LAUREN KAUFMAN (State Bar No. 14677C)
kaufman@aclunv.org
AMERICAN CIVIL LIBERTIES UNION OF NEVADA
601 S. Rancho Drive, Suite B11
Las Vegas, NV 89106
(702) 366-1536

FRANNY FORSMAN (State Bar No. 14)
f.forsman@cox.net
LAW OFFICE OF FRANNY FORSMAN, PLLC
1509 Becke Circle,
Las Vegas, NV 89104
(702) 501-8728

EMMA ANDERSSON (*pro hac vice*)
eandersson@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street,
New York, NY 10004
(212) 284-7365

MARGARET L. CARTER (*pro hac vice*)
MATTHEW R. COWAN (*pro hac vice*)
mcarter@omm.com; mcowan@omm.com
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071
(213) 430-7592

KATHERINE A. BETCHER (*pro hac vice*)
kbetcher@omm.com
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
(415) 984-8965

Attorneys for Plaintiffs

THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CARSON CITY

DIANE DAVIS, JASON LEE ENOX, JEREMY LEE IGOU, and JON WESLEY TURNER II, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

STATE OF NEVADA; STEVE SISOLAK, Governor, in his official capacity,

Defendants.

Case No. 170C002271B

Dept. No. II

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

(ORAL ARGUMENT REQUESTED)

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INTRODUCTION

This Court should certify the Class and allow it to challenge and enjoin Defendants' failure to structure an indigent defense system that provides meaningful representation to the indigent in the Rural Counties.

Defendants' Opposition fails to rebut, and in most cases, even to address, Plaintiffs' key arguments and evidence to support class certification. Plaintiffs have presented overwhelming evidence that Defendants have, on a systemic level, violated their constitutional obligation to provide meaningful representation to the indigent in the Rural Counties. Now, after more than a year to conduct class discovery, Defendants offer no evidence to dispute this fact and no reason why this Class should not be certified. Defendants do not dispute that:

- It is Defendants' responsibility— not the Rural Counties'—to ensure that the indigent defense in the Rural Counties is constitutionally adequate under *Gideon v. Wainwright*, 372 U.S. 335 (1963);
- They have failed to monitor, set standards for, or structure a system for indigent defense in the Rural Counties;
- Their inaction is leading to systemic deprivations in the provision of indigent defense across those counties; and
- They have known about this deficiency for years and failed to address it.

Defendants fail to challenge a number of Plaintiffs' legal arguments as well, including that the Class meets the numerosity and adequacy requirements of Rule 23.

The arguments that Defendants do make—about standing, commonality, typicality, and Rule 23(c)(2)—all rely on this faulty premise: that differences within the non-party Rural Counties somehow make Plaintiffs' claims against *these State Defendants* uncommon, untypical, and incapable of resolution by an injunction that requires systemic *state* reform—though the legislature is even now considering state-level reform in Assembly Bill 81 ("AB 81").[1] Although Defendants admit that it is the *State's* obligation to provide meaningful defense to the indigent,

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[1] *See* Committee on Judiciary, Assembly Bill No. 81 (April 23, 2019), available at https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6032/Text.

they continue to insist that the real question is whether attorneys provided by the Rural Counties have been deficient, and that this somehow requires a Named Plaintiff for every Rural County. Opp. at 6. Defendants do so even though Plaintiffs have:

- Named *State Defendants*;
- Challenged the *State's* policy of inaction and abdication in the Rural Counties;
- Sought a declaration that this policy violates the *State's* obligation to provide meaningful representation to indigent criminal defendants in the Rural Counties; and
- Demanded injunctive relief requiring Defendants to establish a constitutional system to remedy the violation.

E.g., FAC ¶¶ 105-107 (State policy), ¶¶ 1-9 (State's obligation); FAC at 52 (Relief Requested). And Defendants do so even though this type of class action is not new; indeed, it is a common formula to demand that it is the *state defendants* who must meet their constitutional obligations. *See e.g.*, *Duncan v. State*, 832 N.W.2d 761 (Mich. 2013); *see also Tucker v. Idaho*, No. CV-OC-2015-10240, (Idaho Dist. filed June 17, 2015).[2]

Defendants' attempt to shift focus to the Rural Counties' actions instead of the State's appears to be based on a misapplication of the prejudice requirement in *United States v. Cronic.* 466 U.S. 648 (1984). Plaintiffs had cited *Cronic* because the five factors that the Court of Appeals had used to infer ineffective assistance of counsel are relevant to evaluating a state's indigent defense system under *Gideon*. Mot. at 5, 25. *See also Wilbur v. City of Mount Vernon* ("*Wilbur III*"), 989 F. Supp. 2d 1122 (W.D. Wash. 2013). But the Supreme Court rejected the use of that inferential approach in backward-looking *ineffective assistance of counsel* cases. The Court instead required a case-by-case prejudice inquiry, or a showing that prejudice could be presumed because the circumstances were such that "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic,* 466 U.S. at 659. Defendants argue that it is this prejudice prong that Plaintiffs must satisfy—apparently by naming plaintiffs from each of the Rural Counties. Opp. at 4–5. But Plaintiffs do not challenge the lawfulness of any

[2] *Available at* https://www.acluidaho.org/sites/default/files/field_documents/tucker_v_idaho_order_granting_class_certification_2018-01-17.pdf.

single conviction on the grounds of ineffective assistance of counsel, as in *Cronic* or *Strickland v. Washington*, 466 U.S. 668 (1984), and it is therefore unnecessary to show prejudice or a presumption of prejudice on either an individual or county basis. *See, e.g.*, *Wilbur v. City of Mount Vernon* ("*Wilbur II*"), 2012 WL 600727, at *1 (W.D. Wash. Feb. 23, 2012) (request for injunctive and declaratory relief was necessary because reversal of errors in individual cases would not resolve the systemic problems identified by plaintiffs). Although Plaintiffs addressed this distinction in their Opening Brief, Mot. at 5–7 & 28–30, Defendants do not address that discussion, nor do they make any real attempt to address the claims of systemic failure by the State.

The Court should reject Defendants' argument that Plaintiffs lack standing. Standing requires only that the Named Plaintiffs were injured by the alleged conduct of Defendants, and that the injury is redressable. Here, each of the Named Plaintiffs alleged that they are injured by Defendants' actions and inaction, and that the injury is redressable through injunctive and declaratory relief requiring Defendants to implement systemic reform. *See* Mot. 12-15; FAC at 52. Defendants do not dispute that Plaintiffs meet these requirements. Errata to Opp. at 2. ("Defendants do not argue that Plaintiffs have no standing at all."). But Defendants attempt to erect a new hurdle for Plaintiffs by demanding that more Named Plaintiffs should have been named to cover each of the Rural Counties. There is nothing in standing case law or class action law that suggests that a group of Named Plaintiffs must represent every possible variety of injury—which would, of course, defeat the purpose of a class action—or that one plaintiff's standing can be created or defeated by another's. The lack of additional Named Plaintiffs in other Rural Counties cannot defeat standing for these Named Plaintiffs.

Nor can it defeat class certification. Here too, Defendants' arguments about commonality, typicality, and the uniform-injunctive-relief prong set forth in Rule 23(c)(2) can be reduced to this: They claim that this Class should not be certified because the Complaint does not name plaintiffs from each of the Rural Counties. This argument is baseless. Under Rule 23, and consistent with *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), Plaintiffs' claims need not be precisely uniform to meet the commonality requirement; all that is required is that Class

Members' claims of injury depend upon a common contention capable of classwide resolution, 564 U.S. at 350. Plaintiffs' claims are typical of the Class because they are all the result of the same conduct, perpetrated by the same Defendants: the State Defendants' failure to maintain a system that ensures meaningful representation for the indigent in the Rural Counties. System-wide injunctive relief will resolve all of the Class's claims, making certification appropriate under Rule 23(c)(2). Indeed, State is currently considering state-level reform: AB 81 would replace the State's current policy with an independent Board and Department charged with oversight, regulation, and funding of indigent defense services throughout the State.[3] *Wilbur II*, 2012 WL 600727, at *1; *see also* Mot. Ex 14 at 111-16 & 164-65, Ex. 1, & Ex. 20. This is exactly why this case is best litigated as a class action, as is typical for serious civil rights claims alleging systemic constitutional violations and requesting systemic reform.

For these reasons, the Court should grant Plaintiffs' Motion and certify the Class.

ARGUMENT

A. Defendants' Opposition Fails To Rebut and in Most Cases Does Not Address Plaintiffs' Key Arguments and Evidence To Support Class Certification

The arguments and evidence in Plaintiffs' Motion support Class certification; Defendants concede a number of them, and ignore most of the rest. Defendants make no attempt to rebut Plaintiffs' evidence with any of their own, despite more than a year of discovery.[4] The one piece of evidence Defendants do discuss is the Sixth Amendment Center's 2018 report "The Right to Counsel in Rural Nevada." Mot., Ex. 14 (hereinafter the "6AC Report"). But Defendants

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[3] *See* concurrently filed Request for Judicial Notice, Ex. A, at 8-9. ("The Board shall…[e]stablish minimum standards for the delivery of indigent defense services to ensure that such services meet the constitutional requirements and do not create any type of economic disincentive or impair the ability of the defense attorney to provide effective representation.").

[4] On December 21, 2017, Defendants moved this Court for an extended class discovery period to take "more than 50 depositions (and many more investigative interviews)." Mot. for Class Discovery and a Corresponding Extension of Time to Respond to Plaintiffs' Motion for Class Certification at 2. Defendants took no depositions and propounded no interrogatories during the entire class discovery period, which began on January 26, 2018. Declaration of Katherine Betcher ("Betcher Decl.") ¶ 4. Defendants served no requests for production since Plaintiffs filed their First Amended Complaint on October 15, 2018. Betcher Decl. ¶ 5.

misrepresent the Report's core conclusion that the State's system for indigent defense in the Rural Counties is riddled with pervasive deficiencies. *Id.* at 164–65.

In their Opening Brief, Plaintiffs detailed the factual predicate for their class certification motion. They explained the State's obligation under *Gideon v. Wainright* to provide meaningful representation to indigent criminal defendants. Mot. 4–7. Plaintiffs also explained how Defendants had failed to maintain a system to ensure meaningful representation for the indigent in the Rural Counties. Mot. at 7–10. Plaintiffs demonstrated that Defendants have long known about systemic deficiencies, through reporting of the Indigent Defense Commission, among other sources, going back to 2007, FAC ¶¶ 120, 122, 124; Mot. Ex. 1, 2 & 9, and through the more recent findings of the Nevada Right to Counsel Commission. FAC ¶ 131; Mot. Ex. 14. Plaintiffs set forth specific system-wide deficiencies, including an analysis by public defense expert Edward C. Monahan of the pervasive, pernicious, and illegal use of flat-fee contracts. Mot. at 10-11 & Exs. 5 § 6, Ex. 6 § 4, Ex. 7, Ex.8; Ex. 9 § XII, Ex. 10 Part J, Ex. 11 14, Ex. 12 § 4, Ex. 13 § XII, Ex. 20. *See also* FAC ¶ 136 (citing that Nevada Supreme Court's 26 Order ADKT No. 411 that counties "shall not use a totally flat fee contract."); FAC ¶¶ 141-55; Mot. Ex. 25 14 at 145-50; Ex. 15 at 25-32 & Ex. 16. Plaintiffs' Motion described how the Named Plaintiffs were subject to this system and injured by it; in many cases they had limited contact with the attorneys representing them, in some cases they had none. Mot. at 12–15 & Exs. 26-29.

This argument and evidence easily satisfy the requirements of Rule 23(c)(2).[5] The entire Class, across the Rural Counties, has been affected by the state's action—and inaction—as shown in the Complaint, FAC ¶¶ 102-213, in the findings of "pervasive" deficiencies in the 6AC Report, Mot., Ex. 14 at 164-65, and in the Indigent Defense Commission materials, Mot. Exs. 1-3, 16, 17, 19, among other sources. After reviewing multiple reports evaluating indigent defense in the Rural Counties, model attorney standards and guidelines, contracts between the Rural Counties and attorneys, and caseload information from the Rural Counties, Plaintiffs' expert concluded that without State intervention, the Rural Counties share a common, deficient structure that is likely to

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[5] Current Nev. R. Civ. 23(c)(2) was found under section 23(b)(2) prior to the March 2019 amendments to the Nevada Rules of Civil Procedure, and is so cited in Plaintiffs' Opening Brief.

cause "substantial and immediate irreparable injury to clients who will not receive meaningful assistance of counsel." Monahan Decl. at 2. Plaintiffs also submit evidence that the State does not reimburse the Rural Counties for any contractual costs, provide any resources to the counties, supervise the counties' systems to ensure that they are providing constitutional, meaningful representation, or offer resources for training or mentorship in any of the counties. Mot. at 10, 12; FAC ¶¶ 162-68. These failures flow directly from Defendants' inaction in the Rural Counties. *Id.* The Class seeks a system-wide injunction to remedy these failures—another hallmark of Rule 23(c)(2)—requiring the State Defendants to establish a public defense system that provides oversight and structure in the Rural Counties. FAC at 52. It does not matter that "some class members may have suffered no injury or different injuries from the challenged practice." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). As Plaintiffs demonstrated in their Motion, courts consistently certify these types of civil rights claims when the class alleges systemic violations and seeks systemic reform. Mot. at 22 (collecting cases).

The requirements of Rule 23(a) are met. ***Numerosity*** is clear: Nevada's Indigent Defense Commission indicates that hundreds of indigent defendants in Rural Counties receive appointed counsel each year. Mot. at 23 & Ex. 19; *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 847, 124 P.3d 530, 537 (2005) ("putative class of forty or more generally will be found numerous"). ***Commonality*** is established by the answer to a core common question: Is Defendants' pervasive conduct of not overseeing, holding accountable, or structuring the provision of indigent defense in the Rural Counties a violation of constitutionally mandated responsibility under *Gideon*? Mot. at 24; *Hurrell-Harring v. State* ("*Hurrell-Harring II*"), 914 N.Y.S.2d 367, 370 (N.Y. App. Div. 2011). Indeed, Plaintiffs identified nine other common questions that would also justify certification, Mot. at 25–26, more than enough to satisfy the "permissive" requirement. *Riker v. Gibbons*, 2009 WL 910971, at *3 (D. Nev. Mar. 31, 2009). ***Typicality*** is established because the Class claims all arise from the same conduct—Defendants' failure to adequately oversee, hold accountable, or structure the provision of indigent defense in the Rural Counties. Mot. at 30-33. Because the Named Plaintiffs and the Class Members are all subjected to the same State policy, all the Named Plaintiffs and Class Members share the same

risk to their constitutional rights. Mot. at 12-15, Exs. 26-29. ***Adequacy*** is also established. Mot. at 33-34. All the Named Plaintiffs are indigent, all were appointed counsel in the Rural Counties, and all are committed to effecting systemic change. Mot. at 12-15, Exs. 26-29. Plaintiffs' counsel are adequate because they are experienced litigators, with experience in class-action litigation and indigent defense-reform litigation. Mot. at 15-16; Mot. Ex. 22-25.

Defendants offer no evidence to rebut Plaintiffs' facts, and concede or ignore most of Plaintiffs' arguments:

- Defendants ***do not address*** Rule 23(a)'s numerosity and adequacy requirements, and do not dispute that the Class Members are numerous and that the Plaintiffs and counsel are adequate to address the interests of the Class.
- Defendants ***do not dispute*** that the constitutional obligation at issue belongs to the State. Specifically, Defendants do not dispute that the State of Nevada has a constitutional obligation to provide meaningful legal representation to all indigent criminal defendants—including in the Rural Counties.
- Defendants ***do not dispute*** that, despite knowing for years of systemic deficiencies in the Rural Counties, Defendants have done nothing to remedy them. Mot., Ex. 2 at 5.
- Defendants ***do not dispute*** or even acknowledge the declaration of Plaintiffs' expert, who describes several systemic problems that the State has permitted, including (1) Rural Counties' use of flat-fee or *de facto* flat-fee[6] contracts that do not encourage zealous representation, (2) contract attorneys' ability to concurrently maintain private practices at the expense of adequately defending indigent defendants, (3) an inability to allocate workload should cases go to trial, (4) lack of oversight or performance standards to ensure competent representation, and (5) lack of required qualifications for hiring attorneys. Mot. at 10-12; Mot. Ex. 20.

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[6] Although Defendants take issue with Plaintiffs' characterization of these contracts as flat-fee contracts, Opp. at 11-12, Defendants fail to identify any contractual provision that would suggest otherwise. In all but one of the contracts Defendants cite, the payment of additional fees above those fixed in the attorney's contract are contingent on the discretion of a court or county administrator, and thus any additional fees are not guaranteed even when warranted.

- Defendants ***do not dispute*** that each of the Named Plaintiffs was injured by the State's failure to provide a system of meaningful representation for the indigent. Mot. at 12-15.

The one piece of Plaintiffs' evidence that Defendants do address in detail is the 6AC Report. Opp. at. 1-3, 11-12. But Defendants mischaracterize it and willfully ignore its key findings of systemic deficiencies that require state-level reform. Defendants disingenuously claim that the 6AC Report concludes merely that Nevada has "room to improve," and argue that "[h]aving room to improve on the delivery of indigent defense services is not the equivalent of stating that current conditions are resulting in a nearly statewide, systemic deprivation of the right to counsel for indigent defendants in Nevada." Opp. at 2. But the 6AC Report made an explicit finding—which Defendants offer no facts to rebut—that the provision of indigent defense in the Rural Counties is rife with "systemic deficiencies." Mot., Ex. 14 at 164-66. The 6AC Report found that "without guidance from the State of Nevada on how to create local structures that meet the parameters of the Sixth Amendment," the Rural Counties' indigent defense systems suffer from "a ***pervasive*** lack of institutionalized attorney supervision and training," "a ***pervasive*** lack of attorneys at initial appearance to advocate for pretrial release of defendants," "a ***pervasive*** lack of independent defense investigations," "a ***pervasive*** lack of support services," "fixed fee contracts," and "excessive caseloads." *Id.* at 164-65 (emphasis added). The 6AC Report also found that the Rural Counties suffer from a "***pervasive*** lack of independence," *id.* at 164 (emphasis added)—in other words, that appointed attorneys have to cater to local officials who may not put a high priority on the interests of indigent clients. *Id.* at 111-16. Nor is mere "room for improvement" the conclusion of the Indigent Defense Commission. FAC ¶ 19; Mot. Ex. 1. Nor is it the conclusion of Plaintiffs' expert. Mot. Ex. 20. That characterization is simply not consistent with Plaintiffs' unrebutted evidence, and Defendants provide no evidence to support it.

Plaintiffs' Motion proffered substantial evidence demonstrating that the Class should be certified, which Defendants have not and cannot rebut. Defendants do not challenge numerosity nor adequacy, and effectively admit key facts and arguments that should lead this Court to find commonality, typicality, and the presence of common questions of fact and law under Rule 23(c)(2). The Court should certify the Class based on Plaintiffs' showing.

B. Plaintiffs' Claims Relate to the State's Systemic Failures to Provide Indigent Defense, and Are Not Individual Ineffective Assistance of Counsel Claims like those in *United States v. Cronic*

The Court should also reject the faulty premise set forth in the introduction of Defendants' analysis section, which infects each of Defendants' subsequent legal arguments. Defendants reference the prejudice discussion in *United States v. Cronic*, and attempt to import it from the ineffective-assistance-of-counsel context to the injury requirement for standing and commonality for this *Gideon* class action. Opp. at 5–6, 8, 11. They claim that this in turn requires in turn a Named Plaintiff from every Rural County. *Id.* This argument misinterprets and misapplies *Cronic*. It both misconstrues Plaintiffs' allegations and overlooks evidence of systemic failures by Defendants (not just in the Named Plaintiffs' counties). It ignores Plaintiffs' requested remedy—to enjoin the State Defendants to adopt state-level, systemic reform—not piecemeal, county-by-county injunctions that fail to hold the Defendants accountable.

In the Opening Brief, Plaintiffs cited *Cronic* because the five factors that the Court of Appeals had used to infer ineffective assistance illustrate the types of elements that Courts consider in evaluating forward-looking, systemic *Gideon* challenges. Mot. at 5, 25. *See also Wilbur III*, 989 F. Supp. 2d 1122. *Cronic*, however, rejected the use of that inferential approach for people who were challenging the lawfulness of their conviction on the grounds of *ineffective assistance of counsel in their particular case*, requiring instead case-by-case prejudice inquiry or a showing that prejudice can be presumed because the circumstances were such that "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." 466 U.S. at 659. Defendants argue that it is this prejudice or presumption-of-prejudice prong that Plaintiffs must satisfy—apparently by naming plaintiffs from each of the Rural Counties (although it is not clear why scrutiny of the county system is appropriate but scrutiny of the State's system is not). Opp. at 4–5.

Defendants, however, confuse this *Gideon* challenge to the State's system of indigent defense with a post-conviction individual ineffective-assistance-of-counsel challenge like the one in *Cronic*. Plaintiffs here are not challenging the lawfulness of a single conviction on the grounds of ineffective assistance of counsel, like either *Cronic* or *Strickland,* 466 U.S. 668, which

Plaintiffs distinguish in their Opening Brief. Mot. at 4–7. So there is no need to prove prejudice or a presumption-of-prejudice on either an individual or an individual-county basis. *Hurrell-Harring II*, 914 N.Y.S.2d at 370 (Plaintiffs' system-wide claims "obviate[] any need to conduct individualized inquiries into the performance of the class members' individual attorneys[.]").

The constitutional requirement here is the State's obligation to provide meaningful representation on a systemic and forward-looking basis under *Gideon,* 372 U.S. 335, a right to which the Class is entitled no matter the outcome of a Class Member's individual case in the state's system. *See, e.g.*, *Wilbur II*, 2012 WL 600727, at *1 ("[C]ase-by-case requests for new counsel, appeals, and/or malpractice actions [as occur with ineffective assistance of counsel claims] would not resolve the systemic problems identified by plaintiffs, making a request for injunctive and declaratory relief necessary."); *Rivera v. Rowland*, 1996 WL 677452, at *3 (Conn. Super. Ct. Nov. 8, 1996) ("The common question presented ***is not*** whether plaintiffs are each individually receiving effective assistance from their public defender based on inadequate representation in their individual cases. The common question plaintiffs raise . . . is whether the plaintiffs are being injured due to the alleged overload of cases and under-allocation of resources."); *Best v. Grant Cty.*, 2004 WL 7198967, at *6 (Wash. Sup. Ct. Aug. 26, 2004) (same). A showing of prejudice is not required, and the common injury suffered by all the Class Members is the heightened risk that flows from being subject to the State's deficient system. *E.g.*, *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014). Although Plaintiffs addressed this distinction at length in their Opening Brief, Mot. at 5–7 & 28–30, Defendants do not discuss it, nor do they make any real attempt to engage with or respond to Plaintiffs' actual claims of systemic failure by the State Defendants.

C. The Court Should Reject Defendants' Argument that Standing Is Defeated by Having Named Plaintiffs from Some but not All of the Rural Counties; Each of the Named Plaintiffs Has Standing, Which Is All that Is Required

The Court should also reject Defendants' argument that Plaintiffs lack standing. To have standing in a class action that challenges a policy equally applicable to the entire Class, all that is required is that the Named Plaintiffs have individual standing, which is satisfied by injuries that Named Plaintiffs have pleaded. FAC ¶¶ 214-227; *see also* Mot., Exs. 26-29. There is no separate

class action standing requirement, and it does not matter that there is not a named plaintiff from each of the Rural Counties or that the Named Plaintiffs have suffered varying injuries. Neither *Lewis v. Casey* nor any of Defendants' other cases has such a requirement. 518 U.S. 343 (1996). In fact, *Lewis* is not even a standing case; it held that after a trial, a certified class had not proved systemic injury such that it was entitled to a system-wide injunction. *Id.* at 359. *Lewis* does not stand for the proposition that at the class-certification stage, or when deciding constitutional standing, the named plaintiffs must represent every type of injury that the Class could have suffered. Because named Plaintiffs have established that they have individual standing, they have met their burden.

The standing inquiry in a class action simply asks whether the class representatives themselves have standing. Newberg on Class Actions § 2:1 (5th ed.). To have standing, Plaintiffs (1) must have suffered "an injury in fact", (2) the injury must have been caused by the challenged conduct of a particular defendant, and (3) it must be likely that the injury will be redressed by a decision in Plaintiffs' favor. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Named Plaintiffs here have standing: (1) Plaintiffs have each been injured (2) ***by these Defendants*** because of ***the State's*** failure to establish a public defense system that provides sufficient oversight, monitoring, standard setting, and structure to satisfy the basic elements of the right to counsel for every Class Member, including the Plaintiffs; and (3) Plaintiffs' injuries would be remedied by an injunction that directs the State to set out sufficient oversight, monitoring, and standards in the Rural Counties. *See, e.g., Duncan,* 832 N.W.2d 761 (mem.) (holding that an indigent defense class action could proceed against Michigan although the state had delegated responsibility to counties); *Hurrell-Harring v. State* ("*Hurrell-Harring I*"), 930 N.E.2d 217, 227 (N.Y. App. 2010) (allowing class action to proceed against New York even though indigent defense obligations had been delegated to counties); *cf. Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1062-63 (9th Cir. 2010), *aff'd sub nom. Armstrong v. Brown*, 732 F.3d 955, 957 (9th Cir. 2013), *cert denied*, 134 S. Ct. 2725 (2014) (California retained the ultimate responsibility for providing reasonable accommodations to disabled prisoners and parolees regardless of whether it had delegated the operation of jails to the counties).

Defendants concede that the Named Plaintiffs have individual standing. Errata to Opp. at 2. ("Defendants do not argue that Plaintiffs have no standing at all."). Defendants' sole contention is that Plaintiffs lack standing to sue for injuries suffered by absent Class Members in other Rural Counties where Named Plaintiffs have not themselves been injured. This argument is baseless. "Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court; there is no further, separate 'class action standing' requirement." *In re SuperValu, Inc.*, 870 F.3d 763, 773 (8th Cir. 2017) (citing Newberg on Class Actions § 2:1 (5th ed. 2012)); *In re Horizon Healthcare Services Inc. Data Breach Litigation*, 846 F.3d 625, 634 n.11 (3d Cir. 2017)).

Defendants' argument should also fail because it hinges on the same faulty attempt described in Section B to twist Plaintiffs' allegations against the State into allegations against individual counties. Plaintiffs have not sued the individual Rural Counties for their actions, nor are Plaintiffs seeking to enjoin the Rural Counties. Instead, Plaintiffs have sued Defendants for abdicating what Defendants have now admitted is the ***State's*** constitutional obligation, alleging injuries caused by the ***State's*** inactions, and seeking an injunction directed at the ***State***. The Court should reject Defendants' assertion that *Lewis v. Casey* requires that the Named Plaintiffs have suffered actual harm in each Rural County. Opp. at 8-9 (citing 518 U.S. at 343). *Lewis* does not stand for this proposition. *Lewis* was not a case about threshold standing requirements or even class-certification requirements. *Lewis* examined whether, after a three-month bench trial, the district court had properly found a broad, systemic constitutional violation under *Bounds v. Smith*, 430 U.S. 817 (1977), which guarantees inmates access to the courts, when "only two instances of actual injury" had been found during the trial. *Id.* at 359. The Supreme Court held that these limited instances of actual deprivation of access to the courts were insufficient to prove a systemic violation and, therefore, insufficient to warrant systemic relief. *Id.*

Notably, *Lewis* was certified as a class action. 518 U.S. at 357-58. And the Supreme Court agreed that the *Lewis* plaintiffs had standing. *Id.* at 356. Indeed, the Court observed that plaintiffs' allegations of systemic injury were sufficient, and that their class standing was

unaffected by having different named plaintiffs with different alleged inadequacies. *Id.* The problem was that the *Lewis* plaintiffs had not proved them at trial:

> The general allegations of the complaint in the present case may well have sufficed to claim injury by named plaintiffs, *and hence standing to demand remediation*, with respect to *various* alleged inadequacies in the prison system, including failure to provide adequate legal assistance to non-English-speaking inmates and lockdown prisoners. That point is irrelevant now, however, for we are beyond the pleading stage.

Id. (emphasis added).

Defendants' misreading of *Lewis* is contrary to class-action case law, which makes clear that it is not necessary that named plaintiffs represent every injury in every jurisdiction within the class. It is simply not accurate that all plaintiffs in a class must suffer exactly the same kind of injury in exactly the same manner. *Riker* 2009 WL 910971, at *4 ("We do not insist that the named plaintiffs' injuries be identical with those of other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same injurious course of conduct.") (quoting *Armstrong v. Davis*, 275 F.3d 849, 868-69 (9th Cir. 2001). Indeed, courts routinely certify classes that allege systemic failure, notwithstanding variations in the alleged inadequacies or injuries of the named plaintiffs. In *Brown v. Plata*, 563 U.S. 493 (2011), for example, the Supreme Court permitted California prisoners to bring a class action seeking improved access to health care in prisons statewide, although there was not a named plaintiff from each prison. 563 U.S. at 506. Because the plaintiffs alleged "systemwide deficiencies in the provision of medical and mental health care," the Court did not need to consider deficiencies of care provided on particular occasions in particular prisons. *Id.* The cases of *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014), and *Coleman v. Brown*, 922 F. Supp. 2d 1004 (N.D. Cal 2013), are two more examples of prisoner class actions seeking systemic relief that did not include a named plaintiff from each state prison. In each case, the named plaintiffs had standing to bring claims against the State, although the named plaintiffs had not suffered actual harm in each location in the system. *Parsons*, 754 F.3d at 685-86; *Coleman*, 922 F. Supp. 2d at 1008-09. Defendants reading of *Lewis* simply misstates the law.

There is no standing or justiciability issue in bringing a case without a Named Plaintiff from each of the Rural Counties.

None of Defendants' other authorities compel a different result. Those cases address whether a named plaintiff has standing to bring *different* claims against *different* defendants. *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59 (2d Cir. 2012), for example, rejects judicial link doctrine, which enables named plaintiffs to sue defendants who did not injure any of them directly but who may have injured absent class members. 683 F.3d at 64. Plaintiffs here do not rely on such a doctrine—they have sued these state Defendants based on the Defendants' actions and inactions, and the injury and risk of injury that result. Similarly, in *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 2012 WL 39766, at *3 (N.D. Ill. Jan. 9, 2012) and *Parks v. Dick's Sporting Goods, Inc.*, 2006 WL 1704477, at *1 (W.D.N.Y. June 15, 2006) the issue was whether the class representatives could bring claims under the laws of states in which they were not harmed, but in which other class members purportedly were. The Named Plaintiffs here, however, assert statutory and constitutional claims under the laws of the United States and the State of Nevada. They plead no violations of any county-specific laws.[7]

In short, Plaintiffs have demonstrated—and Defendants have conceded—that class representatives have individual standing, which is all that is required at this threshold stage.

D. Plaintiffs Have Met the Requirements for Class Certification Under Rule 23 Because Plaintiffs Have Detailed Allegations and Evidence of Defendants' *Systemic* Constitutional Violations

Defendants' arguments regarding commonality, typicality, and Rule 23(c)(2)'s uniform-injunctive-relief prong also all reduce to an argument that this Class should not be certified

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[7] Defendants cite *Beazer Homes Holding Corp. v. District Court*, 291 P.3d 129 (Nev. 2012), and other cases for the proposition that a standing inquiry should be conducted *before* class certification is assessed. Opp. at 8. This timing argument is a strange one. Defendants often want courts to rule on class certification first, because if the class is narrowed or only partially certified, it may be that there are named plaintiffs who no longer have standing, because "their" claims have been stripped from the class claims and not certified. That Defendants want to look at standing first reveals their misunderstanding of *Lewis*. Defendants want to require that each Named Plaintiff (or at least the group of Named Plaintiffs as a whole) cover every type of alleged injury, even if they all give rise to the same causes of action against the same Defendants, redressable by the same systemic injunctive relief. Opp. at 8. But as discussed above, this is not a requirement for constitutional standing, and it is not required by class action case law.

because the Complaint does not name plaintiffs from each of the Rural Counties. Defendants' arguments are baseless. Plaintiffs' claims need not be precisely uniform to meet the commonality requirement; all that is required by class-action case law, including *Dukes*, 564 U.S. 338, is that class members suffer the same injury and that their claims depend upon a common contention capable of classwide resolution. *Id.* at 350. That standard is met here because, unlike in *Dukes*, Plaintiffs have pleaded a violation by the State of its *Gideon* obligations that is common across the class, because across the Rural Counties, the State has foisted the obligation for indigent defense onto the Rural Counties without providing the structure, standards, training, monitoring, accountability, independence, and resources necessary to avoid systemic deprivations. This is Defendants' obligation, and it is Defendants' failure. It matters not that such failure may have played out slightly differently in different Rural Counties because it is amenable to resolution through an injunction directing the State to reform. Indeed, the Ninth Circuit and other courts have reaffirmed post-*Dukes* that in a case about systemic deficiencies, "same injury" means the substantial risk of harm from the deficient system. *Parsons*, 754 F.3d at 676. Plaintiffs' claims are typical of the Class for the same reasons—they stem from the same course of conduct perpetrated by the same Defendants and subject to the same resolution. And for the same reasons, class certification is appropriate under Rule 23(c)(2) because uniform injunctive relief directing Defendants to reform the State's system will resolve the Class's claims.

1. *Wal-Mart Stores, Inc. v. Dukes* Does Not Defeat Plaintiffs' Arguments on Commonality

Plaintiffs easily satisfy Rule 23(a)'s "permissive" commonality requirement, *Riker*, 2009 WL 910971, at *3, in a way that is consistent with *Dukes and Civil Rights Education and Enforcement Center v. Hospitality Properties Trust*, 317 F.R.D. 91 (N.D. Cal. 2016) (hereinafter "*CREEC*").

As discussed above and in Plaintiffs' Opening Brief, Mot. at 24-30, the commonality requirement is met because there are a number of significant common questions of law and fact here. Mot. at 24-30; Section A, *supra*., at 6-7. Only one is required, *Stockwell v. City & Cty. of S.F.*, 749 F.3d 1107, 1111 (9th Cir. 2014), and "Plaintiffs need not show that every question in

the case, or even a preponderance of the questions, is capable of classwide resolution," *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013). Here, Plaintiffs have identified a core common question—does Defendants' pervasive conduct of not overseeing, holding accountable, or structuring the provision of indigent defense in the Rural Counties violate its constitutionally mandated responsibility under *Gideon*, Mot. at 24; *Hurrell-Harring*, 914 N.Y.S.2d at 370—along with nine other questions that would also justify certification, Mot. at 25–26. Defendants refuse to engage with these common questions, with Plaintiffs' request for common relief—an injunction directed towards the State, directing the State to set appropriate standards, structure, accountability, independence, and resources for indigent defense in the Rural Counties, and Plaintiffs' significant evidence that there are "systemic deficiencies" that require system-wide, state-level reform. *E.g.*, Mot. Ex. 14 at 111-16, 164-66.

Instead, Defendants argue that the State has no system for indigent defense, and that it *need not have one*. Opp. at 14. They argue therefore that there is no common question because all that matters is the ten different sets of circumstances in each of the ten Rural Counties. *Id.* But this is not the law. In the indigent defense context, it is the State that has the obligation under *Gideon* to provide meaningful representation to the indigent. In other words, the State is affirmatively obligated by *Gideon* and by the Sixth Amendment to have a system that works—it is no answer to say, as Defendants do, that that the State need not have a *uniform* system. Opp. at 14. If there is a systemic failure to provide meaningful defense across the Rural Counties, that failure is necessarily the State's, and it is necessarily amenable to systemic state-level reform. *See Duncan,* 832 N.W.2d at 765 (affirming class certification for *Gideon* claims against the State of Michigan, where commonality was found in part due to state-level injunctive and declaratory relief sought); *see also* 6AC Report at V ("The State of Nevada as a Fourteenth Amendment obligation to ensure effective Sixth Amendment services in every court at every level everywhere in the state.").

Dukes is not to the contrary, nor is *CREEC*. Notably, Defendants inadequately address the indigent defense cases cited in Plaintiffs' Opening Brief, citing just two and distinguishing them on the grounds that those cases named a plaintiff from every county mentioned, instead of dealing

with the common questions related to the *Gideon* right and remedy that are also present here. Opp. at 12-13. Defendants seek instead to analogize this case to two employment discrimination cases, *Dukes* and *CREEC*, where the putative class plaintiffs failed to establish commonality because they failed to show a company policy of discrimination. *Dukes,* 564 U.S. at 355; *CREEC*, 317 F.R.D. at 103. The employment claims in these cases are different than the *Gideon* claims here because the State has an affirmative obligation under *Gideon* and Defendants' policy of inaction, delegation, and neglect cannot absolve them.

Courts applying *Dukes* to claims like Plaintiffs'—claims of systemic violations where Defendants have an affirmative constitutional obligation—confirms that nothing in *Dukes* prohibits a finding of commonality in this case. Indeed, such courts reject arguments like those made by Defendants. For example, in *Tucker v. Idaho*, the plaintiffs challenged Idaho's practice of delegating to counties the responsibility for providing indigent defense without providing adequate oversight, monitoring, structure, or funding. Like Defendants here, the state defendants in *Tucker* also argued that there was no commonality because of "the dissimilarities of experiences with public defenders among the class," and because there was no "monolithic public defense system in Idaho"—the manner in which indigent defense was provided varied from county to county. *Tucker,* No. CV-OC-2015-10240, at 13. The *Tucker* court found these arguments unpersuasive, and distinguished itself from *Dukes*:

> This case will examine the State . . . policies and practices concerning public defender services in the State of Idaho, which is dissimilar from the multitudinous decisions and answers concerning why an employee might have been disfavored in seeking a promotion in *Dukes*. Here, there are single answers to questions such as whether the State has violated the United States and Idaho Constitutions by failing to implement, administer, and oversee adequate public defense in Idaho.

Id. at 16-17. So too in *Parsons*—a post-*Dukes* opinion cited by Plaintiffs but ignored by Defendants in their Opposition. In *Parsons*, thirteen Arizona state inmates filed a putative class action for declaratory and injunctive relief against senior officials from the Arizona Department of Corrections, asserting Eighth Amendment claims based on alleged systemic deficiencies in the conditions of confinement in isolation cells, and in the provision of privatized medical, dental,

and mental health-care services in Arizona. 754 F.3d at 662. The Ninth Circuit rejected the same argument against commonality that Defendants assert here:

> In [defendants'] view, Eighth Amendment healthcare and conditions-of-confinement claims are inherently case specific and turn on many individual inquiries. [Defendants argue] [t]hat fact is an insurmountable hurdle for a commonality finding because *Wal–Mart* instructs that dissimilarities between class members impede the generation of common answers. In other words . . . [it is Defendants' position that] the plaintiffs fail Rule 23(a)(2)'s commonality test because a systemic constitutional violation of the sort alleged here is a collection of individual constitutional violations, each of which hinges on the particular facts and circumstances of each case.

Id. at 675. The Ninth Circuit reasoned that defendants' position rested on a fundamental misunderstanding of plaintiffs' claims and applicable law:

> Here, the defendants describe the plaintiffs' claims as little more than an aggregation of many claims of individual mistreatment. That description, however, rests upon a misunderstanding of the plaintiffs' allegations. The Complaint does not allege that the care provided on any particular occasion to any particular inmate (or group of inmates) was insufficient, but rather that [defendants'] policies and practices of statewide and systemic application expose all inmates in [Defendants'] custody to a substantial risk of serious harm.

Id. at 676. Accordingly, *Parsons* held that the putative class members "all set forth numerous common contentions whose truth or falsity can be determined in one stroke," including "whether the specified statewide policies and practices to which they are all subjected by [defendant] expose them to a substantial risk of harm." *Id.* at 678. Because there was at least one policy that applied to all class members, "either each of the policies and practices is unlawful as to every inmate or it is not." *Id.* The Ninth Circuit emphasized that "[t]hat inquiry ***does not*** require us to determine the effect of those policies and practices upon any individual class member (or class members) or to undertake any other kind of individualized determination." *Id.* (emphasis added).

As in *Parsons*, Defendants' commonality argument rests on the incorrect contention that the Court would need to conduct case-specific inquiries across the Rural Counties to determine whether Defendants' system is indeed violating the constitution. Opp. at 11-13. But just as in *Parsons*, Defendants' "view rests . . . on a fundamental misunderstanding of *Wal–Mart*, [Sixth] Amendment doctrine, and the [P]laintiffs' constitutional claims." *Parsons*, 754 F.3d at 676. Plaintiffs do not allege that criminal defense provided on any particular occasion to any particular

indigent defendant (or group of indigent defendants) was insufficient; rather, Plaintiffs contend that Defendants' statewide, systemic policy of not sufficiently standardizing, monitoring, supporting, and holding accountable the provision of indigent defense across all Rural Counties exposes all indigent criminal defendants to a substantial risk of serious constitutional harm.

Defendants do not support their commonality argument with a single opinion that evaluates certification of a class of civil rights plaintiffs who challenged a system-wide government policy, as Plaintiffs do here. This is because commonality is routinely found in such cases. *E.g.*, *Hurrell-Harring v. State* ("*Hurrell-Harring II*"), 914 N.Y.S.2d at 372 ("Finally, and in our view not insignificantly, our research has failed to identify a single case involving claims of systemic deficiencies which seek widespread, systematic reform that has not been maintained as a class action."). Instead, Defendants try to argue that this case is different from *Wilbur* and *Hurrell-Harring* because this case does not have a Named Plaintiff from every county, and "other factors" allegedly "differ significantly from county to county." Opp. 12. But the reasoning of *Wilbur* and *Hurrell-Harring* demands neither uniformity among the Class Members' claims nor a city-by-city or county-by-county analysis. For example, although *Wilbur* related to a smaller indigent defense system that operated in two Washington cities, nothing in the opinion restricted class certification to that specific set of circumstances, and differences in indigent defense delivery between the two cities did not defeat commonality. *See generally Wilbur III*, 989 F. Supp. 2d 1122. *Hurrell-Harring* also confirms that the number of counties and variations across counties does not defeat commonality. In *Hurrell-Harring*, Plaintiffs challenged the State of New York's policy of leaving to five different counties the "performance of the State's obligation" to provide indigent defense. *Hurrell-Harring I*, 930 N.E.2d at 219. In certifying the class of indigent defendants, the court did not conduct a county-by-county analysis to identify similarities in the way Defendants' policy affected the indigent defendants across the five counties; rather, the court held this: "[T]he fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action."[8] *Hurrell-*

[8] The law review article that Defendants cite is also helpful to Plaintiffs' position. Defendants rely on Stephen F. Hanlon's article, *The Appropriate Legal Standard Required to Prevail in a Systemic Challenge to an Indigent Defense System*, 61 St. Louis U. L.J. 625 (2017)

Harring II, 914 N.Y.S.2d at 370.

In short, Plaintiffs have demonstrated that there are many questions of law and fact common to the Class. As in similar cases which rejected arguments like Defendants', no individual, attorney-by-attorney or county-by-county assessment is required.

2. Defendants' Contention that Typicality Requires an Individual Analysis of the Rural Counties Is Incorrect; Typicality Is Satisfied Here Because the Claims of the Class Arise from the Same Course of Conduct

Defendants' typicality argument, which rests on the same reasoning, should also fail. The typicality requirement is satisfied when "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Jane Roe Dance I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 35, 176 P.3d 271, 276 (2008). "[T]ypicality refers to the nature of the claim or defense of the class representative, and ***not*** to the specific facts from which it arose or the relief sought." *Parsons*, 754 F.3d at 685 (emphasis added).

Applying this precept, *Parsons* held that the plaintiffs had shown typicality because (1) "the named plaintiffs are all inmates in [Defendants'] custody" and (2) "[e]ach [of the named plaintiffs] declares that he or she is being exposed, like all other members of the putative class, to a substantial risk of serious harm by the challenged [Defendants'] policies and practices." The Ninth Circuit determined that this was an ample demonstration that the plaintiffs alleged (1) "the same or a similar injury" as "the rest of the putative class" and (2) "that this injury is a result of a course of conduct that is not unique to any of them" and that injury "follows from the course of

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for the proposition that *Dukes* changed the pleading standard for class certification. But the Hanlon article supports Plaintiffs' argument that they satisfy the commonality requirement by identifying a common, risk-based injury in indigent defense challenges like this one: as a "significant likelihood (or risk) of substantial and immediate injury to the class—that is, prejudice, at both plea and trial—because the defendants lack the capacity to provide to class reasonably effective assistance of counsel under prevailing professional norms at all critical stages of the proceeding." *Id.* at 648-49. Hanlon makes clear the distinction between risk-based claims of systemic Sixth Amendment violations, which Plaintiffs are asserting here, as opposed to case-specific performance-based claims of actual ineffectiveness of counsel, which are not asserted here. *Id.* This analysis is consistent with the reasoning in *Hurrell-Herring II* that system-wide claims "obviat[e] any need to conduct individualized inquiries into the performance of the class members' individual attorneys," 914 N.Y.S.2d at 370.

conduct at the center of the class claims." *Id.* at 685. The court explained that "[i]t does not matter [for typicality] that the named plaintiffs may have in the past suffered varying injuries or that they may currently have different health care needs; [typicality] requires only that their claims be 'typical' of the class, not that they be identically positioned to each other or to every class member." *Id.* at 686. As in *Parsons*, Plaintiffs here have demonstrated that (1) the Named Plaintiffs are all indigent defendants in the Rural Counties, Mot. at 12-15, and (2) each of the Named Plaintiffs is exposed, like all of the other members of the putative class, to a substantial risk of harm by Defendants' challenged policy of inaction in the Rural Counties. Mot. at 7-16.

3. Contrary to Defendants' Interpretation of the 23(c)(2) Standard, Final Injunctive or Declaratory Relief for the Class Is Appropriate

The Court should reject Defendants' argument about NRCP Rule 23(c)(2) for similar reasons. Defendants argue that, as in *Lewis*, courts can only remedy the harms actually established in the case before the courts, and that therefore this case is not one that can be resolved by a state-level injunction. 518 U.S. at 360. As explained, the holding in *Lewis* turned on what was proved after a trial. The allegations were perfectly sufficient to plead a request for a system-wide injunction, 518 U.S. at 354, and indeed, the case was certified as a class action. Here, unlike in *Lewis*, Plaintiffs can already point to voluminous evidence of "systemic" and "pervasive" deficiencies across the Rural Counties, Mot at 10, 12. FAC ¶¶ 162-68, and Defendants do not dispute the findings of systemic and pervasive deficiencies or that the State has done nothing to remedy them.

Plaintiffs' showing is sufficient to satisfy Rule 23(c)(2), which asks only one key question: whether "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Nev. R. Civ. Proc. 23(c)(2). "These requirements unquestionably are satisfied when putative class members seek uniform injunctive or declaratory relief from policies or practices generally applicable to the class as a whole." *Hernandez v. Cty. of Monterey*, 305 F.R.D. 132, 162 (N.D. Cal. 2015); *see also Riker,* 2009 WL 910971, at *5 ("A court may certify a class under Rule 23(b)(2) if class members complain of a

pattern or practice that is generally applicable to the whole class." (citing *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)).

Nothing in *CREEC* should lead to a conclusion that Plaintiffs here have failed to satisfy the requirements of Rule 23(c)(2). CREEC quotes *Parsons*, and affirms the Rule 23(c)(2) principles cited by Plaintiffs in their opening brief:

> "[Rule 23(c)(2)'s] requirements are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons*, 754 F.3d at 688 (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir.2011)). "That inquiry does not require an examination of the viability or bases of the class members' claims for relief, does not require that the issues common to the class satisfy a Rule 23(b)(3)-like predominance test, and does not require a finding that all members of the class have suffered identical injuries." *Id.*
>
> "The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir.2009).

CREEC, 317 F.R.D. at 105. In *CREEC*, however, Plaintiffs could not articulate what systemic relief they wanted, other than that the Defendant hotel trust should follow the law. *Id.* Also, because there was no system-wide policy to address with an injunction, the Court determined that any remedy more precise than "follow the law" would apply only to those hotels with ADA violations. This is not the case here. Plaintiffs have pleaded for a more detailed systemic injunction, FAC at 52; Plaintiffs have submitted evidence, including the 6AC Report, that contains detailed recommendations for systemic, statewide reform.

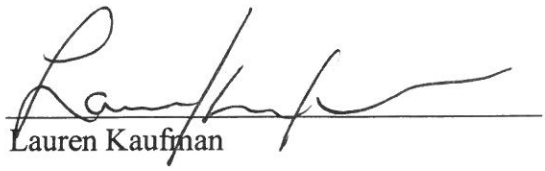
Defendants also attack the Rule 23(c)(2) prong with the bare assertion that a system-wide injunction would be "much more difficult to implement and oversee than Plaintiffs propose." Opp. at 15. This is totally unsupported and conclusory; Defendants offer no authority for it. It is also irrelevant. As Plaintiffs set forth in the Opening Brief at 20, the Rule 23(c)(2) inquiry "does not require an examination of the viability or bases of the class members' claims for relief, does not require that the issues common to the class satisfy a predominance test, and does not require a finding that all members of the class suffered identical injuries." *Hernandez*, 305 F.R.D. at 162. Plaintiffs have satisfied this prong.

CONCLUSION

The Class meets each requirement of Rule 23 of the Nevada Rules of Civil Procedure. Defendants concede that it is their constitutional responsibility to ensure that each criminal defendant in Nevada receives meaningful representation, and that they are doing nothing to ensure that the Rural Counties furnish such representation. This class action—brought by the very people neglected by Defendants—seeks to remedy the Defendants' systemic failures. The Court should grant the Motion for Class Certification for the reasons set forth above, in the Plaintiffs' Motion for Class Certification, and the First Amended Complaint.

Dated: May 23, 2019

AMERICAN CIVIL LIBERTIES UNION OF NEVADA
LAUREN KAUFMAN (State Bar No. 14677C)
601 S. Rancho Drive, Suite B11
Las Vegas, NV 89106
(702) 366-1536
(702) 366-1331 (fax)
kaufman@aclunv.org

By: 
Lauren Kaufman

FRANNY FORSMAN (State Bar No. 14)
LAW OFFICE OF FRANNY FORSMAN, PLLC
1509 Becke Circle,
Las Vegas, NV 89104
(702) 501-8728
f.forsman@cox.net

EMMA ANDERSSON (*pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street,
New York, NY 10004
(212) 284-7365
eandersson@aclu.org

MARGARET L. CARTER (*pro hac vice*)
mcarter@omm.com
MATTHEW R. COWAN (*pro hac vice*)
mcowan@omm.com
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071
(213) 430-7592

KATHERINE A. BETCHER (*pro hac vice*)
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
(415) 984-8965
kbetcher@omm.com

CERTIFICATE OF SERVICE

I hereby certify that on the 23th day of May 2019, I served a true and correct copy of the foregoing Plaintiffs' Reply In Support of Motion for Class Certification upon the appropriate parties hereto by enclosing these materials in a sealed envelope or package, postage fully prepaid thereon, deposited in the United States mail at a point within the State of Nevada, addressed to:

AARON D. FORD
Attorney General
JEFFREY M. CONNER
Deputy Solicitor General
FRANK A. TODDRE II
Senior Deputy Attorney General
STEVE SHEVORSKI
Office of the Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

An employee of the ACLU of Nevada

Declaration of Katherine Betcher

LAUREN KAUFMAN (State Bar No. 14677C)
kaufman@aclunv.org
AMERICAN CIVIL LIBERTIES UNION OF NEVADA
601 S. Rancho Drive, Suite B11
Las Vegas, NV 89106
(702) 366-1536

FRANNY FORSMAN (State Bar No. 14)
f.forsman@cox.net
LAW OFFICE OF FRANNY FORSMAN, PLLC
1509 Becke Circle,
Las Vegas, NV 89104
(702) 501-8728

EMMA ANDERSSON (*pro hac vice*)
eandersson@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street,
New York, NY 10004
(212) 284-7365

MARGARET L. CARTER (*pro hac vice*)
MATTHEW R. COWAN (*pro hac vice*)
mcarter@omm.com; mcowan@omm.com
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071
(213) 430-7592

KATHERINE A. BETCHER (*pro hac vice*)
kbetcher@omm.com
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
(415) 984-8965

Attorneys for Plaintiffs

THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

DIANE DAVIS, JASON LEE ENOX, JEREMY LEE IGOU, and JON WESLEY TURNER II, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

STATE OF NEVADA; STEVE SISOLAK, Governor, in his official capacity,

Defendants.

Case No. 170C002271B

Dept. No. II

DECLARATION OF KATHERINE A. BETCHER IN SUPPORT OF REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

DECLARATION OF KATHERINE A. BETCHER

I, Katherine A. Betcher, declare under penalty of perjury under the law of the State of Nevada that the following is true and correct:

1. My name is Katherine A. Betcher. I am over the age of 18 and I live in Oakland, California. I am licensed to practice law in the State of California and the State of New York and am an attorney with the law firm O'Melveny & Myers LLP, attorneys of record in this lawsuit for the above-named Plaintiffs Diane Davis, Jason Lee Enox, Jeremy Lee Igou, and Jon Wesley Turner II, and those similarly situated. I was admitted *pro hac vice* to this Court.

2. I am familiar with the factual and procedural history of this case. I make this declaration in support of Plaintiffs' Reply In Support of Motion for Class Certification. This declaration is based on my personal knowledge, and if called as a witness in this matter, I could and would testify thereto.

3. Defendants moved for class discovery on December 21, 2017. On January 26, 2018, this Court gave parties until April 27, 2018 to conduct class certification discovery. Class discovery was extended until March 15, 2019.

4. Defendants did not take a single deposition and propounded no interrogatories during the entire class discovery period, which began on January 26, 2018.

5. Plaintiffs filed their First Amended Complaint on October 15, 2018. Defendants have served no requests for production after Plaintiffs filed their First Amended Complaint.

DATED this 23rd day of May, 2019.

Katherine A. Betcher