HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

DEFENDANTS' REPLY IN SUPPORT OF SUMMARY JUDGMENTS

NOTED: OCTOBER 21, 2011

I. PLAINTIFFS LACK STANDING TO PURSUE THIS LAWSUIT

These plaintiffs lack standing. In its Order, finding that Mr. Osborn's putative claims would be futile, the Court correctly ruled:

> In order for Mr. Osborne to be added as a named plaintiff, he must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. In other words, he must satisfy the "irreducible constitutional minimum of standing." Now that the City of Mount Vernon has dismissed the charges against him, Mr. Osborne is no longer represented by a public defender or otherwise threatened by the alleged systemic deprivation of counsel. Thus, any prospective relief obtained in this litigation will not inure to Mr. Osborne's benefit.

Dkt. 44 (Order at 2-3) (internal citations omitted).

The same is true of Wilbur, Montague, and Moon. These individuals had no trouble obtaining a different public defender of their choice—who they believe to be effective. *See*

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Johnson Decl. ¶ 5 ("Glen Hoff… got the case dismissed"). Consequently, they, like Osborn, are not entitled to seek "prospective relief based on a controversy that has already been resolved." *Ibid*. (Order at 4). The controversy alleged—that Sybrandy and Witt are overworked and/or incompetent—can no longer cause them harm.

Plaintiffs respond by admitting that they *had* standing when they filed—so it counts now. The Court has already rejected this argument once, noting that the usual rule controls: parties cannot seek prospective relief when they can no longer benefit in a tangible way. Dkt. 44 (Order at 3) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 n.5 (1998)). This is consistent with the Supreme Court's admonition that standing must be supported with the required "manner and degree of evidence" at ***all*** "successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). At summary judgment, the rules require admissible evidence—but none exists.

Article III requires "likely injury" that will be "redressed by a favorable decision." *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1171 (9th Cir. 2002). However, the possibility that Wilbur, Moon, and Montague will break valid laws ***in the future*** is insufficient. The Supreme Court has confirmed this twice. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *O'Shea v. Littleton*, 414 U. S. 488, 497-98 (1974).[1]

Plaintiffs' allusion to the "capable of repetition" doctrine is misplaced for the same reason. In their brief, plaintiffs completely omit the applicable legal standard: this exception only applies when "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) ***there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again***." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (emphasis added); *see also*

[1] Plaintiffs attempt to distinguish this binding precedent—with no authority—by suggesting that they "break the law more often" than average people. Opp. at 44. It would surely be an odd proposition if parties were permitted to amplify standing by beating up their girlfriend (Dkt. 29 at 78) (Moon) or driving drunk (Dkt. 34 at 101) (Montague) more often. The four law firms representing plaintiffs cite no support for this unprincipled outcome, and the Cities can find none. The Court can disregard this argument. *See State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."); *DeSilva v. DiLeonardi*, 181 F.3d 865 (7th Cir. 1999) (brief must make all arguments accessible to judges, rather than ask them to "play archaeologist").

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Lyons, 461 U.S. at 109 ("capable of repetition" applies "only in exceptional situations"). In *Weinstein*, for example, the Supreme Court rejected its applicability in a case involving identical facts. There, a prospective challenge to the parole system was made by a plaintiff who was no longer subject to parole. Citing *O'Shea*, the Supreme Court rejected his claim as moot, explaining there is ***no*** "reasonable expectation" that the proponent would be on parole in the future. *Id.* at 149. The same is true of Wilbur, Moon, and Montague.

Then, compounding their error, plaintiffs speculate further that: (1) they will be caught and arrested; (2) remain indigent; (3) be assigned Sybrandy or Witt; (4) a respected superior court judge will violate precedent, past practice, and the public defense contract, by refusing a substitution request; (5) Sybrandy and Witt will perform incompetently; and (6) the judge and prosecutor will ignore their legal and ethical duties, by standing silent. This unlikely chain of events does not constitute a "real and immediate" threat of repeated injury. *Chapman v. Pier 1 Imports*, 631 F.3d 939, 946 (9th Cir. 2011) (*en banc*).

II. PLAINTIFFS CONCEDE—AND EVEN ILLUSTRATE—THE EFFECTIVENESS OF THEIR EXISTING REMEDY AT LAW

Plaintiffs, in this case, not only fail to refute this point—they illustrate it. It is undisputed—and not even responded to in briefing—that all three plaintiffs easily obtained substitute counsel upon request. *See* Dkt. 26 (*Decl*. at 10); Dkt. 34 (*Decl.* at 169); 30 (*Decl*. at 134-35). Indeed, even their witness, Tina Johnson—who presents herself as another indigent criminal defendant—illustrated the effectiveness of the remedy in detail:

> I told the judge that I didn't believe Mr. Witt could represent me because he was intoxicated, and the judge continued the hearing. Later I wrote the judge a letter saying the same thing, and the judge wrote me back and said I would get a new attorney. Glen Hoff was appointed to represent me.

Dkt. 49 (*Johnson Decl.* ¶ 5).[2] Like plaintiffs, nobody objected or refused substitution, and Hoff resolved the case. *Id*. This, as illustrated, is an adequate remedy at law. And, even if substitution were not available (which it is), plaintiffs would still have mandatory remedies

[2] This is the first anybody from the Cities had heard about Ms. Johnson's accusation. Declaration of Stendal, Dkt. #60, p. 6.

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through post-trial motions, the appellate process under *Strickland*,[3] and in tort. Plaintiffs have not—and cannot—establish a lack of remedies.

Granting an injunction constitutes an "extraordinary" exercise of the court's equitable powers, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and as such, the party seeking one must demonstrate that it does not have an adequate remedy at law. *Northern California Power Agency v. Grace Geothermal Corp*., 469 U.S. 1306 (1984). Here, plaintiffs admit—and show—that this is plainly not the case.

III. MOTION TO STRIKE INADMISSIBLE EVIDENCE

Plaintiffs, as a procedural matter, are playing very fast and loose. Ignoring their page limit (Dkt. 24), plaintiffs oppose summary judgment with what is, in large part, voluminous hearsay stapled to an attorney-declaration—which is wholly impermissible. Fed. R. Civ. P. 56(e); *Beyene v. Coleman Sec. Servs., Inc*., 854 F.2d 1179, 1181 (9th Cir.1988) (hearsay); *Orr v. Bank of America*, 285 F.3d 764 (9th Cir. 2002) (authentication).

While the Cities cannot respond to all of it in this short reply, they note some examples. The "complaint forms," *Marshall Decl.* Ex. 18, are hearsay within hearsay. They are (unauthenticated) documents, purporting to capture what somebody said about what Sybrandy or Witt did. Similarly, a sensationalist newspaper article, recounting what a non-party supposedly said, is entirely inadmissible. *See Larez v. City of Los Angeles*, 946 F.2d 630, 642-43 (9th Cir. 1991). These same is true of the "experts." To illustrate, and with due respect to Mr. Boerner, he offers absolutely no reasoning in support of opinion that "the prosecutions expectations are not being met." *Boerner Decl.* ¶ 16. It is simply a statement that he reviewed records, and a conclusion. Conclusory opinions do not create a factual issue. *In re Apple Computer Sec. Litig*., 886 F.2d 1109, 1116 (9th Cir. 1989).

These are not mere procedural foot-faults. Plaintiffs' *assumptions*—based upon inadmissible and speculative evidence—go directly to the heart of their lawsuit.

[3] In response, plaintiffs cite *Halbert v. Michigan*, 545 U.S. 605 (2005), for the proposition that a *pro se* defendant would have trouble navigating the appellate process. Opp. at 47. By statute, criminal defendants are entitled to appellate lawyers as a matter of right. RCW 10.73.150(1).

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IV. THE ENTIRETY OF PLAINTIFFS' ARGUMENT RESTS UPON SEVERAL UNSTATED BUT FAULTY PREMISES

On the one hand, it is undisputed that Sybrandy and Witt have: (1) no record of pleas or trials being overturned on *Strickland* grounds; (2) no record of bar discipline; and even (3) no serious mistakes that have ever prejudiced a client's position. *See Stendal Decl.* ¶ 10. Yet plaintiffs—based upon "math" and assumptions—condemn them as incompetent.

Moderate scrutiny of the record demonstrates that the entirety of plaintiffs' position is based upon fiction and faulty assumption.

A. A Hearsay Statement On The AVVO Website Is Not Competent Evidence

First, as noted above, information downloaded from the AVVO website is not competent evidence. Indeed, it is not even true. *See Supp. Cooley Decl.* Yet plaintiffs—and their experts—rely heavily on AVVO to the point that it undergirds their entire position. *See Opp.* at 4 ("Richard Sybrandy and Morgan Witt serve as the Public Defender on a part-time basis only"); Opp. at 5 ("the part-time basis of Sybrandy and Witt limited them to an average of 34 minutes of attorney time per public defense case."); ("Witt's average of 1,150 misdemeanor cases (performed on a part-time basis)").

All of this strange mathematics is based upon an assumption of "part time work," taken from the AVVO website.[4] This is a flawed premise.

B. Plaintiffs Badly Misstate The Number Of Cases Handled By The Public Defender

Similarly, based upon ostensible mathematics, plaintiffs leap to the conclusion that "Witt's average of 1,150 misdemeanor cases (performed on a part-time basis) works out to a full-time equivalent of 3,450 such cases per year. This is more than 11 times the normal standard established by the WSBA." Opp. at 23. This is just flat-out wrong.[5]

First, as a factual matter, plaintiffs grossly inflate Sybrandy and Witt's caseload.

[4] A few years ago, in a class action lawsuit against AVVO, this Court noted how "how ludicrous the rating of attorneys (and judges) has become…" *Browne v. Avvo, Inc., et al* Cause No. 07-0920 (Dec. 18, 2007) (Order at 6).

[5] The Cities would note, as a threshold observation, that the issue of "capping caseloads" in the misdemeanor context is very much a debated issue. *See Marshall Decl.* Ex 14. Under *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009), the constitution does not require adherence to standards at all, let alone those that are still being generated.

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Though glossed over in briefing, the WSBA standards permit the weighting of cases, up to 400, for various reasons—such as complexity, policies related to negotiation to non-criminal violations, and other administrative procedures. *Marshall Decl.* Ex. 13 at 325.

Plaintiffs, and their experts, make no attempt to "weight" the cases. They instead count every single "indigence screening" as one full case. This ignores the manner in which the City weighs, for example, "Driving With A Suspended License (3rd)," which is readily negotiable down to a non-criminal infraction—*i.e.*, continued so that the defendant can obtain a license. *Stendal Decl.* ¶ 6.[6] Plaintiffs also overlook: (1) the fact that cases are not counted if not worked on by the public defender; (2) several charges resolved in one case are counted as one; and (3) when a criminal repeatedly fails to appear, and is rearrested (like Wilbur), it is not counted as several different cases. *Stendal Decl.* ¶ 24-27.

Indeed, the contract, as written, gave Sybrandy and Witt zero incentive to exceed 400 cases per year—which is the number they are paid to handle. *Stendal Decl.* ¶ 28. Had they done so—and handled "over a thousand cases" as plaintiffs suggest—common sense would dictate that they would stop work, with their contract fulfilled. *Id.* This never occurred, because plaintiffs' estimate is simply wrong.

Plaintiffs also suggest—again, based upon inadmissible hearsay from a website—that there were "no jury trials" in Burlington, and "two" in Mount Vernon (as opposed to 24 in Anacortes). Opp. at 13. This, too, is wrong—and illustrates the problems with trial-by-hearsay. Craig Cammock is the prosecutor for both Anacortes *and* Burlington. He explains that there were two jury trials in Anacortes. *Cammock Decl.* ¶ 7. He further explains that this is consistent with Burlington, where there were also two jury trials (as well as other bench trials). *Id.* ¶ 5. Significantly, the ***only*** trials that occurred in Burlington were tried by Sybrandy and Witt while representing indigent defendants. *Id.* Private attorneys tried none. *Id.*[7] Prosecutor for Mount Vernon, Pat Eason, likewise explains that there were five

[6] This is nearly 35-45% of the caseload in the Cities. *Stendahl Decl.* ¶ 6.

[7] The lack of trials, as Cammock explains, is due to overcrowding in jail and a lack of resources on the part of *the prosecutor*. Accordingly, it is generally him—not Sybrandy or Witt—who dismisses the case or otherwise resolves it.

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trials, four of which were handled by the public defender. *Eason Decl.* ¶ 4. By percentages, this is the same as Skagit County. *Id.* ¶ 5.

Fictional numbers, based upon incorrect assumptions and inadmissible hearsay, do not create an issue of fact.

V. EVEN TAKING THEIR FACTS AS TRUE, PLAINTIFFS DO NOT STATE A CONSTITUTIONAL CLAIM

Finally, even if the Court takes *all* of plaintiffs' facts as true—including the inadmissible ones—and disregards standing and several adequate legal remedies, these lawsuits still fail.

A. Plaintiffs' Invitation For The Court To Overrule *Strickland* Is Based Entirely Upon Vacated Or Out-of-State Case Law

Notably, plaintiffs' legal argument is almost entirely based upon vacated decisions, trial court rulings, and inapposite state court decisions. The law in this circuit—and indeed, all of the circuits—has been that the Sixth Amendment is implicated by *prejudicial* error. *See, e.g.*, *United States v. Cronic*, 466 U.S. 648, 657-58 (1984) ("we begin by recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of ***the effect*** it has on the ability of the accused to receive a fair trial.") (emphasis added). Process-based complaints have never been constitutionalized.

To be sure, a panel in the Eleventh Circuit initially came to a different conclusion—on a Rule 12(b)(6) record, before *Twombly*—but later vacated its opinion. *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992). Similarly, in *Hurrell-Harring v. New York*, 15 N.Y.3d 8, the New York Court of Appeals endorsed a class action supported by over 60 prosecutors and the New York Bar Association. This was more akin to political compromise than precedent. And, *Best v. Grant County*, No. 04-2-00189-0 (Wash. Super. Ct. Oct. 14, 2005), which is heavily relied upon, is a state trial court order—never subject to review. It is not known what arguments were raised, or what the factual record looked like.[8]

[8] Plaintiffs also suggest that "commentators" support their position. For this proposition, they rely upon an article written by ACLU attorney, Emily Chiang. http://www.law.utah.edu/faculty/faculty-profile/?id=emily-chiang (last visited October 21, 2011). Citation to colleagues in the same organization is not "commentator agreement."

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Thus, if this Court departs from *Strickland*, and endorses a claim for injunctive relief based upon "process-based complaints," it will be the first federal decision doing so—apart from the now-defunct *Lucky* decision. Decades of unbroken federal precedent counsels against this, as does practical reality. A cause of action does not arise out of the "number of meetings," nor the manner in which the client is addressed. The Sixth Amendment violation must by definition affect the outcome of the matter. This is routinely addressed by the Courts, and plaintiffs offer no reason to disregard the general rule.

B. The Sixth Amendment Does Not Operate To Regulate Where Defense Attorneys Stand Or the Nature of Their Meetings

To the extent that plaintiffs' experts are not relying upon an incorrect understanding of Sybrandy and Witt's caseload, they are criticizing them for where they stand or how they speak to clients. *Howson Decl.* ¶ 9; *Boerner Decl.* ¶ 14. This reduces the Sixth Amendment to theatrics. Such overly-specific reach of the Sixth Amendment is exactly what the Supreme Court ***rejects***. *See Nix v. Whiteside*, 475 U.S. 157, 165 (1986) ("a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards"); *Strickland v. Washington*, 466 U.S. 668 (1984) ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel… Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.").

Plaintiffs seem to ask the Court to "constitutionalize" a wide range of attorney-conduct. This is both novel and dangerous. Whether experienced attorneys find it fruitful to meet with clients before they obtain the police report is uniquely their decision to make. Similarly, where they stand during arraignments has never been subject to constitutional direction. There is no precedent that would support an injunction to literally "direct counsel's footsteps."[9]

[9] Besides being novel, this necessarily invades the province of the municipal court judges. In courtrooms across Washington—including this one—attorney decorum is routinely controlled by the preference of the judge. In addressing the Court, lawyers are told where to stand, how to conduct themselves, and even the

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"Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment." *Connick v. Thompson*, ___ U.S. ___, 131 S.Ct. 1350, 1369 (2011). The purely subjective criticisms of Sybrandy and Witt—such as where they stand—do not implicate the constitution.

C. <u>The Facts In The Record Do Not Establish Deliberate Indifference</u>

Contrary to plaintiffs' cursory analysis, the constitutional standard to create liability on *the Cities'* part is "deliberate indifference." This is uniform in the case law, likely explaining plaintiffs' failure to cite an alternative standard.

Plaintiffs first argue that "deliberate indifference" is limited to "failure to train" cases. Opp. at 39. There is nothing supporting this. Indeed, *Connick* said the opposite: "Plaintiffs who seek to impose liability on local governments under §1983 must prove that 'action pursuant to official municipal policy' caused their injury." *Connick*, 131 S.Ct. at 1369. *Miranda v. Clark County, Nevada*, 319 F.3d 465, 466 (9th Cir. 2003), provides an even more helpful comparison. There, the Ninth Circuit, in its words, considered whether the liability under 42 U.S.C. § 1983 could arise "for a policy that leads to a denial of an individual's right to effective representation of counsel." It was not solely a "failure to train" case, as plaintiffs claim (Opp. at 39-40). Rather, the court considered whether a policy and resource allocation was "deliberately indifferent" to constitutional rights:

> The remaining question is whether the alleged policy resulted in deprivation of the plaintiff's constitutional rights to effective representation of counsel. That constitutional guarantee is of effective representation of all defendants, regardless of guilt or innocence. Here, according to the plaintiff, if the criminal defendant appeared on the basis of the polygraph test to be guilty, the office sharply curtailed the quality of the representation by limiting the investigatory and legal resources provided. ***The policy, while falling short of complete denial of counsel, is a policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt***….

Id. at 470 (emphasis added) (internal citations omitted). The *Miranda* court found an issue of fact as to the defendant's liability under § 1983.

That same standard applies here, because plaintiffs are alleging the same thing: that

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speed at which to speak. If the judges before whom Sybrandy and Witt appear—who are also sworn to uphold the constitution—deem appropriate, they can address their location where they stand.

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the Cities, through resource allocation and policy, violated their right to counsel. The question here is whether there is ***admissible evidence*** of "deliberate indifference."

Importantly, this is a subjective, actual-knowledge standard. *Farmer v. Brennan*, 511 U.S. 825, 837-40 (1994) (adopting criminal recklessness standard). There is no deliberate indifference if officials "responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 844. Here, the record is as follows:

- The Cities adopt a comprehensive contract citing WSBA caseload limits, and the public defenders are free to stop work after working 400 weighted cases;[10]
- The Cities agree to pay for conflict counsel, so there is no financial disincentive for cases to be turned away;
- The public defenders have no record of bar discipline or any track record of *Strickland* violations;
- A 2009 hearsay email stating that Sybrandy and Witt were difficult to contact "after hours." *Marshall Decl.* Ex. 33. This was "the only issue… [the sender] was not aware of any other issues." *Id.* There is no evidence that this was ongoing, nor that it harmed or prejudiced the case of anybody. If anything, it would lead to failed prosecutions on constitutional grounds. *Stendahl Decl.* ¶ 17.
- A hearsay email sent in 2008 by Sybrandy, in the course of contract negotiations, in which he explained why it made more sense for defendants to contact him—with the contact information they are provided—than for him to find them. *Marshall Decl.* Ex. 37.
- The few complaints received from indigent clients over a course of years were reviewed, evaluated, and responded to adequately by Sybrandy and Witt. Many of the complaints were misunderstandings, in which the defendant believed he was represented when he was not. *Stendal Decl.* Ex. at 23. None of these complaints came from judges, prosecutors, or other attorneys who saw Sybrandy or Witt practice. In fact, even plaintiff's own witness acknowledges that he has "no specific reason to question the motion and trial work of either [Sybrandy or Witt]." *Howsen Decl.* ¶ 6.

Significantly, ***none*** of plaintiffs' experts opine that this would make the Cities "deliberately indifferent" to the constitutional rights of the accused. Nor would common sense support such a conclusion. Consistent with well-established case law, the Cities were entitled to presume that Sybrandy and Witt providing the "guiding hand" that the defendants needed, *see, e.g., Michel v. Louisiana*, 350 U.S. 91, 100-101 (1955), and there is no evidence of "actual, subjective knowledge" to the contrary.

[10] *See Marshall Decl.* at 18 ("The Public Defender reserves the right to decline to advise or represent any person on the basis of actual legal, ethical, or professional conflict of interest as is prohibited by RPC 1.6 - 1.8."); *see also Stendal Decl.* at 9-10.

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VI. BASIC EQUITABLE PRINCIPLES BAR RELIEF IN THIS CASE

In attempting to respond to the fugitive from justice doctrine, plaintiffs accidently explain just how appropriate it is in this case. They argue that "[e]ach Plaintiff has submitted testimony in support of the Complaint, this cross-motion for preliminary injunction and opposition to the Cities' motions for summary judgment, and their whereabouts are known by counsel." Opp. at 51. This is ***precisely*** what the fugitive disentitlement doctrine contemplates.

Plaintiffs are indeed participating in their own lawsuit *against* the judiciary. But they are simultaneously disregarding the authority *of* the judiciary. The fact that "counsel knows where they are" does not change this—if anything, it makes it worse. And, read properly, the one case cited by plaintiffs does not support them. The doctrine was not applied in *Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009), because "Sun [was] not ***currently*** a fugitive, and ***ha[d] not been a fugitive at least since the time she first filed a petition***." (emphasis added). Wilbur, Montague, and Moon *are* fugitives, as they were when they first filed.

Those who seek equity must do equity. And those who seek "extraordinary equitable relief," it would stand to reason, should at least stop breaking the law. *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir. 1985) (those seeking the court's equitable protection must act "fairly and without fraud or deceit as to the controversy in issue").[11]

VII. THIS MOTION IS RIPE FOR RULING

In passing, plaintiffs make two brief procedural arguments. They suggest that because the Cities "sought depositions" there must be issues of fact (Opp. at 33; 36), and relatedly, that summary judgment "must be denied" because they do not have sufficient

[11] Plaintiffs' entire response to unclean hands is that "the ends justify the means." Though they, in effect, concede that they have unclean hands, they suggest that their cause is so uniquely worthy that the Court should "depart" from the doctrine entirely. Opp. at 50. This is without factual or legal basis—likely because any plaintiff could make the same argument. Those who bring employment lawsuits are working to "end discrimination." Personal injury lawsuits seek to "redress a wrong and secure accountability." Every § 1983 lawsuit is by definition directed at a perceived constitutional deprivation. Plaintiffs' argument, in this regard, reads all meaning out of an equitable doctrine that has existed for over a century. "Unclean hands" applies, irrespective of how important plaintiffs feel their lawsuit is.

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discovery. *Id.* These are non-starters.

The Cities' motion is ready to be ruled upon. First, there is no rule, nor any precedent, that a motion halts discovery—or visa-versa. Indeed, by this logic, a defendant disputing liability should be *per se* barred from exploring damages—because damages should "never be granted" (Opp. at 33) where there is no liability. Competent attorneys are *always* developing their case—even when they expect to win on other grounds.

Similarly, plaintiffs' half-hearted request for more discovery does not even cite Rule 56(f). This specialized continuance requires, minimally, an affidavit identifying specific facts that further discovery would reveal and an explanation of how those facts would preclude summary judgment. *See* Fed. R. Civ. P. 56(f) ("If a party opposing the motion shows by affidavit..."); *U.S. v. Kitsap Physicians Service*, 314 F.3d 995, 1000 (9th Cir. 2002) (…must be set forth in an accompanying affidavit). Plaintiffs' failure to provide any affidavit, let alone one "detailing specific discovery and explaining how it will create a genuine issue of material fact," supports denial of that relief. *Id.* at 1000.

VIII. CONCLUSION

If plaintiffs truly seek to reform institutions, their remedy lies in the public process. The same constitution they cite permits them a near-absolute right to make their case to local, state, and national governments—as well as the public at large. This is the avenue for reform; a federal court taking over a municipal court is not. The Cities respectfully ask that summary judgment be granted in their favor.

DATED this 21ST day of October, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury of the laws of the State of Washington that she is of legal age and not a party to this action, and that on the 19th day of October, 2011, she caused a true and accurate copy of ***Defendants' Reply to Motions for Summary Judgment, Declaration of Andrew G. Cooley, Declaration of Patrick A. Eason, and Declaration of Craig Cammock*** to be filed and served on the individuals listed below using the USDC CM/ECF filing system:

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