

IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY TUCKER, et al., 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, et al., )  
 )  
Defendants-Respondents. )  
\_\_\_\_\_ )

**BRIEF OF RESPONDENTS SARA B. THOMAS AND WILLIAM H. WELLMAN**

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

## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	i
TABLE OF CASES AND OTHER AUTHORITIES.....	ii
I. STATEMENT OF THE CASE.....	1
A. Nature of the Case.....	1
B. Procedural History.....	3
II. ISSUES PRESENTED ON APPEAL.....	4
III. ARGUMENT.....	5
A. Standard of Review.....	5
B. Plaintiffs Lack Standing Against the Public Defense Commission.....	6
1. Causal Connection.....	7
2. Redressability.....	10
C. Separation of Powers.....	14
IV. APPELLANTS' CLAIM FOR ATTORNEY FEES ON APPEAL.....	17
V. CONCLUSION.....	19

TABLE OF AUTHORITIES

PAGE

CASES

*Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 249,  
95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).....18

*ASARCO Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037,  
104 L.Ed.2d 696 (1989).....6

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955,  
167 L.Ed.2d 929 (2007).....5

*Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human  
Resources*, 532 U.S. 598 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001).....17, 18

*Ciszek v. Kootenai County Bd. of Com'rs*, 151 Idaho 123, 254 P.3d 24 (2011).....10

*Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59,  
98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).....7

*Greenfield v. Suzuki Motor Co. Ltd.*, 776 F.Supp. 698 (E.D.N.Y. 1991).....5

*Harper v. Harper*, 122 Idaho 535, 835 P.2d 1346 (Ct.App. 1992).....5

*Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587,  
127 S.Ct. 2553, 168 L.Ed.2d 424 (2007).....6

*Key Tronic Corp. v. United States*, 511 U.S. 809, 114 S.Ct. 1960,  
128 L.Ed.2d 797 (1994).....18

*Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377,  
188 L.Ed.2d 392 (2014).....6, 7

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130,  
119 L.Ed.2d 351 (1992).....6, 7, 10, 11, 12

*Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990).....15

*Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989).....5, 6, 7

*Noh v. Cenarussa*, 137 Idaho 798, 53 P.3d 1217 (2002).....6

<i>O'Donoghue v. United States</i> , 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356 (1933).....	15
<i>Orthman v. Idaho Power Co.</i> , 126 Idaho 960, 895 P.2d 561 (1995).....	5
<i>Papasan v. Allain</i> , 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).....	5
<i>Schneider v. Howe</i> , 142 Idaho 767, 133 P.3d 1232 (2006).....	6, 10
<i>Simon v. Eastern Kentucky Welfare Rights Organization</i> , 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).....	7, 11
<i>State v. Taylor</i> , 58 Idaho 656, 78 P.2d 125 (1938).....	15
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	13
<i>Sweeny v. Otter</i> , 119 Idaho 135, 804 P.2d 308 (1990).....	14
<i>Utah v. Evans</i> , 536 U.S. 452, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002).....	12
<i>United States v. Cronin</i> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....	13
<i>Valley Forge College v. Americans United</i> , 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).....	6, 10
<i>Wackerli v. Martindale</i> , 82 Idaho 400, 353 P.2d 782 (1960).....	5
<i>Young v. City of Ketchum</i> , 137 Idaho 102, 44 P.3d 1157 (2002).....	5, 6

## CONSTITUTIONS

Idaho Constitution, Article II, § 1.....	15
Idaho Constitution, Article III, § 1.....	15
Idaho Constitution, Article III § 15.....	15

## RULES

I.R.C.P. Rule 12(b)(6).....	5, 6
-----------------------------	------

**STATUTES**

42 U.S.C. § 1988.....17

Idaho Code § 12-121.....17, 18

Idaho Code § 19-848, et seq.....1

Idaho Code § 19-849.....1

Idaho Code § 19-850(1).....2, 8, 9, 12

Idaho Code § 19-850(1)(a)(vi) (effective July 1, 2016).....2, 8, 9, 12

Idaho Code § 19-859.....1, 11

Idaho Code § 19-862A (effective July 1, 2016).....2, 12

## I. STATEMENT OF THE CASE

### A. Nature of the Case

This case stems from Appellants' claims that they "and other indigent criminal defendants similarly situated in the State of Idaho, are continuously being deprived of their state and federal constitutional rights to counsel and Due Process of law" by the State of Idaho, Governor C.L. "Butch" Otter, and the Idaho Public Defense Commission ("PDC"). *Memorandum Decision and Order Granting Motion to Dismiss*, p. 1. (R., p. 468.) Respondents Sara B. Thomas ("Thomas") and William H. Wellman ("Wellman") are members of the PDC. Appellants allege injuries including "ineffective assistance of counsel for lack of representation at initial appearances, and attorneys' failure to communicate with them at time, or to file certain motions on their behalf, or to properly investigate their cases." *Id.* at p. 2. Appellants attribute these alleged injuries to "systemic statewide deficiencies" in the public defense system. *Appellants' Brief*, p. 7 (Apr. 25, 2016).

The statewide system of public defense in Idaho is controlled by the Idaho Public Defense Act (Idaho Code §§ 19-848 through 19-866). The Idaho legislature delegated its duty to provide public defense throughout the state to the individual counties. Under Idaho Code § 19-859, the counties are required to administer and fund public defense services. "The natural result is forty-four different systems with different standards and resources, managing thousands of cases with varying quality of services." *Memorandum Decision and Order Granting Motion to Dismiss*, p. 3 (R., p. 470.) The National Legal Aid and Defender Association ("NLADA") issued a report in 2010 identifying specific problems with the Idaho public defense system. Following the NLADA report, the Idaho legislature formed the PDC under Idaho Code § 19-849. The PDC, as initially created, only has the power to promulgate rules establishing 1) training and continuing legal

education for public defense attorneys, and 2) uniform data reporting requirements for public defense attorneys. Idaho Code § 19-850(1)(a). Other than these two powers, the PDC is largely an advisory agency pursuant to Idaho Code § 19-850(1)(b). On March 24, 2016, House Bill 504 was signed into law to go into effect on July 1, 2016. House Bill 504 expands the powers of the PDC to set and enforce performance standards and give the PDC power to review and either accept or deny county indigent defense grant applications. Idaho Code §§ 19-850(1)(vi), (vii), and 19-862A (effective July 1, 2016). Pursuant to Idaho Code §§ 19-862A(2), (11), the PDC can require individual counties to address how noncompliance with indigent defense standards will be cured in the upcoming fiscal year in their respective state indigent defense grant applications.

Whether there are deficiencies in the statewide public defense system is not dispositive of whether a claim may be brought against Respondents Thomas and Wellman. As longtime advocates for an adequate public defense system, Thomas and Wellman understand the challenges that exist for public defense attorneys through the state to effectively assist indigent defendants. However, Respondents Thomas and Wellman also understand that the PDC lacks the power under the current law to effectuate change and remedy Appellants' claimed injuries.

Appellants argue that “[t]he remedies Plaintiffs seek are fully within the Defendants’ power to provide.” *Appellants’ Brief*, p. 9 (Apr. 25, 2016). However, in regard to the PDC, this claim ignores the clear language of Idaho Code § 19-850 which limits the PDC to only have power to promulgate rules relating to 1) training and continuing education for public defenders in Idaho, and 2) uniform data reporting requirements. The PDC’s authority cannot be causally connected to Appellants’ alleged injuries, nor would a Court order regarding the PDC remedy those injuries. Any Court order directing the PDC to act to remedy Appellants’ alleged injuries would violate the Separation of Powers Doctrine and usurp the authority of the Idaho legislature to enact laws.

Appellants point out that the enactment of House Bill 504 should remove any doubt regarding the PDC's "authority to remedy Appellants' grievances." *Appellants' Brief*, p. 47 (Apr. 25, 2016). Further, Appellants state, "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." *Id.* at p. 7. Appellants' alleged injuries, however, occurred under the previous (and still current) Idaho Public Defense Act. Further, since the legislature has enacted new legislation under House Bill 504 that expands the authority of the PDC beginning July 1, 2016, any Court order directing the PDC to act would be premature since the PDC has not even legally had the opportunity to act.

The amicus briefs, and much of the Appellants arguments, focus on whether there is a constructive denial claim prior to an adjudication of guilt. Whether or not a constructive denial claim exists is not dispositive of the case with regard to Respondents Thomas and Wellman. Regardless of whether the claim exists, the Appellants lack standing because the PDC did not cause their claimed injury, the Respondents cannot redress the claimed shortcomings, and directing the exercise of their newfound authority would violate the Separation of Powers doctrine. Whether a constructive denial claim exists does not affect this legal bar to the claims against Ms. Thomas and Mr. Wellman.

## **B. Procedural History**

On June 17, 2015, Plaintiffs filed their Class Action Complaint for Injunctive and Declaratory Relief along with a Motion for Class Certification. (R., pp. 6-54.) On July 8, 2015, Defendants filed a Motion to Dismiss. (R., pp.154-155.) On August 21, 2015, Defendants filed a Motion for Protective Order Staying Discovery Pending Decision on Motion to Dismiss. (R., pp. 176-177.) On October 20, 2015, the District Court entered an Order Governing Discovery,



ordering that certain discovery requests be responded to by Defendants, and other discovery requests be stayed until the decision on Defendants' Motion to Dismiss was entered, upon which, if such Motion to Dismiss were denied, for full discovery to proceed.<sup>1</sup> (R., pp. 304-305.) On October 8, 2015, the law firm Cantrill, Skinner, Lewis, Casey & Sorensen, LLP substituted as counsel of record for Defendants Thomas and Wellman, due to the inherent conflict of interest in having the Attorney General represent two active public defense attorneys and the problems associated with discovery. Following oral arguments on the Motion to Dismiss on December 16, 2015, the District Court issued its Memorandum Decision and Order Granting Motion to Dismiss on January 20, 2016. (R., pp. 468-499.) Plaintiffs filed a Notice of Appeal on January 25, 2016. (R., pp. 502-507.)

## **II. ISSUES PRESENTED ON APPEAL**

- A.** Whether there is a sufficient causal connection between the PDC's actions, or inaction, and the alleged harm suffered by Appellants, in order to establish Appellants' standing against PDC members.
- B.** Whether the alleged harm suffered by Appellants is redressable by the Court in order to establish Appellants' standing against PDC members.
- C.** Whether the relief sought by Appellants against the PDC would violate the Separation of Powers Doctrine.
- D.** Whether Appellants are entitled to attorney fees on appeal.

---

<sup>1</sup> In Appellants' Notice of Appeal, the stayed discovery ordered by the District Court is listed as an issue on appeal. Although this issue is not addressed in Appellants' Brief, Respondents Thomas and Wellman maintain that if discovery goes forward in this matter, documents and information relating to their public defense case files must be protected by attorney-client privilege.

### III. ARGUMENT

#### A. Standard of Review

“A court may grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) only ‘when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle relief.’” *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct.App. 1992) citing *Wackerli v. Martindale*, 82 Idaho 400, 405, 353 P.2d 782, 787 (1960). When an appellate court reviews an order of the district court dismissing a case pursuant to Idaho Rule of Civil Procedure 12(b)(6), the non-moving party is entitled to have all inferences from the record viewed in his favor. *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) citing *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). “After drawing all inferences in the non-moving party’s favor, we then ask whether a claim for relief has been stated.” *Id.* “The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims.” *Id.* citing *Greenfield v. Suzuki Motor Co. Ltd.*, 776 F.Supp. 698, 701 (E.D.N.Y. 1991).

“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-5, 167 L.Ed.2d 929 (2007) citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). “Factual allegations must be enough to raise a right to relief above the speculative level.” *Id.*

“A 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has been stated.” *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002).

Therefore, on an appeal of a 12(b)(6) dismissal, the Court “must initially examine whether Plaintiffs have sufficiently alleged the requisite elements of standing in their complaint to survive a 12(b)(6) motion to dismiss.” *Id.*

**B. Plaintiffs Lack Standing Against the Public Defense Commission**

Because neither action nor inaction by the PDC has caused the injuries claimed, and the PDC presently lacks the ability to redress the alleged deficiencies, the Appellant’s lack standing.

“One of the controlling elements in the definition of a case or controversy under Article III is standing.” *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 596, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007) citing *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) (opinion of Kennedy, J.). Idaho has adopted the Article III federal justiciability requirement. *Noh v. Cenarussa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002). “The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated.” *Miles*, 116 Idaho at 641, 778 P.2d at 763 citing *Valley Forge College v. Americans United*, 454 U.S. 464, 484, 102 S.Ct. 752, 765, 70 L.Ed.2d 700 (1982). The Idaho Supreme Court explained the standing requirements by stating, “In order to satisfy the requirement of standing, the petitioners must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.” *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006). “From Article III’s limitation of the judicial power to resolving ‘Cases’ and ‘Controversies,’ and the separation-of-powers principles underlying that limitation, [the U.S. Supreme Court has] deduced a set of requirements that together make up the ‘irreducible constitutional minimum of standing.’” *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386, 188 L.Ed.2d 392 (2014) quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). “The

plaintiff must have suffered or be imminently threatened with a concrete and particularized ‘injury in fact’ that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable decision.” *Id.*

As Appellants’ Complaint applies to Respondents PDC, Appellants lack standing because the causal connection between Appellants’ alleged injuries and the PDC is too remote and the injury could not be redressed by the Court or the PDC. At the time this lawsuit was filed, and at the time of this brief, the PDC had no power to control or change the public defense system in Idaho. It is only the passage of House Bill 504 that gave the PDC any power to control or change the statewide public defense system. However, this bill does not go into effect until July 1, 2016. The PDC, until this point, is merely an advisory board with no power to enact or enforce change in the public defense system.

#### **1. Causal Connection**

As the District Court correctly concluded, the connection of the claimed injury to the PDC is too remote to be fairly traceable. There has to be “a fairly traceable causal connection between the claimed injury and challenged conduct” in order for a plaintiff to have standing. *Miles* at 116 Idaho 641, 778 P.2d 763 quoting *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978). Article III requires that a court act only to “redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.” *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976).

Under Idaho law, at the time of this lawsuit and the date of this brief, the PDC had no power to cause, or alleviate, the injuries complained of by Appellants. To the same effect, the

PDC has no power to effectuate the types of change sought by Appellants. Under Idaho Code § 19-850(1), the powers and duties of the PDC are as follows:

(a) Promulgate rules in accordance with the provisions of chapter 52, title 67, Idaho Code, establishing the following:

(i) Training and continuing legal education requirements for defending attorneys, which shall promote competency and consistency in case types including, but not limited to, criminal, juvenile, abuse and neglect, post-conviction, civil commitment, capital and civil contempt; and

(ii) Uniform data reporting requirements for the annual reports submitted pursuant to section 19-864, Idaho Code. The data reported shall include caseload, workload and expenditures.

(b) On or before January 20, 2015, and by January 20 of each year thereafter as deemed necessary by the commission, make recommendations to the Idaho legislature for legislation on public defense system issues including, but not limited to:

(i) Core requirements for contracts between counties and private attorneys for the provision of indigent defense services and proposed model contracts for counties to use;

(ii) Qualifications and experience standards for the public defender and defending attorneys;

(iii) Enforcement mechanisms; and

(iv) Funding issues including, but not limited to:

1. Training and continuing legal education for defending attorneys;

2. Data collection and reporting efforts; and

3. Conflict cases.

(c) Hold at least one (1) meeting in each calendar quarter.

Under Idaho Code § 19-850(1)(a), the PDC can only enact rules relating to the training and continuing legal education requirements for public defenders and the uniform data reporting requirements. Other than those two specific grants of authority, the legislature has only given the PDC advisory powers. There is no enforcement mechanism if the rules are not followed.

Any failure of the PDC to perform its duties pursuant Idaho Code § 19-850, as claimed by Appellants, cannot be traced to the broad harm claimed by Appellants. Even taking Appellants' claims as true, any actions or inactions by the PDC did not cause the type of harm claimed.<sup>2</sup> They do not fund public defenders, do not control the criminal processes, have no present authority to limit maximum caseloads, and have no actual authority which has caused the claimed shortcomings.

The causal connection between any actions resulting in the alleged harm, and any ability to redress said harm by this Court, lies with actors outside of the PDC. The independent actions of individual counties, which are not parties to this action, are much more closely connected than the PDC to the alleged harm suffered by Appellants. Each county has made independent choices in its implementation of its respective public defense system. There is no action or inaction by the PDC that can be traced to Appellants' alleged injuries.

Even without considering the PDC's lack of power to cause or prevent the harm claimed by Appellants, the actions of third parties outside of this lawsuit break any causal connection between the PDC's conduct (or lack thereof) and Appellants' alleged harm. Each county in Idaho is delegated the power to oversee and administer its respective public defense system. The alleged harm caused to Appellants can be traced to the intervening actions or inactions of the individual counties and the individual public defenders. As the District Court concluded, "it is not clear (or even properly alleged) that systemic constitutional violations are occurring in every county." *Memorandum Decision and Order Granting Motion to Dismiss*, pp. 22-23. (R., pp.489-490.)

---

<sup>2</sup> Although Respondents recognize that for purposes of this appeal, all facts and inferences are to be drawn in favor of Appellants, Respondents note that they vehemently disagree with the characterization and description of the actions and lack of actions alleged by Appellants in their Complaint. As the Appellants are well aware, Ms. Thomas and Mr. Wellman have both worked vigorously for years with the legislature and others to improve the public defense system in Idaho.

“[T]he legislature and the county commissioners [are] the principal bodies with the power to affect the policy (political) and systemic changes Plaintiffs seek.” *Id.* at p. 23. As such, the actions of the counties, or the legislature, which empowered the counties to maintain public defense systems, are much more closely connected to the alleged harm incurred by Appellants. The connection between the PDC and the Appellants’ harm is far too remote to be fairly traceable.

There is no causal connection that provides the Appellants with standing to sue Sara Thomas or William Wellman.

## **2. Redressability**

Coupled with the lack of standing, neither Ms. Thomas nor Mr. Wellman have the authority to redress the alleged problems.

“In order to satisfy the requirement of standing, the petitioners must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.” *Ciszek v. Kootenai County Bd. of Com’rs*, 151 Idaho 123, 128, 254 P.3d 24, 29 (2011) quoting *Schneider*, 142 Idaho at 772, 133 P.3d at 1237. “[I]t must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Lujan*, 504 U.S. at 561, 112 S.Ct. at 2136 citing *Simon*, 426 U.S. at 38, 43. 96 S.Ct. 1924, 1926. “The requirement of ‘actual injury redressable by the court’ serves several of the implicit policies embodied in Article III.” *Valley Forge Christian College*, 454 US at 472, 102 S.Ct. at 758. “It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” *Id.*

In *Lujan*, the Supreme Court held:

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at

the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing “depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.” *ASARCO Inc. v. Kadish*, 490 U. S. 605, 615 (1989) (opinion of Kennedy, J.); see also *Simon, supra*, at 426 U.S. 41-42; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.

*Lujan*, 504 U.S. at 561-562, 112 S.Ct. at 2137.

In the case before this Court, Appellants are challenging the system of public defense implemented throughout the State of Idaho by the Idaho legislature. That system, under Idaho Code § 19-859, delegates the responsibility of providing and regulating public defense to the individual counties throughout the State. The PDC did not implement this system. The PDC cannot enforce public defense standards. The PDC does not have any power over the counties to regulate the administration of public defense. There is no action the Court can take in regard to the PDC to redress any alleged harm incurred by Appellants. The power over public defense in Idaho lies with the legislature and the individual counties. Like in *Lujan*, Appellants chose to “challenge a more generalized level of Government action,” rather than “attacking the separate decisions” of third parties. *Lujan* 504 U.S. at 568, 112 S.Ct. at 2140. The only redress of Appellants’ alleged injuries requires action by individual parties (the counties) or the funding



agency (Idaho legislature). See *Id.* at 504 U.S. 571, 112 S.Ct. at 2142. The Court cannot control the independent counties in this case, largely because they have not been made parties to this action.

To the extent that Appellants argue that the PDC will have additional enforcement powers over county indigent defense programs, based on the revisions to the Idaho Public Defense Act that go into effect July 1, 2016, such argument is not relevant. At the time of this lawsuit and the alleged harm suffered by Appellants, the PDC had no regulatory, funding, or enforcement power over the public defense system from county to county. Beginning on July 1, 2016, the PDC will have enforcement powers over standards of public defense services throughout the state pursuant to Idaho Code §§ 19-850(1)(a)(vi) and 19-862A. However, at the time of Appellants' alleged injuries, the PDC had no such power. As Appellants state, the changes to the PDC's powers "if actually implemented and enforced, could directly remedy many of the deficiencies identified by Plaintiffs in their Complaint." *Appellants' Brief*, p. 27 (Apr. 29, 2016). Appellants, however, are asking the Court to step in and regulate the PDC before it even legally had an opportunity to redress the alleged deficiencies.

Appellants cite *Utah v. Evans*, 536 U.S. 452, 464, 122 S.Ct. 2191, 2199, 153 L.Ed.2d 453 (2002) in stating "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.'" *Appellants' Brief*, p. 28 (Apr. 29, 2016). Even without considering the speculative nature of Appellants' claimed harm, no relief that the District Court could grant could amount to a significant increase in the likelihood that the Appellants would obtain relief that directly redressed the injury suffered. As the District Court correctly concluded, the proper process for challenging effective assistance of counsel involves bringing a motion in a post-conviction

setting before the Court on a case-by-case basis. *Memorandum Decision and Order Granting Motion to Dismiss*, pp. 24-25. (R., pp. 491-492.) A two part test, explained by the District Court, provides that to succeed on a post-conviction motion alleging ineffective assistance of counsel, a petitioner must show first, “that counsel’s performance was deficient” and second, “that the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The appropriate tool for addressing preconviction relief would be within the court case itself, before the handling judge.

Appellants rely on *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), to show that constructive denial of counsel is redressable by the Court. Respondents Thomas and Wellman do not dispute that injuries can be suffered by indigent defendants due to constructive denial of counsel preconviction. However, it is only the local court that would have any authority to order the public defender to do something in a particular case. Should a defendant raise a claim of constructive denial of counsel in a pending criminal case, the handling court has the ability to protect the right to counsel because it would have the authority to order the public defender actually rendering deficient performance to take particular steps to remedy the problem. The PDC certainly has no such power.

Further, the *Cronin* case differs from the present case in that the *Cronin* case involved a post-conviction appeal for ineffective assistance of counsel. In the case before this Court, Appellants are seeking class status, for themselves and similarly situated individuals, in a case entirely separate from their respective criminal cases. Most, if not all, of the Appellants had not been convicted at the time of the lawsuit. The District Court explained that a post-conviction motion or appeal, such as was used in *Cronin*, is the appropriate procedure to redress Appellants’ alleged injuries. *Memorandum and Decision and Order Granting Motion*, p. 25. (R., p. 492.)

“Plaintiffs do not contend that the post-conviction procedure is faulty or is systematically failing criminal defendants in Idaho.” *Id.*

Appellants’ alleged post-conviction harm could be, or could have been, redressed by the Court in a post-conviction motion alleging ineffective assistance of counsel. It could also be addressed preconviction. However, a favorable decision in the case before this Court against the PDC would not afford the Appellants any relief from any injury suffered. A favorable decision would not overturn any conviction (if any Appellant has received one), nor would it change the outcome of any initial appearance before their respective courts. A broad declaration by the District Court that the public defense system in Idaho is unconstitutional would not afford Appellants any relief from their claimed harm, nor would entering injunctions as requested by Appellants (which will be further addressed regarding separation of powers).

As such, Appellants’ harm, if any, cannot be redressed by the District Court in this case as to the PDC.

### **C. Separation of Powers**

Coupled with the lack of standing, it would not be appropriate for this Court to take over the operation of the PDC when it has never previously had the authority to take the proposed actions. On basic principles of separation of powers, this case is not ripe for adjudication against the PDC.

“The separation of powers doctrine embodies the concept that the three branches of government, legislative, executive and judicial, should remain separate and distinct so that each is able to operate independently.” *Sweeny v. Otter*, 119 Idaho 135, 139, 804 P.2d 308, 312 (1990). “This concept of separation of powers was adopted as a guiding principle by the United States

government, although not expressly mentioned in the United States Constitution.” *Id.* citing *O’Donoghue v. United States*, 289 U.S. 516, 530, 53 S.Ct. 740, 743, 77 L.Ed. 1356 (1933).

Article 2, § 1 of the Idaho Constitution provides for the separation of powers among the three branches of Idaho's government. Article 3, § 1 provides that the power to pass bills is vested in the legislature. Article 3, § 15 provides that, “[n]o law shall be passed except by bill, ...” Read together, these three constitutional provisions stand for the proposition that, of Idaho's three branches of government, only the legislature has the power to make “law.”

The Constitution of the state of Idaho and this Court, through its interpretation in the cases cited herein, have clearly established that the legislative power was vested exclusively in the legislature; that a statute or law should be enacted only by a bill, passed by both houses of the legislature and signed by the governor, or rejected by the governor, passed over the veto by the legislature, or having become law without the governor's signature as provided in the Constitution.

*Mead v. Arnell*, 117 Idaho 660, 664, 791 P.2d 410, 414 (1990) (string citations omitted).

Administrative agencies in Idaho are granted power by the Idaho legislature to enact rules and regulations. *Id.* “While the power to make law lies exclusively within the province of the legislature, (Idaho Constitution, art. 3 §§ 1, 15) ‘the legislature may constitutionally leave to administrative agencies the selection of the means and the time and place of the execution of the legislative purpose, and to that end may prescribe suitable rules and regulations.’” *Id.* citing *State v. Taylor*, 58 Idaho 656, 664, 78 P.2d 125, 128 (1938).

As previously stated, the concept of separation of powers underlies the concept of standing. Not surprisingly, the problems that exist in Appellants’ arguments regarding causal connection and redressability of their alleged injuries also relate to separation of powers in this case. Since the PDC had no enforcement, funding, or regulatory authority over the individual counties, any redress offered by the District Court in regard to the PDC would be usurping the powers of the

legislature. Any injunctive relief that would direct the PDC to act in a way beyond the powers afforded to it by the legislature would be legislating from the bench.

Although Appellants frame their relief sought as simply declaring the public defense system in Idaho unconstitutional, such argument belies the actual relief requested in their Complaint. Appellants request injunctive relief in addition to a determination of constitutionality. Specifically, Appellants request that the District Court “[e]nter an injunction requiring the State to propose, for this Court’s approval and monitoring, a plan to develop and implement a statewide system of public defense that is consistent with the U.S. Constitution and the Constitution and laws of the State of Idaho”, to “[e]nter an injunction that requires the State to propose, for this Court’s approval and monitoring, uniform workload, performance, and training standards for attorneys representing indigent criminal defendants in the State of Idaho in order to ensure accountability and to monitor effectiveness”, and to “[e]nter an injunction barring the use of fixed-fee contracts in the delivery of indigent-defense services in the State of Idaho.” *Class Action Complaint for Injunctive and Declaratory Relief*, p. 53. (R., pp. 6-54.) Such requests for relief go well beyond the judiciary’s powers under the separation of powers doctrine. Not only are Appellants seeking a declaration on the constitutionality of the public defense system in Idaho, they are asking the Court to revise existing law and enact new law.

The PDC, as an administrative agency (with little administrative power), was granted its limited power by the Idaho legislature. Under current Idaho law, the PDC only has the power to promulgate rules regarding training and continuing legal education for public defense attorneys. It has no power to enforce those rules. Its only other power is to make recommendations to the Idaho legislature. Under House Bill 504, which was recently passed, the PDC will have some actual power to enact changes to the public defense system throughout the State of Idaho.

However, this law does not go into effect until July 1, 2016. As such, the PDC has not had a chance to effectuate change. Appellants, however, are asking the Court to legislate from the bench and usurp the powers given to the PDC before the PDC has even had a chance to act.

Respondents Thomas and Wellman concede that the Court has the power to declare a law, or the application of a law, unconstitutional. However, none of the injuries allegedly sustained by Appellants are related to the PDC's actions. Until House Bill 504 goes into effect, the PDC can only promulgate rules relating to training and continuing legal education. Any injunctive relief from the Court regarding the PDC would go beyond the Court's powers. The PDC can only work within the confines of the Idaho Code, specifically the Idaho Public Defense Act. The Idaho legislature is the only branch of government that can delegate administrative powers to the PDC.

#### **IV. APPELLANTS' CLAIM FOR ATTORNEY FEES ON APPEAL**

Appellants' claim for attorney fees on appeal against Respondents Thomas and Wellman should be denied. Appellants' claim for attorney fees is based on the Civil Rights Attorney Fees Act (42 U.S.C. § 1988) and ostensibly Idaho Code § 12-121.

42 U.S.C. § 1988(b) provides that in an action to enforce a covered provision under the code, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs..." Similarly, Idaho Code § 12-121 provides "In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties..." As indicated by the clear language of both 42 U.S.C. § 1988(b) and Idaho Code § 12-121, an award of attorney fees to the prevailing party is discretionary.

"In the United States, parties are ordinarily required to bear their own attorney's fees – the prevailing party is not entitled to collect from the loser." *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 602, 121 S.Ct. 1835, 1839,

149 L.Ed.2d 855 (2001) citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 249, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975). “Under this ‘American Rule,’ we follow ‘a general practice of not awarding fees to a prevailing party absent explicit statutory authority.’” *Buckhannon*, 532 U.S. at 602, 121 S.Ct. at 1839 quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 819, 114 S.Ct. 1960, 1967, 128 L.Ed.2d 797 (1994). 42 U.S.C. § 1988(b) and Idaho Code § 12-121 give courts discretionary authority to award attorney fees to a prevailing party. However, such discretion is limited by the confines of the term “prevailing party.” “[A] ‘prevailing party’ is one who has been awarded some relief by the court...” *Buckhannon*, 532 U.S. at 603, 121 S.Ct. at 1839. By enacting 42 U.S.C. § 1988, “Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims.” *Id.* citing *Hanrahan v. Hampton*, 446 U.S. 754, 758, 100 S.Ct. 1987, 1989, 64 L.Ed.2d 670 (1980) (*per curiam*). “Our ‘respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.’” *Buckhannon*, 532 U.S. at 603-4, 121 S.Ct. at 1839-40 quoting *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S.Ct. 2672, 2675, 96 L.Ed.2d 654 (1987).

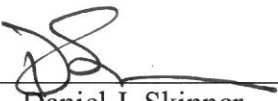
In the case before this Court, Appellants are appealing the dismissal of their case due to lack of standing. Such an appeal, even if successful, deals merely with a preliminary, procedural matter in the case. The appeal does not address the merits of the case. Any decision by the Court would not give Appellants any relief on the merits of the overall matter. As such, an award of attorney fees to Appellants on appeal would be inappropriate under the standards outline above.

## V. CONCLUSION

For the reasons described in the Argument above, Respondents Thomas and Wellman respectfully request that this Court deny Appellant's appeal and affirm the ruling of the District Court.

DATED this 30<sup>th</sup> day of June, 2016.

CANTRILL SKINNER LEWIS CASEY  
& SORENSEN, LLP

By:  \_\_\_\_\_  
Daniel J. Skinner  
Attorneys for Respondents Sara Thomas  
and William Wellman



CERTIFICATE OF SERVICE

I hereby certify that on the 30<sup>th</sup> day of June, 2016, I served two true and correct copies of the above and foregoing instrument, by method indicated below, upon:

Steven L. Olsen	<input type="checkbox"/>	Facsimile
<a href="mailto:steven.olsen@ag.idaho.gov">steven.olsen@ag.idaho.gov</a>	<input type="checkbox"/>	Hand Delivery
Michael S. Gilmore	<input checked="" type="checkbox"/>	U.S. Mail
<a href="mailto:mike.gilmore@ag.idaho.gov">mike.gilmore@ag.idaho.gov</a>	<input type="checkbox"/>	Email:
Shasta Kilminster-Hadley		
<a href="mailto:shasta.k-hadley@ag.idaho.gov">shasta.k-hadley@ag.idaho.gov</a>		
Scott Zanzig		
<a href="mailto:scott.zanzig@ag.idaho.gov">scott.zanzig@ag.idaho.gov</a>		
Civil Litigation Division		
Office of the Attorney General		
954 West Jefferson Street, 2 <sup>nd</sup> Floor		
Boise, ID 83702		
Cally A. Younger	<input type="checkbox"/>	Facsimile
<a href="mailto:cally.younger@gov.idaho.gov">cally.younger@gov.idaho.gov</a>	<input type="checkbox"/>	Hand Delivery
Counsel to the Governor	<input checked="" type="checkbox"/>	U.S. Mail
Office of the Governor	<input type="checkbox"/>	Email:
Idaho State Capitol Building		
700 West Jefferson Street		
Boise, ID 83702		
Jason D. Williamson	<input type="checkbox"/>	Facsimile
<a href="mailto:jwilliamson@aclu.org">jwilliamson@aclu.org</a>	<input type="checkbox"/>	Hand Delivery
American Civil Liberties Union Foundation	<input checked="" type="checkbox"/>	U.S. Mail
125 Broad Street	<input type="checkbox"/>	Email:
New York, New York 10004		
Richard Eppink	<input type="checkbox"/>	Facsimile
<a href="mailto:reppink@acluidaho.org">reppink@acluidaho.org</a>	<input type="checkbox"/>	Hand Delivery
American Civil Liberties Union of Idaho	<input checked="" type="checkbox"/>	U.S. Mail
Foundation	<input type="checkbox"/>	Email:
P.O. Box 1897		
Boise, ID 83701		
Andrew C. Lillie	<input type="checkbox"/>	Facsimile
<a href="mailto:andrew.lillie@hoganlovells.com">andrew.lillie@hoganlovells.com</a>	<input type="checkbox"/>	Hand Delivery
Hogan Lovells US LLP	<input checked="" type="checkbox"/>	U.S. Mail
One Tabor Center, Suite 1500	<input type="checkbox"/>	Email:
1200 Seventeenth Street		
Denver, CO 80202		

Kathryn M. Ali  
[kathryn.ali@hoganlovells.com](mailto:kathryn.ali@hoganlovells.com)  
Hogan Lovells US LLP  
555 Thirteenth Street NW  
Washington, DC 20004

Facsimile  
 Hand Delivery  
 U.S. Mail  
 Email:

Bret H. Ladine  
[bret.ladine@hoganlovells.com](mailto:bret.ladine@hoganlovells.com)  
Hogan Lovells US LLP  
3 Embarcadero Center #1500  
San Francisco, CA 94111

Facsimile  
 Hand Delivery  
 U.S. Mail  
 Email:

Jenny Q. Shen  
[jenny.shen@hoganlovells.com](mailto:jenny.shen@hoganlovells.com)  
Hogan Lovells US LLP  
4085 Campbell Ave., Ste. 100  
Menlo Park, CA 94025

Facsimile  
 Hand Delivery  
 U.S. Mail  
 Email:

Wendy J. Olson  
[wendy.olson@usdoj.gov](mailto:wendy.olson@usdoj.gov)  
U.S. Attorney's Office  
800 Park Blvd., Ste. 600  
Boise, ID 83712-7788

Facsimile  
 Hand Delivery  
 U.S. Mail  
 Email:

Christine A. Monta  
[christine.monta@usdoj.gov](mailto:christine.monta@usdoj.gov)  
U.S. Department of Justice  
Civil Rights Division  
95 Pennsylvania Ave., NW  
Washington, DC 20011-4403

Facsimile  
 Hand Delivery  
 U.S. Mail  
 Email:



---

Daniel J. Skinner