JOSEPH ALLEN, STEVEN AYRES, ASHLEY HURLBURT, RORY KEVIN GATES, JAMES HOWARD, DEMARCUS MORROW, RODNEY WALLER, KEITH ARCEMENT, FREDERICK BELL, GENARO CRUZ GOMEZ, SAM YBARRA, MICHAEL CARTER, AND JAMES PARK, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

VS.

JOHN BEL EDWARDS IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF LOUISIANA, ZITA JACKSON ANDRUS, CHRIS L. BOWMAN, FLOZELL DANIELS, JR., THOMAS D. DAVENPORT, JR., PATRICK J. FANNING, W. ROSS FOOTE, KATHERINE E. GILMER, MICHAEL C. GINART, JR., FRANK HOLTHAUS, DONALD W. NORTH, AND MOSES JUNIOR WILLIAMS, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE LOUISIANA PUBLIC DEFENDER BOARD; AND JAMES T. DIXON, JR., IN HIS OFFICIAL CAPACITY AS THE LOUISIANA STATE PUBLIC DEFENDER,

Defendants.

DOCKET NO. 655079

HONORABLE TODD HERNANDEZ

19th JUDICIAL DISTRICT COURT

EAST BATON ROUGE PARISH

STATE OF LOUISIANA

FILED: _____ _____
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
TO CERTIFY A CLASS ACTION PURSUANT TO ARTICLE 591

Plaintiffs Steven Ayres, Ashley Hurlburt, Demarcus Morrow, Keith Arcement, Frederick Bell, Michael Carter and James Park submit this memorandum in support of their Motion to Certify a Class Action pursuant to Article 591. At a hearing, in addition to this supporting memorandum and attached expert report and affidavits, Plaintiffs will offer and introduce the Verified Petition with the documents included in the Appendix to the Petition. Plaintiffs also intend to call witnesses to testify at the hearing of this matter, including one or more of the Defendants, staff from the Louisiana Public Defenders Board, and District Public Defenders. Plaintiffs further reserve the right to introduce deposition transcripts, records from Defendants, and all other relevant evidence at the hearing and to supplement the record as permitted by the Code of Civil Procedure.

INTRODUCTION

This action for class-wide declaratory and injunctive relief arises from the statewide and systemic failure of Defendants to establish and maintain a constitutionally acceptable public defense system in Louisiana. It does not seek to upset or undo convictions or sentences in any cases. Nor does it seek individualized relief or money damages.

For years, the State—acting through Defendants—has knowingly maintained an indigent criminal defense system with severe structural shortcomings, including: excessive caseloads; inadequate staffing; failure to train and supervise attorneys; failure to monitor and enforce performance standards and ethical obligations; and an inadequate and unstable funding source. Together, these failings deprive indigent criminal defendants across the State of the meaningful and effective representation guaranteed by the U.S. and Louisiana Constitutions.

Plaintiffs are seven indigent persons accused of crimes in Louisiana for which they face imprisonment who are thereby subjected to and threatened by the systemic defects in the State's public defense system.[1] Because these defects threaten to deprive all indigent criminal defendants in Louisiana of their right to counsel, Plaintiffs have brought this class action on behalf of: "All persons who are indigent and facing charges in Louisiana of a non-capital criminal offense punishable by imprisonment" (the "Class"). Pet. ¶ 79. Excluded from this Class are criminal defendants represented by private counsel, criminal defendants who are voluntarily and knowingly representing themselves *pro se*, and juveniles charged with criminal offenses but whose cases are assigned only to juvenile court. *Id.* Plaintiffs seek class-wide declaratory and injunctive relief for the Class as a whole, including an order compelling Defendants to remedy systemic defects and to establish a constitutionally adequate public defense system.

This case easily satisfies the requirements to certify a class action under Article 591(B)(2) or Article 591(B)(1)(a). Indeed, this case is ideally suited to class treatment because it does not seek money damages or individualized relief, but rather only class-wide declaratory and injunctive relief to remedy the generally applicable policies and procedures of Defendants whose cumulative effect injures all members of the Class throughout the State. Consequently, this case raises none of the complications that certifying a class under Article 591(B)(3) often entails. As

[1] Certain of the original 13 plaintiffs have resolved their criminal cases through pleas or are in the process of retaining *pro bono* private counsel. The remaining plaintiffs move for certification on behalf of the putative class.

shown below, Louisiana courts and federal courts have recognized that cases that seek to enjoin common policies and procedures with class-wide effect, but do not seek damages, are exactly the types of cases for which Article 591(B)(2) and Article 591(B)(1)(a) (and their federal analogs) are intended. Accordingly, Plaintiffs respectfully request that this Court certify the proposed Class, appoint the proposed Class representatives, and appoint the proposed Class counsel.

FACTUAL BACKGROUND

The United States and Louisiana Constitutions both require the State of Louisiana to provide counsel to poor people accused of crimes. *See* U.S. Const. amends. VI & XIV; La. Const. § 13; *see, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 341-42 (1963). In 2007, the Louisiana Legislature passed the Louisiana Public Defender Act, and expressly delegated to the Louisiana Public Defender Board ("LPDB" or the "Board") the State's constitutional obligation to establish a statewide public defense system that provides meaningful and effective representation to indigent defendants. *See* LA-RS § 15:141 *et seq*. Pursuant to that delegation, the Board—an executive agency for which the Governor has statutory and constitutional responsibility—bears the obligation for establishing and supervising a constitutionally sufficient statewide public defender system, including promulgating and enforcing performance standards that ensure meaningful and effective representation. *See, e.g.*, *State v. Peart*, 621 So. 2d 780, 789 (La. 1993) ("We take reasonably effective assistance of counsel to mean that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients.").

Despite these well-established constitutional commands, the State's public defense system is, by Defendants' own admission, in a state of "crisis." App. 30.[2] Throughout the State, the traditional markers of effective representation, such as meaningful adversarial testing of the prosecution's case, timely and confidential consultation with clients, and appropriate case investigation, are largely absent from public defender services or significantly compromised.

Defendants have created this crisis by failing to remedy systemic and interrelated defects in the public defense system, including: requiring public defenders to carry excessive caseloads; failing to provide public defender offices with necessary support from investigators, experts, social workers, and support staff; failing to train and supervise public defenders to ensure their adherence to basic performance standards; failing to monitor public defenders' performance and

[2] All "App." cites refer to the Appendix of exhibits attached to Plaintiffs' Original Verified Petition, filed February 6, 2017.

compliance with ethical requirements; failing to discipline or otherwise hold public defenders accountable when they fail to refuse appointment or seek to withdraw from cases when they cannot comply with the Louisiana Rules of Professional Conduct due to lack of time, independence, and resources; permitting districts to enter into flat-fee contracts with public defenders while fully aware that such contracts provide the public defenders with insufficient time, independence, and resources to mount an effective defense; and an unstable and unreliable funding source. In their totality, these pervasive failings detrimentally impact the delivery of public defense services, and impose on all indigent defendants the constitutionally intolerable risk of being denied meaningful and effective representation.

A. Excessive Caseloads

As reflected in LPDB's own published statistics, public defenders in nearly all of the State's 42 districts have caseloads that exceed well-established national caseload limits. *See* Expert Affidavit of Professor Robert C. Boruchowitz[3] (hereinafter "Boruchowitz Aff.") ¶ 45 & Point VI. In 39 of the districts, the caseloads exceed even LPDB's inflated caseload caps—which the State Public Defender has conceded "exceed those of every other known caseload standard in the United States."[4] In each of the past six years the State's overall average caseloads—as measured by LPDB—have been *more than twice* and, in some Districts, up to *five times* LPDB's already inflated caseload limit. App. 3. For 2015 and 2016, every single public defender office in the State reported caseloads in excess of national standards.[5]

B. Failure to Train, Supervise, and Enforce Performance Standards and Ethical Obligations

Fulfilling the State's constitutional obligation to provide meaningful and effective assistance of counsel to indigent defendants throughout Louisiana—for which the Governor has

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[3] As detailed in the attached affidavit, Professor Boruchowitz has more than 40 years of experience in public defense and has served as an expert witness in other cases challenging the inadequacy of public defense systems. *See* Boruchowitz Aff. at ¶ ¶ 14-39.

[4] Jay Dixon, "The Louisiana Public Defender Board at the Crossroads, Ethics and Law in Public Defense" (July 2015). LPDB's maximum annual caseload standards for each public defender in Louisiana are 200 felony cases or 450 misdemeanor cases. These significantly exceed traditional national standards of no more than 150 felony or 400 misdemeanor cases annually.

[5] The severity of public defender caseloads is further corroborated by a February 2017 workload study commissioned by LPDB. *See* The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards, available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.authcheckdam.pdf. The study was undertaken by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants and the accounting firm of Postlethwaite & Netterville, APAC "to establish public defense workload standards for the state." *Id*. Using the widely respected Delphi method, which incorporates the consensus opinions of numerous qualified Louisiana criminal defense lawyers (both public defenders and private lawyers), the study found that found that Louisiana has substantially too few defenders to provide effective representation statewide. *Id.*

statutory and constitutional responsibility and which has been delegated to the Board—would require Defendants to provide adequate training and supervision to all public defenders, and to enforce performance standards and compliance with ethical obligations. Defendants have systematically failed to do so.

There are well-established national standards, as well as standards promulgated by LPDB, regarding the supervision and training of public defenders. These standards include:

- "Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency."[6]
- "Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors."[7]
- "Prior to agreeing to undertake representation in a criminal matter, counsel should have sufficient experience or training to provide effective representation."[8]

Despite the State's delegation of its constitutional obligations to LPDB, Defendants have abandoned LPDB's supervisory and oversight functions altogether. Among other things, LPDB has ceased all efforts to assess or monitor compliance with state-wide performance standards by the district offices, publish reports regularly showing variances between the Board standards and guidelines and the conduct of each district office, enforce the contractual obligation of the District Offices to supervise and train their attorneys, or fill crucial staff positions contemplated by the Public Defender Act such as a state-wide training director. The result has been to render state-wide standards hollow and training opportunities practically non-existent. *See generally* Boruchowitz Aff. Points XVIII, XXIII.

Similarly, standards of performance for public defenders have been promulgated by national organizations like the American Bar Association ("ABA") and the National Legal Aid & Defender Association ("NLADA") and by LPDB. "[B]ecause of the statewide systemic deficiencies" in Louisiana's indigent defense system, however, these performance standards "are neither enforced effectively nor generally implemented" by LPDB. Boruchowitz Aff. ¶ 66.

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[6] *See* American Bar Association, Ten Principles of a Public Defense Delivery System, ABA Principle 10, available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

[7] *See id*., ABA Principle 9.

[8] LPDB Trial Court Performance Standards § 705(B).

Moreover, LPDB has altogether failed to ensure that the State's public defenders comply with the Louisiana Rules of Professional Conduct. Lack of time, independence, and resources prevent public defenders throughout the State from complying with their obligations under Rules 1.1 (competence), 1.3 (diligence), 1.4 (communications), or 1.7 (conflicts) of the Louisiana Rules of Professional Conduct in their representation of the putative Class members. Throughout the State, public defenders routinely permit direct communications between their clients and prosecutors and judges outside the presence of the public defender. Public defenders also routinely ignore other obligations imposed by the Rules, such as timely and meaningful adversarial testing of the prosecution's case, confidential consultation with clients, and appropriate investigation. LPDB knows about these systemic violations of the ethical rules, yet ignores them and permits public defenders to continue accepting appointments even when doing so results in a violation of the Rules. Providing a meaningful defense requires the appointment of attorneys who are capable of complying with the ethical rules for their profession. Those rules, in fact, require an attorney to stop providing legal services if providing those services would require the attorney to act in violation of the Rules.

LPDB's failure to monitor and enforce public defenders' compliance with ethical rules has created a statewide system in which "defenders and judges have come to accept routinely and openly a pattern of practice regarding indigent accused persons that falls well below what the Louisiana Rules of Professional Conduct require and effectively disregards the ethical responsibilities of both lawyers and judges." Boruchowitz Aff. ¶ 43.

> In many districts in Louisiana, the caseload has been so high for so long, the funding has been so inadequate for so long, the disparity in resources between the prosecution and the defense has been so dramatic for so long, the defenders have operated with meager investigation and practically no expert witnesses for so long, people have been staying in jail for weeks or months before having counsel appointed for so long, the courts have treated misdemeanors perfunctorily for so long, that the defenders, the prosecutors, and the judges have become accustomed to that culture and have become inattentive to their ethical obligations.

Id. ¶ 70. Defendants' systematic refusal to remedy these ethical violations is yet another way in which the systemic defects in Louisiana's indigent defense system have contributed to a class-wide deprivation of meaningful representation.

Consistent with its practice of failing to enforce compliance with performance standards and ethical rules, LPDB also permits districts to enter into flat-fee contracts to serve as public defenders with attorneys that LPDB knows lack the time, independence, and resources to mount an effective defense. The heavy reliance on flat-fee contracts for part-time public defenders used

in most districts in Louisiana also raises serious ethical conflicts for these contract defenders that put clients at substantial risk of insufficient representation, particularly because those contracts permit contract defenders to maintain a private practice.

> As the National Legal Aid and Defender Association has explained, a flat-fee contract that pays a lawyer a single lump sum to handle an unlimited number of cases creates a direct financial conflict of interest between the attorney and each client. Because the lawyer will be paid the same amount, no matter how much or little he works on each case, it is in the lawyer's personal interest to devote as little time as possible to each appointed case, leaving more time for the lawyer to do other more lucrative work

Boruchowitz Aff. ¶ 135. Washington State banned flat-fee contracts in 2009 because they create an "inherent conflict of interest" between a client's right to adequate counsel and the attorney's personal financial interest. App. 32. When salaried lawyers are free to represent private clients, they have a financial incentive to devote more time to those clients than to their indigent clients. In practice, the public defense contracts are largely unsupervised, and the arrangement commonly results in contract lawyers underserving their indigent clients.

C. Inadequate Support Staff

Investigators, expert witnesses and social workers are essential to ensuring that public defenders have the time and resources to adequately represent their clients. *See* Boruchowitz Aff. ¶172, Points XII, XIV, XVI. Defendants maintain an indigent defense system in which the State's public defenders lack such necessary support.

Because investigators are necessary components of an effective criminal defense, the National Study Commission on Defense Services prescribes that defender offices should hire experienced and trained investigators and recommends the hiring of one investigator for every three attorneys. *Id.* at Point XII. Colorado, Connecticut, New Hampshire, New Jersey, Vermont, and Washington State maintain or prescribe ratios of at least one investigator for every four attorneys; Indiana requires indigent defense providers to fill three support staff positions for every four staff attorneys, at least one of whom should be an investigator; Delaware, Iowa, Minnesota, Rhode Island, Virginia, and Washington D.C. maintain or prescribe a ratio of at least one investigator for every six attorneys; and Kentucky, Massachusetts, Montana, Washington and Wisconsin maintain or prescribe a ratio of better than one investigator for every eight attorneys. *Id.*

In sharp contrast, Defendants have failed to ensure that the State's public defender offices have sufficient—or in many districts, any—investigative support, thereby preventing public

defenders from pursuing timely and diligent investigations in most of their clients' cases. *See* Boruchowitz Aff. ¶ ¶ 177-186. Few, if any, district offices for public defender services in Louisiana come close to meeting recommended ratios, and none of them meet those ratios once they are adjusted to account for Louisiana's excessive caseloads. *See id.* ¶ 180.

Defendants' state-wide failure to provide investigatory resources has far-reaching consequences for criminal defendants. The 8th District Defender, in his Restriction of Services Protocol for Fiscal Year 2015, described the problem and its dire consequences succinctly:

> Investigators are essential to criminal defense. They locate the witnesses and get the statements from people who are indispensable to a case. We will no longer be able to afford a full time or part-time investigator due to the fact that we did not receive adequate state funding. This takes time away from our clients and now that we have greater numbers of clients due to a reduction in [work] force, it is virtually impossible to find the time to adequately investigate the cases. In addition, we are not trained, licensed investigators. People facing the most serious crimes cannot get adequate representation because there are no investigators to flush out their witnesses, get statements from witnesses, review the crime scene, and talk to those eyewitnesses that the police never interviewed.

See Boruchowitz Aff. ¶ 179.

Defendants have failed to provide public defenders with access to experts. LPDB's own performance standards emphasize the importance of retaining experts where "necessary or appropriate" for preparation of the defense or for adequate understanding of the prosecution's case and rebutting that case. *See* Boruchowitz Aff. ¶ 190; *see also id.* ¶ 191 ("It is critical for defenders to be able to use expert witnesses both to challenge the prosecution's case and to be able to present affirmative defenses."). Yet analysis of district defenders' budgets reveals that many of them report not having spent any funds on expert witnesses. *See id.* ¶ 201.

Defendants have likewise failed to ensure that the State's public defenders have access to the critical support of social workers. *See* Boruchowitz Aff. ¶¶ 52, 218 ("Although social workers have become an important and widely recognized component of effective representation, in Louisiana social workers are rarely employed to assist indigent defendants."). A significant number of the people charged with crimes suffer from mental health and substance abuse problems.[9] In order to communicate with and advocate effectively on behalf of their clients, public defenders often require assistance from trained professionals, who are widely used in many other states' defender offices. App. 70; *see* Boruchowitz Aff. ¶¶ 52, 218. For example, client and family interviews conducted by an experienced social worker can, among other things,

[9] *See, e.g.*, Doris J. James & Lauren E. Glaze, U.S. Dep't of Justice Bureau of Justice Statistics, NCJ 213600, *Mental Health Problems of Prison and Jail Inmates* (Sept. 2006).

identify mental health issues. *See* Boruchowitz Aff. ¶ 218. Information gleaned from such interviews is often not only essential for a defender to be able to meaningfully communicate with a client, but also can raise new defenses and trial strategies and help shape arguments during plea bargains, bond hearings, and sentencing hearings. *See id*. Although social workers play a crucial role in effective advocacy and are widely available in other states, Defendants have failed to ensure that these resources are available to indigent defendants throughout the state.

D. Unstable and Inadequate Funding

Exacerbating these systemic failings is "inadequate and inconsistent" funding for the indigent defense system. *See* Boruchowitz Aff. ¶ 41. All district defenders rely substantially on locally generated funds from traffic tickets and court fees for their budgets.[10] App. 2, at 2. In addition, the State consistently has fallen short of providing the revenue necessary to make up for the significant and erratic shortfall in overall funding created by the unreliable fines and fees system.

Defendants are acutely aware that this funding scheme is deficient, and that the resulting harm is borne by the State's indigent accused. In his January 20, 2017, introduction to the 2016 Annual Board Report for the Louisiana Public Defender Board, State Public Defender James T. Dixon conceded that district defenders "still rely on funds raised locally to provide for a majority of their budget. This local funding source, primarily through traffic ticket fines, remains unreliable, unstable and insufficient." App. 3, at 5. In its January 2016 report, LPDB not only acknowledged the funding crisis itself but also rightly observed that the resulting detrimental impact on indigent defendants creates legal vulnerabilities for the State:

> Despite our best efforts, the crisis in Louisiana Public Defense worsens. More districts are entering a restriction of services. These districts do not have sufficient funding to provide all of the services they have provided in the past and must, therefore, limit or eliminate some of those services. This has taken a number of forms. Many districts have had to limit the number of cases they accept in order to somewhat triage the dire consequences of excessive caseloads. To do otherwise would result in caseloads so high as to render their lawyers' representation ineffective, in violation of state statutes, the state and federal constitutions, and the Louisiana Rules of Professional Conduct. Placing a limit on the cases accepted by a Public Defender Office, in some instances, has resulted in waiting lists, leaving criminal defendants unrepresented until defenders are available to represent them. This also leaves the State open to legal attack and litigation regarding the right to counsel.

[10] This funding structure places sheriffs, prosecutors, and other stakeholders in a position to manipulate the budgets for public defenders, and gives defenders a financial benefit when their clients are convicted. Because a percentage of the fees assessed on defendants who are convicted of a crime are allocated to the local district defender, defenders who lose more cases stand to do better financially than those who win. The State Public Defender put it succinctly: "Our revenue is partially dependent on our losing." App. 55.

Members of the judiciary have likewise observed that the public defense system maintained by Defendants is plagued with unstable and inadequate funding. In her 2016 State of the Judiciary Speech to the Louisiana Legislature, Chief Justice Bernette Joshua Johnson stated:

> Our indigent defender system is funded through a combination of state appropriations ($33 million last year), proceeds from traffic tickets, and local funds and court fees. Unfortunately, revenues from traffic tickets have decreased dramatically; and we know state appropriations have been slashed. As a result, 33 of the state's 42 judicial district public defender offices are presently operating under a Restriction of Services, and they foresee that half the public defender offices in the state will be insolvent within months.[11]

Further, in a January 2017 ruling, United Stated District Court Judge James J. Brady concluded that "[b]y all objective measures, there is a crisis in public defense funding in Louisiana." *Yarls v. Bunton*, 2017 WL 424874, at *3 (M.D. La. Jan. 31, 2017).

LAW AND ARGUMENT

This case raises the question of whether Defendants have fulfilled their obligation to establish a statewide public defense system that meets constitutional requirements. It does not raise any individualized issues with respect to any class members. To the contrary, Plaintiffs are specifically complaining that Defendants have acted and refused to act on grounds generally applicable to the Class as whole. As such, the requested injunctive and declaratory relief will vindicate the constitutional rights of the Class as a whole. Under these circumstances, Plaintiffs easily meet their burden of demonstrating that this case meets the requirements for class certification under Louisiana Code of Civil Article 591(A) and 591(B)(1) & (2).

A. This Case Satisfies the Requirements of Article 591(A)

Article 591(A) of the Louisiana Code of Civil Procedure sets forth five prerequisites for maintaining a class action: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the class is or may be defined objectively in terms of ascertainable criteria. La. C.C.P. art. 591(A).

"Louisiana's class certification analysis is appropriately informed by federal jurisprudence interpreting Rule 23." *Price v. Martin*, 79 So. 3d 960, 967 n.6 (La. 2011). Because Louisiana courts are rarely confronted with civil rights class actions seeking system-

[11] *See* 2016 State of the Judiciary Address, *available at* www.lasc.org/press_room/press_releases/2016/2016-09.asp

wide declaratory and injunctive relief, federal law construing Rule 23 of the Federal Rules of Civil Procedure is especially instructive here.

As shown below, each of Article 591(A)'s five requirements is satisfied.

1. Numerosity Is Satisfied

It is well established that "[w]here the exact size of the class is unknown but general knowledge and common sense indicates that it is large, the numerosity requirement is satisfied." 1 Robert Newberg, *Newberg on Class Actions* §3.3 (4th ed. 2002). Here, the Class comprises the tens of thousands of criminal defendants in Louisiana state courts, other than capital defendants, who are constitutionally eligible for the appointment of counsel. App. 1-3. Louisiana courts regularly certify classes consisting of a mere fraction of that number. *See, e.g.*, *Davis v. Jazz Casino Co.*, 864 So.2d 880, 888 (La. Ct. App. 4th Cir. 2004) (affirming certification of a class of 148 class members).

2. Commonality Is Satisfied

"The test for commonality requires only that there be at least one issue the resolution of which will affect all or a significant number of putative class members." *Claborne v. Hous. Auth. of New Orleans*, 165 So.3d 268 (La. App. 4th Cir. 2015) (quotation omitted); *see also, e.g.*, *Price*, 79 So. 3d at 969 ("The commonality prerequisite requires a party seeking class certification to show that '[t]here are questions of law or fact common to the class.'").

In this case, the Class seeks only declaratory and injunctive relief to acknowledge and remedy the systemic, state-wide failures in the public defender system. Under these circumstances, the commonalty requirement is easily satisfied. *See, e.g.*, *Sourovelis v. City of Philadelphia*, No. 14-4687, 2015 WL 12806512, at *1 n.1 (E.D. Pa. Nov. 4, 2015) (observing that "'injunctive actions by their very nature often present common questions' where 'they do not also involve an individualized injury for the determination of damages awards'" (quoting *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994)). Indeed, courts consistently hold that the commonality requirement is satisfied where, as here, plaintiffs seek only declaratory and injunctive relief to challenge and remedy systemic violations generally applicable to the class. *See, e.g., Braggs v. Dunn*, 317 F.R.D. 634, 656 (M.D. Ala. 2016) (collecting cases holding that commonality is satisfied when class plaintiffs seek injunctive relief to remedy "common policies or practices" that are the source of harm to all class members, even where that harm may manifest in different ways); *see also, e.g., Parsons v. Ryan*, 754 F.3d 657,

678 (9th Cir. 2014) (holding that commonality was satisfied for a class of 33,000 Arizona prisoners who sought injunctive relief to remedy system-wide medical policies and practices that exposed them to a substantial risk of serious harm in violation of the Eighth Amendment); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010) (certifying statewide class of Oklahoma foster children seeking to enjoin a state agency from failing to monitor the safety of class members); *Steward v. Janek*, 315 F.R.D. 472, 487-88 (W.D. Tex. 2016) (certifying class of all Medicaid-eligible persons in Texas over 21 with intellectual or developmental disabilities who sought injunctive relief challenging defendants' failure to provide timely and adequate notice about community-based alternatives to institutional care); *Kenneth R. ex rel. Tri-County CAP, Inc. v. Hassan*, 293 F.R.D. 254 (D.N.H. 2013) (certifying class of persons with serious mental illness seeking to enjoin their unnecessary institutionalization in state hospitals); *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334 (N.D. Cal. 2008) (certifying statewide class of all persons with mobility disorders seeking to enjoin defendants from denying them access to property).

Moreover, as the foregoing case law makes clear, commonality is satisfied in (B)(2) actions seeking to remedy structural deficiencies even where plaintiffs do not allege that the risk of substantial injury has materialized as to every member of the class. *See M.D. v. Perry*, 675 F.3d 832, 847 (5th Cir. 2012); *accord Parsons*, 754 F.3d at 678 ("[A]lthough a presently existing risk may ultimately result in different future harm for different inmates—ranging from no harm at all to death—every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide [ ] policy or practice that creates a substantial risk of serious harm.").

Here, common questions of fact and law are abundant. They include, but are not limited to:

1. Whether Defendants have met their obligation to establish a statewide public defense system that meets minimum constitutional requirements.

2. Whether Defendants have sufficient mechanisms in place to mitigate the risk that Class members will be assigned a public defender who does not have the time, independence, and/or resources to provide meaningful assistance.

3. Whether, on a system-wide basis, the traditional markers of effective representation—such as timely and meaningful adversarial testing of the prosecution's case, confidential consultation with clients, and appropriate investigation—are absent or significantly compromised.

4. Whether the Class members are at risk of being assigned a public defender who has a caseload that is so high that he or she cannot provide meaningful constitutionally-mandated assistance.

5. Whether substantial structural deficiencies in the statewide public defense system in Louisiana, including severe lack of resources, unreasonably high workloads, conflicts of interest, and critical understaffing, actually or constructively deny counsel to the members of the Class.

6. Whether LPDB systematically fails to monitor and enforce statewide public defender standards and guidelines necessary to ensure that the statewide public defender system provides provide constitutionally adequate representation throughout the State.

7. Whether Defendants fail to monitor and require public defenders compliance with ethical rules, including Rules 1.1, 1.3, 1.4, or 1.7 of the Louisiana Rules of Professional Conduct.

Plaintiffs will rely on "common evidence" to answer these common questions. *See Price*, 79 So.3d at 970 (reasoning that common issues "must be capable of resolution for all class members based on common evidence"). The common evidence includes but is not limited to the materials in Appendix to the Verified Petition, including: (1) the testimony, written admissions and public statements of members of the Board and its staff; (2) LPDB data and reports, published and unpublished, documenting systemic defects, such as excessive caseloads and inadequate funding; (3) decades of other findings, studies and investigations by the Louisiana Supreme Court, the United States Department of Justice, social scientists, law professors, and government officials describing the systemic failures of the state's public defense system and their detrimental impact on the State's' indigent accused; (4) expert reports such as Plaintiffs' attached expert report detailing the systemic deficiencies in Louisiana's indigent defense system and the dire consequences of those deficiencies for the putative Class members' right to counsel; and (5) evidence establishing basic performance and ethical standards for adequate indigent defense systems.

A sure path to finding commonality in this case was paved by the commonality analysis in *M.D. v. Perry*, 294 F.R.D. 7 (S.D. Tex. 2013). There, the plaintiffs sought to certify a statewide (b)(2) class of 12,000 children in a state program that placed them in foster homes, group homes and residential facilities. *See id.* at 18-19. The plaintiffs alleged that statewide structural deficiencies subjected children in the program "to a risk of being assigned a caseworker who has a caseload that is so high that she cannot fulfill her duties to the child," such as monitoring the child's well-being. *Id*. at 38. These systemic deficiencies, the plaintiffs asserted, deprived them of "their constitutional right to personal security and reasonably safe living conditions." *Id*. The plaintiffs argued that commonality exists where an unconstitutional

risk of harm arises from state actors' system-wide policy or practice of making caseworkers carry excessive caseloads.

The district court agreed.[12] *See M.D.*, 294 F.R.D. at 38-39. The court found that excessive caseloads—as to which there was "considerable evidence in the record"—were "the product of deliberate choices made by State actors," and that there was a "persuasive" relationship "between caseworkers' workloads and class members' safety." *Id.* at 40-44. As the court reasoned:

> To what extent caseworkers are overworked, whether this overwork is significant enough to subject the members of the General Class to an unconstitutionally unreasonable risk of harm, and whether the State has sufficient mechanisms in place to mitigate those risks are the issues central to the Plaintiffs' claim. Resolving them will determine the validity of the common General Class Fourteenth Amendment claim 'in one stroke.'

Id. at 44 (footnotes omitted).

The district court's reasoning in *M.D.* is directly applicable to this case. Here, as in *M.D.*, the evidence shows that systemic defects in a statewide program inflict on the entire Class a cognizable threat of injury, which Plaintiffs will establish is unconstitutional. As in *M.D.*, these systemic defects are "the product of deliberate choices made by State actors." *See id*. at 39. The existence of these defects and their creation of a constitutionally inadequate public defense system are the issues central to Plaintiffs' claim, and resolving them will demonstrate the validity of the Class's claim "in one stroke." *Price*, 79 So.3d at 969.

3. <u>Typicality Is Satisfied</u>

"The requirement of typicality is satisfied if the claims of the class representatives arise out of the same event, practice, or course of conduct that gives rise to the claims of other class members and those claims are based on the same legal theory." *Husband v. Tenet Health Sys. Mem. Med. Center, Inc.*, 16 So. 3d 1220 (La. Ct. App. 4th Cir. 2009). Louisiana courts do "not require that the class representatives exhibit all the different types of possible injuries[.]" *Johnson v. Orleans Parish Sch. Bd.*, 790 So. 2d 734, 742 (La. Ct. App. 4th Cir. 2011).

Here, Plaintiffs satisfy the typicality requirement because their claims "arise out of the same event, practice, or course of conduct that gives rise to the claims of other class members"—namely, Defendants' maintenance of a public defense system plagued with systemic defects that threaten to deprive all Class members of the meaningful and effective assistance of counsel. In

[12] The court reasoned that such a "policy or practice need not be officially adopted," but "can be established through custom or through failing to act in the face of actual or constructive knowledge that there is likely to be a violation of constitutional rights." *Id.*

other words, each of the Plaintiffs seeking to act as a Class representative is part of the Class and possesses the same interest and is threatened with the same injury as the other Class members. Louisiana courts have consistently found typicality in such situations. *See, e.g.*, *Baker v. PHC-Minden, L.P.*, 167 So.3d 528 (La. 2015) (finding typicality satisfied where hospital applied the challenged collection policy to all class members over a term of years); *Smith v. City of New Orleans*, 131 So.3d 511, 522 (La. Ct. App. 4th Cir. 2013) (finding typicality satisfied where "claims of Appellees all arise out of the issuance of parking citations that were unauthorized under the Municipal Code"); *Gudo v. Adm'rs of Tulane Educ. Fund*, 966 So.2d 1069, 1078 (La. Ct. App. 4th Cir. 2007) (finding typicality satisfied where class representatives and putative class members were all family members impacted by the same allegedly unlawful practice of selling donated cadavers).

Further, Plaintiffs' legal theories are the same as those of the putative Class: that Defendants' maintenance of a systemically deficient public defender system violates their constitutional rights to counsel and equal protection under both the United States and Louisiana Constitutions. *See Smith*, 131 So.3d at 522 (finding typicality satisfied where the class representatives and other class members shared the same legal theory); *Gudo*, 966 So.2d at 1078 (same).

Federal cases involving claims for systemic relief likewise support a finding of typicality. *See, e.g.*, *Baby Neal v. Casey*, 43 F.3d 48, 58 (3rd Cir. 1994) (observing that "cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement"). Courts regularly find typicality where, as here, plaintiffs' legal claims arise from systemic defects, such as defendants' maintenance of harmful policies or practices. *See, e.g.*, *Parsons*, 754 F.3d at 685-86; *Braggs*, 317 F.R.D. at 663-66. This is true even where the systemic defects at issue cause a diversity of injuries across the putative class, like many symptoms of the same disease. *Baby Neal*, 43 F.3d at 58 ("Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice.").

4. <u>Adequacy Is Satisfied</u>

The Louisiana Supreme Court has identified four factors as relevant to whether the representative parties will fairly and adequately protect the interests of the class: "(1) The

representative must be able to demonstrate that he or she suffered an actual-vis-à-vis-hypothetical injury; (2) The representative should possess first-hand knowledge or experience of the conduct at issue in the litigation; (3) The representative's stake in the litigation, that is, the substantiality of his or her interest in winning the lawsuit, should be significant enough, relative to that of other class members, to ensure that representative's conscientious participation in the litigation; and (4) The representative should not have interests seriously antagonistic to or in direct conflict with those of other class members, whether because the representative is subject to unique defenses or additional claims against him or her, or where the representative is seeking special or additional relief." *Baker*, 167 So. 3d at 543-44.

The inquiry is even more straightforward in class actions, such as the instant action, seeking only declaratory and injunctive relief. Although Louisiana courts have not had an opportunity to opine on this issue, case law from the federal courts establishes that adequacy of representation may be presumed "in the absence of contrary evidence" and where, as here, "there is no monetary pie to be sliced up." *Braggs*, 317 F.R.D. at 666.

Here, there is no evidence that overcomes the presumption that Plaintiffs will fairly and adequately represent the Class. To the contrary, application of each of the factors identified by the Louisiana Supreme Court in *Baker* demonstrates Plaintiffs' adequacy. First, Plaintiffs are members of the Class and able to demonstrate actual injury through violation of their constitutional rights. *See, e.g., S. Cent. Bell Tel. Co. v. PSC*, 555 So. 2d 1370, 1373 (La. 1990) (citing *Elrod v. Burns*, 427 U.S. 347 (1976), for the proposition that deprivation of constitutional rights "constitutes irreparable injury"); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("'[S]uits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury other than the threatened constitutional deprivation itself.'") (quoting *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998)). Second, as indigent criminal defendants in Louisiana state courts who have had counsel appointed to represent them, Plaintiffs have first-hand knowledge and experience of the structural, statewide defects in the public defense programs caused by the Defendants. *See* Verified Pet. ¶¶ 26-49; *see also* attached Declarations of Steven Ayres, Ashley Hurlburt, Keith Arcement, Frederick Bell, Demarcus Morrow, Michael Carter, and James Park. Third, each Plaintiff is threatened with the deprivation of his or her liberty, and that threat is substantially enhanced by the challenged constitutional violations. Thus, Plaintiffs could hardly have a more

significant stake in the litigation. Fourth, the interests of Plaintiffs and the interests of the absent Class members in challenging the constitutionality of the statewide public defense system are fully aligned – they will collectively benefit from remedying the systemic flaws in Louisiana's indigent defense system. *See, e.g., New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007) ("Conflicts of interest are rare in Rule 23(b)(2) class actions seeking only declaratory and injunctive relief."); *J.D. v. Nagin*, 255 F.R.D. 406, 416 (E.D. La. 2009) (finding "no conflict of interest" between named plaintiffs and the class where "[a]ll claims of named and unnamed Plaintiffs rest upon the practices and policies at [a youth detention center] as a whole, and as such apply to both named and unnamed class members alike" and "the named Plaintiffs seek the same remedies, namely declaratory and injunctive relief, as the class as a whole").

5. <u>Ascertainability Is Satisfied</u>

To fulfill the requirement of ascertainability, "parties seeking certification must be able to establish a definable group of aggrieved persons based on objective criteria derived from the operative facts of the case." *Smith*, 131 So.3d at 517-18. Here, Plaintiffs seek to represent a defined Class of "all indigent. . .[criminal] defendants accused of non-capital crimes and entitled to counsel under the Sixth Amendment and Fourteenth Amendments of the United States Constitution and under Section 13 of the Louisiana Constitution," excluding any criminal defendants who are represented by private counsel or who voluntarily represent themselves. Under this definition, "any potential class member can readily determine if he or she is a member of the class." *Husband*, 16 So.3d at 1230; *see also Claborne*, 165 So.3d at 283 (holding the ascertainability requirement satisfied where the Class definition was based on "defendants' affirmative duties and obligations as a lessor" of particular property). Moreover, the Court and the Defendants can easily verify the majority of, if not all, putative Class members' status by reviewing the internal records of the Louisiana Public Defender Board. *See Smith*, 131 So.3d at 518 (finding ascertainability requirement satisfied where Defendants could "easily verify" the validity of putative class members' status by reviewing their business records).

Where, as here, a case satisfies the prerequisites of Article 591(A), it need satisfy only one of Article 591(B)'s three prongs in addition to be certified as a class action. *See* La. C.C.P. art. 591(B). As shown below, Plaintiffs easily satisfy Article 591(B).

B. This Case Satisfies the Requirements of Article 591(B)(2)

A class should be certified under Article 591(B)(2) where, as here, Defendants have "acted [and] 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." La. C.C.P. art. 591(B)(2). Article 591(B)(2) class actions—which are often referred to as "civil rights actions"—are "certified on a 'non-opt out' basis in order to ensure the completeness of appropriate declaratory or injunctive relief concerning conduct by the defendant that may be either ordered or blocked." *Robichaux v. State*, 952 So.2d 27, 40 (La. Ct. App. 1st Cir. 2006); *see also, e.g.*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (identifying "[c]ivil rights cases against parties charged with unlawful, class-based" violations of individuals' rights as "prime examples" of class actions certified under the analogous federal rule).

The federal counterpart to Article 591(B)(2)— a Rule 23(b)(2) class action—also requires that the conduct at issue "can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (internal quotation marks omitted); *see also, e.g., Parsons*, 754 F.3d at 688 (observing that the (b)(2) 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"); *Baby Neal*, 43 F.3d at 59 (reasoning that the Rule 23(b)(2)'s requirements are "almost automatically satisfied in actions primarily seeking injunctive relief").

Here, Plaintiffs' claims fall squarely within the ambit of Article 591(B)(2). The systemic defects in the State's public defense system impose a constitutionally intolerable risk of inadequate representation on all members of the Class. Plaintiffs do not seek any individualized relief for this unconstitutional conduct, such as individually tailored injunctions to remedy the denial of counsel in their particular criminal cases. Rather, Plaintiffs seek a single injunction to remedy Defendants' ongoing practice of maintaining a public defense system that is deficient *system-wide* in the ways described above, which is precisely the type of claim envisioned by Article 591(B)(2). *See, e.g., Robichaux*, 952 So. 2d at 40-41 (recognizing that claims seeking "'purely' declaratory or injunctive relief" are "best addressed" by Article 591(B)(2)).

C. This Case Also Satisfies the Requirements of Article 591(B)(1)(a)

A class should be certified under Article 591(B)(1)(a) where, as here, "the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent

or varying adjudications which would establish incompatible standards of conduct for the party opposing the class." *Duckworth v. Louisiana Farm Bureau Mut. Ins. Co.*, 125 So. 3d 1057, 1067 n.6 (2012) (specifying the requirements); *see also* La. C.C.P. Article 591(B)(1)(a). Similar to a (B)(2) class action, a class action under Article 591(B)(1)(a) is also proper where plaintiffs seek injunctive or declaratory relief as opposed to monetary damages to remedy conduct that affects a broad class of individuals. *See, e.g., Robichaux*, 952 So.2d at 40.

Federal courts have certified classes under the analog to Article 591(B)(1)(a) in civil rights cases challenging systemic constitutional violations where, as here, the pursuit of individual lawsuits—as opposed to a class action—would create a risk "that each individual case would impose a different standard on the [defendant]." *Gray v. County of Riverside*, No. EDCV 13-00444-VAP, 2014 WL 5304915, at *37 (C.D. Cal. Sept. 2, 2014).; *Ashker v. Governor of California*, No. C 09-5795 CW, 2014 WL 2465191, at *7 (N.D. Cal. June 2, 2014) (certifying class of inmates claiming prison policy violated the Eighth Amendment pursuant to Fed. R. Civ. P. 23(b)(1)(A) in light of the "significant risk" of inconsistent judgments if the hundreds of proposed class members filed separate actions).

D. <u>The Court Should Appoint the Proposed Class Counsel</u>

The lawyers that Plaintiffs respectfully request that the Court appoint as Class counsel are, as required, "competent, experienced, qualified, and generally able to conduct the litigation vigorously." *Crooks v. LCS Corrections Servs., Inc.*, 994 So.2d 101, 11 (La. Ct. App. 1st Cir. 2008). The proposed Class counsel are Jones Walker LLP, Southern Poverty Law Center, Davis Polk & Wardwell LLP and the Lawyers' Committee for Civil Rights Under Law. One attorney for each of the organizations and firms serving as counsel in this action has filed an accompanying affidavit attesting to counsels' qualifications. *See* attached Affidavits of Mark A. Cunningham, Meredith J. Angelson, Daniel F. Kolb, and Jon Greenbaum.

In particular, Plaintiffs' counsel have the skills, experience, and resources necessary to serve effectively as class counsel for the Class. They have a history of representing indigent defendants and worked together to identify and investigate the claims in this action. They have interviewed scores of putative Class members and other potential fact witnesses, conducted numerous visits to criminal courtrooms across the state to conduct fact research, and engaged in extensive legal research. Plaintiffs' counsel have extensive experience in handling class actions seeking systemic institutional reform, as well as other complex litigation, and they are

knowledgeable with regard to the applicable law. Finally, Plaintiffs' litigation team has committed and will continue to commit to the representation of this class action significant staffing and material resources, including the retention of highly qualified experts. Plaintiffs therefore respectfully request that the Court appoint them in its class certification order.

CONCLUSION

Plaintiffs respectfully request that the Court: (1) certify this case as a class action for "All persons who are indigent and facing charges in Louisiana of a non-capital criminal offense punishable by imprisonment, excluding criminal defendants represented by private counsel, criminal defendants who are voluntarily and knowingly representing themselves *pro se*, and juveniles charged with criminal offenses but whose cases are assigned only to juvenile court"; and (2) appoint Jones Walker LLP, Southern Poverty Law Center, Davis Polk & Wardwell LLP and the Lawyers' Committee for Civil Rights Under Law as co-lead Class counsel.

Respectfully submitted,

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*Application for Pro Hac Vice Admission, Pursuant to LA Supreme Court Rule XVII, § 13, Pending before the Court