THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF
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

DEFENDANT CITIES OF MOUNT VERNON AND BURLINGTON'S MOTION FOR SUMMARY JUDGMENT

Noted for Consideration:
March 29, 2012

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I. INTRODUCTION

The Cities of Mount Vernon and Burlington ("the Cities") respectfully move the Court for an Order dismissing this lawsuit on summary judgment as moot. These municipalities have completely overhauled their public defense system to reflect, and comply with, the recently-promulgated Washington Supreme Court public defense standards. There are now reduced case loads, being handled by twice as many full-time attorneys, who are funded at more than double the previous rate. This is the culmination of the following extensive process:

- Retention of W. Scott Snyder, of the law firm of Ogden, Murphy & Wallace, to oversee a ground-up improvement of the Cities' public defense system;
- Hiring a public defense attorney with over 40 years of experience to investigate the existing system and make recommendations, which was the basis for new regulatory legislation (Ordinances MV 3556 and Burl 02-2012);
- Preparing and publicizing a Request for Qualifications, also under the guidance of independent counsel, for new public defenders. This led to inquiries from several qualified law firms;
- Negotiating a new public defense services agreement with Baker, Lewis, Schwisow & Laws, PLLC—a firm which had previously handled public defense for the City of Everett. Its principals personally committed to compliance with the new Supreme Court standards, and certify continued compliance with the court every quarter;
- Defining the terms "case" and "caseload" with more precision, and imposing a 400-case limit on the public defenders *without* regard to "weighting";
- A specialized complaint system, in which indigent clients are given a simple statement of their rights, and a check-box style complaint form. If denied a meeting or voluntary plea, they have immediate and decisive recourse;
- Enacting measures that have further reduced the public defenders' caseloads;

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Plaintiffs survived summary judgment, and avoided *Monell*, by couching their allegations in terms of "the system."[1] They argued—repeatedly and emphatically—that the Cities' "funding, contracting, and monitoring" policies operated to deprive indigent criminal defendants of their Sixth Amendment right to counsel, "regardless of any individualized error" on the part of the public defender. *See* Dkt. 142 (Order at 10).

But that "system" no longer exists. Intervening standards, legislation, contracts, and policy changes addressed the problems raised in plaintiffs' complaint and prior briefing. This, as a general rule, renders a claim for prospective relief moot. *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) ("The government's change of policy presents a special circumstance in the world of mootness. Of course there is always the possibility of bad faith and a change of heart. But, unlike in the case of a private party, we presume the government is acting in good faith."); *Nat'l Min. Ass'n v. U.S. Dept. of Interior*, 251 F.3d 1007 (D.C. Cir. 2001) ("The old set of rules, which are the subject of this lawsuit, cannot be evaluated as if nothing has changed. A new system is now in place."). The same is true here. A new, and greatly improved, system supplanted the old one. And it poses no imminent harm to anybody—as illustrated by fact that ***not a single complaint*** about the public defenders has been filed. There is no justification for the extraordinary relief of an injunction or declaratory judgment.

The Cities respectfully request dismissal of the lawsuit.

II. FACTUAL BACKGROUND

A. The Cities' Public Defense System Prior to the Lawsuit

The nature and policies associated with the Cities' public defense system were exhaustively briefed in 2011. *See* Dkt. No.'s 25-34; 45-68; 74; 82-86; 115-137. Plaintiffs raised the following grievances:

[1] The Cities are not subject to § 1983 liability based upon the discrete, case-specific errors of the public defender. *See Polk County v. Dodson*, 454 U.S. 312, 325 (1981).

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Excessive case loads. According to plaintiffs' consultants, public defenders Richard Sybrandy and Morgan Witt handled *thousands* of cases per year. Dkt. 54 (*Strait Decl.* ¶ 20).[2] The Cities, admittedly, did not closely monitor the exact number of cases. And the difference in the parties' view was compounded by the vague definition of "case" and varied counting styles. *See* Dkt. 57-4 (*Marshall Decl.*). They—along with the prior public defenders—viewed the caseload limitations as a mechanism for the attorneys to conclude their contract or seek further resources if they became overly burdened. Ex. A (Sybrandy Dep. Tr. 90:23-92:2); Dkt. 60 (*Stendal Decl.* ¶ 19).[3] They never did.

Sybrandy and Witt. Plaintiffs took issue with the two public defenders. They asserted that both mistreated their clients. Witt was allegedly intoxicated in court, and Sybrandy purportedly "laughed" at Plaintiff Montague's circumstances. *See* Dkt. No.'s 47-51 (*Johnson Decl.* ¶ 5; *Montague Decl.* ¶ 22). Plaintiffs also contended that both attorneys maintained active private practices (without a commensurate reduction in their misdemeanor caseloads), *id.*; dkt. 57-7 (*Marshall Decl.* Ex. 15-16), and were essentially the low-bid in an uncontested bidding process. Dkt. 45 (Mot. at 2-3).

Refusal to Meet. Plaintiffs, next, criticized the public defenders for refusing to meet with them. They claimed that the only meetings they got were at the courthouse, prior to their hearing. Dkt. 46-48 (*Wilbur Decl.* ¶ 7; *Moon Decl.* ¶ 3; *Montague Decl.* ¶ 18).

Failure to Monitor. Finally, plaintiffs chided the Cities for failing to monitor the public defenders. Sybandy and Witt's case reports were handwritten. *See, e.g.,* Dkt. 57-5 (*Marshall Decl.* Ex. 12). And all of their clients' complaints, and responses, were directed to the contract administrators for the Cities. This caused the administrators, plaintiffs

[2] According to Mr. Strait, "[I]n 2009, Mr. Sybrandy served as the Public Defender in 1,206 cases, and Witt served as the Public Defender in 1,136 cases, for a total of 2,342. In 2010, Mr. Sybrandy served as the Public Defender in 963 cases and Mr. Witt served as the Public Defender in 1,165 cases, for a total of 2,128 misdemeanor cases in one year." *Id.* It remains unclear how these numbers were calculated.

[3] Unless otherwise indicated, Exhibits are attached to the Declaration of Adam Rosenberg in Support of Motion.

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contended, to defer too heavily to the opinions of the public defenders, particularly on matters involving legal judgment. *See* Dkt. 45 (Mot. at 16).

B. Denial of Summary Judgment and Injunctive Relief

The parties brought cross-motions for relief early in the case. The Cities sought summary judgment; plaintiffs sought a preliminary injunction. Throughout, plaintiffs emphasized that they were not seeking to impose liability based upon individualized error, but rather, *the system as a whole.* Dkt. 45 (Mot. at 48) ("The cause of these widespread violations is the Cities' unconstitutional implementation and execution of regulations, ordinances, and contracts that the Cities have promulgated and adopted for the provision of public defense services."). The Court accepted plaintiffs' theory in its subsequent Order. Dkt. 143 (Order at 10) ("Plaintiffs allege that defendants have made funding, contracting, and monitoring decisions which directly and predictably deprive indigent criminal defendants of their Sixth Amendment right to counsel.").

The record was comprised exclusively of evidence pertaining to Sybrandy and Witt, *their* contract, and *their* monitoring. The Court found issues of fact. Dkt. 143.

C. Both Cities Take Extraordinary Steps To Improve Their Public Defense System

In the interim, the Cities undertook to improve the system. This was brought on by a number of considerations. In addition to Sybrandy and Witt terminating their contract, and this case bringing various shortcomings to the forefront, the Cities were primarily motivated by the evolving standards on misdemeanor defense compelled by the new Supreme Court rules. *Declaration of Bryan Harrison in Support of Motion* ("*Harrison Decl.*") ¶ 3-5, Ex. A. The time was right to make sweeping improvements. *Id.*

1. INDEPENDENT REVIEW OF THE SYSTEMS

The Cities began by retaining W. Scott Snyder, from the law firm of Ogden, Murphy & Wallace. *Harrison Decl.* ¶ 6-7. Mr. Snyder has been a municipal attorney for

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over 30 years, having worked out of state, as well as for the cities of Edmonds, Poulsbo, and Mercer Island. *Declaration of W. Scott Snyder in Support of Motion* ("*Snyder Decl.*") ¶ 2-3. In addition, he has worked with over twenty Washington city councils on various investigations and special projects. *Id.* His firm, too, is active in municipal law. *Snyder Decl.* ¶ 4. Its members act as city attorneys for at least twelve Washington cities—though they do no prosecution work. *Id.* They limit themselves to civil work, which includes crafting contracts for prosecution and public defense services. *Id.*

Mr. Snyder independently[4] recommended James Feldman—based upon his work in Edmonds—to independently investigate the public defense systems. *Snyder Decl.* ¶ 6-7.; *Harrison Decl.* ¶ 7. Mr. Feldman is an extraordinarily experienced public defender, having done criminal defense work for nearly 40 years. *Snyder Decl.* ¶ 6, Ex. A. His resumé includes acting as a public defender for the cities of Lynnwood, Edmonds, Bothell, Mill Creek, Mountlake Terrace, Arlington, Lake Stevens, and Marysville.[5] *Id.*

Mr. Feldman interviewed the public defender, the Skagit County District Court judges and magistrates, the Skagit County Director of Public Defense, and the prosecutor. *Harrison Decl.* ¶ 8, Ex. B. He also reviewed documents pertaining to the allegations in this lawsuit, the public defense services contract, and the recent performance guidelines promulgated by the Washington State Bar Association. *Id.* Mr. Feldman's investigation culminated in a written analysis and report, in which he proposed 13 additions and amendments to the existing public defense services contract. *Id.* They included more detailed guidelines for case counting, better access to databases, more contact, and better funding for investigative services. *Id.*

[4] As emphasized by both Mr. Snyder and Mr. Harrison, the retention of Mr. Feldman was an entirely independent decision, by an independent advisor with complete discretion. *Snyder Decl.* ¶ 6-7; *Harrison Decl.* ¶ 7.

[5] It is notable that plaintiff's purported expert, Christine Jackson, who lives in Edmonds and claimed to have knowledge of public defense there, had no criticisms whatsoever. Ex. B (Jackson Dep. Tr. 26:13-27:8; 29:18-20).

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Again, great pains were taken to ensure that this investigation and report were completely independent. *Snyder Decl.* ¶ 6-7. Substantive contact with the City Attorneys was disallowed after tasks and rates were agreed upon. *Id.*

2. A NEW AND MORE DETAILED PUBLIC DEFENSE ORDINANCE

Both Cities, through their elected councils, adopted Mr. Feldman's recommendations *legislatively*. *Harrison Decl.* ¶ 9, Ex. C - D. On January 17, 2012, Mount Vernon passed Ordinance 3556, which incorporated the foregoing analysis as legislative findings—specifically requiring more detailed case analyses, improved funding, and better reporting. *Id.* Burlington's city council passed similar legislation in Ordinance 02-2012. *Id.*

3. REQUESTS FOR QUALIFICATIONS AND COMPETITIVE BIDDING

From there, both Cities jointly undertook to find new public defenders. A detailed Request for Qualifications (RFQ) was prepared and publicized through several outlets, including the WSBA. *Snyder Decl.* ¶ 8; *Harrison Decl.* ¶ 14. It set forth the new legislation and expectations of the new public defender, including prompt contact, availability for confidential meetings, immediate review of each case, and compliance with City or State Supreme Court caseload standards (whichever was more restrictive). The RFQ was a competitive bidding process, in which the attorney-applicants proposed compensation rates that would allow them to do the work. *Harrison Decl.* ¶ 15-16, Ex. G

The process yielded six interested firms; a good turnout under the circumstances. *Snyder Decl.* ¶ 8. They are summarized as follows:

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Anthony, Ochs, Luke, Swinney	Baker, Lewis, Schwisow, Laws	Sybrandy and Volluz	North Cascade Legal Services	Feldman and Lee	North Cascades Public Defender Assoc.
2 attorneys	3 attorneys (to be relocated; more if necessary)	3 attorneys	4-5 attorneys	2-5 attorneys	2-4 attorneys
5+ years' experience	10+ years' experience	10+ years' experience	3-10 years' experience	1-10 years' experience	10+ years' experience
$15,000 per month	$17,500 per month	$25,350 per month	$25,000 per month (if more than 1600 cases)	$30,500-$32,000 per month	$750,000 per year

Ibid.

4. THE LAW FIRM OF BAKER, LEWIS, SCHWISOW & LAWS

The Cities retained another experienced—and local—defense attorney,[6] Patrick Hayden, to assist in considering the applications. Ex. C (Hayden Dep. Tr. 39:22-40:24). Working with Mr. Snyder and the Cities' Contract Administrators, the applications were reviewed. *Id.*

The Baker Lewis firm and North Cascade Legal Services Group stood out as the frontrunners.[7] *Harrison Decl.* ¶ 17-20; *Snyder Decl.* ¶ 9-10. Both boasted considerable experience, including local expertise and appropriate qualifications. The North Cascade Group was comprised of local attorneys, whereas the Baker Lewis firm had been providing services to the City of Everett for several years. Both would be zealous, and effective. Ex. A (Hayden Dep. Tr. 178:8-179:8); *Harrison Decl.* ¶ 17-20.

[6] Mr. Hayden is an attorney from Sedro Woolley, who has been handling misdemeanors—both privately and as a public defender—since 1981. Ex. C (Hayden Dep. Tr. 14:15-23). He was also the City Attorney for Sedro Woolley for a period of time. Ex. C (Hayden Dep. Tr. 15:13-17).

[7] From the perspective of cost, both firms were somewhere in the middle. Baker Lewis offered to handle 1,735 cases per year for $210,000, and $121 for each case over that number. North Cascade offered to handle 1,600 cases per year for $300,000, and an additional $60,000 if that number were exceeded.

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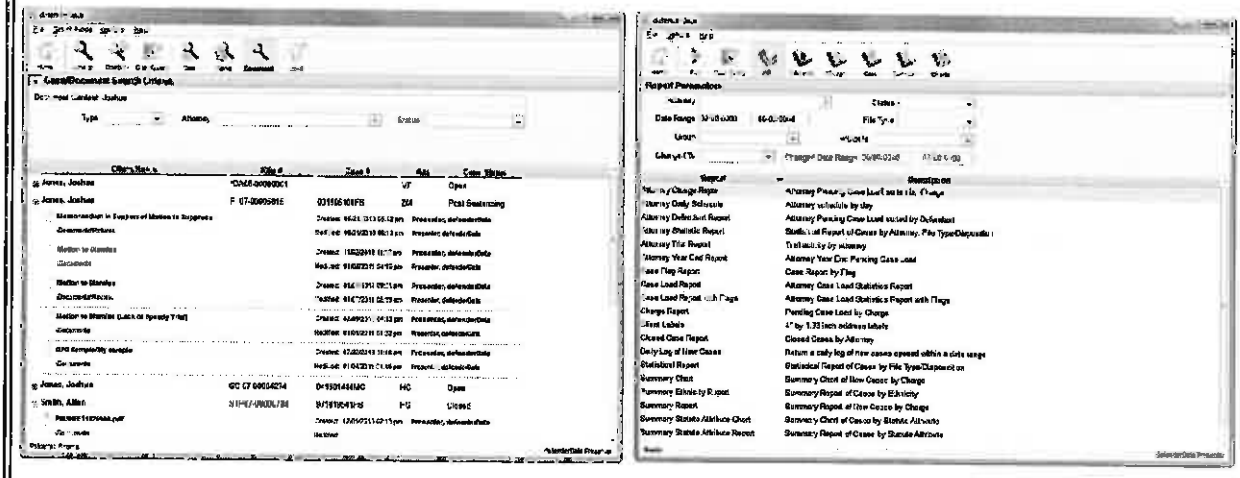
But Baker Lewis distinguished itself in its philosophy and ability to track and monitor cases. *Id;* Ex. A (Hayden Dep. Tr. 165:13-166:8); *Snyder Decl.* ¶ 10. Prior to responding to the RFQ, it had invested in a sophisticated information management system to ensure that it could accurately monitor and detail its caseload. It was therefore able to prepare reports as to the number of DUI cases (for example) handled in a given year, how they were disposed of, court appearances, and the like:



Justice Works – Defender Data, http://www.justiceworks.com/defenderData.html (last visited May 31, 2012).

After interviewing the top two applicant-firms, the Cities chose Baker, Lewis, Schwisow & Laws to provide public defense services. *Harrison Decl.* ¶ 18.

5. THE PUBLIC DEFENDER AGREEMENT IS REVISED TO REFLECT AND ADOPT THE SUPREME COURT STANDARDS

The Cities went on to revise their public defense services contract to reflect the policy changes set forth in their new legislation. The three partners from the Baker Lewis firm all signed it on April 6, 2012, personally obligating themselves to the task of public defense. *Harrison Decl.* ¶ 23, Ex. H. They then formed a separate entity—Mountain Law, PLLC—for this undertaking. *Id.*

It was contemplated that Mountain Law would start with one principal, attorney Michael Laws, and he would hire associate attorneys as he got a sense for the local work.

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Snyder Decl. ¶ 11; Ex. A (Hayden Dep. Tr. 61:25-62:11). Mr. Laws is an experienced criminal defense attorney, who holds a Master's Degree in social work, in addition to his J.D. After graduating from law school, Mr. Laws became a prosecutor for Yakima County, where he remained for over 10 years. He ultimately went on to supervise its misdemeanor unit. Ex. D (Laws Dep. Tr. 12:15-20; 306:18-308:10); *see also Harrison Decl.* ¶ 23.

Mr. Laws initially hired Jesse Collins, followed by Sade Smith a few months later, and Stacy DeMass more recently. *Declaration of Patrick Eason in Support of Motion* ("*Eason Decl.*") ¶ 4. All four of these attorneys are full-time public defenders for the Cities. Ex. D (Laws Dep. Tr. 314:3-315:4). For context, each of the Cities have *one* part-time prosecutor.

6. THE SUPREME COURT ENACTS MANDATORY PUBLIC DEFENSE STANDARDS

The Washington Supreme Court, as expected, promulgated new public defense standards in June, 2012—which will go into effect this October. This presented the Cities with a golden opportunity to adopt and comply with the most recent, objective statement on public defense. The Cities simplified their public defense agreement to reflect the high court's standards. *Harrison Decl.* ¶ 24; 28; *Snyder Decl.* ¶ 12-14, Ex. B.

The Cities also seized the opportunity to resolve the ongoing confusion about "cases" and "case counting." It was this confusion that led the parties in this case into vehement disagreement as to the number of cases Sybrandy and Witt were handling.[8] *Harrison Decl.* ¶ 25-28. Now, in contrast, the Mountain Law attorneys' cases are counted without any regard to "weighting." *Harrison Decl.* ¶ 28; *Snyder Decl.* ¶ 14. So, even though Theft and DWLS 3rd charges are usually easy to resolve, they are still counted as "one case." As well, the definition of case is taken directly from the Supreme Court: "the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide representation. In courts of limited jurisdiction

[8] Plaintiffs, presumably, did their own calculation to count "thousands" of cases. Sybrandy and Witt strongly denied this claim. Dkt. 120 (*Sybrandy Decl.* ¶ 18) ("… Plaintiffs in this matter believe that I handle over a thousand cases a year. This is crazy.").

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multiple citations from the same incident can be counted as one case." *Snyder Decl.* ¶ 13 n.1; *Harrison Decl.* ¶ 28(a). Both the Cities and Mountain Law agree that this is "much easier" to apply. *Id.*; *see also* Ex. D (Laws Dep. Tr. 318:15-319:1).

The new Supreme Court standards also provide that the public defender must certify, under oath, that he or she is in compliance with the standards. This includes the caseload standards—which Mountain Law has begun to do. Ex. D (Laws Dep. Tr. 319:15-320:17). They are also providing the Cities a copy of the certifications, *Harrison Decl.* Ex. I (Public Defense Services Agreement), and in addition to their own explanatory statement of their caseloads. Ex. E.

7. COMPLAINTS

The Cities also passed legislation segregating client-complaints into two distinct categories. The first type of complaint involved a refusal to meet and/or coerced pleas. This was, by far, plaintiffs' larger grievance. To address this, the Cities enacted a fast-tracked complaint system with a check-box style complaint form. All indigent defendants receive this form, as a matter of course, upon assignment to a public defender. *See Declaration of Maria Van De Grift in Support of Motion* ("*Van De Grift Decl.*") ¶ 3-5, Ex. A-B. In addition, it is broadly available at the courthouse and city halls—or, in Mountain Law's words, the complaint form is "printed on almost everything but the toilet paper." Ex. D (Laws Dep. Tr. 223:1-13). There is also a website where the form and statement of rights are available. *See*, http://mountvernonwa.gov/index.aspx?NID=591. If a defendant believes that he or she was denied a meeting, the box can simply be checked and returned. *Ibid.*; *Harrison Decl.* ¶ 35-39. Upon receiving it, the Cities will ensure that a meeting is held. *Id.* Or, if the defendant believes that his or her plea was not knowing and voluntary, the box can be checked, and the Cities will ask that the prosecutor move to vacate the plea. *Id.* To date, there have been ***zero complaints*** of either regard. *Id.*; *Van De Grift Decl.* ¶ 7.[9]

[9] The closest thing to complaints that the Cities have received about Mountain Law were the declarations filed in opposition to a continuance in *this case*, approximately six months ago. The Cities promptly sent a letter to class counsel, requesting to investigate them consistent with this Court's prior order on communications with

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As for other complaints pertaining to the attorneys' style, judgment, performance, or advocacy, the Cities legislatively directed that they go to the judge and/or the Bar Association. This right and recourse is reflected in another form the defendants receive upon assignment to a public defender. *Van De Grift* ¶ 4, Ex. B.

The Cities view this as an appropriate balancing of competing considerations. If a meeting were ever refused, for example, the Cities' contract administrators are in a position to quickly resolve the problem. But if a defendant believes that a certain motion should be filed, the dilemma is not properly resolved by the Cities. The government should not—and cannot—dictate to the independent public defender what motions to bring, or what arguments to make—as even plaintiffs' consultant concedes. Ex. D (Jackson Dep. Tr. 74:18-77:1) ("So I think that when you talk about independence you're talking about a system where the government is not in a position -- is -- the public defense in relationship to the government is not in a position where there are forces or systems in place that discourage or prevent you from representing your particular client as well as make systematic changes in the system.").

This distinction is somewhat academic, however, as there have likewise been zero complaints of this nature. *Harrison Decl.* ¶ 42; Ex. D (Laws Dep. Tr. 300:24-301:11).

8. PERMANENCE

These changes have been costly and time-consuming, but they are for the better. The Cities have ***no intention*** of reverting back to the prior system. The above changes are viewed as a benefit to all parties, and there is no likelihood they will be undone. *Harrison Decl.* ¶ 43-44; *Declaration of Eric Stendal in Support of Motion* ("*Stendal Decl.*") ¶ 6.

D. Mountain Law Takes Over Public Defense

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the class; plaintiffs never bothered to respond. *Harrison Decl.* ¶ 41, Ex. L. And when the clients themselves were offered new counsel, to replace Mountain Law, they uniformly declined (Dkt. 215)—leading one to suspect that their grievances were not as serious as previously believed.

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As noted above, Mountain Law began its transition in April, 2012. And after ironing out a few glitches one would expect during a transition, its attorneys have been performing wonderfully.

1. PERFORMANCE

As noted above, Mountain Law's clients have been overwhelmingly satisfied. There have been no written complaints at all. This is significant, given the apparent willingness of the indigent population to complain about Sybrandy and Witt (and the weight afforded to those complaints by plaintiffs). *See* Dkt. 57 (*Marshall Decl.* Ex. 29).

The Mountain Law attorneys regularly go to trial, sometimes collectively setting upwards of 15 cases per week for trial in each City. Ex. B (Laws Dep. Tr. 280:5-281:3; 345:2-8); *see also Eason Decl.* ¶ 4-5 ("The Mountain Law attorneys go to trial more often, on average, than private counsel…"). Ms. Smith and Mr. Collins, who are slightly younger, are particularly aggressive. *Id.* They also bring more motions, regularly catch issues in their cases, stand with their clients at hearings, and attempt to work to bring about systemic improvement. *Eason Decl.* ¶ 6-11. In-custody visits are also happening *at least* every week now as well. Ex. B (Laws Dep. Tr. 379:4-16); Ex. F (In-Custody Form).

Mountain Law is also in compliance with the Supreme Court caseload standards (seven months ahead of time). They are on track to carry only 400 un-weighted cases per year, and are certifying with the district court accordingly. *Standal Decl.* ¶ 5, Ex. A; Ex. B (Laws Dep. Tr. 363:16-364:8). In addition to hiring more attorneys, the Cities have also successfully reduced the number of cases being filed by enacting measures deferring criminal charges without a formal filing. *Harrison Decl.* ¶ 10, Ex. E-F. A DWLS 3rd charge, for example, can now be avoided, pre-filing, by securing a license. *Id.* In addition, new state legislation—which has included more restrictions on license suspension and marijuana legalization—is also expected to reduce criminal filings. *Harrison Decl.* ¶ 11-12.

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Mountain Law is also regularly meeting with clients. In fact, their assistant schedules appointments the moment that a client qualifies for a public defender. Ex. B (Laws Dep. Tr. 325:16-327:22); *Eason Decl.* ¶ 10 (noting large poster in courtroom, with attorneys' pictures, prominently inviting clients to speak with them). This is unlikely to be in dispute.

The Cities fully anticipate a declaration from Christine Jackson—the only expert who supplemented her report to reflect *any* criticisms of Mountain Law.[10] But these criticisms should be disregarded as objectively incorrect. After securing "50 random files," Jackson looked at Mountain Law's cold records and made broad assumptions about their skill as lawyers. Ex. G. These assumptions were almost uniformly wrong. For example, Jackson claimed that the Mountain Law lawyers were not doing legal research, checking criminal histories, or reviewing driving history. Untrue; the attorneys absolutely do this work, but they do so electronically. Thus, there is no "document" in their paper files. Ex. D (Laws Dep. Tr. 346:17-347:3); (Laws Dep. Tr. 347:7-348:5); (Laws Dep. Tr. 363:19-367:2). Jackson also made wrongheaded assumptions based upon time-keeping records and client resolutions, which are addressed more fully below.

At bottom, Mountain Law is doing admirably—and there is no objective, or even subjective, evidence to the contrary. And their attorneys are being compensated accordingly. They are paid **$374,200 per year**, which does not include separately budgeted expenses for investigators and experts. *Harrison Decl.* ¶ 31. This is more than twice what the previous public defender was paid. *Compare* Dkt. 57 (*Marshall Decl.* Ex. 1). Jackson, perhaps not surprisingly, declined to express an opinion about whether this level of compensation was adequate. Ex. B (Jackson Dep. Tr. 232:3-5). Nor have any of plaintiffs' other experts.

2. MONITORING

[10] Notably, Ms. Jackson supplemented her report one week before the close of discovery, and gave the Cities only a few days to conduct her deposition. Professors Straight and Boerner apparently have no criticisms of Mountain Law whatsoever.

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For context, Seattle holds itself out as a national leader in public defense, and boasts a budget of over $5 million. Ex. H. It is therefore reasonable to conclude that if the Cities are monitoring similarly to Seattle, it probably passes constitutional muster. So, the Cities simply posed the question to Seattle public defender Jackson:

> Q. Did I summarize the steps Seattle takes to monitor you accurately with audits, case reports, caseload numbers, monthly meetings, complaints, and input from stakeholders?
>
> A. Yes.

Ex. B (Jackson Dep. Tr. 91:22-92:1). Substantively, the Cities actually do more.

The Cities review open and closed case reports that are *more* detailed than those produced by the Seattle public defenders. *Compare* Ex. I (Seattle's) *with* Ex. J (Mountain Law's).[11] The Cities enforce a caseload that is in line with the state supreme court. *Harrison Decl.* ¶ 34. The Cities regularly meet with the public defender to discuss the substance of the case reports, among other things—by telephone and in-person. *Harrison Decl.* ¶ 34; Ex. D (Laws Dep. Tr. 350:24-351:16). The Cities' implemented a complaint system and monitor it. *Harrison Decl.* ¶ 34. And the Cities solicit input from prosecutors, court staff, and the judges. *Harrison Decl.* ¶ 34; *see also Eason Decl.* ¶ 13. In addition—and unlike Seattle—the Cities administrators actually go watch the public defenders in court, unannounced, and visit their office. *Ibid.*

The only difference between Seattle and the Cities is the "audit," which requires a closer look. When pressed, Jackson admitted that the "audit" is really nothing more than an "honor system," in which public defender files are *not* turned over—but instead, an attorney is vaguely questioned about them (*e.g.*, "was investigation done"). Ex. B (Jackson Dep. Tr. 80:16-23); (93:24-94:16). It is also worth mentioning that Jackson was unaware of *any* other municipality that conducted a similar exercise, nor has Seattle even done so since 2010. Ex. B (Jackson Dep. Tr. 103:11-14); (Jackson Dep. Tr. 123:20-124:16) (no

[11] *See also* Ex. B (Jackson Dep. Tr. 99:18-100:12) (conceding that the case reports are virtually identical).

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recollection of 2011 audit); (Jackson Dep. Tr. 95:13-17) (no recollection of 2012 audit). In any event, the Cities effectively perform the same task by simply speaking with Mountain Law regularly about the substance of their case reports. *Harrison Decl.* ¶ 34; Ex. D (Laws Dep. Tr. 350:24-351:16).

Because the Cities' public defense is overhauled, effective, and well-monitored, there is no longer any question of its constitutional validity. They respectfully move for summary judgment.

III. AUTHORITY

A prerequisite to Article III standing is the existence of a live "case or controversy." This requirement must exist not only at the time the complaint is filed, but at all stages of appellate review. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct. 1249, 1253 (1990). The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness). *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1509 (9th Cir. 1994). There are times, as here, when there is standing in the first place; but, "as sometimes happens, time and events… outstrip the court processes," and accomplish the same thing that a judgment would have. *Smith v. Univ. of Washington, Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000).

This, as here, operates to render a given case moot.

A. The Legal Standard

The Cities acknowledge the general rule, that when a defendant claims a case has become moot, the burden "is a heavy one." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). The concern is that if courts were compelled to dismiss on account of a "mere voluntary cessation of conduct," it would leave the defendant "free to return to his old ways." *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). Accordingly, the defendant must show (1) with assurance, there is no reasonable expectation that the alleged violation will recur, and (2) that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *Smith*, 223 F.3d

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at 1194 (*Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998)).

But "that does not mean that the burden cannot be borne." *Smith*, 233 F.3d at 1194. And significantly, as here, a ***governmental*** change of policy presents "a special circumstance in the world of mootness." *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010). "[C]essation of the allegedly illegal conduct *by government officials* has been treated with more solicitude by the courts than similar action by private parties." *Id.* (citing *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir.1988); 13A Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533.7, at 353 (2d ed.1984)) (emphasis added).[12] "A statutory change is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Smith v. Univ. of Washington, Law Sch.*, 233 F.3d 1188, 1195 (9th Cir. 2000) (citing *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)).

There is always a theoretical possibility of bad faith or a future "change of heart," to be sure, but in this context, it is presumed that the government is acting in good faith, *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010), and *not* looking to "return to its old ways." As the Ninth Circuit observed:

> A statutory change… is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed. As a general rule, if a challenged law is repealed or expires, the case becomes moot. ***The exceptions to this general line of holdings are rare*** and typically involve situations where it is virtually certain that the repealed law will be reenacted.

[12] *See also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010) (requiring, to deny mootness, "clear showings " of governmental "desire to return to the old ways"); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328-29 (11th Cir. 2004) ("[G]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities."); *Amax, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003) (noting that cessation of conduct by the government is "treated with more solicitude ... than similar action by private parties").

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Native Vill. of Noatak v. Blatchford, 38 F.3d 1505, 1510 (9th Cir. 1994) (collecting cases) (internal citations omitted) (emphasis added).[13] Indeed, in this context, the burden has been reversed, and there must be a "clear showing" *by the plaintiff*, of the government's "desire to return to the old ways." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010)

The Cities now turn to the record.

B. The Grievances Raised By Plaintiffs, Which Initially Created An Issue Of Fact, Are Resolved

In denying summary judgment, the Court found that plaintiffs' evidence created an issue of fact as to whether the Cities' public defense system operated to constructively deny indigent defendants their right to counsel. A trial was set to determine whether injunctive and declaratory relief were appropriate. But the system that was to be put on trial no longer exists; and the grievances have been legislatively addressed—as discussed below.

1. "Failure To Impose Reasonable Case Load Limits" (Preliminary Injunction and Opposition to Summary Judgment at 3)

The Cities went to great lengths to ensure that the new public defenders did not attempt to take on more cases than they could adequately handle. This earlier problem was addressed through a global reduction in caseloads, legislation and a new contract, a detailed RFQ process echoing this requirement, a more workable definition of "case," and *mandatory* caseload standards that the Mountain Law attorneys must certify compliance with. It cannot be said that there is a substantial likelihood—or any likelihood—that the new public defenders will, in the future: (1) breach their contract, (2) disregard legislation, (3) ignore mandatory court standards, and (4) violate their certifications, all to carry an excessive caseload.

[13] The court cited *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), as an exception to the rule. There, the repeal of city ordinance did not render challenge to ordinance moot, because the city had track record of enacting and withdrawing legislation in response to court rulings. *See id.* at 287-89.

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This is buttressed by the marked increase in attorneys and funding. There are now ***double*** the number of ***full time*** public defenders, with more than double the compensation. There has also been a countervailing reduction in case filings due to the detailed deferral measures enacted by the Cities—which tangibly reduce the number of charges brought by the prosecutor. *Harrison Decl.* ¶ 10-12, Ex. E-F.

The attorneys are carrying caseloads in compliance with applicable standards. To the extent that there *was* a dispute, it is resolved.

2. "FAILURE TO COUNSEL DEFENDANTS WHO ARE IN OR OUT OF CUSTODY" (PRELIMINARY INJUNCTION AND OPPOSITION TO SUMMARY JUDGMENT AT 6-13)

This, too, is now a non-issue. Mountain Law is regularly meeting with their clients, and even works to schedule in-office meetings at the moment of case assignment. Ex. D (Laws Dep. Tr. 325:16-326:24). And to the extent that this does not happen on account of the lawyer, their clients have immediate and effective recourse through the complaint form they receive upon assignment. *See generally Van De Grift Decl.* None have needed to use it, however. *Id.* Mountain Law is also meeting with its in-custody clients in Skagit jail *at least* weekly—and maintains signed forms from their clients to prove it. Ex. F.

The attorneys are also standing with their clients in court. *Eason Decl.* ¶ 9.

These issues are resolved.

3. "FAILURE TO MONITOR" (PRELIMINARY INJUNCTION AND OPPOSITION TO SUMMARY JUDGMENT AT 14)

The Cities' comprehensive investigation, overhaul, and implementation of new policies and procedures belies any suggestion of "indifference." The Cities made considerable improvements, at considerable cost, because they do indeed care about the rights of indigent defendants in their municipal courts. And the manner in which they monitor their public defenders is comparable—if not, better than—the way plaintiffs' own expert is monitored. *Compare* Ex. B (Jackson Dep. Tr. 91:22-92:1).

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The Cities put in place a new process for addressing complaints, receive more detailed reports and case load certifications, solicit feedback from stakeholders, go to court, and engage in regular discussions with Mountain Law about their work. *Harrison Decl.* ¶ 34; Ex. D (Laws Dep. Tr. 350:24-351:16). This complaint is resolved.

4. NEGATIVE EXPERIENCES WITH SYBRANDY AND WITT

Finally, plaintiffs—and others—raised various adverse experiences with these two attorneys. They ranged from mild complaints pertaining to where they stood, to startling complaints about alcohol in court. Sybrandy and Witt denied the allegations. But the dispute is moot, in any event. The Cities have entered into a binding contract with a new firm. *Snyder Decl.* ¶ 12, Ex. B.

Any complaints about the prior two attorneys, disputed or not, are immaterial.

C. This Case Should Be Dismissed As Moot

Taking plaintiffs at their word, this was a case about a "bad system." *See* Dkt. 45 (*passim*). But that system is gone. It has been legislatively and contractually replaced by a better one. The problems cited no longer exist; nor does the likelihood of future harm. The premise on which the Court found issues of fact is now absent.

1. THE RECENT CHANGES ARE PERMANENT AND THERE IS NO LIKELIHOOD OF REGRESSION

It is true that in "rare circumstances" a governmental claim of mootness is rejected when there is a substantial likelihood that it will "go back to its old ways," thus making injunctive relief necessary. But that is absolutely not the case here.

The Cities are not chafing under these new policies. They view them as improvements. Indigent defendants are better served, the courts are better served, and as a consequence, justice is better served. The Cities harbor no secret intention of (a) breaching their contract and supreme court standards; (b) undoing all of their carefully-crafted legislation; or (c) disregarding the thoughtful work of independent counselors, Mr. Snyder and Mr. Feldman. This has been a lengthy process, culminating in a better system.

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In other words, this is not *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). There, unlike here, the city made no secret of its disagreement with its new enactments; and had a track record of enacting and withdrawing legislation in response to court rulings. *See id.* at 287-89. The Supreme Court therefore found it appropriate to consider injunctive relief to ensure that there was no "return to the old ways." Here, by contrast, there is no track record or desire for regression.

Nor does the Cities' earlier briefing call these improvements into question. Even if the Cities did disagree with their new enactments (which they do not), courts recognize that it is one thing to disagree with the law and quite another to violate it. *Smith*, 233 F.3d at 1195 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978)).

The changes are permanent. The Cities stand behind them. *Stendal Decl.* ¶ 6; *Harrison Decl.* ¶ 43-44.

2. PROSPECTIVE RELIEF PERTAINING TO A CONSTITUTIONALLY ADEQUATE SYSTEM IS INAPPROPRIATE

Based upon the beneficial changes, there is no reason for either party to litigate. The relief sought has already come about, through legislation and affirmative policy change. As such, this case should be dismissed.

By way of context, the relief plaintiffs are requesting is extraordinary, in both principle and execution. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). They are effectively asking the Court to step in and take over the budgeting and prosecuting authority of two elected legislative bodies. The Court has this authority, to be sure. But it should be used sparingly and only in rare circumstances. *See, e.g., Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (school desegregation). There must be "extraordinary justification" for this relief:

> There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing [of] an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in

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> damages. ***The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction; but that will not be awarded in doubtful cases, or new ones, not coming within well-established principles***; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. ***It will be refused till the courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act***...

Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, § 2942, 11A Fed. Prac. & Proc. Civ. § 2942 (2d ed. 2012) (citing *Bonaparte v. Camden*, C.C.D.N.J.1830, 3 Fed. Cas. 821, 827 (No. 1, 617)) (Baldwin, J.)) (emphasis added).

These principles apply with even more force here, in light of the "mandatory" relief plaintiffs are seeking. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (a mandatory injunction requiring a positive act is "particularly disfavored"). The Court has every reason to exercise restraint, and none to rush to judgment of a newly-enacted public defense system.

In fact, new regulations presumptively obviate the need for prospective relief. *Nat'l Min. Ass'n v. U.S. Dept. of Interior*, 251 F.3d 1007 (D.C. Cir. 2001), provides a helpful comparison. There, the court was considering the validity of certain regulatory requirements and procedures imposed on permit applicants. *Id.* at 1009. After oral argument, the Interior Department revised these regulations and procedures. The court, upon review, determined that the revisions rendered the association's case moot, stressing that the alteration of real-world conditions eliminated the possibility of meaningful relief. *Id.* at 1010-11. In dismissing, the court emphasized:

> The old set of rules, which are the subject of this lawsuit, cannot be evaluated as if nothing has changed. A new system is now in place.

Id.; *Cf. Ramsey v. Kantor*, 96 F.3d 434, 446 (9th Cir. 1996) (holding that the rule of mootness applies "where an agency will be basing its ruling on different criteria or factors in the future").

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But perhaps more fundamentally, there must *always* be a baseline showing of "imminent harm." *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). This requires something more than speculative fear:

> The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."
>
> * * *
>
> Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects."

City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (collecting cases).

Here, however, there is no such showing—a fact borne out by the testimony of plaintiffs' own expert. One week before discovery closed, she produced a new report stating:

> "... it is ***certain*** that actual harm will result to indigent defendants. Some of the forms that this harm may take are as follows: being deported as a result of guilty pleas to crimes and sentencing dispositions that trigger immigration consequences; years of debt from excessive fines; loss of rights due to domestic violence conviction; increased imprisonment and extended supervision due to guilty pleas where there is inadequate consideration of the client's record and other pending cases; being convicted of a crime and suffering the consequences of a criminal record when the person was not legally guilty of that crime, or the charge should have been dismissed, or a non-conviction disposition should have occurred. DVs, DUIs, and theft convictions are the kind of misdemeanors that destroy people's lives...

Ex. G (*Jackson Decl.* ¶ 39). Consequently, in her deposition, the Cities posed the logical question, *i.e.*, which of these "certain" harms actually happened in Mount Vernon or Burlington:

> Q. Okay. Paragraph 39, you testified that it's certain that actual harm result to indigent defendants under these circumstances. And some forms of harm may take the following forms. And then you list a few.

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A. Yes, mm-hmm.

Q. Are you familiar with anyone being deported as a result of a guilty plea… in Mount Vernon or Burlington?

A. Not from the information that I reviewed.

Q. Are you familiar with anybody incurring years of debt from excessive fines?

A. A specific individual?

Q. Yes.

A. I don't think I have any specific information on any of the available information that I have…

Q. Are you familiar with anybody who lost gun rights as a consequence of a conviction that would have been avoided with Constitutional public defense?

A. I don't -- I'm not quite sure I understand the question. But in terms of the case -- the specific cases that I looked at, I didn't see any specific information about any one individual...

Q. You can't point me towards the name of an individual right now?

A. No.

Q. Anybody who had increased imprisonment or extended supervision as a consequence of inadequate consideration of the client's record and other pending cases?

A. No, because there was specifically not analysis on certain -- on many of the individuals with regard to whether they had open cases or not.

Q. Are you familiar with anybody whose life was destroyed as a consequence of the unconstitutional public defense in the cities?

A. Not based on the information that I had.

Ex. B (Jackson Dep. Tr. 268:21-270:21).

To be clear, this lawsuit was filed almost ***two years ago***—and plaintiffs had been investigating since well-before that. They had access to tens of thousands of pages of

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discovery, public court documents, and even confidential third party information. Class counsel deposed everybody they wanted to, and beyond that, had far better access to the class than the Cities. *See* Dkt. 164. Yet, years later, plaintiffs remain unable to cite a single instance in which their "certain harms" actually happened. This speaks volumes about the need for "extraordinary relief."

Continued litigation would only be justified by the compound assumptions that (1) the Cities will violate or repeal their duly enacted legislation; (2) the parties will breach their new public defender contract and ignore Supreme Court standards; (3) the new public defenders will suddenly become incompetent and unethical; and (4) the new measures to monitor and reduce caseloads will somehow cease to work. Factually, this is untenable, and legally, it is not assumed. *See, e.g., Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir.1988); *Smith v. Univ. of Washington, Law Sch.*, 233 F.3d 1188, 1195 (9th Cir. 2000).[14] At best, such a failure is pure speculation. The ongoing burden of litigation is no longer justified, nor is the extraordinary relief sought.[15]

Finally, it bears emphasis that if *all* of the Cities' new measures suddenly *did* fail or were dismantled, plaintiffs would have a remedy. They would be within their rights to re-file their complaint, inform the Court of prior events, and pursue relief accordingly. This is precisely what was done in *Jews for Jesus, Inc. v. Hillsborough County Aviation Auth.*, 162 F.3d 627 (11th Cir. 1998), where the plaintiff organization was precluded from distributing

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[14] *See also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010) (requiring, to deny mootness, "clear showings" of governmental "desire to return to the old ways"); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328-29 (11th Cir. 2004) ("[G]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities."); *Amax, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003) (noting that cessation of conduct by the government is "treated with more solicitude... than similar action by private parties").

[15] Though the authority cited generally involved injunctive relief, the mootness considerations apply to declaratory relief as well. The mootness inquiry is generally not diminished in declaratory judgment actions. *Gator.com Corp. v. L.L. Bean Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005); *Green v. Mansur*, 474 U.S. 64, 67-72 (1985).

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literature by airport policy. *Id.* at 628. It brought suit, seeking injunctive and declaratory relief relating to its First Amendment rights. *Id.* The airport's restrictive policy was lifted a month later, and the airport raised mootness. Agreeing that evaluation of the old policy would be "a purely academic point," the case was dismissed. *Id.* at 629-30. The organization countered that the old practices could still be reinstated. But the court observed that such a cavalier decision would be subject to redress:

> We may, of course, be mistaken about the secret intentions of Tampa International Airport's officials. If they choose to reinstate their restrictive policies-or adopt similar ones-the courthouse door is open to Jews for Jesus to reinstate its lawsuit. Under such circumstances, the case would not be moot even if the airport again revoked its policies in response to the lawsuit, because such "flip-flopping" would create a reasonable expectation that the airport would reinstate the challenged practice at the close of the lawsuit.

Id. at 629-30.

So too, here. If the Cities were to suddenly dismantle their new system, plaintiffs could bring suit without fear of a mootness defense. And more importantly, plaintiffs would be in a position to demonstrate the problems with the *new* system in a way that warrants a remedy. This is far more prudent than litigating future events now, based upon speculative assumptions—and more consistent with the law as it pertains to prospective relief. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (injunctive relief requires a "clear showing").

For the reasons outlined above, this case—which has factually evolved since its inception—should be dismissed as moot.

D. Plaintiffs' Anticipated Responses Will Lack Merit

All of plaintiffs' criticisms of public defense are resolved. Caseloads are within appropriate limitations. Meetings are being scheduled immediately, and held shortly after. The number of full-time attorneys doubled. The budget is greatly increased. And there are zero complaints. There is simply nothing left to allege. But it is nonetheless anticipated

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that plaintiffs will respond with (1) the sweeping opinion of Christine Jackson, and (2) declarations from undisclosed witnesses. Neither bears scrutiny.

1. THE UNSUPPORTED—AND PROVABLY WRONG—SAY-SO OF SEATTLE ATTORNEY, CHRISTINE JACKSON, DOES NOT SUPPORT EXTRAORDINARY RELIEF

If allowed, Seattle attorney, Christine Jackson, appears willing to say what the evidence does not. Based upon reviewing some documents from Mountain Law, she broadly condemns its attorneys. Her allegations have since been discredited, but should they reappear, they should be disregarded for the following reasons.

i. Jackson's Opinion Is Based Upon Assumptions Which Are Demonstrably Wrong

"Rule 702(1) requires that expert testimony be 'based upon sufficient facts or data.'" Wright § 6266 Scientific Evidence, Non-Scientific Experts, and Reliability, 29 FED. PRAC. & PROC. EVID. § 6266 (1st ed. 2012) (citing Fed. R. Civ. P. 702). Included in the analysis under Rule 702(1) is whether the expert considered all the pertinent physical or eyewitness evidence. *Id.* Here, we know that Jackson did not.

To the contrary, Jackson secured "50 random Mountain Law files" through subpoena, and from there, assumed wildly. Virtually all of her guesses were flat-out wrong. They include by way of example:

JACKSON'S CLAIM	THE TRUTH
"There were Mountain Law case files where the client's criminal history was not provided or obtained." Ex. G (Decl. ¶ 24).	Mountain Law reviews criminal history every time—*electronically*. This is why it was not in the files Jackson reviewed. Ex. D (Laws Dep. Tr. 347:7-348:5.
"The average number of hours that Mountain Law's attorneys are spending on misdemeanor cases… is less than two hours per case." Ex. G (Decl. ¶ 14).	The time records kept by Mountain Law are "used to record the big picture," but are under-reported because, many times, they do not reflect travel, meetings, conversations, and phone calls. Ex. D (Laws Dep. Tr. 360:3-361:19).

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JACKSON'S CLAIM	THE TRUTH
"I did not see evidence of any legal research…" Ex. G (Decl. ¶ 20).	Like criminal history, Mountain Law conducts legal research *electronically*. It does not go into the files that Jackson reviewed. Ex. D (Laws Dep. Tr. 363:19-367:2).
"I saw no evidence in the Mountain law case files of consultation with the immigration resource attorneys…" Ex. G (Decl. ¶ 23).	Mountain Law is aware of, and uses, immigration attorneys. Ex. D (Laws Dep. Tr. 340:14-341:19). Its lawyers always ask whether their clients are in the country legally. *Id.* When pressed, Jackson could cite no immigration consequences that have befell a Mountain Law client. Ex. B (Jackson Dep. Tr. 269:1-5).
"[In *Phillips* and *Bromels*,] I saw little or no evidence of an effort to obtain pretrial diversions…" Ex. G (Decl. ¶ 25).	Phillips *did* secure an alternative resolution, in which her charge would be removed from her record with good behavior. Bromels was not eligible because he had priors. Ex. D (Laws Dep. Tr. 372:21-373:23).
"… I did not see any attempt to obtain client files from the Department of Licensing…" Ex. G (Decl. ¶ 27).	Again, Mountain Law reviews this *electronically*; it is also received in discovery. Ex. D (Laws Dep. Tr. 346:17-347:3).
"… there is little or no indication that the attorneys provided factual or legal analysis to the clients in each case." Ex. G (Decl. ¶ 28).	This is done *verbally* as a matter of course. Ex. D (Laws Dep. Tr. 375:2-4).
Spielman was resolved prematurely; an expert should have been consulted. Ex. G (Decl. ¶ 29).	Ms. Spielman was mortified by her drunken behavior, and felt strongly about resolving her charges at the earliest possible time. Ex. D (Laws Dep. Tr. 337:12-339:8).
"On the ICRAP form, which is filled out for in-custody clients, there is no place to record information that would be helpful to obtaining the client's release…" Ex. G (Decl. ¶ 32).	The In Custody Response Assessment Profile is, by its own terms, for "internal tracking purposes only." Ex. F Its sole purpose is to document jail visits, Ex. D (Laws Dep. Tr. 287:13-16), it is not the only form of note-taking

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JACKSON'S CLAIM	THE TRUTH
"Too few cases are set for trial…" Ex. G (Decl. ¶ 35).	Mountain Law tries more cases than private counsel in the Cities, and at the time of its deposition, its attorneys had 15 cases set for trial in Mount Vernon along. Ex. D (Laws Dep. Tr. 280:5-281:3; 345:2-8); *Eason Decl.* ¶ 4.

Jackson's claims are both inaccurate and unfair.[16]

Experts may not rely on unreasonable inferences or resort to "mere speculation or guess." *Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, 476 F. Supp. 2d 1143, 1154-55 (N.D. Cal. 2007) (citing *Central Soya Co. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1576 (Fed.Cir.1983)); *Guidroz–Brault v. Missouri Pac. R.R. Co.*, 254 F.3d 825, 829 (9th Cir.2001) ("may not include unsupported speculation and subjective beliefs."). In *Guidroz-Brault v. Missouri Pac. R. Co.*, 254 F.3d 825, 830 (9th Cir. 2001), for example, the plaintiffs were involved a train wreck when the tracks had been sabotaged. They alleged that had the train maintained a proper lookout, the accident could have been avoided. An expert endorsed this claim, but was no evidence in the underlying record that the sabotaged track were visible in the first place—that was merely an assumption the expert made. His opinion was appropriately excluded. *Id.* at 830-31.

This applies perforce to Jackson's opinions; her opinions are worse than those in *Guidroz-Brault*. There, the assumptions were speculative. Here, Jackson's assumptions are just plain wrong. This, standing by itself, furnishes a basis to reject Jackson's demonstrably incorrect opinions. Fed. R. Evid. 702(b) (expert testimony must be "based on sufficient facts or data"); *J.B. Hunt Transp., Inc. v. Gen. Motors Corp.*, 243 F.3d 441, 444 (8th Cir. 2001) ("Expert testimony that is speculative is not competent proof and contributes nothing to a legally sufficient evidentiary basis.").

[16] These faulty conclusions are a function of an extraordinarily result-oriented investigation. Jackson ignored unfavorable evidence—such as the prosecutors' declarations—and rather than even hear the public defenders' side of the story, Jackson chose to review only excerpts carefully selected for her by the plaintiffs' attorneys. *See* Ex. B (Jackson Dep. Tr. 132:4-6; 219:5-7). Nor did Jackson speak to a single indigent defendant, judge, or court staff-member to test her conclusions. Ex. B (Jackson Dep. Tr. 135:25-137:5).

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ii. Jackson's Opinions Cannot Survive A *Daubert-Kumho* Challenge

Even if the Court were ignore the inaccurate assumptions undergirding Jackson's opinions, they would still fail under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and Fed. R. Evid. 702, both of which require *reliability*. Distilled down, Jackson's opinion is that the "average amount of time" spent by the Mountain Law attorneys is too low. Plaintiffs bear the burden of establishing the reliability of her methodology. *Lust v. Merrell Dow Pharms. Inc.*, 89 F.3d 594, 598 (9th Cir.1996).

"Reliability" under Rule 702 requires a "sufficiently rigorous analytical connection between the methodology and the expert's conclusions." *Nimely v. City of New York*, 414 F.3d 381, 397 (2d Cir. 2005). "Nothing in either *Daubert* or the Federal Rules of Evidence requires the district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (9th Cir. 1997); *see also McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000) (opinion must rest on "good grounds" which is "more than subjective belief and unsupported speculation"). The Court is entitled to conclude that there is too great an analytical gap between the data and the opinion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

"The Supreme Court has extended to all expert testimony the general principles of *Daubert*." Charles Alan Wright et al, § 6266 Scientific Evidence, Non-Scientific Experts, and Reliability, 29 FED. PRAC. & PROC. EVID. § 6266 (1st ed. 2012) (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999)). Applying this framework to Jackson's opinion—*i.e.*, that the Sixth Amendment can be reduced to a stop watch—it is immediately clear that it flunks the usual *Daubert* criteria. There is no support in any peer reviewed journal, it is not "testable," has no known "error rate," and finds no support in the relevant community. *See Kumho Tire Co.*, 526 U.S. at 150.

But, to be fair, the Court has discretion to apply some or none of the *Daubert* factors when the opinion is non-scientific. Jackson's is not. But it still must rest on "good

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grounds"—as determined "by common sense, logic, and practices common to or accepted in the area of expertise in question." Charles Alan Wright et al, § 6266 Scientific Evidence, Non-Scientific Experts, and Reliability, 29 FED. PRAC. & PROC. EVID. § 6266 (1st ed. 2012). First and foremost, Jackson's methodology finds no support in the legal community. Agencies do not measure the constitutional adequacy of their public defenders by "average time" spent per case. If this were an accepted methodology of evaluating attorneys, the Washington Supreme Court would have adopted it in its recent standards. It did not. Nor has the WSBA.

More importantly, any claim of "logic and common sense" is belied by the sheer quantity of variables that are overlooked or ignored in Jackson's methodology. The Cities would list a few of the more obvious ones.

First, the clients' absolute right to accept a plea may extend or shorten time spent on any given case. The *Spielman* case provides a good example of this. Without speaking to Ms. Spielman, Jackson criticized Mountain Law for "underworking it" and failing to "hire an expert." But it turned out that Ms. Spielman was embarrassed and wanted to resolve her charges with as few appearances as possible. She chose to plead early, with full understanding of the consequences. Ex. D (Laws Dep. Tr. 337:12-339:8). Jackson cited *Crawford* as another example. But again, Mr. Crawford intelligently elected to accept a pending offer in lieu of further proceedings, and in doing so, avoided a potentially more significant Minor in Possession charge. Ex. D (Laws Dep. Tr. 369:21-371:14). Applying a stopwatch to these cases is an arbitrary, if not counterproductive, measure of the quality of the representation.

Second, Jackson is assuming perfect time-keeping, when even her own agency does not do this. *See* Ex. B (Jackson Dep. Tr. 249:15-5) ("… our [Seattle public defense] lawyers under-report their time… I assume all lawyers under-report their time."). Mountain Law is no different. It keeps time only "to record the big picture," but generally under-reports, Ex. D (Laws Dep. Tr. 360:3-361:19), in part, because the task is not even required

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by their contract (or the Supreme Court standards). Considerable work is not captured. *Id.* The time records, on which Jackson relies, are likewise not reliable.

Third, the correlation between time spent and effective outcome is entirely variable. Often, there is no correlation whatsoever. In his deposition, Mr. Laws explained that when they spot an issue or defense, it is generally *less* effective to immediately bring a motion. Many times, they can simply raise it with the prosecutor, who will dismiss the charge. This exact thing had happened the Wednesday before Mr. Laws' deposition, Ex. D (Laws Dep. Tr. 335:337:11), and it was much quicker and more effective than a motion[17]; *see also* Dkt. 120 (*Sybrandy Decl.* ¶ 10; 13); *Eason Decl.* ¶ 6-7. In contrast, when a more time-consuming motion is brought and lost, the defendant can lose leverage in negotiating the plea. Ex. D (Laws Dep. Tr. 335:337:11).

Fourth, the sample size is arbitrary in terms of size and mix. There is no underlying methodology or objective basis for concluding that documents, which do not capture all of the work done, in approximately 3% of Mountain Law's annual caseload, speak holistically to the constitutionality of their representation.

And ***fifth***, Jackson completely ignores the size and complexity of the jurisdictions—yet another variable affecting the time one would expect to spend on a given case. She practices only in Seattle, and admittedly has no experience in smaller jurisdictions like Mount Vernon or Burlington. Ex. B (Jackson Dep. Tr. 246:10-12). Her analysis, by its own terms, did not take into account (1) the size of the geographic area, (2) the number of prosecutors, (3) the number of police officers, (4) the number of judges, (5) the number of indigent defendants, (6) the type of population, or (7) average sentences. Common sense would dictate that a case can be more quickly resolved when the lawyers already know the defendant and witnesses, have experience with the judge and prosecutor, do not face severe sentences, and live near the scene. *See also* Ex. A (Hayden Dep. Tr. 128:11-130:22). These variable, too, are ignored by Jackson.

[17] Even Jackson admits that this occurs. Ex. B (Jackson Dep. Tr. 251:8-12).

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Courts routinely exclude experts whose opinions, as here, rest upon too many variables. *See, e.g., Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997) (expert who failed to rule out other possible theories of causation stricken); *J.B. Hunt Transport, Inc. v. General Motors Corp.*, 243 F.3d 441, 444-45 (8th Cir. 2001) (opinion of accident reconstructionist who only examined pictures was properly excluded); *Turner v. Iowa Fire Equipment Co.*, 229 F.3d 1202, 1208 (8th Cir. 2000) (trial court properly excluded expert who did not rule out other possible explanations); *Oglesby v. General Motors Corp.*, 190 F.3d 244, 250–251 (4th Cir. 1999) (expert's testimony was unreliable because he did not test, do calculations, or consider alternatives). Jackson's opinions, in this case, are subject to more significant variables than *any* of the expert opinions in the above-cases.

Plaintiffs cannot meet their burden to establish that Jackson's opinion is reliable. It should be rejected on that basis as well.

iii. Even if Jackson's Opinion Were Supportable—Which It Is Not—She Cites No Connection To City Policy For Purposes Of *Monell* (Nor Could She)

Lastly, even if the Court were to credit Jackson's opinions, they do not go far enough. The Cities are not subject to § 1983 liability based upon the discrete, case-specific errors of the public defender. *See Polk County v. Dodson*, 454 U.S. 312, 325 (1981). Plaintiffs avoided this last time by arguing that the Cities' "funding, contracting, and monitoring" policies directly and predictably deprived indigent criminal defendants of their Sixth Amendment right to counsel, "regardless of any individualized error" on the part of the public defender. *See* Dkt. 143 (Order at 10).

This is no longer tenable. The Cities' "policies and funding decisions" flow directly from the Washington Supreme Court and an independent investigation by a well-respected public defender, who, himself, was independently picked by another independent counselor. *Snyder Decl.* ¶ 5-7. And the current four Mountain Law attorneys carry—and are

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compensated for—caseloads which are entirely in line with the applicable standards. Even Jackson conceded that four attorneys were sufficient to handle the caseload, assuming the cases were properly counted (which they are). Ex. B (Jackson Dep. Tr. 321:2-22).[18]

Even if the Mountain Law attorneys erred in some way, it was not caused by any City policy. Their investigations, motions practice, and retention of experts is a function of their independent legal judgment and client wishes. Ex. D (Laws Dep. Tr. 322:12-325:7); (339:9-340:9); (342:1-343:4). It has nothing to do with any "systemic" policy or funding decision. No expert or individual suggests otherwise.

2. THE COURT SHOULD DISREGARD UNTIMELY DECLARATIONS

On the evening of the last day of discovery, plaintiffs emailed their Fourth Supplemental Disclosure of Witnesses, which reflected new potential witnesses. To the extent that their testimony is offered, it should be disregarded under Rule 37:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

Fed. R. Civ. P 37(c)(1); *see also Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008) (affirming district court's order excluding undisclosed damages evidence); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (similar).

These witnesses were insulated from any and all discovery and investigation. Discovery had closed by the time they were disclosed, so they could not be deposed timely. Nor could they be spoken to privately. Paladichuk is privately represented, and the Cities could not speak with her under Rule 4.2. And the only contact information given for Muenscher was the jail—which he left by the time it was contacted. Other witnesses were

[18] To be fair, Jackson was cagey—and insisted that it would "depend on who the lawyers are." But when asked if she held any opinions about the competence of Mountain Law, she responded that she "would not be able to hazard a guess." Ex. B (Jackson Dep. Tr. 219:11-15). Accordingly, she is in no position to controvert the positive opinions of the prosecutors, contract administrator, Michael Laws, and negative complaint history.

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disclosed with no contact information whatsoever, and uniformly subject to the same evasive disclosure of their knowledge—*i.e.*, "Information regarding Defendants' pattern and practice of constructively denying indigent persons of the right to counsel" (Ex. K). This provided no further insight.

Consistent with Rule 37, these individuals should be precluded. The error is not harmless, nor is there any justification for the suspect timing and substantively meaningless disclosure of these two individuals. They should play no part in this motion or trial.

E. Summary Judgment Should Be Granted

The Cities commend plaintiffs on their advocacy, but they are now champions without a cause. To the extent that this lawsuit was ever meritorious, the underlying basis is now negated. The proper remedy, consistent with Article III, is dismissal.

IV. CONCLUSION

For the foregoing reasons, the Cities respectfully request that the Court enter their proposed Order granting summary judgment, a copy of which accompanies this memorandum.

DATED this 5th day of March, 2013.

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DECLARATION OF SERVICE

I, Joan Hadley, hereby declare under penalty of perjury of the laws of the state of Washington that I am of legal age and not a party to this action, and that on the 5th day of May, 2013, I caused copies of the ***Defendant Cities' Motion for Summary Judgment***, ***Declaration of Adam Rosenberg in Support of Motion***, ***Declaration of Bryan Harrison in Support of Motion***, ***Declaration of W. Scott Snyder in Support of Motion***, ***Declaration of Maria Van De Grift in Support of Motion***, ***Declaration of Patrick Eason in Support of Motion***, ***Declaration of Eric Stendal in Support of Motion***, and ***Proposed Order Granting the Cities' Motion for Summary Judgment*** to be filed and served to the following parties of record using the USDC CM/ECF filing system:

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