No. 1190043

IN THE SUPREME COURT OF ALABAMA

ALABAMA DIRECTOR OF FINANCE KELLY BUTLER
AND ALABAMA OFFICE OF INDIGENT DEFENSE SERVICES
DIRECTOR CHRIS ROBERTS,
Defendants-Appellants,

v.

WILL J. PARKS, III AND
C. CLAIRE PORTER,
Plaintiffs-Appellees.

On Appeal From the
Montgomery County Circuit Court
(CV-2018-901008)

APPELLANTS' REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Plaintiffs' brief confirms that their claims for retrospective monetary relief fail under either of Plaintiffs' theories. Defendants explained that Plaintiffs' constitutional argument cannot create a previously nonexistent ministerial duty that can be retroactively applied to require payments the Legislature never authorized. *See* Opening Brief at 37-42. And Plaintiffs provide no response. Instead, they continue to argue that because §15-12-21 *forbids* payments over a specified amount, the statute is unconstitutional, before somehow concluding that §15-12-21 contains a ministerial duty that *requires* payments over that specified amount. But if the statute forbids payments above the fee caps, it plainly does not require such payments. Plaintiffs' constitutional argument thus makes no sense and should be rejected.

Nor does Plaintiffs' statutory argument fare any better. To evade sovereign immunity, Plaintiffs must show that §15-12-21 contains a ministerial duty that requires the Office of Indigent Defense Services (OIDS) to do what Plaintiffs ask the Court to compel: pay fees in the exact amount certified

by the trial court, regardless of whether that amount exceeds the statutory fee-caps. But that argument fails for at least three reasons.

First, the only non-discretionary duty that Plaintiffs point to in the statute is one requiring OIDS to *not exceed* the fee-caps. And a mandatory duty to *not* do something is no mandatory duty to do it.

Second, because OIDS has discretion to approve an amount different than the one certified by the trial court, and Plaintiffs have not argued that OIDS lacks such discretion, sovereign immunity bars the retrospective relief they seek.

Third, even if a court were to determine that §15-12-21 required OIDS to act contrary to the statute's plain text and rubberstamp the trial court's certification, OIDS's reasonable interpretation and good-faith implementation of that disputed statute protects the State from claims for retrospective relief.

Finally, Plaintiffs do not have third-party standing to raise the constitutional rights of hypothetical, future indigent defendants. Plaintiffs, therefore, cannot ask for a declaration that §15-12-21 is unconstitutional because it

violates a future, hypothetical indigent defendant's right to a fair trial or right to effective counsel. The requests for declaratory relief on those grounds should be dismissed.

ARGUMENT

I. Sovereign immunity bars Plaintiffs' claims for retrospective monetary relief under both Plaintiffs' constitutional and statutory arguments.

Plaintiffs' claims for retrospective monetary relief depend on one of two mutually exclusive arguments: either §15-12-21 is unconstitutional because it does not allow OIDS to pay beyond the statutory caps, or OIDS misinterpreted §15-12-21 because when it says the fee its pay "shall not exceed" a certain amount, the statute doesn't really mean it. Plaintiffs argue that under either theory they are entitled to retrospective monetary relief. They are not. Sovereign immunity bars such relief under either argument.

A. Even if a court were to find §15-12-21 unconstitutional, sovereign immunity would bar retrospective monetary relief.

First, a finding of unconstitutionality would not bring this statute into the clear "ministerial-duty categor[y] recognized by this Court as not coming under the prohibition of §14." *Williams*, 699 So. 2d at 1238. A finding of

unconstitutionality is just that: a judicial determination that a statute violates the Constitution as to the parties before it. But for Plaintiffs' theory to work, the court would have to insert a new, non-discretionary spending provision into §15-12-21 and then order disbursement of State funds via the retroactive application of that judicially created ministerial duty. The separation of powers mandated by our Constitution does not allow that outcome nor does this Court's precedent support it.

Separation-of-powers principles forbid such judicial arrogation of the Legislature's appropriations power. Article III, Section 42 of Alabama's Constitution divides the government "into three distinct branches: legislative, executive, and judicial," and mandates that "the judicial branch may not exercise the legislative or executive power." Ala. Const. art. III, §42(b),(c). The judicial branch has no power over the purse because "[t]he authority to determine the amount of appropriations necessary for the performance of the essential functions of government is vested fully and exclusively in the legislature." *Morgan Cty. Comm'n v. Powell*, 293 So. 2d 830, 834 (Ala. 1974).

Indeed, the Constitution jealously protects the legislative branch's appropriation power: "No order of a state court which requires disbursement of state funds shall be binding on the state or any state official until the order has been approved by a simple majority of both houses of the Legislature." Ala. Const. art. III, §43. That constitutional protection is subject to some limitations but still illustrates the importance of legislative control over the State's treasury and highlights the impropriety of Plaintiffs' request to have a novel spending provision not only judicially inserted into §15-12-21, but also retroactively applied to require the expenditure of millions of dollars that were never appropriated by the Legislature.

It is thus unsurprising that this Court's precedent precludes relief. This Court has consistently refused to allow retrospective monetary relief based on a statute's constitutional faults.[1] Even if Plaintiffs prevail in

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[1] *See Poiroux v. Rich*, 150 So. 3d 1027, 1037-38 (Ala. 2014); *Patterson v. Gladwin Corp.*, 835 So. 2d 137, 154 (Ala. 2002); *cf. Williams*, 699 So. 2d at 1237-38 (barring retrospective relief sought based on a statute's unconstitutional implementation).

challenging §15-12-21's constitutionality, retrospective monetary relief "would affect the financial status of the state treasury, and would result in the . . . recovery of money from the state." *Poiroux*, 150 So. 3d at 1037 (internal quotation marks and citations omitted); *see also Patterson*, 835 So. 2d at 143, 154. Thus, "[s]uch claims are barred by the doctrine of sovereign immunity." *Poiroux*, 150 So. 3d at 1037; *see also Patterson*, 835 So. 2d at 154.

Sovereign immunity bars such claims because the ministerial-duty avenue to relief is open only if there is a duty already in the statute's clear text: Plaintiffs cannot evade sovereign immunity by claiming a ministerial duty that is "*outside the statutory scheme*." *Patterson*, 835 So. 2d at 152. Indeed, although correcting a mistake or error can be a ministerial act, "it is so *only because the statutes make it so*. It is ministerial because of the specificity with which the Legislature defined the duties." *Id.* Even when an unconstitutional statute deprives someone of payment, unless that statute itself has a clear ministerial duty requiring the payment the plaintiffs seek, "reliance on the ministerial-act exception to sovereign immunity is

misplaced." *Id.*; *cf. Williams*, 699 So. 2d at 1238 (refusing to allow retrospective relief for payments denied under the good-faith but unconstitutional implementation of a statute because the case could not be "pigeonhole[d]" into the "ministerial-duty categor[y]").

By Plaintiffs' own admission, they cannot take advantage of a ministerial-duty theory to press their constitutional claims. Plaintiffs acknowledge that the plain text of §15-12-21 does *not* contain the ministerial duty they want Defendants to perform (paying amounts above the fee-caps).[2] In fact, they admit that §15-12-21 contains a ministerial duty to *not* pay any amount above the fee-caps.[3] They also concede that OIDS acted according to "the specificity with

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[2] For ease and clarity, the State adopts the citation format used by Appellees for citations to the reporter's transcript. *See* Brief of Appellees at 3 n.3. *See* R.3:49 (conceding that the "law does not give [OIDS] a ministerial duty to do what [Plaintiffs] [a]re asking."); C.143 (recognizing that both "OIDS procedure and the statute sa[y] [attorneys] cannot get a fee exceeding the cap"); *cf.* Brief of Appellees at 13 ("OIDS did not exercise any discretion in denying all over-the-cap fees.").

[3] Brief of Appellees at 36-37 ("'Section 15-12-21 contains no statutory authority for the Office of Indigent Defense to exceed the fee caps.' (C.47-48). This is not a statement of discretion but of ministerial obedience to the statute.").

which the Legislature defined the duty." *Patterson*, 835 So. 2d at 152.[4] Yet after those admissions, Plaintiffs provide no answer to why this Court's precedent does not foreclose their claim to retrospective monetary relief under their constitutional argument. *See, e.g.*, *Patterson*, 835 So. 2d at 152. Indeed, they do not even mention this Court's precedent at all.

Instead, Plaintiffs' constitutional argument proceeds just as it did below: §15-12-21 is unconstitutional because it forbids payments over the fee-caps; the statute thus requires payments over the fee-caps, i.e., it contains a ministerial duty to pay amounts over the fee-caps. C.9, 11. Therefore, in Plaintiffs' view, this Court should compel OIDS to pay those amounts not only prospectively but also retroactively. But nowhere in their response brief do they explain how a finding of unconstitutionality could impose an admittedly absent ministerial duty. Nor do they rectify the logical error in their argument, which leads to the nonsensical conclusion of "if A, then not A." *See* Opening

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[4] R.3:15 ("[THE COURT:] [OIDS] did what the legislature told them to do. [PLAINTIFFS:] Well, there are—Sure, they did.").

Brief at 40-41. Nor do they offer any response for how finding a statute unconstitutional empowers a court to untie the State's purse strings.[5] There is no adequate response. A finding of unconstitutionality does not overcome sovereign immunity.

B. OIDS has not failed to perform any compellable ministerial duty.

Sovereign immunity also bars any retrospective monetary relief under Plaintiffs' statutory argument. Because Plaintiffs seek to compel a "ministerial duty to pay Plaintiffs' fees in the amounts certified as reasonable by the trial court," C.11, to evade sovereign immunity, §15-12-21 must require OIDS to pay exactly the amount that the trial court certifies as reasonable, even if that amount is over the statutorily mandated fee-caps. If §15-12-21 contains that non-discretionary mandate, then the court can compel OIDS to

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[5] Their discussions of *Barnhart v. Ingalls*, 275 So. 3d 1112 (Ala. 2018), and *Ex parte Bessemer Bd.*, 68 So. 3d 782 (Ala. 2011), are of no use under this theory because both of those cases dealt only with undisputedly constitutional statutes — one of the several reasons why *Barnhart* is not "factually indistinguishable" as Plaintiffs claim, Brief of Appellees at 25 — and neither case touched on the interplay between unconstitutionality and sovereign immunity.

carry out that ministerial duty, even retroactively, without running afoul of §14. But here Plaintiffs have not even argued that the proper interpretation of §15-12-21 includes a non-discretionary duty for OIDS to rubberstamp trial court certifications and pay amounts above the fee-caps. In fact, the only non-discretionary duty that Plaintiffs have argued exists is the duty *not* to pay amounts above the fee-caps. And, of course, a mandatory duty to *obey* the fee caps does not impose a mandatory duty to *ignore* them. Sovereign immunity thus bars the retrospective relief Plaintiffs seek.

Under Plaintiffs' statutory argument, the only question of discretion that matters is whether OIDS has discretion to pay any amount other than the amount certified as reasonable by the trial court. If they do, then §15-12-21 does not contain the "ministerial duty to pay Plaintiffs' fees in the amounts certified as reasonable by the trial court" that Plaintiffs seek to compel. And OIDS certainly has such discretion. After receiving a fee-submission certified by the trial court as reasonable, OIDS reviews the bills, can request additional information from the trial court to help with its assessment, can investigate the submission on its own, and

can ask another State entity for review and comment before approving the bill for what OIDS believes to be the appropriate amount. Ala. Code §15-12-21(e). OIDS may approve the entire amount certified by the trial court or may reduce the certified amount for myriad reasons, such as to make payment for similar work consistent across the state or because of duplicate entries. C.144. OIDS's ability to approve an amount other than the one certified by the trial court as reasonable means there is no "ministerial duty to pay Plaintiffs' fees in the amounts certified as reasonable by the trial court." C.11.

Nor do Plaintiffs contest that OIDS has discretion to vary from the amount certified by the trial court. Indeed, Plaintiffs have argued that OIDS has discretion to approve and pay amounts other than the exact amount certified by the trial court. C.144-45 (arguing that "[a]s long as [the fee submissions] were under the cap" the standardized billing criteria that OIDS used to assess fee-submissions were "more like guidelines as opposed [to] being binding" and that OIDS could assess the reasons that an attorney did not comply with the standardized billing criteria and then use its discretion

to allow the deviation). Section 15-12-21 thus does not require OIDS to perform the ministerial task of rubberstamping the trial court's certification, but instead allows OIDS discretion to adjust the amount and approve what it deems appropriate. Because the State has shown that OIDS is performing a discretionary duty when it assesses the fee-submissions, sovereign immunity bars the retrospective relief Plaintiffs seek.

The only potential ministerial duty Plaintiffs emphasize in their response brief is the same one that the State emphasized in its opening brief: the requirement that OIDS not pay amounts above the fee-caps.[6] Of course, even if §15-

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[6] *See* Brief of Appellees at 36-37 ("'Section 15-12-21 contains no statutory authority for the Office of Indigent Defense to exceed the fee caps.' (C.47-48). This is not a statement of discretion but of ministerial obedience to the statute."); Appellants' Opening Brief at 23 ("[Section] 15-12-21 only specifically binds OIDS in one respect: the fee-caps. Thus, if there is any ministerial duty imposed by the statute, it is one to *deny* a petition for more than the fee cap."); *see also* Brief of Appellees at 8 ("Were the Defendants exercising discretion . . . where they . . . repeatedly insisted they had no authority to approve . . . fees [exceeding the §15-12-21(d) fee limitations]?"), 9 ("[Defendants] repeatedly insisted they had no discretion to pay any trial court fees exceeding the §15-12-21(d) fee caps."), 13 ("[Defendants] made it clear that OIDS did not exercise any discretion in denying all over-the-cap fees."), 23 ("Defendants

12-21 requires OIDS to perform the duty of restricting fee awards to comply with the fee caps, that is a duty *different* than the one that Plaintiffs seek to compel. Perhaps if Plaintiffs were seeking to compel OIDS *not* to pay amounts above the statutory fee-caps, their argument would be sound. But the premise that OIDS must *not* pay more than the fee caps does not reveal a duty to pay more than the fee caps. Plaintiffs thus have failed to identify statutory language mandating the action they want Defendants to take, and sovereign immunity thus bars their claim.

Plaintiffs rely heavily on *Barnhart*. Yet in *Barnhart*, this Court made clear that its analysis turned on what the statute at issue obligated the State agency to do. *See Barnhart*, 275 So. 2d at 1124-25 (stating the questions were whether the "*statute entitle[d]* the plaintiffs to compensation," whether "the *benefit statutes obligated* the Commission officers to pay," whether the State agency was "avoiding a *statutory requirement*," and whether the

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unequivocally stated they had no discretion to approve trial court fees that exceeded the fee caps of §15-12-21(d).").

"plaintiffs should have received additional compensation *pursuant to the benefit statutes*" (emphasis added)).

Plaintiffs in this case, however, argue that §15-12-21 obligates OIDS *not* to pay amounts over the fee caps, Brief of Appellees at 36-37 (explaining that OIDS denial of over-the-cap fees is an act "of ministerial obedience to the statute"), and then ask the court to compel OIDS to do the opposite. *Barnhart*'s emphasis that "obedience to the statute is mandatory" forbids such compulsion. *Barnhart*, 275 So. 3d 1125; *see also id.* at 1123 ("*Ex parte Bessemer Board* stands for the proposition that a claim for backpay will be allowed where it is undisputed that sum-certain *statutorily required* payments should have been made." (emphasis added)); *Ex parte Bessemer Bd.*, 68 So. 3d 782, 790 (Ala. 2011) ("The amount of the salary increase the Bessemer Board members must pay *involves obedience to the statute*." (emphasis added)).

Plaintiffs have made no argument that the statute obligates OIDS to pay exactly what the trial courts certify, even under their proffered interpretation of §15-12-21. Indeed, below they admitted that §15-12-21 "does not give [OIDS] a ministerial duty to do what [Plaintiffs] [a]re

asking." R.3:49. Therefore, Plaintiffs point to no ministerial duty for a court to compel, and sovereign immunity bars the retrospective relief they seek.

This Court, thus, need not reach the issue of whether a reasonable, good faith interpretation of an ambiguous statute precludes recovery of retrospective monetary relief. But should this Court choose to address this issue, *see* Appellants' Opening Brief at 36; Brief of Appellees at 34, it should reaffirm that sovereign immunity bars retrospective monetary relief when a State agency reasonably and in good-faith interprets and implements an ambiguous statute.

In *Williams v. Hank's Ambulance Serv., Inc.*, 699 So. 2d 1230 (Ala. 1997), this Court made that proposition clear. The Court explained that the touchstone of sovereign immunity analysis was fairness and that although it would be unfair to allow a State agency to "arbitrarily avoid" "clear … ministerial obligations (once those obligations are determined)," it would likewise be unfair to open the State's coffers to satisfy unclear and undetermined obligations. 699 So. 2d at 1237-38. In essence, *Williams* holds that if a statute can reasonably and in good-faith be read more than

one way, a first-time determination of that statute's obligations may affect a State agency going forward but cannot be used to overcome sovereign immunity as to retrospective monetary relief. Contrary to Plaintiffs' assertion that *Williams* "plainly says there is no immunity" when a ministerial obligation is determined for the first time, Brief of Appellees at 33, *Williams* found that retrospective monetary relief based on the State agency's pre-determination actions was not "constitutionally allowable under §14" because its interpretation was reasonable and in good faith. *Williams*, 699 So. 2d at 1238.

Plaintiffs thus acknowledge that *Williams* "might be read . . . to limit or defeat the principles reiterated in *Barnhart*," Brief of Appellees at 34, but claim that *Williams* is unique because the statutory interpretation in that case required "torturous reading," and the statute was "not easily decipherable." *Williams*, 699 So. 2d at 1237. That admission, however, gives up the game. Plaintiffs' proposed statutory interpretation requires a court to read into §15-12-21 a good-cause provision that the Legislature deleted and then construe the permissive language of that (nonexistent)

provision as imposing a non-discretionary duty on OIDS. It is a "torturous reading" to say the least to interpret language like "the total fee shall not exceed four thousand dollars" to mean that the fee *must* exceed that amount. Ala. Code. §15-12-21(d)(1). Regardless, even if the complexity of the interpretation mattered, Plaintiffs offer no limiting principle for when a statute is ambiguous, but not quite ambiguous enough, for *Williams* to apply. *Williams* did not involve one-of-a-kind circumstances as Plaintiffs contend. Its holding applies to this case and protects the State from claims for retrospective relief.

Plaintiffs also try to dodge *Williams* by claiming that the weight of authority is against it. They fail, however, to support that statement. Plaintiffs, like the State, note the tension between *Barnhart* and *Williams*, but they cite no other opinion "inconsistent" with *Williams*'s holding or reasoning. Brief of Appellees at 34. The cases Plaintiffs cite do not mention sovereign immunity. *Id.* at 30-31. Only one unpublished opinion mentions subject-matter jurisdiction at all, and that is in relation to mootness. *Id.* at 31. Those "drive-by jurisdictional rulings" have no bearing on what

sovereign immunity does or does not bar and thus fail to cast any doubt on *Williams*. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (explaining that cases without an in-depth discussion of a jurisdictional argument should be given "no precedential value" on that point because the actual reason for dismissal (or not) cannot be known). The cases Plaintiffs cite as "the great weight of this Court's opinions" on sovereign-immunity analysis do not even mention sovereign immunity; they are irrelevant to that issue and this case.

Nor is *Bessemer Board* inconsistent with *Williams*. This Court explained that "*Bessemer Board* stands for the proposition that a claim for backpay will be allowed where it is undisputed that sum-certain statutorily required payments should have been made." *Barnhart*, 272 So. 3d at 1123. Sovereign immunity did not bar relief in *Bessemer Board* because the "action essentially was nothing more than a plea to the trial court to order the board to perform correct mathematical computations." *Ala. State Univ. v. Danley*, 212 So. 3d 112, 126 (Ala. 2016). Therefore, *Bessemer Board* considered an undisputed statute while *Williams* concerned a disputed one. The two cases are not inconsistent.

And other cases from this Court, such as *Woodfin v. Bender*, 238 So. 3d 24 (Ala. 2017),[7] support *Williams*'s reasoning. Although *Woodfin* was a plurality opinion (with three additional justices joining two separate concurring opinions that also support *Williams*'s reasoning) and involved a school-board policy instead of a statute, the reasoning is persuasive and the holding is applicable in the statutory context. Before beginning its analysis, the plurality "assum[ed] that a school-board policy should be treated like . . . a statute." *Woodfin*, 238 So. 3d at 32 & n.3 (plurality opinion). The plurality then reasoned from opinions where this Court assessed sovereign immunity in the statutory context. *Id.* at 32. Indeed, the plurality relied primarily on *Bessemer Board* — a statutory-interpretation case — and explained that as far as the reasoning in *Woodfin* is concerned, the statute versus policy distinction is one without a difference. *Id.* at 32-33. Any claim that this

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[7] The State did not "seriously misstate the facts of *Woodfin*." Brief of Appellees at 32. After making that accusation, Plaintiffs do not cite a single factual misstatement because there are none. The State never discussed the facts of *Woodfin* and only discussed its reasoning and its explanation of previous cases. *See* Appellants' Opening Brief at 30-31.

reasoning does not apply to statutory interpretation is wrong.

Proceeding on the assumption that a school board's policy interpretation should be treated identically to a State agency's statutory interpretation for sovereign-immunity-analysis purposes, the plurality stated that "the issue is whether the defendants acted arbitrarily in interpretati[on] and implement[ation]" because "[i]f they did not act arbitrarily, they are entitled to §14 immunity." *Woodfin*, 238 So. 3d at 32. The important question is thus "whether the language in the [statute] unambiguously create[s]" the duty that the plaintiffs seek to compel. *Id.* The *Woodfin* plurality explained that *Bessemer Board* "contemplate[d] a lack of discretion by State officials when there was *no dispute* that a particular payment is required [under the statute]." *Id.* It then contrasted the undisputed statutory interpretation in *Bessemer Board* with when "there is a legitimate dispute" about an interpretation and explained that when there is a legitimate dispute and non-arbitrary interpretation "the defendants were entitled to §14 immunity." *Id.* at 32-33.

The reasoning of three other justices concurring in *Woodfin* also supports *Williams*. As Justice Shaw, joined by Justice Bryan, put it, "when a plaintiff seeks payment of money from the State, the 'limited circumstances' in which [sovereign immunity does not bar payment] depends on whether the amount sought is 'certain' and the State's obligation to pay is 'undisputed.' If there is doubt as to those, the analysis ends and §14 bars the action." *Woodfin*, 238 So. 3d at 34 (Shaw, J., concurring in result). And Justice Murdock went even further explaining that "[i]f [the amount owed] is not [undisputed], then there is immunity, regardless of whether the State official's decision regarding it might, in retrospect, be deemed by a court or law to have been 'arbitrary.'" *Id.* at 33 (Murdock, J., concurring in result).

To the extent some language in *Barnhart* could be read in tension with *Woodfin* and *Williams* (though the *Barnhart* Court never cited *Williams*), the Court should clarify that when there is legitimate dispute as to the statute under which the plaintiffs seek payment, the Court's unanimous *Williams* decision and the reasoning of six Justices in *Woodfin* controls: a reasonable interpretation and a good-faith

implementation are enough to protect State coffers. Only that result would prevent the injustice of opening up the State's coffers after OIDS reasonably interpreted §15-12-21 and implemented it in good-faith, especially when Plaintiffs' proposed "correct" interpretation requires intellectual gymnastics of an Olympic level.

In any event, Plaintiffs have not identified a non-discretionary duty for OIDS to pay exactly what a trial court certifies or to pay any amount above the fee-caps. On the contrary, they have argued that OIDS's refusal to pay amounts over the fee-caps were actions "of ministerial obedience to the statute," Brief of Appellees at 37, and that OIDS's "duty to pay is the amount specified in Ala. Code §15-12-21(d) as 'approved by the trial court,'" *id.* at 29 n.10, where the only specification in §15-12-21(d) is the prohibition against paying amounts over the fee-caps. Because Plaintiffs have shown that the statute contains not the ministerial duty that they want the Court to compel but one that commands the exact opposite, sovereign immunity bars retrospective relief.

II. Plaintiffs lack third-party standing to seek a declaration that §15-12-21 violates future, hypothetical defendants' constitutional rights to a fair trial and effective counsel.

Plaintiffs seek a declaration that §15-12-21 is unconstitutional, in part, because it violates a defendant's right to a fair trial and because it violates a defendant's right to effective assistance of counsel. C.10-11, C.314-15. But the class is composed only of attorneys. C.315-16. And as Plaintiffs admit, attorneys lack standing to argue that hypothetical future indigent defendants' constitutional rights will be violated. Appellees' Brief at 37; *Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004). Claims that depend on that faulty theory of third-party standing, therefore, should be dismissed.

Barnhart says nothing to the contrary. In *Barnhart*, the named plaintiffs were no longer employed and thus could not benefit from purely prospective relief. *Barnhart*, 275 So. 3d at 1133. The Court held that they could, however, benefit from a declaration that their own rights to payment had previously been violated. *Id.* Plaintiffs here, on the contrary, assert third-party rights, not their own rights. They do not have standing to raise claims for future,

hypothetical indigent defendants. They do, of course, have standing to seek a declaration that §15-12-21 is unconstitutional for the other reasons they mention in Count One that touch on their own rights. Therefore, again unlike *Barnhart*, dismissal of the fair trial and effective assistance of counsel claims would not doom the rest of Plaintiffs' case.

Additionally, the State's agreement that the named plaintiffs are adequate to represent a class of attorneys does not create standing for attorneys to bring claims that the rights of criminal defendants (and future, hypothetical ones at that) have been violated, even if "we assume that theory to be viable." *Wyeth, Inc. v. Blue Cross & Blue Shield of Ala.*, 42 So. 3d 1216, 1220 (Ala. 2010); *see Kowalski*, 543 U.S. at 127 ("[T]wo attorneys who seek to invoke the rights of hypothetical indigents . . . lack standing."); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." (citations omitted)). The claims that §15-12-21 is unconstitutional because it violates the rights of

future, hypothetical indigent defendants to a fair trial and effective assistance of counsel should be dismissed.

CONCLUSION

This Court should reverse the lower court's certification of the retrospective-relief class and dismiss the claims seeking retrospective relief and those asserting third-party rights.

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CERTIFICATE OF SERVICE

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