaking functions) could

[5] Available at http://gov.idaho.gov/mediacenter/execorders/eo15/EO%202015-10.pdf

provide further relief, a declaratory judgment will ensure that it is sufficiently likely that any other needed actions will be taken.

d. Relaxed Standing Analysis Alternative

Because Plaintiffs have raised significant constitutional issues, this Court need not conduct the full, federally based standing analysis detailed above. *Coeur d'Alene Tribe*, 2015 WL 7421342 at *4–*5; *see also ISEEO v. Idaho State Bd. of Educ.*, 128 Idaho 276, 284, 912 P.2d 644, 652 (1996) (recognizing "public interest exception" to justiciability doctrines). Despite constitutional duties explicated by over fifty years of Supreme Court precedent since *Gideon*, the State has yet to implement reform, even after the Governor stated unequivocally that Idaho's public defense system is unconstitutional. Although the PDC has now been given greater authority with the passage of 2016 House Bill 504, it still has not even complied with its mandatory statutory requirements—enacted over two years ago—requiring it to promulgate rules and issue recommendations. I.C. § 19-850(1)(a), (b) (2014). The PDC has, in fact, already twice failed to meet its explicit statutory deadlines. *See* I.C. § 19-850(1)(b) (2014).

The constitutional right to counsel at issue in this case could not be more fundamental. The U.S. Supreme Court has held that the Sixth Amendment right to counsel is "essential" to fair trial, and that "if the constitutional safeguards it provides be lost, justice will not still be done." *Gideon v. Wainright*, 372 U.S. 335, 343 (internal quotation marks omitted). If Plaintiffs cannot bring this lawsuit, there will be no one to enforce this essential right against continued inaction and delay by the PDC and other government officials. *See Coeur d'Alene Tribe*, 2015 WL

7421342 at *5. The circumstances presented in the Complaint in this case easily satisfy this Court's public interest justiciability standards.

2. Plaintiffs' Claims Are Ripe for Review.

Under Idaho law, a case is ripe if "(1) [it] presents definite and concrete issues; (2) a real and substantial controversy exists (as opposed to hypothetical facts); and (3) there is a present need for adjudication." *State v. Manley*, 142 Idaho 338, 342, 127 P.3d 954, 958 (2005) (citing *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002)). Ripeness analysis, in other words, "asks whether there is any need for court action at the present time." *ABC Agra, LLC v. Critical Access Grp., Inc.*, 156 Idaho 781, 783, 331 P.3d 523, 525 (2014) (internal citation omitted). Where a future lawsuit would present no new facts or legal issues and it is clear that the issue will be before the court either now or in the future, "a declaration now of the various rights of the parties will certainly afford a relief from uncertainty and controversy in the future." *Miles*, 116 Idaho at 643, 778 P.2d at 765.

"[W]here the facts of the case presently call for court action, this Court has held that an actual controversy exists." *ABC Agra*, 156 Idaho at 784, 331 P.3d at 526. In *Boundary Backpackers v. Boundary County*, for example, a challenge to a county ordinance that required state and federal agencies to comply with the county's land use plan was ripe despite county board members' testimony that they did not intend to enforce the ordinance. 128 Idaho 371, 376, 913 P.2d 1141, 1146. This Court has also held that claims may be ripe for adjudication even where there is no immediately apparent damage. *See, e.g.*, *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 671 (9th Cir. 2005) (holding that a contractual dispute was ripe for adjudication,

even though the dispute prevented one of the parties from selling his property interest under the contract, because there was "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and rarity to warrant the issuance of a declaratory judgment.") *Id.* at 671. This Court held that a challenge to Idaho's Term Limits Act was ripe even before the Act had taken effect. *Gibbons v. Cenarrusa*, 140 Idaho 316, 92 P.3d 1063 (2002). The U.S. Supreme Court has likewise made clear that a plaintiff need not wait for the threatened injury to occur before seeking declaratory or injunctive relief. *Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 298 (1979).

Yet in this case, the district court held that Plaintiffs had not established that there are "definite, concrete issues and a real, substantial controversy" because none of Plaintiffs' criminal cases had concluded. R., p. 493. The lower court believed thus that "the nature and extent of any real or permanent injury cannot be determined at this time." R., p. 494. This analysis is flawed for at least four reasons. First, the court was wrong that none of Plaintiffs' criminal cases had concluded. *See* Part IV.B.1.a, above. Second, a plaintiff need not wait for the threatened injury to occur before seeking declaratory or injunctive relief. *E.g.*, *Babbitt*, 442 U.S. at 298. Indeed, the Court made clear in *Ex parte Young* itself that defense against criminal proceedings by claiming a constitutional violation is not an adequate remedy, because of the gravity of the potential penalty and because the ability to prove the violation in a criminal court "falls so far below that which would obtain in a court of equity that comparison is scarcely possible." 209 U.S. 123, 165 (1908). The even graver risk here—one that actually happened to the lead plaintiff in this case—

is that ongoing denial of counsel, especially to a criminal defendant awaiting trial in jail, will effectively coerce a guilty plea.

Third, as explained above, the district court's conclusion relies on a case-by-case analysis under *Strickland* and ignores the pre-adjudication injuries alleged by Plaintiffs under *Cronic.* In other words, given the state of Idaho's indigent defense system, the present circumstances are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. Plaintiffs have specifically alleged definite and concrete facts suggesting that the public defense system in Idaho is broken and in need of an urgent and system-wide overhaul. The State itself has acknowledged the seriousness of Plaintiffs allegations, R., p. 161, as has the district court, R., p. 492.

Fourth, none of Plaintiffs' allegations are hypothetical. The deficiencies described in the Complaint are longstanding and have been recognized by state officials at every level. Indeed, it is the recognition of those deficiencies that led to the state-requested assessment conducted by the NLADA, R., p. 20, para. 31, the creation of the CJC's Public Defense Subcommittee, R., p. 24, para. 45, the establishment of a legislative study committee, R., p. 24, para. 45., and legislative efforts to reform the system in 2014 and 2016, *see* R., p. 24, para. 45, including the creation of the PDC, which was tasked with "creating rules regarding training and education of defense attorneys and making recommendations to the legislature for improving public defense in Idaho." R., p. 485. Plaintiffs also identified definite and concrete legal issues in the Complaint. These include "[w]hether the State's failure to adequately fund and supervise the delivery of indigent-defense services impedes the provision of effective legal representation to indigent

defendants," "[w]hether the State's failure to develop uniform workload and performance standards for public-defense attorneys in Idaho impedes the provision of effective legal representation to indigent defendants," and, whether the structure of the statewide system and the State's failure to appropriately fund, supervise, and administer the county-level systems violates the right to counsel guarantees in the United States and Idaho constitutions. R., p. 35, para. 91.

As for the final prong of the ripeness inquiry, there is undoubtedly a present need for adjudication, given that thousands of indigent defendants across the state—including the named plaintiffs—continue to receive constitutionally-deficient representation as a result of Idaho's broken system. It is incumbent upon the courts to step in and ensure that the State addresses these ongoing injuries.

3. The Separation of Powers Doctrine Does Not Apply in This Case.

The decision below also reaches the startling conclusion that Idaho's courts are powerless to remedy statewide, systemic constitutional violations occurring daily in Idaho courtrooms. In fact, the district court concluded that our courts will not even take evidence to determine whether there is a statewide, systemic problem to start with. It decided that even to determine whether Defendants are violating their direct, statutory and constitutional responsibilities would "invade the province of the legislature" and "usurp the duties of the PDC." R., p. 496, 492.

That is wrong. As this Court very recently reminded, "courts must refuse to aid and abet . . . violations of the constitution." *Coeur d'Alene Tribe v. Lawrence Denney*, No. 43169, 2015 WL 7421342, at *14 (Idaho Nov. 20, 2015). "Thus, this Court has recognized that it has the power to review the legislature's actions to ensure that they comply with constitutional requirements and

that it is this Court's duty to remedy any violations." *Id.* Plaintiffs have alleged here that thousands of Idahoans are being denied a fundamental constitutional right "as a result of the State's failure to provide the necessary resources, robust oversight, and specialized training required to ensure that all public defenders can handle all of their cases effectively and in compliance with state and federal law." R., p. 12, para. 8. In addition to the constructive denial of counsel claims discussed above, Plaintiffs specifically alleged ongoing, actual denials of counsel at critical stages of the proceedings. R., p. 13–14, para. 11–12 Plaintiffs alleged, with particularity, that these ongoing constitutional violations are due to failures at the state level that the individual counties alone cannot remedy. R., p. 38., para., p. 12, para. 102, p. 55, para. 102–69, p. 26, para. 173, p. 57, para. 176, 180, p. 57, 183; *cf.* p. 13, para. 12, p. 21, para. 36, p. 24, para. 44, 46, 47, 48, p. 25, para. 49, 52, 54, p. 26, para. 57, 58, p. 33, para. 85, 86, 87, p. 34, para. 91, p. 36, para. 96..

The Idaho judiciary has a special and urgent responsibility to stop these ongoing violations. Idaho's separation of powers doctrine has never been applied to avoid a constitutional question that the Constitution has not explicitly assigned to another branch's exclusive discretion. And never, this Court has made clear, may Idaho courts excuse themselves, on separation of powers grounds, from examining the alleged violation of constitutionally protected individual rights. The political branches have no discretion to violate those rights.

a. Separation of Powers in Idaho.

The Idaho Constitution divides the powers of government of this state into the "three distinct departments" of the legislative, the executive, and the judicial branches. Idaho Const.

Art. II, § 1. This Court, more than 110 years ago, observed that, because of that separation of powers, Idaho courts could not prohibit other branches from acting within the scope of their exclusive domains. *See Stein v. Morrison*, 9 Idaho 426, 452–55, 75 P. 246, 255 (1904). "[O]n the other hand," the Court explained, "the legal effect of such action after it has been taken may be inquired into by the court." *Id.*,at 454, 75 P. at 255; *accord Balderston v. Brady*, 17 Idaho 567, 576, 107 P. 493, 495 (1910).

In the century since then, this Court has not hesitated to conduct those sorts of searching inquiries. In the rare instance where our Constitution vests a particular branch with exclusive discretion over a specific determination, the courts will not look behind the discretionary call itself. But even in those unusual cases, the courts still retain their special role and authority to examine and ensure the constitutionality of those decisions. "The question is whether this Court, by entertaining review of a particular matter, would be substituting its judgment for that of another coordinate branch of government, ***when the matter was one properly entrusted to that branch***." *Miles v. Idaho Power Co.*, 116 Idaho at 639, 778 P. 2d at 761 (emphasis added). The rare cases in which this has actually come up illustrate how these peculiar scenarios—where a matter is entrusted exclusively to another branch—are a world apart from this case, which seeks to vindicate a fundamental individual right:

- ***Diefendorf v. Gallet***: Article IV, § 9, of the Idaho Constitution expressly assigns to "[t]he governor" discretion so that he "may" convene the legislature for a special session by proclamation. Article III, § 15, likewise expressly grants discretion to "the house where [a] bill may be pending" so that it "may" dispense with reading the bill three

times before passage. Thus, when the governor acted within his "exclusive province" to convene a special legislative session, and when the legislature took the "purely legislative act" of skipping the extra readings, the Court had no authority to review those discretionary calls. 51 Idaho 619, 638, 639, 10 P.2d 307, 315 (1932).[6]

- ***Idaho State AFL-CIO v. Leroy***: Article III, § 22, contains a "clear . . . textually demonstrable constitutional commitment to the legislature of the issue of determining whether a sufficient emergency exists to necessitate immediate effectuation of legislation." 110 Idaho 691, 695, 718 P.2d 1129, 1133 (1986). Accordingly, the Court held that it could not interfere with "the reasonable exercise by the legislature of powers expressly delegated to it by the constitution of this state," absent some other constitutional violation. *Id.* at 696, 1134.

- ***Troutner v. Kempthorne***: Article IV, § 6, which commits to the Idaho Senate the discretion to grant or deny consent to a governor's nominee, "gives the Senate the sole authority to pass upon the nominee's qualifications." 142 Idaho 389, 393, 128 P.3d 926, 930 (2006). Because of the express textual commitment of discretion to another branch, this Court determined that it would not look behind the Senate's confirmation of a nominee. *Id.*

[6]Another case from the same era, *Johnson v. Diefendorf*, 56 Idaho 620, 57 P.2d 1068 (1936), is sometimes cited alongside *Gallet* in discussions of the separation of powers doctrine. But *Johnson* is actually not a case in which the Court declined review on separation of powers grounds. Rather, because both sides stipulated that a legislative emergency did exist in that case, the question whether the legislature or the courts got to make the final call about the existence of an emergency was not before the Court. *Id.* 56 Idaho at 638, 57 P.2d at 1076.

On the other hand, absent express, textually demonstrable assignments of discretion to a non-judicial branch, this Court has again and again refused to avoid a constitutional question on separation of powers grounds:

- ***Ingard v. Baker***: Although the governor had constitutional discretion in selecting nominees for public offices, the Court still reviewed the governor's nomination because a statute limited that discretion. 27 Idaho 124, 138, 147 P. 293, 298 (1915). Where the law overlaid a duty upon that discretion, even so slight a duty as to consider an executive agency's recommendations before making a nomination, the Court still intervened to ensure the governor complied with that duty. *Id.*
- ***Miles v. Idaho Power Co.***: Again, because of legal duties overlying the political branches' discretion, the Court intervened to review the Swan Falls Agreement between the State and Idaho Power. 116 Idaho 635, 640, 778 P.2d 757, 762 (1989). This Court held that, although the advisability of the agreement itself was a discretionary call for the legislative and executive branches, deciding whether the agreement violated the Fourteenth Amendment and counterpart guarantees in the Idaho Constitution was "a fundamental responsibility of the judiciary." *Id.*
- ***ISEEO v. Evans* (*ISEEO I*)**: Even when faced with vague constitutional duties calling for complicated interpretation, this Court will not defer to the political branches when it comes to individual rights. 123 Idaho at 583, 850 P.2d at 734. This Court acknowledged that it was "not well equipped to legislate in a turbulent field of social, economic and political policy" in figuring out what the Idaho Constitution meant by a

"thorough" public education. *Id.* (internal quotation marks omitted) But the Court nevertheless held that it would be "an abject abdication of [its] role in the American system of government" to avoid the difficult task by invoking the separation of powers doctrine. *Id.*

- ***In re SRBA Case No. 39576***: This Court reversed a lower court's conclusion that the separation of powers doctrine foreclosed judicial decision of whether state agencies could appear separately in the Snake River Basin Adjudication. 128 Idaho 246, 260–61, 912 P.2d 614, 628–29 (1995). Looking to the factors involved in the federal "political question doctrine," laid out in *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Court found no justification for avoiding judicial review, especially because of the due process issues implicated. *In re SRBA Case No. 39576*, 128 Idaho at 261, 912 P.2d at 629.

- ***Coeur d'Alene Tribe v. Denney***: This recent case involved the "validity of enactments," one of the categories identified in *Baker v. Carr* as often raising separation of powers issues. *Baker v. Carr*, 369 U.S. at 214. This Court noted the separation of powers expressed in Article II, section 1, of the Idaho Constitution, but explained that it is nevertheless "axiomatic that each of the branches of government serves as a check against the powers of the others to ensure that each branch is acting within the scope of its authority and consistent with the Constitution." *Coeur d'Alene Tribe*, 2015 WL 7421342 at *13. The Court accordingly mandated constitutional compliance in the face of executive branch inaction. *Id.* at *18.

As these cases demonstrate, the separation of powers doctrine rarely justifies withholding judicial review, whether in federal or in Idaho courts. The district court erred in applying the doctrine to preclude review of Plaintiffs claims in this case.

b. Complying with the Sixth Amendment and Article I, § 13, of the Idaho Constitution is Not a Discretionary Act.

The main principle to be distilled from the precedent set forth above is that the separation of powers doctrine only limits judicial review of other branches' discretionary acts. *In re SRBA Case No. 39576*, 128 Idaho at 261, 912 P.2d at 629. Where the Constitution has removed discretion, the doctrine obviously does not apply. *See Coeur d'Alene Tribe*, 2015 WL 7421342 at *14. The very purpose of the Bill of Rights and the Declaration of Rights in Article I of Idaho's Constitution is to eliminate the political branches' discretion and instead entrust the protection of individual rights to an independent judiciary. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Judge Donald Burnett, in his scholarly and concise way, explained this principle:

> Our system of government is said to embody a separation of powers. Actually, it is more accurate to say that the three branches of government—legislative, executive and judicial—have areas of exclusive and shared authority. Thus, the legislature has exclusive authority, subject to constitutional restrictions, to determine the internal processes by which it will formulate and consider proposed statutes or resolutions. Similarly, the judiciary has exclusive authority, within constitutional constraints, to determine the internal processes by which it will perform fact-finding and law-stating functions of adjudication. These areas of exclusive responsibility often are characterized as "procedure." On the other hand, the legislature and judiciary share authority to define the rights and duties of private persons vis-a-vis each other or of government vis-a-vis individuals. On such issues, court rules or decisions may coexist with statutes so long as they do not conflict. When there is a conflict, the judiciary defers to the legislature ***unless***

> ***the issue is governed by the state or federal constitution. In that event the judiciary's constitutional interpretation will prevail***.

State v. Garza, 112 Idaho 778, 785–786, 735 P.2d 1089, 1096–97 (Ct. App. 1987) (Burnett, J., concurring) (emphasis added).

This Court does not have to look any further than *Gideon v. Wainwright* for confirmation that the right to counsel is a fundamental right with respect to which the political branches have no discretion to fall short. Assistance of counsel, the *Gideon* Court held, "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." 372 U.S. 335, 343 (internal citation omitted). Presented with Florida's failure to establish and fund an adequate system of providing counsel, the *Gideon* Court interpreted the Constitution to nevertheless require it, notwithstanding concerns of federalism and separation of powers. The Court's decision required immediate, statewide action in Florida to remedy a sudden constitutional crisis of daunting magnitude. *See Gideon v. Wainwright*, 153 So.2d 299, 300 (Fla. 1963) (discussing remedies in the wake of the Supreme Court's decision). The counterpart to the Sixth Amendment in Idaho's Constitution, at Article I, section 13, is likewise a fundamental, individual right—not an exclusive or discretionary function of some other co-ordinate branch. *See, e.g., State v. Tucker*, 97 Idaho 4, 7, 539 P.2d 556, 559 (1975); *Bement v. State*, 91 Idaho 388, 395, 422 P.2d 55, 62 (1966) (describing the right to counsel as "so important" that it is "the most pervasive right of an accused" (internal citation omitted)).

There is, obviously, no "textually demonstrable commitment" of exclusive discretion over this fundamental right in either the Sixth Amendment or the Idaho Constitution. *See Idaho*

State AFL-CIO, 110 Idaho at 695, 718 P.2d at 1133. Instead, the text that guarantees the right to counsel in both constitutions alludes, if anything, to the judiciary. Nor does the fundamental right to counsel implicate the "political question doctrine" of *Baker v. Carr*, which is concerned with questions that demonstrably fall within another branch's competence, such as foreign relations, the guaranty of a "republican" form of government, and the status of Indian tribes. 369 U.S. at 211–19; *see also State v. Campbell Cty. Sch. Dist.*, 32 P.3d 325, 331–37 (Wyo. 2001) (analyzing, at great length, the separation of powers and political question doctrines to explain why judicial review in cases alleging ongoing, statewide constitutional violations "is entirely consistent with separation of powers and the judicial role.") Separation of powers and the political question doctrine cannot be used as end-runs around judicial protection of constitutional rights. As the *Baker* Court itself explained, "such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right," for "[i]t is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." 369 U.S. 186, 231, 230 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960)).

The right to counsel is simply not a matter "properly entrusted to [some] other branch." *See Miles*, 116 Idaho at 639, 778 P.2d at 761. This Court does not defer to another branch's determination of constitutional adequacy absent a textually demonstrable assignment of discretion to that branch. *See In re SRBA Case No. 39576*, 128 Idaho at 261, 912 P.2d at 629. Even where the Constitution expressly delegates authority to another branch, the separation of powers doctrine still does not absolve this Court of its fundamental responsibility to examine and decide complaints alleging the violation of individual rights. *See Miles*, 116 Idaho at 640, 778

P.2d at 762. The Complaint in this case raises serious questions involving fundamental individual rights outside the discretion of any particular branch of government. Accordingly, the lower court's dismissal on separation of powers grounds must be reversed.

c. A Declaration and Injunction in This Case Would Respect Executive and Legislative Independence.

In its separation of powers analysis, the district court expressed misplaced concern about "overrid[ing]" the indigent defense system that the legislature had chosen, and about "reshap[ing] the system of indigent criminal defense in Idaho." R., p. 496. As a threshold matter, this is more properly characterized as a redressability issue, which this brief covers in Part IV.B.1.c. It is not truly a separation of powers issue because, as this Court has explained in its own separation of powers decisions, the judiciary has a fundamental responsibility to override other branches' failures to act and to remediate unconstitutional state systems. *See Coeur d'Alene Tribe*, 2015 WL 7421342 at *14; *ISEEO I*, 123 Idaho at 583–84, 850 P.2d at 734–35; *ISEEO v. Evans*, 142 Idaho 450, 459, 129 P.3d 1199, 1208 (2005) [hereinafter *ISEEO V*]; *see also Hellar v. Cenarrusa*, 106 Idaho 571, 575, 585, 682 P.2d 524, 528, 538 (1984) (upholding declaratory judgment invalidating legislative reapportionment and entering an order prescribing a specific reapportionment plan).

In any event, the district court's worry about invading the province of the legislature by overriding the existing system is an imagined one. By design, the remedy that Plaintiffs seek respects the separation of powers. Plaintiffs ask for a declaratory judgment that Idaho's system violates the right to counsel. R., p. 25, para. 53. Entering a declaration obviously does not require

the court to "establish standards or guidelines," to "mandate" that any branch "must enact . . . legislation, ordinances, or rules to meet those standards," or to order any branch to "provide adequate funding therefore." R., p. 497. Rather, entering a declaration to resolve a question of constitutionality is a core judicial branch duty. *ISEEO V*, 142 Idaho at 459, 129 P.3d at 1208.

Plaintiffs also seek an injunction requiring that the State develop and propose a plan to implement a constitutional system. R., p. 25, para. 53. This remedy similarly would not require the Court to impose standards, mandate enactment of legislation, or order appropriation of additional funding. In crafting a constitutional system, the executive and legislative branches would retain the full discretion preserved for them by the separation of powers. They, not the courts, would develop Idaho-appropriate standards on their own. They, not the courts, would determine whether new legislation would be best or whether, instead, the Governor and the PDC would use their existing authority to impose reforms. *See, e.g.*, I.C. § 19-850 (effective July 1, 2016) (granting PDC authority to promulgate rules establishing standards for public defense); Idaho Exec. Order No. 2015-11 (Oct. 1, 2015) (tasking executive branch commission with "ensur[ing] compliance" by local jurisdictions with the federal Juvenile Justice and Delinquency Act, including through "remedial actions for violations"); Idaho Exec. Order no. 2016-01 (Jan. 28, 2016) (granting an executive branch council an "expanded role" beyond its statutory authority and tasking it with the duty of "[a]lign[ing] policy and funding systems"). They, not the courts, would decide whether these measures would require additional funding, the realignment of existing funding, or whether to avoid funding issues altogether by measures to reduce the overall caseload of the entire criminal justice system, thus alleviating the burdens of prosecutors,

the courts, and public defenders alike.[7] Further, as New York's highest court recognized in *Hurrell-Harring*, the fact that the court's ruling may necessitate some action on the part of the legislature does not absolve the court from issuing such a ruling:

> It is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right.

Hurrell-Harring, 930 N.E.2d at 227 (citing *Marbury v. Madison*, 5 U.S. 137, 147 (1803)).

The executive and legislative branches would, in every event, retain their independence. The court would do nothing more than exercise its unique and critical role to make the ultimate determination of constitutional compliance and enter any appropriate orders to set the other branches into motion to correct deficiencies. This Court can assume that after it "fulfill[s] [its] constitutional duty to interpret the constitution the other branches of government also will carry out their defined constitutional duties in good faith and in a completely responsible manner." *ISEEO I*, 123 Idaho at 583, 850 P.2d at 734 (internal quotation marks omitted).

Furthermore, because the right to counsel directly involves the judiciary in its ongoing supervision of the criminal justice system, it is inconceivable that the courts have no role in

[7] A Pennsylvania state court case involving county-level indigent defense was dismissed in part on separation of powers grounds. *Flora v. Luzerne Cty.*, 103 A.3d 125, 138 (Pa. 2014). The plaintiffs in that case, however, sought a writ of mandamus explicitly requiring appropriation of additional funding to the Office of Public Defender. *Id.* Plaintiffs in this case seek neither an extraordinary writ nor an order expressly requiring appropriation of funds. *See* R., p. 25, para. 53. Moreover, the Pennsylvania decision is questionable authority, as the Pennsylvania Supreme Court has granted special permission for appeal, which is now pending. *Flora v. Luzerne Cty.* 118 A.3d 385 (Pa. 2015).

policing the ongoing constitutionality of that system. Rather, this Court has an enhanced responsibility to take remedial action in this case, which involves the daily activity before courts throughout Idaho. The judiciary's responsibility is so direct and special when it comes to the right to counsel that this Court could take remedial action on its own. *See Gideon*, 153 So. 2d at 300 (promptly adopting procedural rules to aid in compliance with the Supreme Court's opinion in *Gideon*); *In the Matter of the Adoption of New Standards for Indigent Defense and Certification of Compliance*, No. 25700-A-1004 (Wash. June 15, 2012), http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1004.pdf.

This Court has made clear, as courts across this country have done since *Marbury v. Madison* was decided in 1803, that the legislature and governor are not the final arbiters of whether their acts or omissions are constitutional. *See Coeur d'Alene Tribe*, 2015 WL 7421342 at *14. Though the Idaho Constitution prescribes a separation of powers, whenever there is a constitutional violation, whether done "perversely" or by "honest mistake," "the remedy for such violation exists, nevertheless." *Id.* Here, neither the Legislature nor the Governor can be allowed to be the final arbiter of whether Idaho's public defense system is constitutional.

C. The District Court Correctly Determined that Governor Otter and the Members of the Idaho Public Defense Commission Are Proper Defendants in This Case.

The burden lies with the State of Idaho, not individual counties, to make certain that indigent defendants' right to competent counsel is realized. The district court agreed: "Unquestionably, the State is ultimately responsible for ensuring constitutionally-sound public defense." R., p. 472. Because the State is ultimately responsible for protecting the right to

counsel, the question is which state officials can be sued when the State fails to meet its constitutional obligation under the Sixth Amendment and Article 1, Section 13. Under the U.S. Supreme Court's decision in *Ex parte Young*, state officials sued in their official capacities for prospective or declaratory relief are not immune to suit under the Eleventh Amendment. *See Ex parte Young*, 209 U.S. at 157. Such officials may be liable so long as they have "some connection" to the enforcement or operation of the law in question. *Id.* Appellants named Governor Otter and the members of the Idaho Public Defense Commission as defendants in this case, because they have a direct and significant connection to the provision of public defense services across this state, and have specific authority to take further steps to reform this state's public defender system and bring it into compliance with the state and federal constitutions.

Here, even the district court agreed, concluding that "[u]nder the *Ex parte Young* doctrine, the Court finds that the Governor and the PDC members have a more than sufficiently close connection or nexus to the enforcement of public defense in Idaho." R., p. 485. Specifically, the court correctly pointed out that "[t]he Governor has a duty to ensure that the Constitution and laws are enforced in Idaho. The Governor also has direct supervisory authority over those responsible to establish standards for a constitutionally sound public defense system." R., p. 485. The lower court also recognized the PDC's specific responsibility for creating training and education rules and for recommending improvements to the legislature. R., p. 485. Most importantly, the lower court correctly rejected the argument that the legislature's delegation of public defender services to the counties abdicates the Defendants' responsibility to indigent defendants in Idaho. *Id.*

The State's, Governor's, and PDC's authority over public defense reform, and their attendant ability to remedy the systemic deficiencies alleged in this case, has further increased in the months since Plaintiffs filed suit. Defendant Otter, by his signature, enacted 2016 House Bill 504, which will empower the PDC to promulgate and enforce specific standards for the provision of public defense services and will also require the PDC to monitor and evaluate whether each individual county complies with those standards. I.C. § 19-850(1)(a)(vii) (effective July 1, 2016). The principles underlying those standards track the deficiencies that Plaintiffs identified in their Complaint. *See* R., p. 37, para. 101. When and whether the PDC promulgates and enforces new standards remains to be seen, but the enactment of House Bill 504 resolves any doubt that the PDC and Governor have more than enough authority to remedy the Plaintiffs' grievances.

Governor Otter also allocated, and the Legislature appropriated, over $5 million of State funding for trial-level public defense delivery across the state. *See* 2016 House Bill 609, http://www.legislature.idaho.gov/legislation/2016/H0609.htm. Though this funding will not nearly be sufficient to remediate this state's public defense system, the allocation does demonstrate the Governor's authority to take concrete steps to reform the system.

The PDC, in turn, will now also have authority to provide some of this limited funding to the counties to assist them in meeting the statutory requirements. I.C. § 19-862A (effective July 1, 2016). In the event that any county is unable or unwilling to take the steps necessary to come into compliance with the statutory requirements, the PDC is ultimately responsible for intervening and ensuring that the standards are met. I.C. § 19-862A(11) (effective July 1, 2016).

The PDC will even have the power to intercept county sales tax revenue to fund failing county-level indigent defense systems. I.C. § 19-862A(12) (effective July 1, 2016).

These steps are not enough to guarantee that Idaho's public defense system passes constitutional muster. The passage of this most recent legislation does not guarantee that the system-wide deficiencies will be adequately addressed, particularly given the State's recent history of enacting public defense legislation and then failing to carry out its statutory responsibilities. The most recent legislation does clearly demonstrate, however, that the PDC and the Governor had (and have) the ability to provide Plaintiffs with appropriate relief. Each defendant in this case was and is connected to Idaho's public defense system and each is responsible for ensuring that it is up to constitutional standards.

V. CONCLUSION

For all of these reasons, this Court should reverse the lower court's decision dismissing the lawsuit at the pleading stage and remand so Plaintiffs can put on their proof.

Respectfully submitted, Dated: April 29, 2016

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ACLU of Idaho Foundation

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 2016, I caused to be served a true and correct copy of the foregoing by U.S. mail, first class postage prepaid, and by electronic mail, addressed to each of the following:

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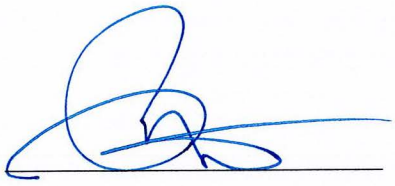
By: 

EXHIBIT

SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Department - Non-Limited	Entered by:
TITLE OF CASE: **Carolyn Phillips va State of California**	
LAW AND MOTION MINUTE ORDER	Case Number: 15CECG02201

Hearing Date: April 12, 2016 — Hearing Type: Demurrer x2/ Motion Strike
Department: 501 — Judge/Temporary Judge: Mark Snauffer
Court Clerk: L. Whipple — Reporter/Tape: Rachael Espinoza

Appearing Parties:

Plaintiff:	Defendant:
Counsel: Novella Coleman, Michael Risher	Counsel: Aaron Jones

☐ Off Calendar

☐ Continued to ☐ Set for _____ at _____ Dept. _____ for _____

☐ Submitted on points and authorities with/without argument. ☒ Matter is argued and submitted.

☐ Upon filing of points and authorities.

☐ Motion is granted ☐ in part and denied in part. ☐ Motion is denied ☐ with/without prejudice.

☐ Taken under advisement

☐ Demurrer ☐ overruled ☐ sustained with _____ days to ☐ answer ☐ amend

☒ Tentative ruling becomes the order of the court. No further order is necessary.

☒ Pursuant to CRC 391(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

☒ Service by the clerk will constitute notice of the order.

☒ See attached copy of Tentative Ruling.

☐ Judgment debtor _____ sworn and examined.

☐ Judgment debtor _____ failed to appear.
Bench warrant issued in the amount of $ _____

Judgment:

☐ Money damages ☐ Default ☐ Other _____ entered in the amount of:
Principal $_____ Interest $_____ Costs $_____ Attorney fees $_____ Total $_____

☐ Claim of exemption ☐ granted ☐ denied. Court orders withholdings modified to $ _____ per _____

Further, court orders:

☐ Monies held by levying officer to be ☐ released to judgment creditor. ☐ returned to judgment debtor.

☐ $ _____ to be released to judgment creditor and balance returned to judgment debtor.

☐ Levying Officer, County of _____, notified. ☐ Writ to issue

☐ Notice to be filed within 15 days. ☐ Restitution of Premises

☐ Other: _____

(20) **Tentative Ruling**

Re: ***Phillips et al. v. State of California et al.***, Superior Court Case No. 15CECG02201

Hearing Date: **April 12, 2016 (Dept. 501)**

Motion: (1) State of California and Governor Edmund Brown, Jr.'s Demurrer

(2) State of California and Governor Edmund Brown, Jr.'s Motion to Strike

(3) County of Fresno's Demurrer

Tentative Ruling:

(1) State of California and Governor Edmund Brown, Jr.'s Demurrer.

To sustain the demurrer to the petition and the entire complaint as to Governor Brown, with leave to amend.

As to the State of California, to sustain the demurrer to the petition for writ of mandate, with leave to amend. To sustain the demurrer to the fifth cause of action with leave to amend. To overrule the demurrers to the first, second, third, fourth, sixth, seventh, eighth and ninth causes of action. (Code Civ. Proc. § 430.10.)

(2) State of California and Governor Edmund Brown, Jr.'s Motion to Strike. To deny. (Code Civ. Proc. § 435.)

(3) County of Fresno's Demurrer. To sustain the demurrer to the petition for writ of mandate, with leave to amend. To overrule the demurrers to the complaint and each cause of action. (Code Civ. Proc. § 430.10.)

Plaintiffs are granted 20 days leave to file the first amended petition and complaint. The time in which the pleading can be amended will run from service by the clerk of the minute order. New allegations in the amended pleading are to be set in **boldface** type. The parties shall meet and confer in accordance with Code Civ. Proc. § 430.41(c).

In the amended pleading, plaintiffs shall separate and clearly distinguish between the petition for writ of mandate and the complaint. The two should be pled separately as independent pleadings, even if bound together in one document.

Explanation:

State of California and Governor Edmund Brown, Jr.'s Demurrer

Plaintiffs in this action filed a Petition for Writ of Mandate and Complaint ("Complaint") against County of Fresno, the State of California and Governor Brown, alleging that the Fresno County Public Defender's Office suffers from systemic and structural deficiencies that prevent it from providing indigent defendants with meaningful and effective assistance of counsel in violation of the federal and California constitutional guarantees of due process and right to counsel, and the constitutional and statutory rights to a speedy trial.

The State of California and Governor Brown will be referred to herein collectively as "the State."

The State's responsibility

Plaintiffs allege that the State has a "constitutional duty to run indigent defense systems" (Complaint ¶ 27); has delegated that duty to the counties; and that the State "does not provide oversight" of the county systems and "leaves counties to shoulder the financial costs." (Id. ¶¶ 27, 29, 31.)

The State contends that the right to counsel does not prescribe any affirmative duty *on the State government* to provide or run a particular indigent defense system or distribution of government powers. (See, e.g., *Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 30 ["The [federal] Constitution does not impose on the States any particular plan for the distribution of governmental powers;" citation omitted].) The State asserts that even if the right to counsel placed an affirmative duty on the State government, the Legislature has enacted a comprehensive system of indigent defense laws, which safeguard the right to counsel. (See, e.g., *Avon v. Municipal Court for Los Angeles Judicial Dist.* (1965) 62 Cal. 2d 630, 632 ["The purpose of section 987a [renumbered 987.2] of the Penal Code is to provide adequate representation for indigent persons charged with crime]; *People v. Chavez* (1980) 26 Cal. 3d 334, 344 [the constitutional right to counsel "is satisfied in California by the statutory provision for the assignment of counsel by the court"].)

The State may be correct that Pen. Code § 987.2 provides an effective backstop to the right to counsel. But at the pleading stage the court cannot determine that this system operates to provide effective assistance of counsel to indigent criminal defendants.

The State contends that the Complaint does not allege that the State failed to perform any specific statutory duty, and thus plaintiffs cannot allege a cognizable as-applied claim against the State.

The Sixth Amendment right to counsel is a provision of the Bill of Rights so "'fundamental and essential to a fair trial'" that it "is made obligatory upon the *States* by the Fourteenth Amendment." (*Gideon v. Wainwright* (1963) 372 U.S.

335, 342-43, emphasis added.) The Fourteenth Amendment's Due Process Clause in turn provides: "nor shall any *State* deprive any person of life, liberty, or property, without due process of law." (US. Const, amend XIV (emphasis added).)

The State argues that that the Fourteenth Amendment's reference to the "State" does not does not place the responsibility for providing counsel on state governments because the term the "State" refers to all public entities within the states, at both the state and local levels, citing *DeShaney v. Winnebago County Dept. of Social Services* (1989) 489 U.S. 189, 195 fn. 1.

That is not a holding of the *DeShaney* decision. The Court stated that that the petitioners in that case "contend that the State [1] deprived Joshua of his liberty interest ..." Footnote 1 reads, "As used here, the term 'State' refers generically to state and local governmental entities and their agents." The Court was merely defining the term as used in that opinion. It was not stating that the term "State" as used in the Fourteenth Amendment refers generically to state and local government entities. As the State points out in its reply brief, *Gideon* did not address where the responsibility lies within states for providing counsel." "It is axiomatic that cases are not authority for propositions not considered." (*People v. Avila* (2006) 38 Cal.4th 491, 566.) The State cites to *City of Lafayette, La. v. Louisiana Power & Light Co.* (1978) 435 U.S. 389, 415 fn. 43 for the same proposition. This citation is not on point either.

The State cannot disclaim its constitutional responsibilities merely because it has delegated such responsibilities to its municipalities. (See *Duncan v. Michigan* (Mich. Ct. App. 2009) 774 N.W.2d 89, 97-98, 104-105.) In *New York Cty. Lawyers' Ass 'n v. State of New York* (N .Y. Sup. Ct. 2002) 745 N.Y.S.2d 376, 381, the court issued a preliminary injunction in a case challenging New York's compensation rate for appointed counsel and citing *Gideon* for the proposition that "New York State bears the ultimate responsibility to provide counsel to the indigent."

Nor can the State evade its constitutional obligation by passing statutes. (See *Armstrong v. Schwarzenegger* (9th Cir. 2010) 622 F.3d 1058, 1074 ["a State cannot avoid its obligation under federal law by contracting with a third party to perform its function"].) Counties are "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions," rather than "sovereign entities." (*Reynolds v. Sims* (1964) 377 U.S. 533, 575.)

Plaintiffs point to *Stanley v. Darlington County School Dist.* (4th Cir. 1996) 84 F.3d 707, an equal protection school desegregation case, where the State argued that "the School District lacks standing to sue the State because the School District is a political subdivision of the State and that the State's allocation of governmental expenses is an internal issue of governmental structuring and money." (*Id.* at pp. 712-713.) The court rejected this argument, stating, "[b]ecause the Fourteenth Amendment imposes direct responsibility on a state

to ensure [due process] ... a state's delegation to a political subdivision of the power necessary to remedy the constitutional violation does not absolve the state of its responsibility to ensure that the violation is remedied." (*Id.* at p. 713.)

The State, here, distinguishes *Stanley* by pointing out that the decision did not place responsibility upon states for violations by other governmental entities. The court recognized "[a]t the outset of our discussion ... that illegal segregation was for many years the policy of both the State of South Carolina and the Darlington County School District." (*Id.* at p. 713.)

However, here, if the State created an indigent defense system that is systematically flawed and underfunded, *Stanley* indicates that the State remains responsible, even if it delegated this responsibility to political subdivisions. "Even if a state gives its local school districts the power and means to remedy segregation, it can still be sued by the students in those districts for its failure to take steps to dismantle a dual educational system that it created. (*Id.* at p. 713.)

The State has not produced authority clearly showing that the causes of action premised on deprivation of the right to counsel have no merit. The court will not sustain the demurrer on this ground.

Violation of Individual's Right to Counsel

The State next argues that the Complaint fails to state a claim for violation of any *individual's* right to counsel.

The State contends that plaintiffs must satisfy the test set forth by the Supreme Court in *Strickland v. Washington* (1984) 466 U.S. 668, 691-94: in order to prevail on an ineffective-assistance-of-counsel claim, a defendant must show (1) that an error by counsel was professionally unreasonable and (2) that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different (i.e., prejudice).

However, plaintiffs in this action are not challenging individual convictions. Rather, they claim that the State systematically deprives Fresno County indigent defendants of the right to counsel. They contend that this right can be vindicated through individual suits challenging the validity of particular criminal convictions, or suits seeking prospective systemic relief where structural deficiencies in an indigent defense system constructively deny the assistance of counsel.

Since no individual convictions are being challenged, the court will only address the question of whether there is a claim of systemic deprivation.

Plaintiffs correctly point out that mere token appointment of counsel does not satisfy the Sixth amendment right to counsel. (*Evitts v. Lucey* (1985) 469 U.S. 387, 395.) "The Sixth Amendment requires effective assistance of counsel at

critical stages of a criminal proceeding." (*Lafler v. Cooper* (2012) 132 S.Ct. 1376, 1385.)

Systemic violations of the right to counsel can be remedied through prospective relief. The Supreme Court in *Gideon v. Wainwright* (1963) 372 U.S. 335, held that states are obligated under the Fourteenth Amendment to appoint counsel for indigent criminal defendants. In *Luckey v. Harris* (11th Cir. 1988) 860 F.2d 1012, the Eleventh Circuit held that *Strickland* is an inappropriate standard to apply in a civil suit seeking prospective relief. The court distinguished between the standard used to determine "whether an accused *has been* prejudiced by the denial of a right," which is an issue "that relates to relief," and the question of "whether such a right exists and can be protected prospectively." (*Id.* at p. 1017, emphasis added.) The court emphasized that prospective relief is designed to avoid future harm; as such, "it can protect constitutional rights, even if the violation of these rights would not affect the outcome of a trial." (Id.)

> Prospective relief is designed to avoid future harm. [Citation.] Therefore, it can protect constitutional rights, even if the violation of these rights would not affect the outcome of a trial.

(*Id.* at p. 1017.)

> In a suit for prospective relief the plaintiff's burden is to show the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.... This is the standard to which appellants, as a class, should have been held.

(*Id.* at p. 1018 (internal quotations omitted).)

Addressing the sufficiency of the allegations, the appellate court noted:

> Appellants have alleged that systemic delays in the appointment of counsel deny them their sixth amendment right to the representation of counsel at critical stages in the criminal process, hamper the ability of their counsel to defend them, and effectively deny them their eighth and fourteenth amendment right to bail, that their attorneys are denied investigative and expert resources necessary to defend them effectively, that their attorneys are pressured by courts to hurry their case to trial or to enter a guilty plea, and that they are denied equal protection of the laws. Without passing on the merits of these allegations, we conclude that they are sufficient to state a claim upon which relief could be granted.

(*Id.* at p. 1018.)

Here, plaintiffs allege similar systemic deficiencies: excessive caseloads (Complaint ¶¶ 4, 50-52); Case management practices that create conflicts of interest for attorneys (Complaint ¶¶ 54, 58-59, 80); inadequate resources (Complaint ¶¶ 69, 75, 78-79, 82); inadequate supervision (Complaint ¶ 95).

Plaintiffs allege that these deficiencies cause the indigent defense system to provide for representation that falls below minimum Constitutional and statutory standards through inadequate preparation (Complaint ¶¶ 54, 63, 80, 87-88); lack of conflict-free legal representation (Complaint ¶¶ 36, 48, 54, 64, 66-71, 79, 80, 95, 112); lack of continuous representation (Complaint ¶ 63); inadequate opportunity for consultation (Complaint ¶¶ 64, 66, 68, 69-71); interference with competent representation due to inadequate training and support from supervisors (Complaint ¶¶ 53, 60, 74, 75, 95, 97); inadequate factual investigation (Complaint ¶¶ 78-80); lack of meaningful adversarial testing (Complaint ¶¶ 85, 87).

Pursuant to *Luckey*, plaintiffs need not plead and prove the elements of ineffective assistance as to specific individuals in order to state a cause of action.

The State relies on *Heck v. Humphrey* (1994) 512 U.S. 477, 486, which held that habeas corpus is the exclusive remedy for a plaintiff seeking to collaterally attack a criminal conviction, and that apart from habeas, civil actions "are not appropriate vehicles for challenging the validity of outstanding criminal judgments."

The suit in *Heck* was brought under 42 U.S.C. section 1983 for damages. The Court held that to maintain a section 1983 suit for damages, the plaintiff must prove that the conviction was invalidated. (*Id.* at pp. 486-487.) *Heck* does not apply here because plaintiffs do not seek damages or relief that would imply the invalidity of any convictions; rather they seek purely prospective relief.

Professional Guidelines

The State argues that alleged violations of professional guidelines are insufficient to state a claim for violation of right to counsel. The State points out that professional guidelines and norms such as those discussed in the Complaint are not themselves constitutional standards or minimums, but are only guides to determining what is reasonable. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.)

However, the Complaint does not hold these guidelines and standards out as inexorable commands, but as evidence and guidelines. As indicated by *Strickland*, cited by the State, professional guidelines and norms are relevant, even if not dispositive. (*Strickland, supra*, 466 U.S. at p. 688 [Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ..."].)

Penal Code § 987 (count 5)

The fifth cause of action, asserting violation of Penal Code section 987, fails against the State because the statute does not impose any duty on the State. The statute provides that if a criminal defendant desires and is unable to

employ counsel, "the court shall assign counsel to defend him or her." (Pen. Code § 987(a).)

The only entity on whom a duty is imposed by section 987 is the court. And it only requires that counsel be assigned to defend the defendant. The Complaint does not allege any instance in which a court was required to appoint counsel but failed to do so. Plaintiffs offer no argument as to how this statute was violated. The demurrer to the fifth cause of action with leave to amend.

Right to Speedy Trial (counts 6-8)

The sixth cause of action alleges violation the California Constitution's right to a speedy trial, and the seventh and eighth allege violation of two related statues, Penal Code sections 1382 [sets forth statutory right to a speedy trial] and 859b [codifies the time for a preliminary hearing].

Plaintiffs allege that in Fresno, structural deficiencies in the indigent defense system routinely force criminal defendants to face unreasonable delays in their cases, in violation of their constitutional and statutory speedy-trial rights. (Complaint ¶¶ 6, 17, 98, 110, 112.)

Speedy trial rights can be infringed by deficiencies in the indigent defense system. (See *People v. Johnson* (1980) 26 Cal.3d 557, 571-72 [defendant's right to a speedy trial may "be denied by failure to provide enough public defenders or appointed counsel, so that an indigent must choose between the right to a speedy trial and the right to representation by competent counsel"].)

The State points out that the right is a "personal" one, and "is waived if not properly asserted by a defendant." (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 251.) The State contends that for the same reasons set forth above, plaintiffs cannot collaterally attack the pleas or sentences of the individuals identified in the complaint. Citing to *Heck*, the State contends that a judicial declaration in this case that any plaintiff was deprived the right to a speedy trial "would necessarily imply the invalidity" of the proceedings against them, and thus is barred. (*Heck, supra,* 512 U.S. at p. 486.)

The cases cited the State sought retrospective relief that would overturn or otherwise impugn the validity of convictions previously imposed. (See *Heck v. Humphrey* (1994) 512 U.S. 477 [suit for damages pursuant to 42 U.S.C. § 1983]; *People v. Villaneuva* 196 Cal. App. 4th 411 (2011) [direct appeal of conviction]; *Gibbs v. Contra Costa County*, No. C 11-00403 MEI, 2011 WL 1899406 (ND. Cal. May 19, 2011) [suit for damages pursuant to 42 U.S.C. § 1983].) But here, plaintiffs seek prospective relief based on the systemic violation of Fresno indigent defendants' rights to a speedy trial and hearing. That relief would not overturn the result in any individual criminal case. In *Wilkinson v. Dotson* (2005) 544 U.S. 74, 76, 82, the Supreme Court held that *Heck* did not bar state prisoners from bringing a section 1983 claim challenging the constitutionality of state parole

procedures where the prisoners sought declaratory and injunctive relief. Accordingly, as with the right to counsel issue, *Heck* does not bar the speedy trial claims since only prospective relief is sought, and plaintiffs are not seeking any adjudications that would imply the invalidity of proceedings against any individual defendant.

Writ of Mandate

> Code of Civil Procedure section 1085, subdivision (a), provides: "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station...." A writ of mandate "will issue against a county, city, or other public body.... [Citations.]" (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1558, 55 Cal.Rptr.2d 465.)
>
> To obtain writ relief under Code of Civil Procedure section 1085, the petitioner must show there is no other plain, speedy, and adequate remedy; the respondent has a clear, present, and ministerial duty to act in a particular way; and the petitioner has a clear, present and beneficial right to performance of that duty. (*Morgan v. City of Los Angeles Bd. of Pension Comrs.* (2000) 85 Cal.App.4th 836, 842, 102 Cal.Rptr.2d 468.) A ministerial duty is one that is required to be performed in a prescribed manner under the mandate of legal authority without the exercise of discretion or judgment. (*Id.* at p. 843, 102 Cal.Rptr.2d 468; *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 618, 113 Cal.Rptr.2d 309.)

(*County of San Diego v. State* (2008) 164 Cal.App.4th 580, 593 [fn omitted].)

"A writ of mandate will lie to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station (citation) upon the verified petition of the party beneficially interested, in cases where there is not a plain, speedy, and. adequate remedy, in the ordinary course of law." (*Cal. Corr. Supervisors Org., Inc. v. Dep't of Corr.* (2002) 96 Cal.App.4th 824, 827 [citing Code Civ. Proc., §§ 1085-1086, quotations omitted].) "Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent [citations]; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty[.]" (*Ibid.*; see also *Cal. Assn. of Prof Scientists v. Dept. of Finance* (2011) 195 Cal.App.4th 1228, 1236 [writ of mandate is to compel "the performance of a clear, present, and ministerial duty where the petitioner has a beneficial right to performance of that duty"].)

"A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists." (*Cal. Assn. of Professional*

Scientists v. Dept. of Finance (2011) 195 Cal.App.4th 1228, 1236.) Mandamus "will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner." (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 232-233.)

Plaintiffs identify no *ministerial* duty owed by the State or Governor.

While plaintiffs cite *Jenkins v. Knight* (1956) 46 Cal.2d 220, for the proposition that "[t]he provisions of our Constitution are mandatory and prohibitory" (*id.* at p. 224), *Jenkins* did not rule that all constitutional provisions set forth ministerial duties for purposes of mandamus. It addressed former article IV, section 12, of the State Constitution, which provided that when vacancies arise in the Legislature, the Governor "shall issue writs of election to fill such vacancies." (*Id.* at p. 222.) This imposed a ministerial duty, because the Governor was "commanded by the Constitution to issue a proclamation" and had "no discretion" in the matter. (*Id.* at p. 224.) Plaintiffs identify no ministerial duty comparable to this one. Plaintiffs also cite *Harn v. County of Ventura* (1979) 24 Cal.3d 605, but *Horn* did not address what constitutes a "ministerial" duty for purposes of mandamus. Finally, *Molar v. Gates* (1979) 98 Cal.App.3d 1, involved a challenge to specific practices of county officials, and the writ simply ordered them to end the practices. (*Id.* at p. 6.) Plaintiffs challenge no specific State acts and instead allege only a general duty to comply the Constitution.

Additionally, mandamus cannot issue against the State. "The state acts only through its officers or agents," and mandamus thus should be directed "to compel an officer or agent of the state to perform an act that 'the law specifically enjoins.'" (*County of San Diego* v. State of California (2008) 164 Cal.App.4th 580, 593 n. 12.)

For these two reasons, the demurrer to the petition for writ of mandate should be sustained. However, plaintiffs' tactic of commingling the petition for writ of mandate with complaint for declaratory and injunctive relief makes it somewhat difficult to fashion an order, as it is unclear whether plaintiffs intended the various counts to be part of the petition or complaint. There is no distinction in the pleading between petition and complaint. In the amended pleading, the two should be pled separately even if bound together in one document.

The State also contends that the writ petition is not properly verified. A petition for writ of mandate must be verified based on personal knowledge. (Civ. Proc. §§ 1069, 1086, 1103(a); *Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204.) The petition is verified only by Petitioner Phillips, not by Petitioners Yepez or Estrada. Phillips verified only paragraphs 14-16 [describing her residence and employment in background] of the Complaint based on personal knowledge. The rest she verifies on information and belief.

However, Code of Civil Procedure section 446 (applicable to petitions for mandamus by section 1109) provides that "[a] person verifying a pleading need not swear to the truth or his or her belief in the truth of the matters stated therein

but may, instead, assert the truth or his or her belief in the truth of those matters 'under penalty of perjury.'" The verification is sufficient at the pleading stage.

Taxpayer Claim

The State next contends that the complaint fails to state a claim under the taxpayer action statute. Two of the three plaintiffs, Phillips and Estrada, assert claims as taxpayers under California's taxpayer-action statute, Code of Civil Procedure section 526a (Claim 9). (See Complaint ¶¶ 16, 20 [alleging taxpayer standing].)

Section 526a provides that a taxpayer may bring "[a]n action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of" a public entity. The "essence" of the action, though, is "an illegal or wasteful expenditure of public funds or damage to public property." (*Humane Society of the US. v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 355, citation omitted.) Therefore, to survive demurrer, "the plaintiff must cite specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur." (*Ibid.*)

However, "[i]t is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds." (*Wirin v. Parker* (1957) 48 Cal.2d 890, 894 [taxpayer suit proper in constitutional challenge to practice of police conducting surveillance using concealed microphones]; *Blair v. Pitchess* (1971) 5 Cal.3d 258, 269 ["county officials may be enjoined from spending their time carrying out" an unconstitutional statute, even though that conduct "actually effect[s] a saving of tax funds"].)

The demurrer to count 9 should be overruled.

Governor Brown

Plaintiffs fail to state a claim against Governor Brown. The Complaint alleges that Governor Brown has a duty to "see that the law is faithfully executed" (Cal. Const. Art. I, § 1), which includes a duty to ensure the State respects the Constitutional and statutory provisions guaranteeing the right to counsel.

No California or federal law does prescribes any role for the Governor in ensuring the legal representation of indigent criminal defendants. The proper defendant in a challenge to a state law or policy is the officer charged with implementing the challenged measure. (*Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533, 551.) The State points out that courts have issued writs to compel action by the governor only when tied to a specific statutory or constitutional duty directed to that office that leaves him no discretion, citing *Jenkins v. Knight* (1956) 46 Cal. 2d 220, 224; *Harpending v. Haight* (1870) 39 Cal. 189, 209-10.)

Plaintiffs cite four decisions for the proposition that the Governor is routinely named in constitutional challenges, but those cases all involved specific acts by the Governor or legal duties placed upon the Governor. (*Hotel Employees & Rest. Emp. Int'l Union v. Davis* (1999) 21 Cal.4th 585, 590 [Governor was obligated to execute a gaming compact]; *Cal. Correctional Peace Officers Assn. v. Schwarzenegger* (2008) 163 Cal.App.4th 802, 808 [Governor's acts pursuant to declared state of emergency]; *Raven v. Deukmejian* (1990) 52 Ca1.3d 386; 340 [Governor charged with implementing challenged law]; Bd. of Adm. v. Wilson (1997) 52 Cal.App.4th 1109, 1119 [Governor's duties concerning the budget process].)

This case presents no analogous circumstances. The demurrer to the petition and complaint should be sustained as to Governor Brown.

State of California and Governor Edmund Brown, Jr.'s Motion to Strike

The State separately moves to strike paragraphs 11, 16, 18, 20, 114 and 115, each count of the Complaint, and each paragraph of the prayer for relief. The State then offers no argument in its memorandum in support of moving to strike any of these portions of the Complaint. It merely references the demurrer, and asserts that each count is legally unsupportable. In other words, the motion to strike basically says, "We move to strike everything. See demurrer." The State points out that a motion to strike may be appropriate where a portion of a cause of action is defective (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-83), but the motion to strike identifies no portion of the complaint to be stricken.

A motion must be supported by a memorandum of points and authorities. (Cal. Rules of Court, Rule 3.1113(a).) The memorandum "must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases and textbooks cited in support of the position advanced." (Cal. Rules of Court, Rule 3.1113(b); see *Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.* (2011) 197 Cal.App.4th 927, 934 [trial court not required to "comb the record and the law for factual and legal support that a party has failed to identify or provide"].) The memorandum in support of the motion to strike fails in this regard. Neither the court nor plaintiffs should be required to comb through the memorandum in support of the demurrer for arguments supporting the motion to strike.

Moreover, the motion to strike is entirely duplicative of the demurrer, which is being sustained as to any count that fails to state a cause of action.

County of Fresno's Demurrer

Judicial Notice

For the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts properly pleaded (i.e., all ultimate facts alleged, but not contentions, deductions or conclusions of fact or law). (*Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 966-967; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) The sole issue raised by a general demurrer is whether the facts pleaded state a valid cause of action - not whether they are true. Thus, no matter how unlikely or improbable, plaintiff's allegations must be accepted as true for the purpose of ruling on the demurrer. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) However, the allegations of the complaint are not accepted as true if they contradict or are inconsistent with facts judicially noticed by the court. The court may consider matters outside the complaint if they are judicially noticeable under Educ. Code §§ 452 or 453. (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474.)

In support of its demurrer the County of Fresno presents the most expansive and excessive request for judicial notice ever seen by this court. The County treats its demurrer as a plaintiff's opposition to a defendant's summary judgment motion, but in this case expecting to have the case dismissed by raising triable issues of fact.

The County's requests for judicial notice goes so far beyond the proper reasonable use of procedure, that they are denied in their entirety pursuant to Evidence Code section 352:

> It is well recognized that the purpose of judicial notice is to expedite the production and introduction of otherwise admissible evidence. . . . the matter to be judicially noticed must be relevant . . . . judicial notice [is] likewise qualified by Evidence Code, section 352, which permits the exclusion of any otherwise relevant evidence in the discretion of the trial court 'if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

(*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578.)

Writ of Mandate

The County contends that the writ petition is demurrable because the County Board has no *ministerial* duty to ensure that Public Defenders' caseloads do not exceed any particular caseload cap number.

Traditional mandate will issue to compel action by a governmental body or official when the action is a ministerial duty – one which a public agency is

required to perform. (*Women Organized for Employment v. Stein* (1980) 114 Cal.App.3d 133, 139.)

"A 'ministerial duty' is one generally imposed upon a person in public office who, by virtue of that position, is obligated 'to perform in a prescribed manner required by law when a given state of facts exists. [Citation.]' [Citations.]" (*City of King City v. Community Bank of Central California* (2005) 131 Cal.App.4th 913, 926.) It is a duty that a governmental or private body, by or through a public or private board, agency, official, or employee, is required to perform without the exercise of independent judgment or opinion. (*Ellena v. Department of Ins.* (2014) 230 Cal.App.4th 198, 205.) Ministerial actions '"are essentially automatic based on whether certain fixed standards and objective measurements have been met."' (*Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v. County of Solano Dep't of Resource Mgmt.* (2008) 167 Cal.App.4th 1350, quoting *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 623.) In general, a ministerial act does not entail the exercise of judgment or discretion. "A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given set of facts exists." (*California Ass'n of Prof. Scientists v. Department of Fin.* (2011) 195 Cal.App.4th 1228, 1236, quoting *Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 Cal.4th 911, 916.)

Plaintiffs cite to case law in which a writ of mandate issued to compel the performance of a constitutional duty, and argue that the cases stand for the proposition that mandate will issue notwithstanding a governmental actor's discretion.

In *Molar v. Gates* (1979) 98 Cal.App.3d 1, the county permitted male prisoners to access minimum security jail facilities with their attendant privileges, while denying such facilities and privileges to female inmates. (*Id.* at p. 6.) The petitioners sought a writ of mandate challenging this practice. Though the court acknowledged that county officials have discretion in this area, it held that this discretion did not preclude mandamus relief to remedy a violation of constitutional equal protection rights. (*Id.* at pp. 19, 20, 23, 25.)

However, this case does not aid plaintiffs. While the county had discretion whether "to provide minimum security facilities or outdoor work opportunities at all" (*id.* at 25), once a facility or privilege was offered to the male inmates, the county was mandated, under equal protection principles, to offer it to female inmates as well. That was reflected in the language of the writ "to refrain from providing facilities and programs to one sex which are not provided to the other and to provide like criteria in offering branch jail privileges to the two sexes . . ." (*Id.*) Hence, in *Molar*, once the county made any discretionary decision to provide facilities or privileges to one gender of inmates, the county had absolutely no discretion to refuse to provide facilities or privileges to the other.

Plaintiffs rely on *Horn v. County of Ventura* (1979) 24 Cal.3d 605, where the plaintiff filed a petition for writ of mandate challenging the constitutionality of the county's procedures for notifying landowners of governmental conduct affecting their property interest. The issue before the court was whether the board's action in approving the subdivision map was legislative (requiring no notice to landowners) or adjudicatory (requiring notice to landowners) in nature. The Subdivision Map Act mandates rejection of a subdivision plan "if it is deemed unsuitable in terms of topography, density, public health and access rights, or community land use plans." (*Id.* at pp. 614-615.) The court noted that resolution of these issues involve exercise of judgment and balancing of conflicting interests, hallmarks of the adjudicative process. The court rejected the concept that subdivision approvals are purely ministerial acts requiring no precedent notice or opportunity for hearing. (*Id.* at p. 615.) Therefore, the petitioner was entitled to notice. (*Id.*)

Plaintiffs rely on *Horn* because the California Supreme Court granted the plaintiffs' writ, despite finding that the challenged conduct involved the exercise of judgment and was not a purely ministerial act. But the discussion of discretionary versus ministerial acts did not involve the mandate to provide notice, but whether notice was required in the first place (i.e., whether it was an adjudicatory decision). *Horn* is not supportive of plaintiffs' position here. Clearly there is a constitutional duty, but it does not appear to be a ministerial duty. For that reason the demurrer to the petition for writ of mandate should be sustained.

The County also argues that Penal Code section 987.2(a) provides for a Sixth Amendment backstop, because it permits the public defender to decline cases for "any ...", which could include workload.

> When a public defender reels under a staggering workload ... [t]he public defender should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him, and order the employment of private counsel (Pen.Code, s 987a) at public expense.

(*Ligda v. Superior Court* (1970) 5 Cal.App.3d 811, 827-28.)

It is *possible* that Penal Code § 987.2(a)(3) ensures protection of the right to counsel, and renders plaintiffs' claims of systemic deficiencies in the indigent criminal defense system meritless. But such a determination would require a much more detailed record and level of review than can be afforded at this stage.

The County also contends that the petition is speculative because plaintiffs rely upon isolated acts to assert the existence of a systemic problem.

While plaintiffs do give examples, they are not the only allegations supporting the ultimate allegations of denial of right to counsel. The County complains that while 42,000 criminal cases are initiated in this court every year (Complaint ¶ 40), plaintiffs give a mere six examples of alleged Sixth Amendment

violations (Complaint ¶¶ 98-112). Plaintiffs do not need to allege more than that in the Complaint. "[T]he complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.) If anything, the Complaint alleges too many facts and statistics. The demurrer will not be sustained on the ground that the examples pled are insufficient to establish *systemic* deficiencies. The County relies on *Rizzo v. Goode* (1976) 423 U.S. 362, for the proposition that plaintiffs' showing of a relatively few instances of violations by individual peace officers, without any showing of a deliberate policy, did not provide a basis for injunctive relief. But *Rizzo* did not involve an attack on the complaint. It was an appeal of orders entered after parallel trials of separate actions. It does not address what is required at the pleading stage.

The County continues to attack the existence of systemic deficiencies by contending that the writ petition is speculative because per-attorney caseloads cannot be reliably predicted, and because the Office's increasing capacities to handle work should be the result of recently-expanded PD training budgets. The County points to Proposition 47 (requiring misdemeanor sentence instead of felony sentence for certain offenses, the full impacts of which are not yet known), new positions added since the low point of the Great Recession, increase in the training budget. Basically, the County contends that the Complaint is speculative because there have been some changes, and caseloads could change in the future. The Complaint alleges many structural deficiencies in the indigent defense system: excessive caseloads (Complaint ¶¶ 4, 50-52); Case management practices that create conflicts of interest for attorneys (Complaint ¶¶ 54, 58-59, 80); inadequate resources (Complaint ¶¶ 69, 75, 78-79, 82); inadequate supervision (Complaint ¶ 95). Plaintiffs allege that these deficiencies cause the indigent defense system to provide for representation that falls below minimum Constitutional and statutory standards through inadequate preparation (Complaint ¶¶ 54, 63, 80, 87-88); lack of conflict-free legal representation (Complaint ¶¶ 36, 48, 54, 64, 66-71, 79, 80, 95, 112); lack of continuous representation (Complaint ¶ 63); inadequate opportunity for consultation (Complaint ¶¶ 64, 66, 68, 69-71); interference with competent representation due to inadequate training and support from supervisors (Complaint ¶¶ 53, 60, 74, 75, 95, 97); inadequate factual investigation (Complaint ¶¶ 78-80); lack of meaningful adversarial testing (Complaint ¶¶ 85, 87). These allegations are sufficient to state a claim against Fresno County under counts one through five and nine for systemically depriving Fresno County indigent defendants of assistance of counsel, despite the factual disputes raised by the County.

Separation of Powers

The County then argues that the writ petition is demurrable because it requires the court to violate the separation of powers doctrine.

"Managing a county government's financial affairs has been entrusted to . . . [the] county board of supervisors, and is an essential function of the board." (*Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1332-1333.) The County contends that the Board had to balance the budget during the Great Recession, and in doing so had to limit the number of employees. That power was vested in the board of supervisors. (See *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 234.)

However, authorities cited by the County indicate that the separation of powers issue is not a hard-and-fast bar to the relief sought here. The County cites to *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d. 317, 330:

> [T]o state a cause of action warranting judicial interference with the official acts of defendants, [the plaintiffs] **must allege much more than mere conclusions of law; they must aver the specific facts** from which the conclusions entitling them to relief would follow.

This citation indicates it becomes more of a sufficiency-of-the-pleading issue. Moreover, the County's reply shifts the separation of powers argument somewhat. Instead of arguing simply that the cannot issue the orders requested because it would violate the separation of powers doctrine, it argues in the reply that even if the *Strickland* test for violation of the right to counsel does not apply[1], and plaintiffs are not required to plead and prove prejudice, plaintiffs are still required to allege actual injury.

In the reply, the County argues that two cases apply the *Strickland* test in the context of Sixth Amendment systemic deficiency claims: *Platt v. State* (1996) 664 N.E.2d 357 and *Kennedy v. Carlson* (1996) 544 N.W.2d 1, 7.

In *Platt*, the plaintiff sought to enjoin the Marion County public defender system on the ground that it effectively denies indigents the effective assistance of counsel. The court found the claim for equitable relief inappropriate because a violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial, relying on *Strickland*. "This prejudice is essential to a viable Sixth Amendment claim and will exhibit itself only upon a showing that the outcome of the proceeding was unreliable. Accordingly, the claims presented here are not reviewable under the Sixth Amendment as we have no proceeding and outcome from which to base our analysis." However,

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[1] This was discussed above in the State's demurrer. *Strickland v. Washington* (1984) 466 U.S. 668, 691-94 held that in order to prevail on an ineffective-assistance-of-counsel claim, a defendant must show (1) that an error by counsel was professionally unreasonable and (2) that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different (i.e., prejudice). I agreed with plaintiffs that, pursuant to *Luckey v. Harris* (11th Cir. 1988) 860 F.2d 1012, the *Strickland* standard does not apply since plaintiffs are seeking prospective relief.

I'm not clear on the procedural posture of the case. And there is no mention of *Luckey*.

Kennedy was a suit by a chief public defender, contending that the public defender funding system violates the constitutional rights of indigent criminal defendants to the effective assistance of counsel by not providing sufficient funds for the operation of the Fourth Judicial District Public Defender's Office. "[C]onstrained by Minnesota's caselaw and the facts before us in this case," and because the plaintiff failed to show "injury in fact" to support his claim "as required under Minnesota law," the court rejected his request for judicial intervention.

The appeal was of the district court's order granting the plaintiff's motion for summary judgment. "The court acknowledged that it could not determine whether Kennedy's attorneys had provided ineffective assistance of counsel in any particular cases, but nevertheless found that judicial relief was necessary to prevent this from occurring in the future."

This decision was reversed on appeal. The appellate court did not apply *Strickland*, but the state's law regarding the requirement of a justiciable controversy in order to issue a declaratory judgment regarding the constitutionality of a statute. The court held that there was no justiciable controversy. Moreover, the appeal was of a decision fully evaluating the evidence in support of the claims being raised, not an attack on the pleadings. Furthermore, the court stated:

> In those cases where courts have found a constitutional violation due to systemic underfunding, the plaintiffs showed substantial evidence of serious problems throughout the indigent defense system. By comparison, Kennedy has shown no evidence that his clients actually have been prejudiced due to ineffective assistance of counsel. To the contrary, the evidence establishes that Kennedy's office is well-respected by trial judges, it is well-funded when compared to other public defender offices, and its attorneys have faced no claims of professional misconduct or malpractice.

Here, there are plenty of allegations of negative consequences of the systemic deficiencies alleged. As the County points out in its reply, in *Luckey v. Harris* (11th Cir. 1988), the Eleventh Circuit Court of Appeals stated that "[i]n a suit for prospective relief the plaintiff's burden is to show 'the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.'" It did not say that irreparable injury must be shown to have already occurred, which is what the County is arguing.

In the reply the County also relies on *Lewis v. Casey* (1996) 518 U.S. 343 in support of the contention that plaintiffs seeking systemic relief must plead and prove actual injury. The United States Supreme Court has "consistently required States to shoulder affirmative obligations to assure all prisoners meaningful

access to the courts." (*Bounds v. Smith* (1977) 430 U.S. 817, 824.) In *Lewis,* the Supreme Court concluded, however, that actual injury is required to state a claim for denial of access to the courts. (518 U.S. at pp. 351-352.) Such injury will be shown when an inmate can "demonstrate that a non-frivolous legal claim has been frustrated or was being impeded." (*Id.* at p. 353.) The Court likewise rejected the argument that the mere claim of a systemic defect, without a showing of actual injury, presented a claim sufficient to confer standing. (*Id.* at p. 349.)

While this is a compelling argument, the demurrer will not be sustained on this ground for the multiple reasons. First, the County's moving papers never argue this pleading injury requirement in the context of separation of powers. The court may refuse to consider new evidence or arguments first raised in reply papers, or it may grant the other side time for further briefing. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538 ["The general rule of motion practice ... is that new evidence is not permitted with reply papers"].) Making the argument for the first time in the reply deprived plaintiffs of the opportunity to address it in their opposition. Second, *Lewis* arose from a different body of law (access to the courts) than is applicable here. *Luckey,* which arises in the context alleged deficiencies in provision of indigent defense services, does not require plaintiffs seeking prospective relief to show injury. Third, the appeal was of an injunction issued after a three-month bench trial. It was not an attack on the pleadings. The Court in *Lewis* found that the plaintiffs in that case had not set forth sufficient evidence to support a conclusion of systemwide violation and imposition of systemwide relief. (*Lewis, supra,* 518 U.S. at pp. 359-60.) Here, such a determination is premature. Fourth, plaintiffs allege that indigent defendants regularly experience wrongful conviction of crimes, guilty pleas to inappropriate charges, waiver of meritorious defenses, compelled waiver of right to speedy trial, harsher sentences than the facts of the case warrant, and waiver of appeal and post-conviction rights. (Complaint ¶ 98.) Plaintiffs allege that Yepez suffered harm as a result of deficiencies in the County's public defense system. (Complaint ¶¶ 99-106.) This and other examples (Complaint ¶¶ 107-112) allege injury.

Unclean hands

The County contends that the writ petition is demurrable as to Petitioner Yepez, relying on the doctrine of unclean hands and judicial notice of records related to plaintiff Yepez's criminal case. However, as noted above, the request for judicial notice of these records is denied. Even if the request were granted, the court could not conclusively say on such a scant record that allegations as to Yepez are false.

Other Available Remedies

The County contends that the writ petition is demurrable because plaintiffs have other remedies.

Where the primary right of a plaintiff is of a legal and not an equitable nature, and where a remedy for the invasion of that right is provided by law, equitable relief will not be granted if the legal remedy is adequate and capable of affording the plaintiff a complete measure of justice. (*Philpott v. Superior Court* (1934) 1 Cal.2d 512.) To be entitled to equitable relief in such circumstances, the plaintiff must show that he or she cannot obtain adequate or complete relief at law. (*Id.*) Equity will refuse to come to a plaintiff's assistance when he or she has lost his or her legal remedy by failing to take advantage of it where possible. (*Hogan v. Horsfall* (1928) 91 Cal.App.37.)

The County primarily focuses its unclean hands arguments on Yepez. For the reasons discussed above, the court will not sustain any demurrers based on the requests for judicial notice.

Moreover, an alternative remedy is only adequate if "it is capable of directly affording and enforcing the relief sought" in the writ. (*Dufton v. Daniels* (1923) 190 Cal. 577, 582.) Avenues for individual recourse are not an adequate alternative in suits seeking systemic relief for "wholesale deficiencies." (*See Knoff v. City and County of San Francisco* (1969) [rejecting argument that taxpayers should have pursued individual challenges to assessments of their own properties in writ action challenging misconduct in tax assessor's office].) As in *Knoff*, plaintiffs have pled individual examples "as symptomatic of the much broader problem the action is designed to relieve." Plaintiffs in this action do not seek to relieve the Public Defender as counsel in any particular case, but to correct wholesale deficiencies in the indigent defense system. Since a *Marsden* motion would provide relief only to the individual who filed it, that alternative is not capable of directly affording a systemic remedy. Accordingly, any failure by Yepez failure to file a *Marsden* motion does not render the writ petition demurrable.

The County argues that the writ petition is demurrable because injunctive relief, also sought in the Complaint, is an adequate remedy. The fact, however, "that an action in declaratory relief lies ... does not prevent the use of mandate." (*Brock v. Superior Court* (1952) 109 Cal. App. 2d 594, 603; accord *Glendale city Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 343 n.20 [citing *Brock*].) "Where relief is sought against a public body, however, the availability of injunctive relief is not a bar to mandate. (*Cal. Teachers Assn. v. Nielsen* (1978) Cal.App.3d 25, 28-29, citing *County of L. A. v. State Dept. Pub. Health* (1958) 158 Cal.App.2d 425, 446, and *Brock, supra.*) For the first time in its reply, the County cites to authority addressing this point. However, none of the authority cited indicates that dismissal of a petition for writ of mandate is warranted for the simple reason that injunctive relief is also sought.

Taxpayer Standing

The County argues that plaintiffs Phillips and Estrada lack taxpayer standing.

The County argues, like the State, that plaintiffs are not alleging wasteful or illegal expenditure of public funds; rather, they allege that not enough money is devoted to public defense. However, "[i]t is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds." (*Wirin v. Parker* (1957) 48 Cal.2d 890, 894 [taxpayer suit proper in constitutional challenge to practice of police conducting surveillance using concealed microphones]; *Blair v. Pitchess* (1971) 5 Cal.3d 258, 269 ["county officials may be enjoined from spending their time carrying out" an unconstitutional statute, even though that conduct "actually effect[s] a saving of tax funds."]) Thus, I would reject this particular attack on plaintiffs' taxpayer standing.

The County argues that plaintiffs lack taxpayer standing because the relief sought would violate the separation of powers doctrine. It argues that it would violate the separation of powers doctrine because plaintiffs attack the Board's discretionary budgetary decisions. The County contends that *Thompson v. Petaluma Police Department* (2014) 231 Cal.App.4th 101, 106, introduced separation of powers into the taxpayer standing issue by stating, "Courts should not interfere with a local government's legislative judgment on the ground that its funds could be spent more efficiently." However, the court never explicitly addressed or applied the separation of powers doctrine. For application of this concept, the County relies on *San Bernardino County v. Superior Court* (2015) 239 Cal.App.4th 679. However, *San Bernardino County* does not discuss separation of powers doctrine either.

In *San Bernardino County*, taxpayer organizations brought suit challenging a settlement agreement between the County and a private entity after a former county supervisor pled guilty to receiving bribes from the private entity in exchange for his vote approving the 2006 settlement agreement. The taxpayer organizations sought to have the settlement agreement declared void under the state law governing conflicts of interest of government officials. The County demurred on the grounds that the taxpayers lacked standing to bring the suit. The taxpayer organizations argued that they had standing under section 526(a). The trial court overruled the County's demurrer and the County filed a writ petition regarding the denial of its demurrer. The court of appeal for the Fourth Appellate District disagreed with the trial court, rejecting the taxpayer organizations' standing theories. (*Id.* at pp. 684-688.) The court held that "[t]axpayer suits are authorized only if the government body has a duty to act and has refused to do so. If it has discretion and chooses not to act, the courts may not interfere with that decision." (*Id.* at p. 686, internal citations omitted.)

Here, the County clearly has Constitutional duties to provide effective counsel for indigent criminal defendants. It has acted, but allegedly not in a manner that satisfies the Constitutional command. *San Bernardino County* addresses situations where the governmental body has the discretion whether or not to pursue legal action. The court found that there was no provision of law requiring it to pursue any claim. (*Id.* at p. 687.) For that reason the plaintiffs did not have taxpayer standing. (*Id.* at p. 688.) The case is not instructive on the

issue of whether plaintiffs in this case have standing to sue as taxpayers in this case. The demurrer on this ground will be overruled.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MMS **on** 4/11/16.
(Judge's initials) (Date)

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department, Central Division 1130 "O" Street Fresno, California 93724-0002 (559) 457-2000	*FOR COURT USE ONLY*
TITLE OF CASE: Carolyn Phillips vs.State of California	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: 15CECG02201

I certify that I am not a party to this cause and that a true copy of the:

Minute Order

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: Fresno, California 93724-0002

On Date: 04/13/2016 Clerk, by L. Whipple, Deputy

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