IN THE COURT OF APPEALS OF THE STATE OF OREGON

Ja'Marious Hannah, **Jackson Dove**, **Gregory Groner**, and **Peter Whittle**,

Plaintiffs-Appellants,

v.

State of Oregon, **Jessica Kampfe**, **Per Ramfjord**, **Paul Solomon**, **Peter Buckley**, **Alton Harvey Jr.**, **Lisa Ludwig**, **Jennifer Nash**, **Jennifer Parish Taylor**, **Max Williams**, and **Kristen Winemiller**, in their official capacities,

Defendants-Appellees.

Multnomah County Circuit Court
No. 22CV36357
Eric L. Dahlin, Judge

Court of Appeals No. A181795

PLAINTIFFS' NOTICE OF PROBABLE MOOTNESS AND ARGUMENT AGAINST DISMISSAL

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Notice

As required by ORAP 8.45, Plaintiffs give notice that their criminal cases have all been resolved through appointment of counsel or dismissal, and that their claims may therefore be moot. (Declaration of Benjamin Haile ¶ 2.) But this appeal should not be dismissed. Plaintiffs' claims involve a matter of public interest and they are capable of repetition yet evading review, so the Court should hear this appeal on the merits under ORS 14.175. Facts and argument follow. *See* ORAP 8.45(a).

Statement of Facts

Plaintiffs are indigent individuals who cannot afford to hire a private attorney. (Complaint 3, TCF Oct. 21, 2022.) The State charged them with crimes, arraigned them, found that each qualified for state-appointed counsel, and failed to appoint them counsel. (*Id.*) On the day he filed suit, Ja'Marious Hannah had been without counsel for 72 days and counting. (*Id.* at 4.) Jackson Dove had been without counsel for 43 days and counting. (*Id.* at 5.) Gregory Groner, 21 days. (*Id.*) Peter Whittle, 128 days. (*Id.* at 6.) Each of them had appeared in court repeatedly, only to be told their cases could not proceed because no attorney was available to represent them. (*Id.* at 4–6.) Hannah, Groner, and Whittle had been released on their own recognizance, but the State held Dove in custody while it denied him counsel. (*Id.*)

Plaintiffs' claims are all too common. The State's failure to provide counsel harms over a thousand indigent defendants in Oregon. (*Id.* at 9.) In October 2022, the number stood at 1,200. (*Id.*) Of those, forty had been jailed indefinitely while they waited for the State to provide counsel. (*Id.*) Those numbers are rising. By July 2023, Washington County alone held eighty people in jail without counsel. Presiding Judge Order 331 at 1, Washington County Circuit Court (July 13, 2023).[1] Of those, twenty-one had been held without counsel for over 30 days. *Id.* In the words of the Washington County Circuit Court: "The unrepresented defendant crisis has not diminished, to the contrary our unrepresented cases have continued to increase." *Id.* at 2.

Plaintiffs sued for declaratory and injunctive relief on behalf of the class of indigent individuals who have been charged with crimes and denied counsel. (Complaint at 1–2.) The State moved for judgment on the pleadings, arguing that the trial court lacked jurisdiction; that declaratory judgment was improper because of Plaintiffs' pending prosecutions; and that Plaintiffs had no right to counsel. (State's Motion to Dismiss, TCF Dec. 15, 2022.) The trial court granted the

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[1] Available at https://www.courts.oregon.gov/rules/Documents/PJO%20331%20%E2%80%93%20Directing%20the%20Priority%20of%20Appointments%20of%20Defense%20Attorneys%20in%20Washington%20County.pdf. This Court can take judicial notice of the facts in the order under OEC 201(b).

State's motion. (Order, TCF April 17, 2023.) Plaintiffs timely appealed.

After the trial court entered judgment, Plaintiffs' criminal cases were resolved through appointment of counsel or dismissal. (Haile Decl. ¶ 2.)

ARGUMENT

Plaintiffs seek a declaration that the State violated their rights to counsel and to equal privileges and immunities. Their criminal cases have concluded, but the Court should still hear their claims under ORS 14.175 because the State's failure to provide indigent defendants with counsel is capable of repetition—indeed, is repeated every day—and yet is likely to evade judicial review.

1. Plaintiffs' claims are capable of repetition yet evading review.

The Oregon Constitution "does not require dismissal in public actions or cases involving matters of public interest." *Couey v. Atkins*, 357 Or 460, 520, 355 P3d 866 (2015) (emphasis omitted). Rather, state judicial power is "plenary." *Id.* at 502 (quotation marks omitted). Especially when a claim involves a matter of "public interest," nothing in the Constitution's text "imposes any limits on the exercise of 'judicial power.'" *Id.* at 515–16.

In ORS 14.175, the legislature sought to facilitate the exercise of judicial power in cases involving the public interest. It provided that if a claim "challeng[es] the lawfulness of an action, policy, or practice of a public body," courts may hear it regardless of mootness when three conditions are met: (1) The party bringing the claim had standing at the outset; (2) the challenged act is capable of repetition or the challenged policy or practice is ongoing; and (3) the challenged act, policy, or practice is likely to evade judicial review. *See Couey*, 357 Or at 520, 522; ORS 14.175. Plaintiffs' claims meet all three requirements.

1.1. Plaintiffs had standing to bring their claims.

Oregon courts have historically enunciated three requirements for a plaintiff to have standing to seek declaratory relief. The challenged law or practice must injure or affect a "legally recognized interest of the plaintiff's"; the injury must be "real or probable, not hypothetical or speculative"; and a declaratory judgment must have some "practical effect" on the right the plaintiff seeks to vindicate. *MT & M Gaming, Inc. v. City of Portland*, 360 Or 544, 554–55, 383 P3d 800 (2016) (quotation marks omitted). Only the third requirement—a "practical effect"—is at issue. (*See* State's Motion to Dismiss at 9–13.)

Standing, under Oregon law, is not a constitutional constraint on judicial power. *Couey*, 357 Or at 502. It is a question of statutory construction. *MT & M*, 360 Or at 553. And the text of the Uniform

Declaratory Judgments Act, which gives courts the power to declare rights "whether or not further relief *is or could be* claimed," is hard to reconcile with the notion that a declaratory judgment must have some practical effect. ORS 28.010 (emphasis added). As a result, courts construe the practical-effect requirement narrowly: If a declaration would vindicate a plaintiff's rights, clarify them, or affect the choices of others, that is enough to confer standing. *Doyle v. City of Medford*, 356 Or 336, 372, 337 P3d 797 (2014); *Chernaik v. Kitzhaber*, 263 Or App 463, 478–79, 328 P3d 799 (2014). Plaintiffs' request for declaratory relief easily satisfies that low bar.

1.1.1. The Oregon Constitution does not require a plaintiff to show that declaratory relief would have a "practical effect."

The law of justiciability in Oregon has undergone a revolution in the last decade. Before 2015, justiciability doctrines like standing and mootness were often viewed as a constitutional constraint on the legislature's power to authorize courts to hear cases. *See, e.g.*, *Yancy v. Shatzer*, 337 Or 345, 97 P3d 1161 (2004), *abrogated by Couey*, 357 Or 460; *see also Couey*, 357 Or at 510–15 (tracing the history of the "constitutionaliz[ation]" of justiciability). So conceived, the practical-effect requirement had an "uneasy relationship" with the UDJA, because "the distinguishing characteristic of a declaratory judgment is the absence of coercive relief." *Hale v. State of Oregon*, 259 Or App

379, 383, 314 P3d 345 (2013), *rev den*, 354 Or 840 (2014); *Ken Leahy Const., Inc. v. Cascade Gen., Inc.*, 329 Or 566, 572, 994 P2d 112 (1999).

In 2015, however, the Oregon Supreme Court wrought a sea change in justiciability doctrine. Canvassing the history of justiciability across English common law and two centuries of federal and state jurisprudence, it concluded that nothing in the Oregon Constitution "imposes any limits on the exercise of 'judicial power.'" *Couey*, 357 Or at 515–16. State judicial power, it held, is "unencumbered by a case-or-controversy limitation" and therefore is "plenary." *Id.* at 502. Specifically, nothing in the Constitution forbids a court from hearing a claim for declaratory relief even when a judicial declaration "can have no possible practical effect on the rights of the parties." *Eastern Oregon Mining Association v. DEQ* ("*Eastern Oregon Mining I*"), 360 Or 10, 16, 19–20, 376 P3d 288 (2016). Especially when a claim involves a matter of "public interest," Oregon courts have long recognized their jurisdiction "without regard to whether those who initiate such actions have a personal stake in their outcome." *Couey*, 357 Or at 516.

In sum, the Oregon Constitution imposes no "practical effect" requirement on declaratory-judgment actions. If such a requirement exists, it must be found in the text of the UDJA.

1.1.2. The "practical effect" requirement is atextual and courts construe it narrowly.

There is no "practical effect" requirement in the UDJA. The words cannot be found in the statute. *See* ORS 28.010–28.160. At one time, the Supreme Court located it in ORS 28.020's requirement that a plaintiff establish "that his or her 'rights, status, or other legal relations' are 'affected by'" the challenged provision. *Morgan v. Sisters School Dist.*, 353 Or 189, 194–95, 301 P3d 419 (2013). But the Court has since noted that the "practical effect" requirement is "less closely tied to the statute's wording." *MT & M*, 360 Or at 555. In fact, the UDJA specifically explains that ORS 28.020 "does not limit or restrict the exercise of the general power[]" to "declare rights, status, and other legal relations." ORS 28.050, 28.010; *see Chernaik*, 263 Or App at 473. In short, the legislature imposed no "practical effect" requirement on claims for declaratory judgment.

If anything, the legislature took pains to obviate any such requirement. On top of the disclaimer in ORS 28.050, it also provided that courts could grant declaratory relief "whether or not further relief is or could be claimed." ORS 28.010. Wringing a "practical effect" out of a declaration was to be left to a petition for "[f]urther relief," which the plaintiff could seek once she had a declaratory judgment in hand. ORS 28.080. In other words, whether or not a plaintiff could seek

injunctive relief or money damages, the legislature sought to ensure she could vindicate her rights through a declaratory judgment.

The Supreme Court has yet to examine whether the practical-effect requirement survives *Couey*,[2] but both it and this Court have construed the requirement narrowly. Declaratory relief has a practical effect when it "finally resolve[s] the controversy" between the parties and "vindicate[s]" a plaintiff's prospective rights. *Courter v. City of Portland*, 286 Or App 39, 49, 398 P3d 936 (2017); *Doyle*, 356 Or at 372. It has a practical effect if it "affect[s] [the] choices" of others, even without the coercive power of an injunction. *Pendleton School Dist. v. State of Oregon*, 345 Or 596, 610 & n4, 200 P3d 133 (2009). In suits against the State, in particular, a declaratory judgment has a practical effect because "it must be assumed that the State will act in accordance with a judicially issued declaration regarding the scope of [its] duties." *Chernaik*, 263 Or at 479. Put simply, a declaratory judgment has a practical effect when it has a "concrete impact on the rights of the person." *See Kellas v. Dep't of Corr.*, 341 Or 471, 486, 145 P3d 139 (2006). The "declar[ing] [of] rights" *is* the practical effect. *Cf.* ORS 28.010.

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[2] In *Couey* itself, however, it did overrule *Yancy*'s rationale that the practical-effect requirement was constitutional. 357 Or at 487, 515–16.

1.1.3. The declaratory judgment Plaintiffs seek would have a practical effect because it would vindicate Plaintiffs' constitutional rights.

Plaintiffs' request for declaratory judgment is at least as justiciable as those greenlit in *Chernaik* and *Pendleton*. Just as in those cases, Plaintiffs sue the State directly for violating a duty owed to them. *Chernaik*, 263 Or App at 478–79; *Pendleton*, 345 Or at 604–06. Just as in those cases, Plaintiffs seek a declaratory judgment that sets out "what the state's legal obligation was"—to timely provide them and other indigent defendants like them with counsel—"and that it had failed to do so." *See Chernaik*, 263 Or App at 478; *Pendleton*, 345 Or at 605. And just as in those cases, Plaintiffs are entitled to that declaration whether or not "related injunctive relief against the state" might follow, because the declaration itself will vindicate Plaintiffs' rights: "[T]his court and the lower courts . . . assume that the responsible state officials [will] honor the court's declaration without the necessity of an accompanying injunction." *Chernaik*, 263 Or App at 478–79 (quoting *Swett v. Bradbury*, 335 Or 378, 389, 67 P3d 391 (2003)) (emphasis omitted).

If anything, Plaintiffs' claims here fit *more* comfortably under general justiciability principles than those in *Chernaik* and *Pendleton*. The *Chernaik* plaintiffs sought a declaration that the State had failed to protect Oregon's water supply and other "public trust" resources, 263 Or App at 471, and the *Pendleton* plaintiffs sought a declaration that the

State had failed to adequately fund the public school system, 345 Or at 606. Those injuries are less concrete and particularized than Plaintiffs' injuries here: Being deprived of counsel for weeks and months while the State prosecuted them, and thus impaired in mounting a viable defense. Yet the plaintiffs in those cases had standing; so too here.

Still, the trial court dismissed Plaintiffs' claims because it saw no "effective remedy that could result from that declaratory judgment." (Tr. 75, Haile Decl. Ex. 1.) In other words, it accepted the State's argument that because it lacked authority to issue an injunction, Plaintiffs lacked standing to seek declaratory relief against the State. (*Cf.* State's Motion to Dismiss at 10–11, TCF Dec. 15, 2023.) But even *if* the trial court lacked authority to issue an injunction—and that is far from clear—this Court in *Chernaik* rejected the argument that "'bare' requests for declaratory relief are nonjusticiable." 263 Or App at 475. As this Court explained then, that notion "cannot withstand the Supreme Court's holding in *Pendleton*." *Id.* at 476. After *Pendleton* and *Chernaik*, plaintiffs are entitled to declaratory relief even if they are "*not* entitled to any related injunctive relief against the state." *Id.* at 478. Put differently, to obtain declaratory relief, Plaintiffs need not also state "what would amount to a [separate] cause of action" for injunctive relief. *Doyle*, 356 Or at 373 (quoting Walter H. Anderson, *Declaratory Judgments* 588–89 (1951)).

Before the trial court, the State cited three cases in support of its argument to the contrary. None fits the bill. In *Morgan*, the plaintiff sought only *retrospective* relief: He alleged that the school district *had* denied him the right to vote, and that it "should have" held an election before entering a certain financing arrangement. 353 Or at 199. The alleged violation of his rights was completed, not ongoing or recurring, so the declaration he sought would have had no prospective effect. *See id.* at 199–200. Nor did he seek ancillary prospective relief, like a declaration that the financing instruments were invalid or an order that the matter be put to a vote. *See id.* at 191.[3] Here, by contrast, at the time the complaint was filed, the State's violation of Plaintiffs' constitutional rights was ongoing. (Complaint 3–6.) In such cases, "a declaration is adequate to satisfy the practical effect requirement." *Morgan*, 353 Or at 199–200; *Chernaik*, 263 Or App at 475.

The State's next case, *Childers Meat Co. v. City of Eugene*, is even less germane. *Cf.* 296 Or App 668, 439 P3d 1000 (2019), *rev den*, 365 Or 556 (2019). There, the plaintiffs challenged a city ordinance requiring users of hazardous substances to make annual reports. *Id.* at 685. Their alleged injury was having to pay fees to support the reporting program, but their claim challenged the legality not of the fees but of the reporting requirement itself. *Id.* at 685–86. Through

[3] *Morgan* also predates *Couey* by two years, and it is uncertain how much of *Morgan* survives *Couey*'s overhaul of justiciability doctrine.

earlier litigation, the fees provision had been severed from the reporting requirement: Even if the reporting requirement were invalid, the fees would still be due. *Id.* And the plaintiffs were not subject to the reporting requirement—only to the fees. *Id.* In short, the provision that caused their injury was not what they challenged, and the provision they did challenge caused them no injury. *Id.* So of course this Court held they lacked standing. Here, by contrast, there is no gap between what caused Plaintiffs' injury—the State's failure to provide counsel—and the relief Plaintiffs seek—a declaration that vindicates their right to counsel. *See Chernaik*, 263 Or App at 478 (plaintiffs were entitled to "a declaration of what the state's legal obligation was . . . and that it had failed to [meet it]").

The State's final case, *Houston v. Brown*, has nothing to do with standing to seek declaratory relief. *Cf.* 221 Or App 208, 190 P3d 427 (2008). There, the plaintiff sought relief under the habeas corpus statutes from future imprisonment for violating the conditions of his post-prison supervision. *Id.* at 211. The only remedy available in habeas corpus, however, is release from custody. *Id.* at 212 (citing ORS 34.310–34.730). The plaintiff was not in custody. *Id.* at 211–12. So this Court held that his claim was moot, because he was no longer eligible for the only relief on offer. *Id.* at 212–13. *Houston* is inapplicable here thrice over. It construed the remedies available in habeas corpus, not under the UDJA. It predated *Couey* and the

attendant overhaul of justiciability doctrine by seven years. And it did not consider whether to grant relief under ORS 14.175. It does not even suggest that Plaintiffs lack standing to seek declaratory relief here.

* * *

When Plaintiffs filed their complaint, there was a "concrete, present, and ongoing dispute between the parties as to what the constitution require[d] the state to do." *Pendleton*, 345 Or at 610 n4. A declaration of the answer would "finally resolve" that controversy and "vindicate" Plaintiffs' right to counsel. *Courter*, 286 Or App at 49; *Doyle*, 356 Or at 372. It would "affect [state officials'] choices" going forward. *Pendleton*, 345 Or at 610 n4. That is enough for Plaintiffs to have had standing to seek declaratory relief. *Chernaik*, 263 Or App at 475–80. Plaintiffs meet the first requirement of ORS 14.175.

1.2. Plaintiffs' claims are capable of repetition.

As to the second requirement—that their claims be capable of repetition—Plaintiffs need not show that the State will again deny counsel *to them*. *Penn v. Board of Parole*, 365 Or 607, 620, 451 P3d 589 (2019). They need show only that "it is reasonable to believe" that the State "will repeat the act or continue it in a way that will similarly affect *someone*." *Id.* (emphasis added).[4] So framed, the State's failure to

[4] The federal courts' rule under *City of Los Angeles v. Lyons*, 461 US 95 (1983), does not apply in Oregon. *Penn*, 365 Or at 615–20.

provide indigent defendants with counsel is not just capable of repetition: It is repeated every day. (Complaint at 8; *see also* n.1, *supra*.) There is not just "a reasonable potential" that "the act will recur to a similar effect" but absolute certainty. *Cf. Penn*, 365 Or at 620.

1.3. Plaintiffs' claims are likely to evade review.

Plaintiffs must also show that "the general type or category of challenge at issue is likely to evade being fully litigated." *Eastern Oregon Mining I*, 360 Or at 17. Plaintiffs' criminal cases were disposed of in an average of 100 days. (Haile Decl. ¶ 3.) That is a long length of time to bear the weight of the State's prosecutorial machinery without the help of counsel, but not long enough to fully litigate a plaintiff's claim through review by the Oregon Supreme Court. *See Penn*, 365 Or at 623–24 (three years insufficient to fully litigate appeal of post-prison supervision); *Eastern Oregon Mining I*, 360 Or at 18–19 (five years insufficient to fully litigate administrative "orders in other than a contested case"). Plaintiffs' claims are likely to evade being fully litigated unless they are heard under ORS 14.175, so ORS 14.175 applies.

1.4. The Court should exercise its discretion to hear this case.

Finally, Plaintiffs must show that the Court should exercise its discretion to hear this case under ORS 14.175. *Eastern Oregon Mining Association v. DEQ* ("*Eastern Oregon Mining II*"), 285 Or App 821, 830, 398 P3d 449 (2017), *aff'd*, 365 Or 313 (2019). This Court considers several factors in choosing whether to exercise its discretion, including "the adversarial nature of the parties' interests, the effect of the decision on both the parties and others not before the court, judicial economy, and the extent of the public importance of the issues presented." *Id.*

All of those factors favor Plaintiffs here:

- The State seeks to impose criminal sanctions on Plaintiffs and those similarly situated. Few parties are more adversarial than that.
- A declaration of Plaintiffs' rights will affect thousands of people. (Complaint at 9.) Indeed, Plaintiffs filed their claims on behalf of a class. (Complaint at 8–10.) The trial court dismissed their claims without ruling on Plaintiffs' motion to certify that class, but class certification would also have served to avoid mootness.
- Judicial economy will be well-served by litigating—fully and finally, without the prospect of waiving the question in

exchange for a plea bargain—whether and when the State violates indigent defendants' rights by refusing to provide them counsel.

- The issues presented are of major public importance.[5]

In short, the Court can hear Plaintiffs' claims under ORS 14.175, and it should exercise its discretion to do so.

CONCLUSION

Justice Hans Linde once wrote that "rigid tests of 'justiciability' breed evasions and legal fictions." *Kellas*, 341 Or at 478–79 (quoting Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Différence!*, 46 Wm. & Mary L. Rev. 1273, 1287–88 (2005)). This case illustrates the point. A claim for declaratory relief based on State's failure to timely provide indigent defendants with counsel will nearly always become moot before appellate review—unless this Court hears it under ORS 14.175. For the reasons above, it should do just that.

Dated: August 8, 2023

Respectfully submitted,

By: */s/Athul K. Acharya*
Athul K. Acharya

[5] *See, e.g.*, Claire Rush, *Oregon public defender shortage: nearly 300 cases dismissed*, Associated Press (Nov. 23, 2022), https://apnews.com/article/health-oregon-covid-portland-a13c2ecf6e4648272dfa12fb9244b7a6.

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Counsel for Plaintiffs-Appellants

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No. 22CV36357
Eric L. Dahlin, Judge

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DECLARATION OF BENJAMIN HAILE

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August 2023

DECLARATION OF BENJAMIN HAILE

1. I am Senior Counsel at the Oregon Justice Resource Center's Civil Rights Project. I am one of the attorneys who represent Plaintiffs in this action. I make this declaration in that capacity and based on my personal knowledge. If called upon to do so, I would testify truthfully as follows.

2. After the trial court entered its judgment in this case, Plaintiffs' criminal cases were all resolved through appointment of counsel or dismissal.

3. The average number of days that the four plaintiffs in this action were waiting for court appointed counsel is 100 days. This period is calculated as beginning either with the date on which Plaintiffs first appeared in court on their criminal charges, qualified for court appointed counsel, and were not appointed counsel; or the date on which their previously appointed attorney withdrew from representation. This period is calculated as ending with the date on which the criminal case was dismissed or the date on which the court appointed counsel.

4. Plaintiffs commissioned a certified court reporter to prepare a transcript of the trial court's hearing on the State's motion for judgment on the pleadings. A true and correct copy of page 75 of that transcript is attached to this declaration as **Exhibit 1**.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Dated: August 8, 2023

Respectfully submitted,

By: */s/Benjamin Haile*
Benjamin Haile

dismissed.

But as a practical matter, cases are being dismissed, and attorneys who are representing the defendants for a limited purpose in arraignment court are making these arguments in that limited capacity, and at least in Multnomah County -- and cases are, in fact, being dismissed, and people are being released from custody, or the release conditions are being dropped, simply because an attorney is not available.

And so it's not -- even though this is a bad situation, it's not quite as catch-22ish or Kafkaesque or just as bad as the plaintiff's attorneys describe things, even though it's obviously significantly less than ideal. But it's not quite the way plaintiffs have described things.

But the bottom line is that to have standings, to request declaratory judgment, I agree with the State that there would have to be a remedy that could result -- an effective remedy that could result from that declaratory judgment. But I don't think there is anything that could be resolved by the declaratory judgment with respect to individual cases, because each case would depend on a reasonableness inquiry, and, as I said, I don't think there was any set amount of time that is presumably unreasonable.

Certificate of Service

I certify that on August 8, 2023, I electronically filed the Appellant's Notice of Probable Mootness and Argument Against Dismissal, and electronically served it upon Denise G. Fjordbeck, Colin H. Hunter, Jeff S. Pitzer, and Joanna T. Perini-Abbott, as well as the transcript coordinator.