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STATE OF NORTH DAKOTA

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**State of North Dakota  
In the Supreme Court**

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**IN THE MATTER OF A PETITION TO PERMIT TEMPORARY  
PROVISION OF LEGAL SERVICES BY QUALIFIED ATTORNEYS  
FROM OUTSIDE NORTH DAKOTA**

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### **[¶3] Issue Presented for Review**

- I.** [¶4] Do the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, as well as Article I, § 12 of the North Dakota Constitution, mandate that this state admit out-of-state attorneys in temporary practice to deal with the flood of criminal charges that is currently overwhelming the local bar's ability to adequately represent all defendants?

## **[¶5] Introduction**

[¶6] Petitioners request that the Supreme Court make a determination that there exists an emergency affecting the South Central Judicial District sufficient to warrant temporary practice in North Dakota by qualified attorneys who are admitted in other jurisdictions. This Court should order a temporary amendment to the Admission to Practice Rules pursuant to N.D.R. Proc. R. § 3. Such amendment would allow criminal defendants whose arrest arose out of the Dakota Access Pipeline (“DAPL”) dispute to be fully represented by qualified attorneys, while still enjoying their right to a speedy trial.

[¶7] Absent the Court granting the relief requested, indigent defendants’ Fifth Amendment right to representation by counsel and Sixth Amendment right to counsel of their choice may be put in jeopardy. This Court is empowered to grant the relief requested by statutory law, the rules governing admission to practice, and the inherent power of the Court to regulate the legal profession. It is the duty of the Supreme Court to assure the preservation of constitutional rights to all persons in North Dakota, including particularly the right to effective counsel and counsel of their choice. The Court should therefore grant this petition.

[¶8] A hearing is requested in this matter.



## [¶9] Statement of Relevant Facts

[¶10] This petition stems from the fallout of protest of the Dakota Access Pipe Line (“DAPL”). As the protests have been international news for months, Petitioners will assume that this Court is generally aware of the underlying dispute, and will not waste the Court’s time with an extended recitation of the facts. What is relevant, however, is the rash of arrests and criminal charges that the conflict has created.

[¶11] As of August 19, 2016, there had been just 28 DAPL-related arrests. On that day, Governor Jack Dalrymple declared that a state of “emergency” existed in Southwest and South Central North Dakota due to civil unrest.<sup>1</sup>

[¶12] Since that time, more than 500 additional arrests have been made. These arrests have occurred predominately within Morton County.<sup>2</sup>

[¶13] Policing the protests has been expensive. To date, protest-related law

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<sup>1</sup> See Exhibit 5 to Affidavit of William L. Tilton Gov. Jack Dalrymple, Dalrymple Declares an Emergency exists in Southwest and South Central North Dakota, (Aug. 19, 2016), *available at* <https://www.governor.nd.gov/media-center/executive-order/dalrymple-declares-emergency-exists-southwest-and-south-central-north-d>

<sup>2</sup> See Exhibit 4 to Affidavit of William L. Tilton Blake Nicholson, Washington Post, Pipeline protest arrests strain North Dakota’s court system, (Nov. 29, 2016) , *available at* [https://www.washingtonpost.com/national/pipeline-protest-arrests-strain-north-dakotas-court-system/2016/11/29/53bdf8aa-b65c-11e6-939c-91749443c5e5\\_story.html](https://www.washingtonpost.com/national/pipeline-protest-arrests-strain-north-dakotas-court-system/2016/11/29/53bdf8aa-b65c-11e6-939c-91749443c5e5_story.html) (stating nearly 575 arrests); See also Exhibits 1, 2 and 3 to the Affidavit of William L. Tilton, *Spreadsheet of DAPL-related Criminal Actions as of December 2, 2016* (listing over 1,000 charges) (data provided by the South Central Judicial District Court Administrator’s Office to attorney Chad Nodland) [hereinafter “*Spreadsheet of Actions*”].

enforcement costs have exceeded \$10 million,<sup>3</sup> and the governor has sought an additional \$7 million in emergency funding.<sup>4</sup>

¶14 Despite the extraordinary pressure these arrests have put on the criminal justice system in Morton County, no emergency funds have been allocated to the court system. In particular, no emergency funding has been allocated to the already budget-constrained public defense system.

¶15 Per the Commission on Legal Counsel for Indigents (“CLCI”), to date, 79 North Dakota attorneys have been assigned 265 cases;<sup>5</sup> but the need is not yet met. As of December 2, 2016, court records list fully 264 defendants as being without counsel.<sup>6</sup> Of these 264 defendants, at least 113 applied to be represented by public defenders but were denied, in which some of these denials likely to be

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<sup>3</sup> See Exhibit 6 to Affidavit of William L. Tilton Mike McCleary, Tribune, Governor calls for federal help in eviction of camped protestors, (Nov. 26, 2016), available at [http://bismarcktribune.com/news/state-and-regional/governor-calls-for-federal-help-in-eviction-of-camped-protesters/article\\_bf5513fb-0298-5654-a30b-29319e110100.html](http://bismarcktribune.com/news/state-and-regional/governor-calls-for-federal-help-in-eviction-of-camped-protesters/article_bf5513fb-0298-5654-a30b-29319e110100.html))

<sup>4</sup> See Exhibit 7 to Affidavit of William L. Tilton Nick Smith, Bismarck Tribune, \$7 million more approved for protest law enforcement response, (Nov. 30, 2016), available at [http://bismarcktribune.com/news/local/govt-and-politics/million-more-approved-for-protest-law-enforcement-response/article\\_fa744ac2-2d5b-54e3-928a-9557a4f6f45c.html](http://bismarcktribune.com/news/local/govt-and-politics/million-more-approved-for-protest-law-enforcement-response/article_fa744ac2-2d5b-54e3-928a-9557a4f6f45c.html)

<sup>5</sup> See Exhibit 8 to Affidavit of William L. Tilton E-mail correspondence from Jean Delaney, Executive Director of the Commission on Legal Counsel for Indigents, to William L. Tilton (Dec. 5, 2016).

<sup>6</sup> See Exhibits 1, 2 and 3 to Affidavit of William L. Tilton *Spreadsheet of Actions*.

reversed upon correction and/or completion of paperwork.<sup>7</sup>

[¶16] Pretrial hearings, dispositions conferences, and jury trials have been scheduled almost continuously throughout the winter, and have already begun to occur.<sup>8</sup> Because of the titanic quantity of defendants, hearings are almost guaranteed to continue well into 2017.

[¶17] These events are of a historic scale. Petitioners know of no other time in which comparable strain has been placed on court system, relative to its size, by such a surge of arrests. While the total number of requests for indigent counsel cannot yet be determined, it is clear that there will be more requests for counsel than can be accommodated by present resources. Similarly, the demand for private counsel also exceeds the capacity of the local bar.

### [¶18] Argument

#### I. [¶19] The Need For Attorneys To Represent DAPL Protestors Is Enormous

##### A. [¶20] The Number of Charges Is Overwhelming the Local Defense Bar

[¶21] Even before the surge of protest-related arrests, the indigent-defense

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<sup>7</sup> See Exhibit 19 to Affidavit of William L. Tilton, Affidavit of Andrea Kilchrist; See also Exhibit 20 to Affidavit of William L. Tilton, Affidavit of Daniel Nunamkin; See also Exhibit 21 to Affidavit of William L. Tilton, Affidavit of Richard Rowski; See also Exhibit 22 to Affidavit of William L. Tilton, Affidavit of Steven S. Hoffmann; See also Exhibit 23 to Affidavit of William L. Tilton, Affidavit of Amy Earlene Cirbo; See also Exhibit 24 to Affidavit of William L. Tilton, Affidavit of Leah Ruth.

<sup>8</sup> See Exhibits 1, 2 and 3 to Affidavit of William L. Tilton *Spreadsheet of Actions*.

system struggled to provide the quantity of services for which it is called upon. It faced inadequate state funding, high turnover due to low pay, high caseloads, and onerous workload standards.<sup>9</sup> With the flood of recent criminal arrests, it is completely overwhelmed.

[¶22] The events of October 27, 2016 are illustrative of the profound recent pressure on the defense bar, and of the need for additional attorneys to protect the rights of these criminal defendants. On that day alone there were at least 139 arrests, leading to 404 separate charges being brought.<sup>10</sup> Virtually every arrestee was charged with Endangering by Fire or Conspiracy to Endanger by Fire (a Class C Felony), Maintaining a Public Nuisance (a Class A Misdemeanor), and Engaging in a Riot (a Class B Misdemeanor).

[¶23] Due to the sheer number of arrests, defendants were spread among jails in Burleigh, Morton, Cass, and Mercer Counties. Bail hearings were held for most of Friday in both Morton and Burleigh County courts. Even then, the Courts had to go to extraordinary lengths to ensure all defendants received hearings: a

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<sup>9</sup> See generally, Gideon at 50, <http://gideonat50.org/> (last visited Dec. 8, 2016) (discussing the ongoing challenges facing public defense systems in the United States); See also Exhibit 9 to Affidavit of William L. Tilton, Archie Ingersoll, Forum News Service, Despite similar work, North Dakota's public defenders paid thousands less than prosecutors, (Jul. 23, 2016) available at [http://bismarcktribune.com/news/state-and-regional/despite-similar-work-north-dakota-s-public-defenderspaid-thousands/article\\_c271c94a-95db-515e-896b-d47dac022e5f.html](http://bismarcktribune.com/news/state-and-regional/despite-similar-work-north-dakota-s-public-defenderspaid-thousands/article_c271c94a-95db-515e-896b-d47dac022e5f.html)

<sup>10</sup> See Exhibits 1, 2 and 3 to Affidavit of William L. Tilton *Spreadsheet of Actions*.

first-ever Saturday session was held by the Honorable James Hill in Morton County, with additional bail hearings held in Burleigh County by Judges Cynthia Feland and David Reich. Initial appearances for the balance of the October 27 defendants were held November 7.

¶24 Every one of the 139-some defendants arrested on October 27, 2016 was charged as a co-conspirator to a felony. As a result, each could require separate counsel to avoid any conflicts with potential co-conspirators. Arguably, therefore, each public defender's office, and each appointed counsel's firm, can only take one case.

¶25 Of those individuals arrested on October 27, at least 101— 74.8%— immediately applied for legal assistance.<sup>11</sup> The system was not prepared to service this surge of defendants. Records suggest that many of the indigent defendants have been left to fend for themselves—recent data from the District Court Administrator's Office indicates that of the 139 October 27 defendants, only 69 are represented by counsel, with the remaining 70 having no attorney listed.<sup>12</sup>

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<sup>11</sup> This is consistent with national data as to numbers eligible for appointed counsel. See Marea Beeman, Using Data to Sustain and Improve Public Defense Programs, The American Bar Ass'n 2 (2012), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_sustaining\\_and\\_improving\\_public\\_defense.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_sustaining_and_improving_public_defense.authcheckdam.pdf); See also Bureau of Justice Assistance, Contracting for Indigent Defense Services 3, n.1(2000), available at <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf> (finding 60-90 percent of all cases use court-appointed counsel).

<sup>12</sup> See Exhibits 1, 2 and 3 to Affidavit of William L. Tilton *Spreadsheet of Actions*.

[¶26] While the October 27 defendants’ felony charges were dismissed on or before December 5, 2016 for failure to allege sufficient facts, the dismissals were without prejudice. If the state opts to re-present, which it can do at its discretion, the availability of defense counsel will again be called into question. Even without the felony charges, defense counsel cannot reasonably represent this many defendants simultaneously against multiple serious misdemeanor charges.

[¶27] As of November 16, 2016—at which time there were 479 DAPL cases filed in Morton County—the Indigent Defense Commission staff estimated that the surge of cases required “a deficiency appropriation of \$937,000.”<sup>13</sup> Despite the documented need, no deficiency appropriation has been received. Since that time, the number of arrests has increased by at least 50. As of December 2, 264 defendants remained without counsel.<sup>14</sup> The need for defense counsel clearly exceeds the available supply.

[¶28] All attorneys in this state are bound by North Dakota’s rules of professional conduct, and all are subject to the disciplinary jurisdiction of this Court. Discipline, up to and including disbarment, may be imposed for any of a number of reasons, including “[v]iolating . . . the North Dakota Rules of

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<sup>13</sup> See Exhibit 10 to Affidavit of William L. Tilton, E-mail correspondence from Jean Delaney, Executive Director of the CLCI, to William L. Tilton (Nov. 16, 2016). One-third of this total was estimated as the cost of implementing Marsy’s Law, while the remaining two-thirds related to DAPL arrests.

<sup>14</sup> See Exhibits 1, 2 and 3 to Affidavit of William L. Tilton *Spreadsheet of Actions*.

Professional Conduct.” See N.D.R. Lawyer Discipl. 1.2(A)(1). Yet excessive caseloads, stemming from the surge of cases, make this impossible. Attorneys have an obligation to provide competent representation, which requires “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” See N.D.R. Prof. Conduct 1.1. Similarly, N.D.R. Prof. Conduct 1.2 requires that the attorney abide by certain client decisions, and consult with the client. Counsel must also act with diligence. See N.D.R. Prof. Conduct 1.3. Comment 2 to Rule 1.3 states “[a] lawyer's work load must be controlled so that each matter can be handled competently.” None of this is currently possible for all DAPL defendants.

[¶29] This problem cannot be solved through greater pro bono involvement by the private bar. Public records show that there are only approximately 3000 attorneys licensed to practice in this state.<sup>15</sup> Approximately 1200 list a primary address in a state other than North Dakota. This leaves at most 1800 licensed attorneys practicing primarily in state. Many of those attorneys do not practice criminal law. The North Dakota Criminal Defense Lawyers’ Association has just 70 members statewide, and practitioners estimate that there are fewer than 60 criminal defense lawyers in Bismarck.<sup>16</sup> When potential conflicts, availability, and willingness to assist are taken into account, it becomes clear that serious

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<sup>15</sup> *See* Exhibit 25 to Affidavit of William L. Tilton  
Affidavit of Chad C. Nodland

<sup>16</sup> *Id.*

deficiencies are likely absent emergency action:

[¶30] It is taking 10 days—or, in some cases, longer—for DAPL-related accused to have a public defender assigned to their case after their applications have been approved.<sup>17</sup>

[¶31] While some counselors have sought to refer clients to attorneys in private practice willing to represent them *pro bono*, they have encountered similar hurdles. In November, attorney Andrea Carter began assisting individuals arrested while protesting. She attempted to help triage them to local criminal defense attorneys. All the attorneys to whom she tried to refer clients refused representation either on the grounds they had no capacity for new clients or that they were not interested in representing these defendants.<sup>18</sup> Attorney Kyle Wiswall also discovered a “very limited pool of North Dakota-licensed attorneys” willing and able to represent DAPL protestors, especially relative to the quantity requesting representation.<sup>19</sup>

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<sup>17</sup> See Exhibit 25 to Affidavit of William L. Tilton  
Affidavit of Chad C. Nodland

<sup>18</sup> See Exhibit 12 to Affidavit of William L. Tilton  
Declaration of Andrea M. Carter

<sup>19</sup> See Exhibit 13 to Affidavit of William L. Tilton  
Declaration of Kyle Wiswall; See also Affidavit of William L. Tilton (“I have interviewed at least a dozen North Dakota attorneys about representation of DAPL protest defendants. From those conversations I have learned that many licensed North Dakota criminal defense attorneys feel conflicted in taking these cases, either because the attorneys have close relations with law enforcement folk who are undertaking the arrests, or because the attorneys have personal interests in the pipeline construction industry, some of them directly with the DAPL. Other licensed North Dakota criminal defense attorneys have been reticent to take anti-DAPL protestors as clients because they live far distant from the South Central District courts where the cases will be tried. Some criminal defense attorneys have already maxed out their public defender contract allotments. Others have



[¶32] The strain on the state’s criminal defense resources caused by this situation is clear. Public defenders from across the state have been called upon to supplement those in the South Central District. Local panelists have reached the limit of case allotments. Attorneys from Dickinson, Minot, Devils Lake, Valley City, Fargo, Crookston, MN and Mobridge, SD, have been assigned cases through the Indigent Services Commission. Scores if not hundreds of additional defendants have indicated they wanted to ask for appointed counsel.

[¶33] But the crisis is not limited to those seeking public representation. Even defendants ineligible for or not seeking appointed counsel face insufficient availability of qualified counsel. Defendants seeking to hire North Dakota criminal defense attorneys have already been turned down due to overburdened caseloads, or personal or professional conflicts of interests.

[¶34] In these circumstances, defendants are being put to an impossible choice: go without an attorney, be represented by an attorney too burdened to provide effective assistance, or forego their right to a speedy trial by having to wait until such time an attorney becomes available. None of these choices are acceptable.

**B. [¶35] The Need is Likely to Increase.**

[¶36] The demands on the criminal defense bar may increase in the future. On November 28, Governor Dalrymple issued a new Emergency Order. It requires “a mandatory evacuation of all persons located in areas” where encampments exist

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undertaken representation of one or a few DAPL protestors and are not interested in taking on more. I have talked with several DAPL protesters who state they have made multiple calls to criminal defense attorneys licensed in North Dakota for representation on DAPL charges, all without success, for these several reasons.”)

north of the Cannonball River in Morton County.<sup>20</sup> This order came on the heels of several thousand veterans announcing plans to join with protestors in opposition to DAPL. Many of these veterans in fact showed up over the weekend of December 4. These converging trajectories could lead to more civil disobedience, additional arrests, and an ever greater burden on the criminal defense bar.

[¶37] In light of these facts, it would be prudent to plan for the possibility that hundreds of defendants simply will not be able to find qualified counsel to represent them.

**C. [¶38] Neither the *pro hac vice* process nor the reciprocity process is an adequate solution**

[¶39] Both *pro hac vice* and temporary license rules severely restrict the ability of an attorney to properly represent a defendant. Both require association with local counsel, who must be present during all hearings, effectively requiring two attorneys represent the single defendant. This does nothing to expand the pool of available counsel, and means that in a criminal co-defendant conflict situation, no new attorneys are available. Additionally, *pro hac vice* or temporary attorneys

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<sup>20</sup> See Exhibit 14 to Affidavit of William L. Tilton Gov. Jack Dalrymple, [Dalrymple Orders Emergency Evacuation To Safeguard Against Harsh Winter Conditions](https://www.governor.nd.gov/media-center/executive-order/dalrymple-orders-emergency-evacuation-safeguard-against-harsh-winter-co.), (Nov. 28, 2016), available at <https://www.governor.nd.gov/media-center/executive-order/dalrymple-orders-emergency-evacuation-safeguard-against-harsh-winter-co.>; See also Exhibit 15 to Affidavit of William L. Tilton, Amy Dalrymple, Forum News Service, [Dakota Access ‘fully committed’ to completing pipeline using current route](http://bismarcktribune.com/news/state-and-regional/dakota-access-fully-committed-to-completing-pipeline-using-current-route/), (2016), available at [http://bismarcktribune.com/news/state-and-regional/dakota-access-fully-committed-to-completing-pipeline-using-current-route/article\\_f406d5f3-d30d-5833-bd06-605b8a6894d8.html](http://bismarcktribune.com/news/state-and-regional/dakota-access-fully-committed-to-completing-pipeline-using-current-route/article_f406d5f3-d30d-5833-bd06-605b8a6894d8.html); See also Exhibit 16 to Affidavit of William L. Tilton, [Dalrymple: Obama Administration Is Making A Serious Mistake](http://www.valleynewslive.com/content/misc/DALRYMPLE-OBAMA-ADMINISTRATION-IS-MAKING-A-SERIOUS-MISTAKE-404642866.html), (Dec. 4, 2016) available at <http://www.valleynewslive.com/content/misc/DALRYMPLE-OBAMA-ADMINISTRATION-IS-MAKING-A-SERIOUS-MISTAKE-404642866.html>

in North Dakota are forbidden full access to the court's electronic records system, including the Secure Records Inquiry and Document Access system that provides access to crucial documents such as charging documents, court filings and the like.<sup>21</sup>

[¶40] Further, out-of-state attorneys who wish to associate with North Dakota counsel have had significant difficulty in identifying local counsel for *pro hac vice* appearances. The experience of Oklahoma attorney Doug Parr illustrates the problem. Mr. Parr has been contacted by several individuals from Oklahoma requesting legal representation for DAPL-related arrests, who he has agreed to represent *pro bono*.<sup>22</sup> Despite Mr. Parr's best efforts, including contact with eleven separate criminal defense attorneys in Morton County, he has been unable to find local counsel willing and able to associate with him to comply with North Dakota's requirements for admission *pro hoc vice*.<sup>23</sup> The lawyers he has contacted all either have already taken up representation of numerous similar cases and cannot take on additional responsibilities, have probable conflicts of interest with their existing clients due to the nature of the charges, or do not have the economic means to waive their fee for association, a fee his clients cannot afford.<sup>24</sup>

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<sup>21</sup> See Exhibit 18 to Affidavit of William L. Tilton North Dakota Supreme Court, Secure Records Inquiry and Document Access Account Registration, available at North Dakota (<http://www.nd.gov/>) Supreme Court (<http://www.ndcourts.gov/>) Electronic Document Access Agreement ([./Default.aspx](http://www.ndcourts.gov/Default.aspx))

<sup>22</sup> See Exhibit 11 to Affidavit of William L. Tilton Affidavit of Douglas L. Parr

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* See also, Exhibit 12 to Affidavit of William L. Tilton Declaration of Andrea M. Carter

[¶41] Without available local counsel to associate with out-of-state attorneys, and with the association requirements passing on the potential for conflict, traditional *pro hac vice* representation is not an adequate solution.

[¶42] Similarly, reciprocity is unlikely to lead to a solution. The requirements for regular admission to the North Dakota bar involve substantial expense and significant delay. Even for those attorneys who are eligible for admission based on reciprocity, the application process can take dozens of hours, requiring weeks of data-gathering, and it costs nearly \$1,000. Further, the background and approval process takes months, effectively barring a lawyer not already admitted in the state from assisting these defendants.<sup>25</sup>

[¶43] The state court system was never designed to handle the massive number of arrests and criminal charges these protests have spawned. It is therefore no surprise that it struggles to respond. Those struggles, however, cannot be an excuse to deny defendants either their right to adequate counsel and counsel of their choice. Discovery and pretrial motion deadlines are passing each day, and defendants are still attempting to navigate the system alone; the dire need for additional attorneys to redress this problem can only be met by extraordinary remedies.

## II. [¶44] It Is Within the Powers of This Court To Provide a Remedy

[¶45] In light of the defense bar's demonstrated dire need, this Court may declare a judicial emergency to exist if believes conditions substantially endanger or infringe upon the normal functioning of the judicial system, the ability of persons to avail themselves of the judicial system, the ability of litigants or others

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<sup>25</sup> See Affidavit of William L. Tilton, Para. 3-7

to have access to the courts, or to meet schedules or deadlines imposed by court order or rule, statute, or administrative rule. See N.D. Sup. Ct. Admin. R. 57.

[¶46] Lack of sufficient criminal defense counsel is seriously affecting the ability of persons to avail themselves of the judicial system to have access to the courts and to meet deadlines while having counsel.

[¶47] In the event this Court declares a judicial emergency under N.D. Sup. Ct. Admin. R. 3.2(B) of the North Dakota Rules for Admission permits this Court to admit out-of-state attorneys on even more relaxed basis, if it so chooses. See N.D.R. Prof. Conduct 3.2. The Rule states that “a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis.” Id. While those so admitted “must be . . . supervised through the State Bar Association of North Dakota, a pro bono program or legal services program, or through another organization specifically designated by the Supreme Court,” id., the Executive Director of the State Bar Association of North Dakota has indicated his organization’s ability to administer such a program if ordered to do so.<sup>26</sup>

[¶48] The North Dakota Supreme Court’s ability to temporarily amend the admission requirements, however, is not constrained by the parameters of Rule 3.2. The ability of the Supreme Court to adopt Rule 3.2, or any other regulation of the legal profession it so chooses, arises from the inherent authority and responsibility of the courts to regulate matters affecting access to the courts.

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<sup>26</sup> *See* Exhibit 25 to Affidavit of William L. Tilton  
Affidavit of Chad C. Nodland, Para. 20

“Ultimate authority over the legal profession is vested largely in the courts.” That is, the judiciary “may regulate the legal profession within the borders of [its] jurisdiction.” See N.D.R. Prof. Conduct 5.5, cmt. 1.

[¶49] The admission of attorneys to practice law, in particular, falls within the ambit of this Court’s inherent authority to regulate the legal profession. See, e.g., In re Simpson, 9 N.D. 379, 83 N.W. 541, 553 (1900) (noting that the right to admit attorneys to practice in North Dakota is vested in the North Dakota Supreme Court, and that “this inherent power . . . cannot be defeated by the legislative or executive departments.”); In re Pohlman, 248 N.W.2d 833, 834 (N.D. 1976) (asserting that the Court “has jurisdiction in all matters involving admission of persons to practice law in this State”); Lamb v. State Bd. of Law Examiners, 2010 ND 11, 777 N.W.2d 343, 348 (“[T]his Court has the authority to admit attorneys to the Bar of North Dakota.”).

[¶50] The authority of this Court to regulate the admission of attorneys to protect the rights of the public can further be inferred from the Court’s pronouncements on the centrality of the practice of law to the effective administration of government and protection of the public interest. See, e.g., Menz v. Coyle, 117 N.W.2d 290, 296 (N.D. 1962) (observing that “the practice of law is . . . vital to the best interests of the public” and that “attorneys are constantly engaged in carrying out fundamental aims and purposes of any good government . . . and are a necessary aid to any good government in protecting the rights of its citizens.”); In re Maragos, 285 N.W.2d 541, 545 (N.D. 1979) (“[T]he purpose of disciplinary proceedings against an attorney is not primarily to punish the attorney, but to determine, in the public interest, if such attorney should be permitted to

practice law.”)

[¶51] The Court’s inherent powers extend to regulation of the legal profession not only as it concerns admission of new lawyers to practice, but also to control its docket, Holkesvig v. VandeWalle, 2016 ND 107, ¶11, 879 N.W.2d 728, 732; prevention of abuses of the judicial process, Holkesvig v. Grove, 2014 ND 57, ¶17, 844 N.W.2d 557, 564; discipline of lawyers, In re Disciplinary Action Against Anseth, 1997 ND 66, ¶18, 562 N.W.2d 385, 388; dismissal of meritless claims, Chisholm v. State, 2014 ND 125, ¶8, 848 N.W.2d 703, 707; and correction of judgments obtained through fraud, State v. Foster, 484 N.W.2d 113, 117 (N.D. 1992). Together, these powers amount to a broad equitable authority to regulate the legal profession consistent with the public interest and the integrity of the profession.

[¶52] Criminal defendants have long been recognized by this Court as a class in need of special protection, including effective assistance of counsel. See, e.g., State v. Stewart, 2002 ND 102, ¶7, 646 N.W.2d 712 (articulating special balancing test governing admission of prior convictions in criminal cases); State v. Kelly, 2001 ND 135, ¶11, 631 N.W.2d 167 (explaining special protections of North Dakota Constitution’s double jeopardy clause). It follows that this Court possesses inherent authority to admit new attorneys for the purpose of ensuring adequate protection of the constitutional rights of criminal defendants in the present situation.

[¶53] Further authority to modify attorney admissions criteria is provided by the Emergency Management Assistance Compact (“EMAC”), adopted pursuant to N.D.C.C. §37-17.1-14.2, *et. seq.* The EMAC is a national interstate mutual aid

compact that facilitates the sharing of resources, personnel and equipment across state lines during times of emergencies or disasters. While the EMAC arose from attempts to better respond to natural disasters such as hurricanes, Governor Dalrymple's Executive Order of August 19 is not the first time it has been invoked in response to civil unrest.<sup>27</sup> Article V of the EMAC provides as follows:

[¶54] Whenever any person holds a license, certificate, or other permit issued by any state party to the compact evidencing the meeting of qualifications for professional, mechanical, or other skills, and when such assistance is requested by the receiving party state, such person shall be deemed licensed, certified, or permitted by the state requesting assistance to render aid involving such skill to meet a declared emergency or disaster.

[¶55] Licensed and qualified attorneys from out of state are precisely the type of licensed professionals who could render assistance. The emergency has already been declared, and other EMAC provisions are in use. The EMAC proclaims it the public policy of the state of North Dakota to favor deputization of all appropriate professionals under emergency conditions.

[¶56] While multiple procedures for determining how lawyers would be admitted on an emergency basis should be explored, one avenue that would provide immediate relief to the bar, at no expense to the state, would be to authorize emergency use of the federal court vetting process—coupled with

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<sup>27</sup> See, e.g., ND Department of Emergency Services, [EMAC Home Page](https://www.nd.gov/des/planning/operations/emac/), <https://www.nd.gov/des/planning/operations/emac/>. See also Exhibit 14 to Affidavit of William L. Tilton; Governor Jack Dalrymple, [Dalrymple Orders Emergency Evacuation To Safeguard Against Harsh Winter Conditions](https://www.governor.nd.gov/media-center/executive-order/dalrymple-orders-emergency-evacuation-safeguard-against-harsh-winter-co), (Nov. 28, 2016), available at <https://www.governor.nd.gov/media-center/executive-order/dalrymple-orders-emergency-evacuation-safeguard-against-harsh-winter-co>. The November 28, 2016 Emergency Order also relies on the EMAC.



safeguards of notice such as those contained in Rule 3.2.

[¶57] The process for admission to practice in the U. S. District Court for the District of North Dakota is straightforward and historically very efficient; its application takes less than an hour to complete, and mere days to get approved. This Court could either temporarily adopt the process used by the federal court, or could temporarily admit U.S. District Court bar members for these limited circumstances.

[¶58] Experienced criminal defense attorneys from nearby jurisdictions—including South Dakota, Minnesota, Wisconsin, Colorado, Nebraska, Iowa, Illinois, and others—have offered to assist.<sup>28</sup> Attorney Emily Beck, who has been coordinating volunteer offers since late September, has received commitments from over 50 attorneys. Over half of them have 20 or more years of experience in criminal law. Among those offering assistance, to date, only one is licensed to practice law in North Dakota.<sup>29</sup>

[¶59] These attorneys could easily and expeditiously become admitted to the U.S. District Court, and begin defending those charged in connection with the pipeline within the week.

### **III. [¶60] If This Court Does Not Provide a Remedy, Defendants Constitutional Rights Will be Jeopardized**

[¶61] Permitting temporary practice by qualified out-of-state lawyers is necessary to fulfill the state's obligation imposed under the Fifth and Sixth Amendments to the United States Constitution, as applied to the States under the

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<sup>28</sup> See Affidavit of William L. Tilton, Para. 43

<sup>29</sup> See Exhibit 17 to Affidavit of William L. Tilton Affidavit and Declaration of Emily R. Beck

Fourteenth Amendment. It is also critical to uphold the obligations imposed under North Dakota's own Constitution.

[¶62] “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.” United States v. Cronin, 466 U.S. 648, 654 (1984). Because the right to counsel is “fundamental and essential to a fair trial, the Fifth Amendment provides a right to an attorney for those accused of felonies, and this right applies to the States through the Due Process clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 339 (1963). The right to counsel for the indigent also applies to defendants facing possible jail time for misdemeanor offenses, Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) and suspended sentences, Alabama v. Shelton, 535 U.S. 654, 658 (2002) (“We hold that a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged.” (quoting Argersinger, 407 U.S. at 40)). The right also attaches during plea negotiations. Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 1486 (2010); Missouri v. Frye, 566 U.S. 134, 132 S. Ct. 1399, 1407 (2012).

[¶63] Article I, § 12 of the North Dakota Constitution similarly enshrines the right to counsel. The right-to-counsel protections enshrined there are consistent with, and arguably even more stringent than, those of the United States Constitution. The purpose of Section 12 is to preserve “the very integrity of the fact-finding process.” State v. Orr, 375 N.W. 171, 178 (N.D. 1985) (quoting Linkletter v. Walker, 381 U.S. 618, 639 (1965)). Under that provision, an accused

shall have the right “to appear and defend in person and with counsel.” Any counsel provided must be “reasonably likely to render and [currently] rendering reasonably effective assistance.” State v. Wolf, 347 N.W.2d 573, 575 (N.D. 1984).

[¶64] The counsel provided cannot be mere window dressing—to satisfy the obligations imposed under the North Dakota and United States Constitutions, counsel must be effective. Yet even if DAPL-related defendants are able to obtain indigent counsel currently, they risk having too little time and attention paid to their cases. When the indigent defense system is as overburdened as the system currently is in Morton County, excessive workloads lead almost inevitably to ineffective assistance of counsel. Thus, even those defendants who currently are able to obtain counsel still risk suffering constitutional indignity.

**A. [¶65] Unavailability or Excessive Workloads of Public Counsel Preclude Effective Assistance**

[¶66] Effective assistance of counsel means “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.” State v. Peart, 621 So. 2d 780, 789 (La. 1993). The American Bar Association likewise has recommended that “Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations.”<sup>30</sup>

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<sup>30</sup> See American Bar Association, Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed., ABA 1993), Standard 4-1.3(e); See also The ABA's Ten Principles of a Public Defense Delivery System, Principle 5 with Commentary (Feb. 2002) (“Counsel's workload, including

[¶67] Excessive workload makes impossible representation consistent with the mandates of state and federal constitutions and Gideon. Due to workload issues, “although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” United States v. Cronin, 466 U.S. 648, 659–660 (1984). As noted by the Arizona Supreme Court in State v. Smith, 681 P.2d 1374, 1381(Ariz. 1984), “[t]he insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads.”

[¶68] The U.S. Supreme Court has cautioned that “the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.” Avery v. Alabama, 308 U.S. 444, 446 (1940). It is vital that effective representation be provided.

**B. [¶69] The Inability of Foreign Counsel to Associate for *Pro Hac Vice* Purposes Preclude Defendants from Obtaining Counsel of Their Choice**

[¶70] For those defendants not requesting appointed counsel, the Sixth Amendment protects the ability to retain a counsel of the defendant’s choice.

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appointed and other work, should never be so large as to interfere with the rendering of quality representation”).

United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006). While the right to counsel of choice is not absolute, “it is clear that an accused who is financially able to retain counsel of his own choosing must not be deprived of a reasonable opportunity to do so.” United States v. Robinson, 662 F.3d 1028, 1031 (quoting Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir. 1984). “[A] defendant's right to the counsel of his choice includes the right to have an out-of-state lawyer admitted *pro hac vice*” and “a decision denying a *pro hac vice* admission necessarily implicates constitutional concerns.” United States v. Gonzalez-Lopez, 399 F.3d 924, 929 (8th Cir. Mo. 2005), aff’d, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006). With the documented lack of local counsel willing and able to associate for *pro hac vice* purposes, obtaining counsel of choice has proven impossible for many defendants.

[¶71] Given the crisis in availability of North Dakota criminal defense attorneys described above, standards imposed by the Sixth Amendment simply cannot be met without prompt assistance from out-of-state defense attorneys. The need for private counsel is simply outstripping the supply in North Dakota at this time; the traditional application and vetting process is too unwieldy to adapt to these unforeseen circumstances, while the *pro hac vice* process cannot create more supply, as rules require out-of-state attorneys to be accompanied to court by local practitioners.

[¶72] Should significant steps not be taken in the very near future to provide counsel for indigent persons who have been arrested for serious charges, the legal help may arrive too late to provide meaningful assistance. If that were to happen, representation would, by definition, be ineffective and inadequate, and

would “equal a denial of due process.” See Smith v. Woodley, 164 N.W.2d 594, 597 (N.D. 1969) (“Ineffective, incompetent, or inadequate representation is the same as no counsel at all, and, as such, will equal a denial of due process.”). Such an outcome would jeopardize defendants’ state and federal Constitutional rights, and fly in the face over a century of this Court’s jurisprudence.

**IV. [¶73] Original Jurisdiction of the North Dakota Supreme Court is Available in Situations, Such as the Situation Here, Where the Question is *Publici Juris***

[¶74] Original jurisdiction is a rarely-invoked use of court power, but it is appropriate in the present situation. Article IV, § 86 of the North Dakota Constitution (as amended, Art. 97, S.L. 1975, ch. 615, and approved September 7, 1976, S.L. 1977, ch. 599), gives this Court original jurisdiction over those cases in which the question presented is *publici juris*. A question is *publici juris* where it implicates the sovereignty of the State, the franchises or prerogatives of the State, or the liberties of its people. State ex rel. Vogel v. Garaas, 261 N.W. 2d 914 (N.D. 1978). To warrant the exercise of this Court's original jurisdiction, the interests of the State must be primary, not incidental, and the public, the community at large, must have an interest or right which may be affected. State ex rel. Jenkins, Inc. v. Omdahl, 138 N.W.2d 439 (N.D. 1965); State ex rel. Burgum v. North Dakota Hosp. Serv. Ass’n, 106 N.W.2d 545 (N.D. 1960); See Kelsh v. Jaeger, 2002 ND 53, 641 N.W. 2d 100 (exercising original jurisdiction with regard to voting and elections).

[¶75] Original jurisdiction should be exercised here because criminal defendants’ inability to access qualified defense counsel affects the liberties of the people of the state, and also affects the implementation of important constitutional

rights. It affects the state in its sovereign capacity, because it is the duty of the state to provide courts of law for the resolution of criminal charges. It is clearly a matter of *publici juris*.

## V. [¶76] Conclusion

[¶77]The fallout from the DAPL protests is unprecedented in North Dakota. The sheer scale presents a legal crisis in providing quality representation to all defendants. North Dakota has historically led the nation in its protection of the rights of the accused. It should continue to do so, by granting the relief requested here.

¶78] Dated December 14, 2016.

By the following Petitioners:

/s/ Timothy Q. Purdon

**ROBINS KAPLAN, LLP**

Timothy Q. Purdon, ND Bar ID 05392  
1207 W. Divide Ave., Ste. 200  
Bismarck, ND 58503  
(701) 255-3000  
tpurdon@robinskaplan.com

**CHAD C. NODLAND, P.C.**

Chad C. Nodland, ND Bar ID 05120  
418 E. Broadway Avenue, #246  
Bismarck, ND 58501  
(701) 222-4228  
(701) 222-4227 – Facsimile  
chad@nodlaw.com

**KIRSCHNER LAW**

William S. Kirschner, ND Bar ID 03713  
1351 Page Dr. S, Suite 104  
Fargo, ND 58103-3536  
(701) 293-5297  
kirschnerlaw@kirschnerlawfargo.com

**SARAH VOGEL LAW OFFICE**

Sarah M. Vogel, ND Bar ID 03964  
P.O. Box 385  
Bismarck, ND 58502-0385  
(701) 355-6521  
sarahvogellaw@gmail.com

**MYHRE LAW OFFICE**

Russell J. Myhre, ND Bar ID 03180  
341 Central Avenue N, Suite 3  
P.O. Box 475  
Valley City, ND 58072  
(701) 845-1444  
russell.myhre@myhrelaw.com  
Eservice: efile@myhrelaw.com



Constantinos DePountis, ND Bar ID 06786  
Bldg. 1, N. Standing Rock Avenue  
P.O. Box D  
Fort Yates, ND 58538  
(701) 854-8512  
ddepountis@standingrock.org

**AMERICAN CIVIL LIBERTIES  
UNION OF NORTH DAKOTA**

Jennifer Cook, ND Bar ID 06531  
P.O. Box 1190  
Fargo, ND 58107  
(701) 478-9924  
jcook@aclu.org

**BAUMSTARK BRAATEN LAW PARTNERS**

Derrick L. Braaten, ND Bar ID 06394  
109 North 4<sup>th</sup> Street, Suite 100  
Bismarck, ND 58501  
(701) 221-2911  
derrick@baumstarkbraaten.com

**De LEÓN & NESTOR, LLC**

Bruce Nestor, ND Bar ID TL-08629  
MN ID #031824  
3547 Cedar Avenue South  
Minneapolis, MN 55407  
(612) 659-9019  
nestor@denestlaw.com

**TILTON & DUNN, P.L.L.P.**

William L. Tilton, ND Bar ID TL-08643  
MN ID # 110073  
101 East Fifth Street, Suite 2220  
St. Paul, MN 55101  
(651) 224-7687  
billtilton@juno.com

**[¶79] Certificate of Compliance on Word Count**

[¶80] The above-signed counsel certify that this brief complies with Rule 32(a)(8)(A) and 32(a)(8)(B) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, and any addendums totals 7,733.

**[¶81] Certificate of Word Processing Program**

[¶82] The above-signed counsel certify that the word processing program is Microsoft Word 2010.

**[¶83] Request for Oral Argument**

[¶84] On account of the statewide importance of the issues presented in this petition, the Petitioners request that a hearing be permitted in this case pursuant to Rule 34 of the North Dakota Rules of Appellate Procedure.