THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

JOSEPH JEROME WILBUR, a Washington resident; JEREMIAH RAY MOON, a Washington resident; and ANGELA MARIE MONTAGUE, a Washington resident, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CITY OF MOUNT VERNON, a Washington municipal corporation; and CITY OF BURLINGTON, a Washington municipal corporation,

Defendants.

NO. 2:11-cv-01100 RSL

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

In response to Plaintiffs' motion for summary judgment, the Cities strive to deflect attention away from the issue that lies at the heart of this case: the Cities' considered failure—indeed, refusal—to meaningfully monitor and oversee their public defense system. The Cities spend a great deal of time quibbling with the caseload counts of the old Public Defender, personally attacking Plaintiffs and other witnesses, and making unsupported assertions about the new Public Defender. But it is the silence of the Cities regarding their own policies and customs that resonates most loudly. The undisputed evidence shows that the Cities have long failed to monitor and oversee their public defense system. In fact, the Cities continue to unabashedly assert that they have no obligation to do so. The Cities also maintain that there was never a problem in the first place and that indigent defendants received zealous representation from Sybrandy and Witt. Given the Cities' extensive pattern of constitutional violations and the strong likelihood that future violations will result from the Cities' continued policies and customs, the injunctive relief Plaintiffs respectfully request is both warranted and necessary.

II. REPLY ARGUMENT

A. The Undisputed Facts Support Plaintiffs' Request for Injunctive Relief

1. It Is Undisputed the Cities Have a Long History of Failing to Monitor the Public Defender

It is undisputed that for years, the Cities were on notice of excessive caseloads in their public defense system but had no system in place to monitor or address the problem. Dkt. No. 242 at 16:3-7; Dkt. No. 245, Ex. 2 at 82:16-19.[1] In 2008, after learning of a class action against Grant County for systemic violations of the right to counsel, the Cities chose to make various changes to their system for the ostensible reason of bringing the system "up to date with its legal requirements." *Id*. at 17:8-21. This included enacting ordinances on public defense in

[1] Plaintiffs do not maintain that the excessive caseloads finding in *City of Mount Vernon v. Weston*, 68 Wn. App. 411, 415, 844 P.2d 438 (Wash. Ct. App. 1992), is somehow "binding" on the Cities. Rather, Plaintiffs cite to the case because it placed the Cities "on notice of the issue of excessive caseloads." Dkt. No. 242 at 16:3.

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accordance with Washington state law, drafting a lengthy public defense contract, and establishing caseload limits for public defense attorneys. *Id*.

These changes set up a structure that, on paper, gave the Cities the tools necessary to ensure their public defense system complied with the constitutional right to counsel. *See* Dkt. No. 242 at 17:15-22. It is undisputed, however, that as quickly as these changes were made, the Cities began taking steps to undo them. *See id*. at 17:21 – 22:7. For example, before entering into a contract with Sybrandy and Witt, the Cities abandoned their decision to cap caseloads at "no more than 450 misdemeanors" and instead adopted a case-credit approach that the Cities admittedly failed to monitor, supervise, or enforce. Dkt. No. 242 at 17:23 – 18:6, 20:5-15. The Cities also indisputably chose to ignore local and state laws that required public defense systems to include "limitations on private practice of contract attorneys," and the Cities did this despite knowing that their Public Defender had a "heavy" private practice. *Id*. at 18:7-12, 20:16-24.

It is also undisputed that the Cities modified their 2009 contract to remove provisions that are basic requirements of public defense services, including client contact requirements, and did so after Sybrandy complained to the Cities that the attorneys are not paid enough to meet with clients in custody or prior to court hearings. Dkt. No. 242 at 18:13 – 19:8; *see also id*. at 21:6-13. Moreover, the Cities increased their public defense caseloads by approximately 61 percent over the years, yet the Cities chose to pay the Public Defender less in 2009 than they did in 2005. *Id*. at 19:9-16.

It is similarly undisputed that the Cities failed to ensure the Public Defender "provide[d] adequate investigative, paralegal, and clerical services . . . necessary for representation of indigent defendants," as required by the Cities' own ordinances and contract. Dkt. No. 242 at 20:25 – 21:5. Indeed, Sybrandy and Witt have testified they never hired an investigator in the twelve years they served as Public Defender for one or both of the Cities. *Id*. at 10:3-9.

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Finally, it is undisputed that even after the filing of this lawsuit, the Cities failed to ensure the Public Defender was in compliance with the Cities' public defense contract, the Cities' ordinances, or the laws of Washington and the United States. Dkt. No. 242 at 21:18-21.

2. It Is Undisputed the Old Public Defender Spent Little Time on Cases and Regularly Failed to Meet with Clients Outside of Court

It is undisputed that monthly closed case reports submitted to the Cities showed the Public Defender was regularly spending only 30 minutes per case. Dkt. 242 at 5:7-12. It is also undisputed that the Cities were well aware Sybrandy and Witt served as the Public Defender on a part-time basis only. Dkt. 242 at 4:6-13. While the Cities dispute the number of cases being handled by Sybrandy and Witt, the Cities' objections lack merit for the reasons set forth below. *See* Section II.C.1. Moreover, the Cities fail to acknowledge that according to his own counts, Sybrandy closed 1,206 cases in 2009 and 1,173 cases in 2011. Dkt. No. 245, Exs. 13, 15.A, 15.C. Similarly, the Cities fail to acknowledge that according to their own discovery responses, the City of Mount Vernon alone filed 1,436 misdemeanor cases in 2009 and 1,366 in 2010. Dkt. No. 245, Ex. 16. These are excessive caseloads for full-time attorneys, let alone attorneys who (like Sybrandy and Witt) spent only 40 to 50 percent of their practices on public defense. Dkt. No. 242 at 4:6-13.

It is undisputed that the Public Defender had a practice of refusing to meet with clients in advance of court hearings. Dkt. 242 at 6:9-16. Indeed, Sybrandy testified that a "majority" of the time, the "initial contact" with a defendant was "at the first pretrial [hearing.]." *Id*. at 6:2-8. Sybrandy found contact before pretrial hearings to be "useless" and told new clients, and the Cities, as much in a standardized memo. *Id*. at 6:6-16, 8:4-7. Witt similarly testified that he usually did not respond to meeting requests made by incarcerated defendants but instead would "just wait until [he] saw them in court" at the next hearings. *Id*. at 8:1-2.

It is undisputed that indigent defendants routinely pleaded guilty at the first pretrial hearing even though this was the only opportunity they had to converse with the Public Defender regarding their cases. Dkt. No. 242 at 10:23 – 11:2.

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3. It Is Undisputed the Cities Were on Notice of Systemic Violations of the Right to Counsel But Failed to Address Those Complaints

The Cities do not deny that from 2008 to 2011, they received numerous complaints about the Public Defender. Dkt. No. 242 at 12:4-17. These complaints alleged myriad violations of the right to counsel. *See id.* Among other things, the Cities were informed that the Public Defender failed to meet with indigent defendants in or out of custody; the Public Defender failed to respond to their telephone calls or kites; the Public Defender failed to appear in court on their cases; the Public Defender failed to discuss the facts of their cases with them; the Public Defender failed to explain jail alternatives and plea consequences or discuss immigration consequences with them; and the Public Defender forced them to accept plea deals. *See id.*

It is undisputed that the complaints came from several sources. Dkt. 242 at 12:1 – 15:13. The director of the Office of Assigned Counsel, who at the time had daily contact with indigent defendants and received more than 100 complaints per year, regularly notified City officials in person and in writing. *Id.* at 12:4 – 13:2. Those officials included the Cities' public defense contract managers, municipal court judges and administrators, and the mayor of Mount Vernon. *Id.* The Cities also received complaints from the Burlington Police Department, the Mount Vernon Police Department, and the administrator of the Burlington Municipal Court. *Id.* at 13:3-22. Finally, the Cities received numerous complaints from indigent defendants directly. *Id.* at 13:23 – 14:22.

It is undisputed that the Cities failed to address the issues raised in these complaints. Dkt. No. 242 at 13:23 – 15:10. Indeed, the contract manager for Mount Vernon admits he took no action in response, adding he "never found any complaint by any criminal defendant to be meritorious." *Id.* at 15:1-10. Furthermore, it is undisputed that despite these complaints, the Cities' contract managers recommended on several occasions that the Cities rehire the same Public Defender, which the Cities did. *Id.* at 16:15 – 17:5.

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4. It Is Undisputed the Current Public Defender Has Been Carrying an Excessive Caseload That Impacts the Amount of Time Spent on Cases

With no evidentiary support, the Cities assert "it is undisputed . . . Mountain Law is in compliance with the Supreme Court caseload standards." Dkt. No. 258 at 23:2-3; *see Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978) ("Conclusory allegations unsupported by factual data will not create a triable issue of fact."). The only evidence before the Court, however, shows that the current Public Defender has been carrying an excessive caseload since being hired in April 2012. Dkt. No. 242 at 22:22 – 23:6. Indeed, the Cities hired Mountain Law fully knowing the firm was going to provide only two attorneys to handle what the Cities themselves estimated to be more than 1,700 cases, an estimate that proved to be far short of reality. *Id*. Within two and a half months of taking over the contract, Mountain Law's two attorneys (one of whom had no criminal defense experience) had opened a combined total of more than 1,200 cases. *Id*. at 23:8-16. By the end of the year, the firm's attorneys had opened a total of 2,070 public defense cases. *Id*. at 23:17-22. As with Sybrandy and Witt, nobody from the Cities followed up with Mountain Law to address the fact that the attorneys were violating their public defense contract (and the Washington State Bar Association ("WSBA") caseload standards). *Id*. at 17:13 – 28:10.[2]

The Cities fail to dispute any of this evidence. Likewise, it is undisputed that as of the last count in mid-January 2013, before discovery closed in this case, the three attorneys at the firm were respectively carrying 362, 241, and 210 open cases, and this excludes the additional 343 cases in bench warrant status. Dkt. No. 242 at 24:17-20. At a modest rate of 150 new cases per month, these three attorneys will exceed their maximum annual caseloads by April

[2] The Cities assert that they "regularly meet with the public defender to discuss the substance of the case reports." Dkt. No. 258 at 19:7-8. These meetings, however, have not been with any of the attorneys actually performing public defense services for the Cities. Instead, the discussions have been with an attorney at Mountain Law's sister firm. *See* Supp. Marshall Decl., Ex. 2 at 238:13 – 242:9. Indeed, the managing attorney at Mountain Law did not know that the public defense contract had a case credit provision or that Mountain Law's reports failed to comply with that provision. *See* Dkt. No. 242 at 27:17 – 28:10.

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2013.[3] And if any of the cases in bench warrant status become active during that period, the attorneys will exceed their limits even sooner.

The Cities also fail to dispute evidence showing that the current Public Defender is spending an average of less than two hours per misdemeanor case. Dkt. No. 242 at 25:15-21. The Cities also do not dispute that of the 2,070 cases handled in 2012, the current Public Defender utilized the services of an investigator only four times and tried only seven cases.[4] *Id.* at 24:23 – 25:6. Finally, it is undisputed that like Sybrandy and Witt, the current Public Defender finds it "pointless" to meet with clients, including incarcerated clients, unless he "ha[s] police reports and/or an offer to go over with them." *Id.* at 25:7-14. Indeed, the Public Defender to this day continues to provide indigent defendants with a standardized form that says: "Often . . . we cannot schedule a meeting prior to your first pretrial hearing (there may not be enough time or we may not yet have information about your case). It should not concern you if we are unable to meet prior to your first pretrial hearing." Dkt. No. 263 at 6:17-29.

The Cities claim that two of Plaintiffs' experts, Professor Jon Strait and David Boerner, have "looked at Mountain Law" but "offer no criticism." Dkt. No. 258 at 31:10-12. The Cities also claim (without citation) that these experts "endorse Mountain Law." Id. at 33:21. These assertions are simply untrue. In fact, the Cities were fully aware that Plaintiffs intended to provide them with a supplemental report from Professor Strait, which Plaintiffs did today. The timing of the supplemental report was due to late discovery productions by the Cities and last-minute changes in the Cities' public defense system, both of which Professor Strait needed to review. Contrary to the Cities' unsupported assertion, Professor Strait's report is highly critical

[3] As of January 16, 2013, the three attorneys had a combined open caseload of 813 and a maximum limit of 1,200, leaving a difference of 387 cases. Assuming 150 new cases per month (which is a rate lower than 2012's rate of 172.5 cases per month), these attorneys will reach their combined limit in less than three months (387 / 150 = 2.58). The addition of a fourth attorney does not change this—it merely extends the point at which the Public Defender will hit its combined limit of 1,600 to July. *See* Dkt. No. 263 at 10:11-32 & n.6.

[4] The fact that seven cases were tried in 2012 comes directly from the testimony of the Public Defender's managing attorney. *See* Dkt. No. 245, Ex. 79 at 100:10-15. If the Cities are correct in asserting that the trial statistics for Sybrandy and Witt are understated, then the current Public Defender is trying even fewer cases than Sybrandy and Witt were trying on a part-time basis.

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of the current public defense system. As for Mr. Boerner, his review of materials and corresponding opinions are limited to the date of his prior declaration, which preceded the change in public defense attorneys.

5. It Is Undisputed the Cities Adamantly Maintain They Have No Obligation to Monitor or Oversee Their Public Defense System

It is undisputed that from the outset of this lawsuit, the Cities have consistently maintained they have no obligation to monitor, supervise, or evaluate their public defense system. Dkt. No. 242 at 26:11 – 27:2. Indeed, in their response brief the Cities cite to the long, scripted answer that a contract manager gave in a recent deposition as the "best summary" of the Cities' position. Dkt. No. 258 at 21:8 – 22:25. In that answer the Mount Vernon official asserts that "[t]he City does not agree that it has to ensure, secure, or guarantee anything" in regard to state and federal constitutions. *Id*. at 21:12-13. He refers to Mount Vernon as nothing more "a contracting agency" with "a duty to ensure that its money is being spent for contracted service and that the taxpayers" are getting a "good price." *Id*. at 22:1-3; *see also* Dkt. No. 262 ¶¶ 4-7 (admission by Burlington contract manager that Cities have chosen less monitoring and oversight in current public defense contract). Nevertheless, while they disavow any obligation to ensure that the constitutional rights of indigent defendants are being satisfied, the Cities simultaneously attempt to argue that various systems achieve that outcome. *See* Dkt. No. 258 at 21:8 – 22:25. For several reasons, the Cities' arguments are unavailing.

First, the Cities assert that the current public defense contract has terms that are "self-evident." Dkt. No. 258 at 22:3-4. Even if that were true, the terms are certainly not self-enforcing. More importantly, though, the Cities fail to dispute that they recently eliminated numerous provisions that would have allowed for meaningful monitoring of the Public Defender. *See* Dkt. No. 242 at 28:11 – 29:13. This includes the elimination of provisions that required the Public Defender to establish reasonable office hours, to be available to talk and meet in person with incarcerated defendants, to maintain contemporaneous records of all legal

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services provided, to maintain records of time spent on each case, and to provide the Cities with access to information that will ensure compliance with contractual terms. *See id*.

Second, the Cities assert that they have enacted new public defense ordinances. Dkt. No. 258 at 22:3-4. In doing so, however, the Cities repealed ordinances that required the Cities to oversee, monitor, and supervise the Public Defender. *See* Dkt. No. 242 at 29:13-22. It is undisputed that under the new ordinances, the Public Defender is "encouraged, but not required" to monitor itself. *Id*. The Cities have completely renounced any responsibility to monitor or oversee their own public defense system. *See id*.

Third, the Cities assert that the Washington State Bar Association is in a "superior" position "to understand whether the public defender's performing adequately . . . ." Dkt. No. 258 at 21:16 – 22:1. According to the Cities' own evidence, however, the longstanding "general policy" of the WSBA "is not to investigate claims of ineffective assistance of counsel unless there is a judicial finding of impropriety." Dkt. No. 259 at 156; *see also* Supp. Marshall Decl., Ex. 1. Moreover, the WSBA is "not a substitute for protecting [the] legal rights" of indigent defendants and "do[es] not and cannot represent [indigent defendants] in legal proceedings." Dkt. No. 259 at 156; *see also* Supp. Marshall Decl., Ex. 1. An indigent defendant being deprived of the right to counsel can find no solace in the WSBA.

Fourth, the Cities maintain that they rely on others in the criminal defense system to monitor the Public Defender, including judges, prosecutors, and police officers. Dkt. No. 258 at 22:20-22. But the Cities provide no evidence to show that they act on the information they receive. In fact, it is undisputed that when the police departments of both Mount Vernon and Burlington complained about Sybrandy and Witt, nothing was done in response. *See* Dkt. No. 242 at 13:3-22. Likewise, it is undisputed that the prosecutor for Mount Vernon received emails in which the Public Defender referred to clients in derogatory terms like "dumbass" and "bitch" or asserted that he would "twist his [client's] arm into pleading," yet there is no evidence that the prosecutor ever raised a concern about those emails with city officials. Dkt.

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No. 242 at 11:2-9 & 14 n.11.[5] Likewise, there is no evidence that the judges have ever done anything to address the issues observed by numerous witnesses in this case. *See, e.g.*, *id*. at 8:17 – 9:6 (mother of indigent defendant), 9:14-19 (private criminal defense attorney), 10:10-22 (indigent defendant), 12:18-24 (director of Office of Assigned Counsel), 13:3-13 (Burlington police department).

Fifth, the Cities claim they have established a new complaint program. *See* Dkt. No. 258 at 22:17-21. But there are numerous problems with that program. Among other things, the Cities will only accept two types of complaints and will only do so after an indigent defendant has satisfied strict requirements for completing and submitting the form. Dkt. No. 242 at 30:1-16. Furthermore, if the defendant is the subject of an active warrant or is no longer a client of the Public Defender, the complaint will be rejected. *Id*. If a defendant gets past these hurdles, the Cities will only "attempt" to set up a meeting with the Public Defender or ask the prosecutor to vacate a guilty plea. *Id*. at 30:17-25. If either attempt fails, the Cities will take no further action other than to forward the complaint to the WSBA, which as discussed above is of no assistance. *See id*.

Finally, the Cities suggest that the State Supreme Court's recent rule on caseload standards is sufficient to protect the right to counsel. *See* Dkt. No. 258 at 22:8-10. Contrary to the Cities' assertions, however, Plaintiffs have never asserted that this case is just about caseload numbers. Likewise, Plaintiffs have never asserted that a constitutional violation arises when a public defender handles more than 400 cases in a year. Instead, Plaintiffs have shown that on the facts of this case, the Cities' policies and customs have resulted in systemic violations of the right to counsel through, among other things, excessive caseloads, inadequate funding and, most importantly, a failure to meaningfully monitor and oversee their public defense system. *See* Dkt. No. 242 at 3:3 – 32:16, 37:9 – 43:23.

[5] It is not the role of the prosecutor, who acts as the adversary to indigent defendants, to monitor and supervise the Cities' public defense system.

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Notably, while touting the new rule, the Cities maintain that the limits on caseloads are merely "permissive" and not mandatory. Dkt. No. 258 at 7 n.8. Moreover, the current Public Defender recently claimed that the reporting requirements of the new Supreme Court rule are unclear and fail to identify when a case is to be counted. *See* Dkt. No. 263 at 9:35 – 10:10. All of this makes the Cities' assertions of future compliance questionable at best. As noted above, the Public Defender attorneys are already on track to exceed the limits by the middle of this year. *See* Section II.A.4, *supra*.

Finally, the Cities are using the new rule not only as a shield but also as a sword, claiming they have absolved the Public Defender of the obligation of reporting the number of hours spent on a case because this is not explicitly required by the rule. *See* Dkt. No. 262 ¶ 3. Such reporting is required by the operative WSBA standards on indigent defense, however, and there is no basis for the Cities' position that the State Supreme Court's silence acts to overturn all other standards. *See* Dkt. No. 245, Ex. 7 (Standard Eight).

In conclusion, it is undisputed that the Cities have abdicated any responsibility to meaningfully monitor and supervise their public defense system.

B. Plaintiffs Are Entitled to Summary Judgment in Their Favor

As the Court recognized over a year ago, this case turns on the Cities' conduct in regard to their public defense system: "Plaintiffs . . . are seeking to hold the municipalities liable for the ineffective public defense system they created through their affirmative decisions, acts, and policies, regardless of any individualized error in which the public defenders may or may not have engaged in particular cases." Dkt. No. 142 at 10:13-16. The Cities nevertheless continue to argue that violations of the right to counsel can only be attributed to the Public Defender and that the Cities are therefore absolved of liability under 42 U.S.C. § 1983. Dkt. No. 258 at 29:11 – 30:24, 31:15-17. This is incorrect. The Cities cannot avoid liability simply by delegating a constitutionally required function to professionals under contract. *West v. Atkins*, 487 U.S. 42, 48 (1988). The Cities' unwavering position on this point only demonstrates the need for the

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Court to make it clear that the Cities have a duty to ensure indigent defendants receive actual assistance of counsel in accordance with state and federal law. *See Gideon v. Wainwright*, 372 U.S. 335, 343 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972); *In re Michels*, 150 Wn.2d 159, 174, 75 P.3d 950 (Wash. 2003).

1. The Cities' Own Policies, Customs, and Deliberate Indifference Have Deprived Class Members of the Right to Counsel

The Cities' "funding, contracting, and monitoring" decisions on public defense are decisions that "serve as 'policymaking'" for purposes of section 1983 liability. Dkt. No. 142 at 10:1-6. The record before the Court overwhelmingly demonstrates that for years leading up to this lawsuit, the Cities repeatedly chose to underfund and understaff their public defense system. *See* Dkt. No. 242 at 16:8 – 19:16. In addition, the Cities chose to enter into public defense contracts that failed to ensure the right to counsel was being met. *See id*. at 19:17 – 22:7. The Cities also chose to limit oversight of their public defense system to passively accepting closed case reports. *See id*. The Cities did nothing to meaningfully monitor or ensure that their part-time public defense attorneys were in compliance with contractual provisions, city ordinances, and state and federal laws. *Id*. As a result, the Public Defender failed to devote sufficient time to the cases of indigent defendants, and this led to a systemic deprivation of the right to counsel. *See id*. at 3:3 – 11:24.

The Cities knew or should have known of the unconstitutional nature of their public defense system, yet the Cities continued to allow the Public Defender to carry excessive caseloads, including for a period of eighteen months following this lawsuit. *See* Dkt. No. 12:1 – 16:7, 17:6 – 19:17, 22:8 – 24:20. Moreover, the Cities repeatedly ignored complaints that detailed a public defense system lacking actual representation at every stage. *See id*. at 12:1 – 15:13. The Cities' actions constituted well settled and widespread customs that were a moving force behind the systemic constitutional violations at issue in this case. *See id*. at 42:12 – 43:23; *see also Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989); *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1233 (9th Cir. 2011).

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In addition to having unlawful policies and customs, the Cities have demonstrated deliberate indifference to the rights of indigent defendants. Managers for both Cities have testified that the Cities had a policy of inaction: wait to see whether someone complains. *See* Dkt. No. 242 at 41:10-13. Yet when complaints were made, the Cities failed to address the substance of the problems. *See id*. at 12:1 – 13:13. "[S]uch inaction amount[ed] to a failure to protect constitutional rights." *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992); *see also Hunter*, 652 F.3d at 1235 ("a recurring failure to investigate . . . constitutional violations" is evidence of "the existence of an unconstitutional practice or custom"). Moreover, after being sued, the Cities affirmatively chose to do away with standards and procedures necessary to ensuring the right to counsel is satisfied. *See* Dkt. No. 242 at 27:11 – 31:7. The Ninth Circuit has held that such post-lawsuit conduct is "even more persuasive evidence of deliberate indifference" to constitutional rights. *Henry v. Cnty. of Shasta*, 132 F.3d 512, 519 (9th Cir. 1997). Given the undisputed facts before the Court, the Cities are liable under 42 U.S.C. § 1983.

2. The Cities Have Not Shown the Case Is Moot; to the Contrary, There Is a Strong Likelihood of Future Violations of the Right to Counsel

The burden of establishing mootness "is a heavy one" and falls on the party asserting the defense. *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). For the reasons set forth in Plaintiffs' opposition to the Cities' motion for summary judgment, which are briefly summarized here, the Cities fail to meet their burden. *See generally* Dkt. No. 263.

The Cities argue that this case is moot because Mountain Law has replaced Sybrandy and Witt. *See* Dkt. No. 258 at 39:14-19. But as explained in detail in their opening brief and again above, Plaintiffs are challenging the policies and customs of the Cities, not the individualized actions of the public defense attorneys. The undisputed evidence shows that the Cities have engaged in a pattern of underfunding and understaffing their public defense system. *See* Dkt. No. 242 at 16:8 – 19:17, 22:8 – 24:20. The undisputed evidence also shows that the Cities have engaged in a pattern of failing to monitor, supervise, and oversee their system. *See*

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id. at 19:17 – 22:7. While the Cities have made a few last-minute efforts to provide additional funding and attorneys in response to this litigation, they have abdicated any responsibility to ensure that indigent defendants are receiving actual assistance of counsel, and this has long been the root cause of the systemic violations present in the Cities' system. *See id*. at 26:11 – 31:7. Because the Cities' policies and customs persist, injunctive relief is warranted.

Furthermore, "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013). Courts are reluctant to moot a case due to voluntary cessation because the "defendant [would be] free to return to his old ways. This together with a public interest in having the legality of the practice settled militates against a mootness conclusion." *United States v. W.T. Grant, Co.*, 345 U.S. 629, 632 (1953). Accordingly, the Cities face a stringent burden of showing: (1) that any changes are not the result of litigation; (2) that there is no reasonable expectation the alleged violations will recur; and (3) that interim events have completely eradicated the harmful activity. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); *Pub. Utils. Comm'n v. Fed. Energy Regulatory Comm'n*, 100 F.3d 1451, 1458 (9th Cir. 1996); *W.T. Grant*, 345 U.S. at 633.

The few changes made by the Cities were indisputably the result of this lawsuit, not the adoption of a new rule by the State Supreme Court. Dkt. No. 263 at 17:1 – 18:37. Where a defendant has voluntarily ceased illegal activity in response to litigation, there exists a presumption of future injury necessitating injunctive relief. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998). Likewise, "[w]hen defendant public officials vigorously assert the legality of challenged conduct, it is legitimate for the plaintiff and court to project repetition of that conduct." 13C Charles A. Wright et al., *Federal Practice & Procedure: Jurisdiction and Related Matters* § 3533.7 & n.26 (3d ed. 2012). To this day, the Cities maintain both that there has never been a problem with their system and that they have no duty to monitor, supervise, or oversee that system. *See* Dkt. 242 at 26:11 – 31:7. This, coupled with the fact

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that the Cities have actively taken steps to eliminate standards and provisions that could have allowed the Cities to meaningfully monitor their public defense system, demonstrates that a live controversy exists before this Court.

3. The Injunctive Relief Plaintiffs Seek Is Appropriate

Injunctive relief is "appropriate in cases involving challenges to governmental policies that result in a pattern of constitutional violations." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (emphasis added). "[A] district court has 'broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may be fairly anticipated from defendant's conduct in the past." *Id*. at 564.

Plaintiffs have demonstrated both that the Cities have a longstanding pattern of operating a public defense system that violates the constitutional rights of indigent defendants and that it is highly likely these violations will continue in light of the Cities' ongoing conduct. *See generally* Dkt. No. 242. It is indisputable that the right to counsel outweighs any financial burden necessary to ensure that the right is satisfied. *See Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 392 (1992). Even so, the Cities have budgets ranging from $26 to $47 million, and there is no assertion that the relief Plaintiffs seek (at less than $50,000 per year) will place a financial burden on the Cities. *See* Dkt. No. 242 at 46:1-12. It is also indisputable the public interest demands every indigent defendant is afforded the procedural and substantive safeguards designed to assure a fair trial. *See Gideon*, 372 U.S. at 344.

The Cities maintain that Plaintiffs are asking the Court to "tak[e] over a public defense system," but this assertion is demonstrably false. Dkt. No. 258 at 38:23-25. The relief Plaintiffs seek is narrowly tailored to address the root cause of the constitutional violations: the Cities' failure to meaningfully monitor and oversee their public defense system. Plaintiffs respectfully propose that the Cities hire one part-time public defense supervisor for a period of two to three years to monitor the defense system and ensure compliance with applicable laws,

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particularly the constitutional right to counsel. *See* Dkt. No. 242 at 47:5 – 48:11. This relief is consistent with current WSBA standards. Dkt. No. 245, Ex. 7 (Standard 10).

C. The Cities' Motion to Strike Is Unfounded and Should Be Denied

In support of their motion for summary judgment, Plaintiffs have submitted more than 1,500 pages of documentary evidence and testimony. Out of this, the Cities move to strike the following items: (1) the Declaration of Jennifer J. Boschen in Support of Plaintiffs' Motion for Summary Judgment (Dkt. No. 257-1); (2) Exhibits 32 and 90 to the Declaration of Toby J. Marshall in Support of Plaintiffs' Motion for Summary Judgment (Dkt. No. 245); and (3) the Second Supplemental Declaration of Christine Jackson (Dkt. No. 243). As explained below, the Cities' motion is unfounded and should be denied.

1. The Declaration of Jennifer J. Boschen Is an Admissible Summary Under Federal Rule of Evidence 1006

Under Federal Rule of Evidence 1006, Plaintiffs have submitted the declaration of Jennifer J. Boschen (Dkt. No. 257-1) for the purpose of summarizing the contents of voluminous recordings— namely, the closed case reports of Sybrandy and Witt. Plaintiffs received these reports from the Cities, and there is no dispute as to the authenticity or admissibility of the reports. *See* Dkt. No. 245, Exs. 14 & 15. The Cities, however, challenge Plaintiffs' summary as inaccurate. For the following reasons, the Cities' challenge is without merit.

First, the Cities take issue with the fact that the counts for 2009 and 2010 are based on "unique case numbers." Dkt. No. 258 at 3:19-20. The Cities maintain it is "now established" that "multiple citations from the same incident can be counted as one case." *Id*. at 3:22 – 4:2. This definition of a case, however, was not adopted by the WSBA until September 2011. *Compare* Dkt. No. 245, Ex. 6 (Standard Three), *with* Dkt. No. 245, Ex. 7 (Standard Three). As made clear in their briefing, Plaintiffs utilized the WSBA standard in place in 2009 and 2010 to count the caseloads for those years, just as the Cities should have done at the time. *See* Dkt.

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No. 242 at 3:14 – 4:2 & n.6. Moreover, Plaintiffs did apply the new standard to Witt's reports for 2011 and counted 1,098 cases for him that year. *See* Dkt. No. 242 at 4:25 – 5:2 & n.7.

Second, the Cities' efforts to discredit Ms. Boschen's summary are demonstrably false. The Cities assert, for example, that Plaintiff Moon "had three citations from a single incident" and that these citations should have been treated as one case, not three. Dkt. No. 258 at 4:5-7. But a review of the citations in question shows that they are actually from three separate incidents. Supp. Marshall Decl., Ex. 3. The first citation is dated August 29, 2008 and involves a charge of assault. *Id*. The second citation is dated November 24, 2008 and involves a charge of possessing drug paraphernalia. *Id*. And the third citation is dated January 24, 2009 and involves a charge of possession of a dangerous weapon. *Id*. These citations are properly counted as three separate cases, just as Plaintiffs have done. *See* Dkt. No. 245, Ex. 6 (Standard Three).

Third, the Cities assert "there is no evidence that any work was actually done" in the year in which a case were reported as closed. Of course, the closed case reports themselves indicate that work was done in the year each report was submitted. Nevertheless, every case was only counted once; thus, even if a few cases needed to be moved from one year to another, the evidence still shows that Sybrandy and Witt each handled more than 3,000 cases on a part-time basis between 2009 and 2011. *See* Dkt. No. 245, Exs. 13-15; Dkt. No. 257-1 ¶¶ 3-6.

Fourth, the Cities argue that Ms. Boschen should have weighted the cases, but the applicable WSBA standards did not allow weighting for 2009 and 2010, and the Cities did not meet the requirements for weighting in 2011 because they did not weight any cases upward. *See* Dkt. 245, Exs. 4 at 195, 6 (Standard Three), 7 (Standard Three). Moreover, the Cities fail to cite any examples in which multiple cases were counted as a result of the defendant failing to appear.

Fifth, the Cities provide no concrete evidence to contradict Plaintiffs' caseload counts. Instead, the Cities cite only to a recent "estimate" by Sybrandy that he handled "somewhere

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between 900 and 1,000" charges per year. Dkt. No. 259, Ex. 2 at 53:5-19. But Sybrandy himself counted 1,206 "cases" closed in 2009 and 1,173 "cases" closed in 2011. Dkt. No. 245, Exs. 13, 15.A, 15.C (emphasis added). These are the very figures that Plaintiffs submitted in their summary judgment motion. *See* Dkt. No. 245 at 4:17 – 5:2 & nn.6-7.

Sixth, Plaintiffs' caseload counts are corroborated by other evidence that the Cities do not dispute. For example, in response to Plaintiffs' discovery requests, the Cities asserted that "[t]he total number of misdemeanor cases filed for the City of Mount Vernon" alone was 1,261 in 2008, 1,436 in 2009, and 1,366 in 2010. Dkt. No. 245, Ex. 16 (Interrogatory No. 16) (emphasis added). Likewise, the Office of Assigned Counsel produced statistics showing that the Public Defender was assigned to represent more than 1,900 indigent defendants in 2009. Dkt. No. 245, Exs. 2 at 91:18 – 93:5 & 17. Furthermore, it is undisputed that Sybrandy and Witt had more than 1,100 open cases when Mountain Law took over in April 2012. Dkt. No. 245, Ex. 81 at 2851; Ex. 79 at 179:6 – 180:4. It is also undisputed that by the end of 2012, Mountain Law had opened a total of 2,070 cases. Dkt. No. 245, Exs. 81 & 83.

The Cities next challenge the declaration of Ms. Boschen on the ground that she is not a "properly disclosed" witness. Ms. Boschen, however, is neither an expert nor a typical lay witness with independent knowledge of discoverable facts. Rather, her declaration is limited solely to providing a foundation for the summarization of materials produced by the Cities. As held by the First Circuit in the case on which the Cities rely, it is permissible to disclose such a witness on the "same day" that her declaration is provided in support of summary judgment. *Colon-Fontanez v. Municipality of San Juan*, 660 F.3d 17, 30-31 (1st Cir. 2011) ("The same day on which the Municipality submitted its exhibits in support of its summary judgment motion, September 1, 2009, it also submitted the name and position of the paralegal who prepared the summary charts. Thus, Colon had ample notice of the paralegal's identity and position, her role in relation to the chart preparation, and the likelihood that she could serve as a witness at trial.").

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Even if Plaintiffs were required to identify Ms. Boschen as a witness in their pretrial disclosures, the Court has discretion to allow her testimony. The factors to be considered in making this decision are: (1) the prejudice or surprise in fact of the party against whom the excluded witness is to testify; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case; and (4) the bad faith or willfulness, if any, in failing to comply with the court's order. *Price v. Seydel*, 961 F.2d 1470, 1474 (9th Cir. 1992). Here, the Cities have long known about the information depicted in the closed case reports, which the Cities themselves produced in evidence. The Cities cannot claim to be either prejudiced or surprised by the fact that Plaintiffs are summarizing that evidence. Even if there were prejudice or surprise, the Cities can cure this by cross-examining Ms. Boschen at trial or presenting evidence to rebut the summary. Because this evidence will be addressed at any trial regardless of whether it is in summary form, allowing Ms. Boschen to briefly testify will not disrupt the orderly and efficient trial of the case. Finally, there is nothing to show that Plaintiffs acted in bad faith by not listing their paralegal as a witness in pretrial disclosures.

The declaration of Ms. Boschen is admissible under Federal Rule of Evidence 1006. Even if the Court were to strike it, however, the evidence of caseload counts found in the closed case reports—which Plaintiffs have provided in full to the Court—remains admissible and demonstrates that Sybrandy and Witt were each handling thousands of cases per year on a part-time basis from 2009 to 2011. *See* Dkt. No. 245, Exs. 13-15.

2. The Kites and Jail Logs Are Admissible

The Cities challenge the submission of jail kites (Ex. 32 to Dkt. No. 245) on two grounds: lack of foundation and hearsay. As noted in Mr. Marshall's declaration, the kites were obtained from the Skagit County Jail through a public records request. *See* Dkt. No. 245 ¶ 34. An employee of the jail has provided testimony on how the kites are maintained. *See*

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Dkt. No. 101 ¶¶ 1-14. There is no credible dispute that the kites are authentic. *See* Fed. R. Evid. 901.

Plaintiffs' cited the kites in support of the assertion "that the Cities' Public Defender knew or should have known incarcerated defendants needed to meet with their appointed attorneys." Dkt. No. 242 at 7:13-15. Thus, the kites were not offered to prove the truth of any of the matters asserted in those documents but, instead, were offered to show the Public Defender was on notice of the need of incarcerated defendants to meet with counsel. Accordingly, the kites are not hearsay. *See* Fed. R. Evid. 801(c).

The Cities also challenge a log of jail visits (Ex. 90 to Dkt. No. 245) on same grounds. Once again, the log was obtained from the Skagit County Jail through a public records request. *See* Dkt. No. 245 ¶ 94. The exhibit is accompanied by a letter from the Skagit County Prosecuting Attorney's office identifying it as "the Skagit County Jail Log" from May 9, 2012 to September 24, 2012. *See* Dkt. No. 245, Ex. 90. The document is authentic. *See* Fed. R. Evid. 901.

The Cities maintain the accuracy of the log is "conclusively refuted by undisputed testimony and documentation," but the Cities fail to cite any evidence in support of this assertion, which only goes to the weight of the evidence. Dkt. No. 258 at 28:18. Moreover, the current Public Defender, who was under contract with the Cities during the period of time covered by the log, has testified that he is required to sign into the log book whenever he visits indigent defendants at jail:

> Q. Does the [Skagit County Jail] have a requirement that you sign in before visiting clients?
>
> A. Yes.
>
> Q. Do you typically follow that requirement?
>
> A. Yes.
>
> Q. Where do you sign in at?

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> A. There is a log book at the counter after you go through the double doors when you come in. You let the deputy know who it is you want to see and sign in.

Dkt. No. 245, Ex. 79 at 206:10-18 (emphasis added).

As for the hearsay challenge, the log is admissible because it meets two separate exceptions to the rule: first, it is a record of regularly conducted activity; and second, it is a public record. *See* Fed. R. Evid. 803(6), (7).

3. The Opinions of Christine Jackson Are Admissible Expert Testimony Under Federal Rule of Evidence 702

For the reasons set forth in Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, the opinions of expert Christine Jackson (Dkt. No. 243) are methodologically sound and admissible under Federal Rule of Evidence 702. *See* Dkt. No. 263 at 27:37 – 35:43. Accordingly, the Court should deny the Cities' motion to strike Ms. Jackson's declaration.

III. CONCLUSION

The record before the Court overwhelmingly demonstrates that for years, the Cities have failed to meaningfully monitor and oversee their public defense system. *See* Dkt. No. 242, Sections II.B-C. The record also overwhelmingly demonstrates that the Cities' policies and customs in regard to indigent defense have resulted in systemic violations of the right to counsel. *See id*., Section II.A. While the Cities claim to have taken steps to rectify the "various shortcomings" highlighted by this litigation, the evidence is to the contrary. Indeed, the undisputed record shows that the Cities have actively chosen to eliminate provisions and standards that would allow for the meaningful monitoring and oversight of the current Public Defender. *See id*., Section II.E.2. Moreover, the Cities continue to assert that the public defense system in place before the lawsuit was "more than adequate," and the Cities remain strident in their position that they are under no obligation "to ensure, secure, or guarantee anything." *Id*., Sections II.E.1, II.F.

The Cities' longstanding policies and customs on public defense have resulted in a pattern of constitutional violations of the right to counsel and have caused irreparable injury to

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indigent defendants charged with crimes in Mount Vernon and Burlington. Remedies at law are insufficient to cure those violations, and the balance of hardships between indigent defendants and the Cities, as well as the public's interest in a fair criminal justice system, weigh in favor of equitable relief. The Cities are unable to meet their heavy, stringent burden of showing: (1) that there is no reasonable expectation the alleged violations will recur; and (2) that interim relief or events have completely eradicated the Cities' illegal activities. Thus, the modest injunctive relief that Plaintiffs respectfully request from this Court is warranted.

RESPECTFULLY SUBMITTED AND DATED this 29th day of March, 2013.

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CERTIFICATE OF SERVICE

I, Toby J. Marshall, hereby certify that on March 29, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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