IN THE SUPREME COURT OF THE STATE OF IDAHO

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TRACY TUCKER, JASON SHARP, NAOMI MORLEY, and BILLY CHAPPELL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

vs.

STATE OF IDAHO; and DARRELL BOLZ, ANGELA BARKELL, ERIC LEHTINEN, REP. DAVID CANNON, HON. LINDA COPPLE TROUT, DAN DINNING, SEN. MELISSA WINTROW, and BEN ANDERSEN, in their official capacities as members of the Idaho State Public Defense Commission,

Defendants-Respondents.
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Supreme Court Docket No. 51631-2024

District Court No. CV-OC-2015-10240

Appeal from the District Court of the Fourth Judicial District

The Honorable Samuel A. Hoagland, District Judge, Presiding
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MOTION TO MODIFY INJUNCTION AND FOR AN ORDER TO SHOW CAUSE WHY FURTHER RELIEF ON DECREE SHOULD NOT BE GRANTED

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This entire appeal was triggered by the District Court's erroneous reliance on the State's "protestations of repentance and reform" to defeat injunctive relief to remedy Idaho's worsening public defense crisis. *Tucker v. State*, 168 Idaho 570, 583, 484 P.3d 851, 864 (2021) (quoting *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952)). The District Court's decision was wrong on both the law and the facts of this case, as Plaintiffs' Opening and Reply briefs explain at length. But as the evidence foretold and the attached witness statements, court orders, and on-the-record statements by both leadership and line-level attorneys from the State's new statewide public defender office show, the District Court's faith was badly misplaced as a matter of "on the ground" reality as well.

Idaho's public defense system is headed for a disaster that was not just predictable, but actually predicted—in this case. And because the executive and legislative branches have repeatedly failed to quell the crisis, it will persist if the judiciary does not intervene at long last. Months before the State Public Defender's (SPD) October 1, 2024 transition took place, attorneys warned SPD leadership that pay cuts and restrictive contracts would drive attorneys out of the system. And when attorneys started resigning and terminating their contracts en masse, few attorneys could be found to replace them. As a result, countless indigent defendants have been suffering—appearing at court without counsel, attempting over and over again to get anyone at SPD to tell them who was appointed to defend them, and worrying how they could possibly receive effective representation (or representation at all) on cases that have been pending for months. Courts, of course, are taking notice and issuing Orders to Show Cause to SPD leadership to try to get answers. In response, SPD attorneys report that there are simply no more attorneys left to appoint, that defendants' rights are at risk, and that the best Idaho's system can offer at this point is ineffective assistance of counsel.

Because these are extraordinary circumstances that will have significant consequences for the State's criminal justice system, under Idaho Rules of Civil Procedure 65 and 72, Idaho Appellate Rules 30, 44, and 48, and Idaho Code Section 10-1208, Plaintiffs respectfully request that this Court take action now, by:

(i) issuing interim emergency relief in Plaintiffs' favor to curb the ongoing crisis—and its attendant severe constitutional harm—before it escalates further;

(ii) permitting Plaintiffs to supplement the appeal record with the evidence submitted with this Motion, and which further confirms that the District Court's prudential mootness analysis was wrong; and

(iii) expediting oral argument, or alternatively setting oral argument on this Motion as soon as possible.

STATEMENT OF FACTS

On October 1, 2024—18 months after Governor Little signed into law amendments to the statutes outlining Idaho's public defense system, more than a year after the SPD was appointed and started work on the transition, and shortly after Plaintiffs filed their opening brief in this matter—the State assumed responsibility for managing and delivering all public defense services throughout the State of Idaho. In the months since, the State's ongoing failure to provide the most basic and fundamental services has only hastened, spread, and aggravated the constitutional injuries that the certified class of tens of thousands of Idahoans continues to endure. In just the short time that Plaintiffs have been observing and investigating the SPD implementation, it has been consistently clear that the State's failures are significant and statewide, and that their impact

is only making the delivery of public defense in the State worse.

A. Mass Resignations Leave The Remaining Roster of Attorneys Even More Burdened Than Before.

Under the State's prior Public Defense Commission system, 30 of the 44 counties provided public defense services on a contract basis, and all of Idaho's counties contracted with attorneys to serve as conflict counsel for indigent defendants. C.R., p. 247 ¶ 70. Under the State Public Defender Act (SPDA), any contract public defender who would continue such work after October 1, 2024, was obligated to enter into a new contract directly with the State. I.C. § 19-6005(1).

The SPD's form contract agreement sets a conflict counsel rate of $100 per hour for legal services, and $50 per hour for travel time outside of the county where counsel resides. Ex. 1, Declaration of Kathi Pearce (hereinafter "Pearce Decl.") ¶ 7; Ex. A to Pearce Decl. at 5. Contract counsel must seek prior approval from SPD "to contract with qualified experts, investigators, paralegals, mitigation specialists, social workers, or mental health professionals," and may not seek compensation for any administrative support staff or any paralegal who does not have a two-year paralegal certificate or degree in paralegal services. Ex. A to Pearce Decl. at 5 ¶ 10. And the State offers no assurance that contract counsel will even receive compensation owed to them: The contract permits SPD to unilaterally terminate an attorney's contract with 10 day's notice in the event the State has insufficient funds to pay for their services. *Id.* at 6-7 ¶ 13.

The SPD's contract terms, which were significantly less favorable than those of the contracts under which many contract and conflict defenders had previously operated, generated "multiple requests" to the Idaho State Bar for ethics advice. Idaho State Bar, *Formal Ethics Opinion No. 137* 1 (2024), https://isb.idaho.gov/wp-content/uploads/Formal-Ethics-Opinion-

137.pdf. Ultimately, they were the impetus for Formal Ethics Opinion No. 137, which confirmed that "[l]awyers whose financial compensation will decrease from their current county pay rate face a potential concurrent conflict of interest" under Idaho Rule of Professional Conduct 1.7. *Id.* at 3. The Idaho State Bar further confirmed that a "concurrent conflict of interest *requires* the lawyer to withdraw under I.R.P.C. 1.16(a)(1)." *Id.* at 5.

As defending attorneys have confirmed, these conflicts were real. As just a few examples, an attorney with years of experience as a contracted public defender in Elmore County refused to sign the new SPD contract because it would have cut his compensation in half and imposed unnecessary barriers for effective representation. Ex. 2, Decl. of Terry Ratliff (hereinafter "Ratliff Decl.") ¶¶ 4-5. Several former conflict attorneys for Shoshone and Kootenai Counties similarly terminated their work with SPD after learning that their compensation would be cut by 30–40%. Ex. 3, Declaration of Chris Schwartz (hereinafter "Schwartz Decl.") ¶ 10; Ex. 4, Declaration of Lisa Chesebro (hereinafter "Chesebro Decl.") ¶¶ 5-8, and that the State would not provide adequate compensation for the support staff necessary to do public defense work. Ex. 3, Schwartz Decl. ¶ 15; Ex. 4, Chesebro Decl. ¶ 6.

In the wake of SPD's distribution of their form contract and the Idaho State Bar's Formal Ethics Opinion, hundreds—if not thousands—of indigent defendants were left without representation as appointed counsel filed motions to withdraw from their cases. *See, e.g.*, Ex. 3, Schwartz Decl. ¶ 12. Several attorneys in Kootenai and Shoshone county filed over 100 motions to withdraw before October 1, 2024. *Id.* ¶ 12; Ex. 4, Chesebro Decl. ¶ 9. The day before the SPD took over, a Kootenai County judge handled more than twenty motions to withdraw from contract counsel. A single court observer saw 74 motions to withdraw that week, on top of 56 that she observed the previous week. Ex. 1, Pearce Decl. ¶ 9. Another Elmore County attorney withdrew

from over 110 pending cases, consisting of mostly felonies. Ratliff Decl. ¶ 7. And although the total number of cases where attorneys withdrew is not known by Plaintiffs with precision, State Public Defender Erik Fredericksen himself confirmed that at least 1100 motions to withdraw were filed around the State between October 1 and October 12. Ex. 1, Pearce Decl. ¶ 26; Ex. T to Pearce Decl. (Eric Fredericksen OSC Hearing Audio, Oct. 22, 2024).[1]

The State's staffing issues are not confined to SPD's contract conflict counsel. The roster of primary counsel, both institutional and contract, has also been impacted by the SPD transition. Since mid-August, for example, nearly 25% of the attorneys in Ada County's institutional office have resigned (mostly felony level attorneys), at least some due to the pay cuts that they received under the new state-based system or the excessive caseloads defenders in the office must carry. Ex. 5, Declaration of Justine Parker (hereinafter "Parker Decl.") ¶¶ 3, 6, 9; *see also* Ex. 6, Declaration of Ingrid Andrulis (hereinafter "Andrulis Decl.") ¶¶ 3-7 (confirming that some attorneys and staff in Ada County will no longer take indigent defense cases because the SPD has lowered compensation and made paying support staff more difficult). The District Public Defender for the First District confirmed on the record at an Order to Show Cause hearing that Kootenai County's SPD office has only 11 public defenders, not even half of the 26 that they need. Ex. 1, Pearce Decl. ¶ 31; Ex. II to Pearce Decl. at 11:15-21 (Jay Logsdon OSC Tr., Nov. 13, 2024); *see also* Ex. 20, Declaration of Safa Riadh (hereinafter "Riadh Decl.") ¶ 9 (describing Kootenai County SPD's pay cuts under the SPD). The Canyon County SPD office has 23 public defenders, also well short of the 32 the county's institutional public defender office had prior to the SPD. Ex.

[1] Plaintiffs are delivering all audio files to the Court and opposing counsel on USB drives.

7, Declaration of David Delyea (hereinafter "Delyea Decl.") ¶ 3.[2] And the former primary contract public defenders for Shoshone County notified the SPD in April 2024 that they would not sign new contracts offered by the SPD. Ex. 3, Schwartz Decl. ¶ 12; Ex. 4, Chesebro Decl. ¶ 7. Gem, Clearwater and Idaho Counties are also suffering without any primary contract counsel, and limited conflict counsel.[3] *See* Ex. 1, Pearce Decl. ¶¶ 24, 29.

Unsurprisingly, SPD's staffing issues have had significant downstream effects. Although many long-time defenders gave the State advance warning of their impending resignations in an effort to ensure that their clients had replacement counsel available immediately and that case files and records would be transferred in an orderly fashion, *see, e.g.*, Ex. 3, Schwartz Decl. ¶¶ 12, 20; Br. of *Amici Curiae* Contract Defense Attorneys at 6-12, those efforts largely fell flat. One attorney reached out to both the State Public Defender himself and the SPD Alternate Counsel Division Chief on several occasions regarding file transfers and provided both electronic and paper access to his firm's indigent defense case files. Ex. 3, Schwartz Decl. ¶¶ 21-22. Yet *still today* many of those case files remain uncollected. Ex. 3, Schwartz Decl. ¶¶ 21-23; Ex. 4, Chesebro Decl. ¶ 10. Nor, in many cases, have replacement counsel been appointed, found, appeared or adequately prepared.[4] *See infra* Section B (discussing delays in appointing replacement counsel, if at all).

These mass resignations have also created increasingly impossible caseloads for the defenders that remain, and put others in incredibly difficult situations where they have to show up

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[2] One SPD Canyon attorney described the office as being "concerningly understaffed," such that she has to manage "an entire district courtroom alone." Ex. 1, Pearce Decl. ¶ 33.

[3] An SPD in Bonner County also reported that the county has only one conflict attorney. *Id.* ¶ 34.

[4] There have also been repeated issues with defendants failing to appear because they did not receive notice of the hearing. *See* Ex. 1, Pearce Decl. ¶ 47 (discussing how one public defender explained the nonappearance of a defendant by noting that "as the court is well aware [SPD] office is doing new procedures that aren't working so she's probably not receiving notices").

not knowing that they would be expected to defend the client they ended up representing. *See, e.g.*, Ex. 1, Pearce Decl. ¶¶ 16, 36. For example, in addition to supervisory and administrative responsibilities, the statutory District Public Defender for the First Judicial District is currently handling nearly all of Shoshone County's public defense cases, estimated to total 275-300 active cases, which would normally be a full-time docket for two attorneys. Ex. 4, Chesebro Decl. ¶ 11. The District Public Defender for the entirety of the Fourth District has had to personally handle indigent defense cases in Elmore County, in addition to his substantial supervisory and administrative duties, due to understaffing. Ex. 5, Parker Decl. ¶ 12. And Canyon County's PD office is handling all arraignments across all of the Third District, which includes Canyon, Gem, Owyhee, Adams and Payette counties. Ex. 7, Delyea Decl. ¶ 8.

These short-staffing issues have forced public defenders into untenable situations. For example, in Kootenai County, one SPD attorney was working on her laptop on a side pew when she learned that she would have to serve as defense counsel. Ex. 1, Pearce Decl. ¶ 39. Other SPD attorneys who showed up to stand in for appointed counsel made it clear that they did not know the defendant or "probably would not be able to answer any questions" about the case. *Id.* ¶ 37. Overstretched defenders—with inadequate access to client files—also struggled to make adequate bond arguments on behalf of their clients. Ex. 1, Pearce Decl. ¶ 41. Clients without counsel, or with unprepared defenders, are now put in the position of having to either waive their right to speedy trial or move forward with their defense effectively alone. *Id.* ¶ 36.

Former public defenders have also voiced concern that in the wake of their departure, their former clients have been unable to get answers from SPD on who will be appointed in their place, and when. Some of these departing defenders gave former indigent clients a phone number provided by SPD's General Counsel to answer any questions regarding new counsel, only to learn

that SPD never answered calls made to that number. Ex. 4, Chesebro Decl. ¶ 13; *see also* Ex. 3, Schwartz Decl. ¶ 19. These attorneys' former clients continue to contact them to report that they were unrepresented in proceedings and were unable to get any response from the SPD Office.[5] Ex. 3, Schwartz Decl. ¶ 19. And despite their best efforts, these attorneys also have gotten no response from SPD in their attempts to determine where to send hearing notices to former clients and where to direct defendants in need of a public defender. Ex. 4, Chesebro Decl. ¶ 14; *see also* Ex. 1, Pearce Decl. ¶ 13.

B. Alarming, Persistent Delays In, or Complete Absence of, Public Defense Counsel.

Court observations and interviews over the last two and a half months have confirmed that countless indigent defendants have appeared in courts across the State without representation from the State Public Defender Office, a clear violation of their right to counsel. Making matters worse, some of these very same defendants have struggled for weeks, if not months, to have any communication with their counsel, yet another violation of their right to counsel.

In numerous courtroom proceedings across the state between September and December 2024, defendants showed up to court only to find themselves unrepresented. Ex. 1, Pearce Decl. ¶¶ 12-18; Ex. 8, Declaration of Tony McKnight (hereinafter "McKnight Decl.") ¶¶ 5-6, 9; Ex. 9, Declaration of Jaclyn Hutchens (hereinafter "Hutchens Decl.") ¶¶ 17, 19; Ex. 6, Andrulis Decl. ¶¶ 12-13; Ex. B to Andrulis Decl. (Ada County Sentencing Hearing Audio,

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[5] A recently resigned Deputy Public Defender in Ada County also reports that there have been ongoing issues with the "Telmate" system SPD installed in the jails, making it difficult or impossible for clients to contact their attorneys, and that the SPD office phone system did not permit clients to leave messages for a while, and was completely inoperable from at least September 13, 2024 to October 3, 2024. Ex. 5, Parker Decl. ¶ 7. A Canyon County SPD similarly describes the telephone system as "not very functional and hard for clients to navigate." Ex. 7, Delyea Decl. ¶ 11.

Nov. 15, 2024). On just one day in Kootenai County, not a single defendant had counsel in any of 17 misdemeanor arraignments. Ex. 1, Pearce Decl. ¶ 15. Many defendants would appear, only to find that their counsel wasn't present, or that they had never been formally assigned one at all. *Id*. ¶¶ 14-16. A long-time Shoshone and Kootenai County private attorney who no longer handles public defense cases has witnessed numerous hearings where there was not a court-appointed attorney present for the indigent defendant. Ex. 4, Chesebro Decl. ¶ 12; *see also* Ex. 20, Riadh Decl. ¶ 15 (former Kootenai County contract attorney also describing the "many occasions" where "defendants' cases come up in court where SPD has been appointed but no attorney has been assigned to them").

On just one day in Bonneville County, several defendants' cases were called without their attorneys present. Ex. 9, Hutchens Decl. ¶¶ 9-13. In three cases on a single day, the conflicts counsel—who had just been assigned—was appearing in another county at the same time, causing all of the Bonneville cases to be continued. *Id.* ¶ 13. The SPD Chief for the Bonneville County office confided that, in comparison with Bonneville, other counties were "on fire." *Id.* ¶ 9. In Bannock County, SPD attorneys' schedules are double-booked, leaving judges forced to call cases based on defense attorney availability. Ex. 9, Hutchens Decl. ¶ 13.

In Ada County, on just one day, SPD appeared on behalf of four different defendants but barely had time to speak with any of them. Ex. 6, Andrulis Decl. ¶ 8. In another instance, an SPD attorney informed the court that he could not express a position regarding the allegations against his client because he had just received the case from another attorney and had not yet had an opportunity to even assess his client's mental competency. *Id.* ¶ 11. Yet another defendant reported that the SPD attorney who appeared at her hearing was her third, and that the public defender who appeared at the previous hearing was a stand-in who did not even speak with her. *Id.* ¶ 9. In another

case, when the judge asked an SPD attorney who would be representing the defendant at the sentencing hearing, the attorney said she did not know. *Id.* And an Ada County SPD reported that he did not have access to any interpreters for his Spanish-speaking client in the wake of the transition while SPD worked to identify a new provider. *Id.* ¶ 15. And when yet another in-custody defendant appeared for their sentencing, the court had "no idea" where their SPD counsel was, and was forced to continue their sentencing as a result. *Id.* ¶ 13.

Indigent defendants have also signed sworn declarations confirming the lack of access to counsel has occurred in their own cases. One class member in Kootenai County appeared in court unrepresented on three separate occasions between October and November, 2024, despite calling SPD every other day after their arraignment. Ex. 10, Declaration of Sarah Gregory (hereinafter "Gregory Decl.") ¶¶ 6-8. A Shoshone County defendant's SPD counsel withdrew due to an unknown conflict, only to have three different conflict attorneys drop him as a client. Ex. 1, Pearce Decl. ¶ 12; Ex. H to Pearce Decl. (Shoshone County Hill Hearing Audio, Oct. 10, 2024). He was then appointed to be represented by SPD two more times, but no attorney ever appeared. Ex. H to Pearce Decl. At his hearing, the defendant expressed disbelief: "So I still don't have an attorney? I'm kind of confused now." *Id*.

Another defendant had to make an eight-hour drive from his home in Boise to the Bonner County Courthouse three times over a couple of months, Ex. 11, Declaration of Vincent Foti (hereinafter "Foti Decl.") ¶ 12, only to have proceedings repeatedly continued because SPD counsel withdrew from his case. *Id.* ¶¶ 7-12. He was not appointed a conflict attorney until November 2024. *Id.*¶ 15. This same defendant called the SPD phone number provided by the court every couple of days for several weeks, only to receive no answer and leave voicemails that were never returned. *Id.* ¶ 13. When the defendant was finally able to speak with an office assistant at

the SPD Alternate Counsel Division, she explained there were only three people working at the office, and that they were unable to keep up with the volume of requests they received. *Id*. ¶ 14.

A class member in Idaho County met his appointed contract counsel mere minutes before a preliminary hearing, which he then waived on that attorney's advice. Ex. 12, Declaration of Thomas Ferrari (hereinafter "Ferrari Decl.") ¶ 5. Upon coming to regret that choice, believing he had been misled, the defendant made numerous failed attempts to get in touch with his appointed counsel, *Id.* ¶¶ 5-7, and ultimately learned that his first counsel was withdrawing from the case due to the changes in the public defender system. *Id.* ¶ 7. After attempting to contact the SPD directly, to no avail, he also attempted to contact the District Public Defender for the Second District directly. When he reached her office, he was informed that while she handles all of the cases for the Second District, she was too busy to take on any additional cases. *Id.* ¶ 10. Eventually, an SPD conflict contract counsel appeared at a status hearing and informed the defendant that he would be their counsel, but the defendant remains concerned that his attorney has not had time to correct information in the record or advocate for reduction of his bail. *Id.* ¶¶ 12-13.

A class member in Canyon County only learned that his assigned public defender had quit from his appointed counsel in a different case. Ex. 13, Declaration of Benjamin Caldwell (hereinafter "Caldwell Decl.") ¶ 11. Upon hearing that he had no new public defender, the defendant reached out by phone to the SPD's office every business day for **<u>two months</u>** without success—in part because the phone system requires that the defendant have the name of their public defender in order to speak with anyone. *Id.* ¶ 14; Ex. 7, Delyea Decl. ¶ 11. Another class member had their trial continued for a month while their counsel waited for the SPD to approve payments for expert witnesses. Ex. 7, Delyea Decl. ¶ 14.

One class member in Twin Falls has been in custody, without representation, since his initial defense counsel withdrew due to a conflict of interest before his first court date in early October 2024. Ex. 8, McKnight Decl. ¶ 9; Ex. 14, Declaration of Anthony Hernandez (hereinafter "Hernandez Decl.") ¶ 3. The defendant went to his initial court appearance without counsel and his case was continued multiple times without appointed counsel. Ex. 14, Hernandez Decl. ¶¶ 4-5, 7. Two other SPD attorneys who were appointed to represent him in other open cases also declared that they had conflicts before he was even able to meet with them. *Id.* ¶ 6. Despite numerous attempts to call the SPD and its Alternate Counsel Division, the defendant still has not been given a clear answer on his representation. *Id.* ¶ 10.

Yet another class member had repeated difficulties communicating with his counsel, until he was then suddenly switched to a different SPD attorney for unexplained reasons. Ex. 15, Declaration of Adam Brown (hereinafter "Brown Decl.") ¶¶ 6-7. He repeatedly tried and failed to contact his new SPD attorney until she finally scheduled a brief meeting at which they did not discuss his case in detail and did not have time for him to ask questions, resulting in the class member feeling pressured to take a plea deal. *Id.* ¶¶ 9-13. Another defendant went for nearly five months without counsel despite his numerous attempts to reach out to the Ada County Public Defender's office, under the old system, and now the SPD, where things remain the same if not worse. Ex. 16, Declaration of Ethan Lankford (hereinafter "Lankford Decl.") ¶¶ 4-9. Another in-custody class member appeared for his arraignment only to find that his SPD conflict counsel was not present, leaving the defendant to argue for bond **by himself**, without success. Ex. 6, Andrulis Decl. ¶ 12; Ex. A to Andrulis Decl. (Ada County Bond Hearing Audio, Nov. 4, 2024); *see also* Ex. 5, Parker Decl. ¶ 11.

Finally, yet another class member similarly did not have counsel at multiple hearings over a month and a half period due to an initial conflict. Ex. 17, Declaration of Jesse Lee Rovig (hereinafter "Rovig Decl.") ¶ 4. He remained in custody for weeks post-arraignment while the court continued the defendant's case on a weekly basis as he waited for an attorney. Ex. 8, McKnight Decl. ¶ 5; Ex. A. to McKnight Decl. (Twin Falls County Preliminary Hearing Audio, Oct. 11, 2024). He was later appointed an SPD attorney, but that public defender was unable to discuss the facts of the case with him and appeared unprepared. Ex. 17, Rovig Decl. ¶ 6. This delay occurred despite Judge Jennifer Bergin instructing SPD to prioritize assigning conflict counsel. Ex. 8, McKnight Decl. ¶¶ 5-6. Several dozen others being held in the Twin Falls County Jail have similarly had to wait for conflict counsel appointment.[6] Ex. 17, Rovig Decl. ¶ 7.

C. Widespread Recognition by Defenders and the Judiciary That SPD Is Under-Funded, Under-Staffed, and Under-Resourced.

Nearly six months before the SPD transition occurred, the appointed State Public Defender conceded in a public forum that the SPD's budget was based on "information [that] was far, far from complete." Ex. 18, Declaration of Richard Eppink (hereinafter "Eppink Decl.") ¶ 2; Ex. A to Eppink Decl. at 6:39 (IACDL Zoom Recording). He admitted that the SPD was "limited" right now by the appropriation it had received and acknowledged "there's some money that we might be missing." *Id.* at 1:01:50. When he recently appeared before this Court to address whether the SPD was responsible for the costs of preparing transcripts on appeal for indigent defendants, he was frank: SPD simply was not appropriated enough money. Idaho Sup. Ct. Hearings Video Archive, *November 8, 2024 Hearing, State v. Blazek/Smith*, https://isc.idaho.gov/appeals-

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[6] Likely as a result of these issues, 18 people have been held in a Twin Falls cell that was only meant to hold 12. Ex. 17, Rovig Decl. ¶ 8.

court/archive (last visited Dec. 23, 2024); *see also State v. Blazek*, No. 51842, 2024 WL 4982927, at *9 (Idaho Dec. 5, 2024) (noting that this Court is "cognizant of the SPD's budget constraints, but whether the SPD currently has funding to pay for appeal transcripts for indigent defendants is irrelevant to the question of whether it is statutorily obligated to do so").

Critical resources other than transcripts are also being short-changed by the lack of adequate funding. SPD attorneys' systems for tracking time, managing client files, and accessing discovery have been inoperable for periods of time. Ex. 1, Pearce Decl. ¶¶ 44, 47-50. An SPD attorney reported to the court in mid-October that it did not "have a way to send mail to people," and over a month later reported yet again that clients were not reliably receiving notices for hearings. *Id.* ¶¶ 45-47; *see also* Ex. 7, Delyea Decl. ¶ 13 (Canyon County PD confirming "no method of sending our clients their legal mail has been put in place"). Other offices and SPD attorneys have lacked adequate access to wifi and computers, forcing some SPD attorneys to ask prosecutors to borrow a laptop to access case documents and to ask court bailiffs whether their client have outstanding parole violations. Ex. 1, Pearce Decl. ¶ 44. Canyon County's share drive permitting prosecutors and defenders to share discovery was terminated, leaving defenders to physically visit the prosecutors' office to view discovery. Ex. 7, Delyea Decl. ¶ 6. New scheduling and workflow tracking software is not working well, either. *Id.* at ¶ 7. And there is inconsistent access to interpreters, *Id.* ¶ 9; Ex. 6, Andrulis Decl. ¶ 15; Ex. 7, Delyea Decl. ¶ 9, and social workers. Ex. 20, Riadh Decl. ¶ 12 (describing how the lack of social workers for contract attorneys was a significant concern that the SPD failed to address).

Courts are taking notice of the State's failure to adequately represent indigent defendants, too. On a single day, Kootenai County District Court Judge Robert Caldwell saw multiple indigent defendants appear unrepresented for pretrial conferences—as each had at previous hearings. Ex. 1,

Pearce Decl. ¶ 17. Judge Caldwell issued orders to show cause to the SPD in each case, noting that the court had ordered that the SPD file a notice of appearance by October 1, but that each defendant appeared without counsel at their October 21 jury trial status hearings. *See* Ex. L (Amanda Cool OSC), M (Trystan Jennings OSC), N (Thomas Rice OSC) to Pearce Decl. Despite her own repeated attempts to contact SPD and multiple orders from the court, one of those defendants had gone more than two months without counsel after her original defender withdrew due to a conflict. Ex. 19, Declaration of Amanda Cool (hereinafter "Cool Decl.") ¶¶ 4-8.

Yet by November 13, 2024 when the District Public Defender for the First District appeared for the Order to Show Cause hearing, many of these defendants had not yet spoken with their just-recently-assigned attorneys. Ex. 1, Pearce Decl. ¶ 31; Ex. JJ to Pearce Decl. at 5:13-14, 27:19-23 (Logsdon OSC Tr., Nov. 13, 2024). This was particularly concerning to Judge Caldwell for many reasons, including that he had specifically informed SPD Alternate Counsel Division Chief Shannon Romero about the need for counsel for at least one of these defendants as a result of the SPD transition. Ex. 1, Pearce Decl. ¶ 11; Ex. JJ to Pearce Decl. at 3:18-4:6 (Logsdon OSC Tr., Nov. 13, 2024). Judge Caldwell noted that in his 16 years as a judge, he'd "never seen anything like it. And it's really problematic from my perspective in terms of not so much how the court is being treated but how the people are being treated." *Id.* at 15:3-8. When asked for an assurance that this would not happen in the future, the District Public Defender replied: "[W]hen the legislature created SPD and they gave them a year to get ready, not a whole lot was accomplished." *Id.* at 7:13-15. He acknowledged that because so many contract attorneys had left the public defense system due to inadequate pay, the District Public Defender himself was being forced to handle all of the Kootenai County contract cases—in addition to every single primary or conflict case in Shoshone County, where there are no other SPD attorneys. *Id.* at 7:18-8:19.

The District Public Defender further stated that in Kootenai County, where they "only have 11 attorneys to a caseload that should be going to about 26 attorneys," the office is forced to "triage everything and provide ineffective assistance to everyone." *Id.* at 11:16-19. When Judge Caldwell pointed out that "once the hearing is set and your office is appointed, there should be somebody there" from SPD to handle the case, the District Public Defender responded: "we don't have any people to send." *Id.* at 12:4-9. Judge Caldwell noted an example of a recent preliminary hearing, where SPD "had deputies there, but they were unwilling to represent that person who sat at counsel table all by themselves." *Id.* at 12:12-15. The District Public Defender responded:

> They could provide them with ineffective assistance of counsel, Judge. I mean, that's all that could be offered at this point. You can have a bunch of overworked public defenders basically just walking in and trying to take care of cases right then and there, but they would be totally unprepared. I mean, that's - - that's the problem with not having enough lawyers here.

Id. at 12:16-23.

When Judge Caldwell again expressed his concern that "these are people, citizens, that are charged with a crime that are in my courtroom and they are sitting there looking at me wondering where their lawyer is," the District Public Defender responded that "I don't believe that people should have to choose between their right to a speedy trial and their right to effective assistance of counsel," but that he is not in a "position to ensure that they're getting either." *Id.* at 14:20-18, 15:12-15. The District Public Defender went on to say that although he shared the court's frustrations, "the big problem right now is that the contracts that the SPD has refused to change are not palatable for the vast majority of attorneys." *Id.* at 16:4-9. When asked what Judge Caldwell should do the next time an indigent defendant appears unrepresented, the District Public Defender said: "I would suggest that the orders to show cause go to Mr. Fredericksen." *Id.* at 16:19-21.

Judge Caldwell is not the only member of the judiciary that has expressed their concerns publicly. At least one other judge has remarked openly about the "labor shortage" afflicting the SPD office. Ex. 1, Pearce Decl. ¶ 30. Judge Combo's chambers in Kootenai County put together a seven-page list of defendants who had not yet been assigned counsel at the end of September, and yet individuals on that list still did not have counsel 10 days later. Ex. 1, Pearce Decl. ¶ 11. By mid-November, Judge Combo's courtroom was still seeing issues: when asked why an in-custody defendant still did not have counsel, SPD's Kootenai County chief responded: "we are just out of attorneys at this point in time." *Id.* ¶ 32.

And in yet another case, Judge Pittard dismissed the defendant's charges "in the interest of justice" and "given the [SPD's] ineptitude and inability to secure legal counsel" after SPD indicated it "was not sure when conflict counsel would be acquired," nearly a month after the case was filed. Ex. 9, Hutchens Decl., Ex. A (*State v. Reyes* Order for Dismissal). Judge Pittard told the defendant the court dismissed the case (without prejudice) because it "has to try to figure out a way to" do something, "whether it's rattle some heads or make some noise—because what's been done isn't working." Ex. 9, Hutchens Decl. ¶ 19; Ex. B to Hutchens Decl. (Cassia County Preliminary Hearing Audio, Oct. 25, 2024).

ARGUMENT

Plaintiffs' recently collected evidence confirms what they have long predicted: the State's restructuring of its public defense services has not remedied Plaintiffs' ongoing constitutional injuries or otherwise rectified the State's longstanding deficiencies. Instead, it has exacerbated the persistent existing problems while adding new ones alongside them, in ways that are dramatically impacting indigent defendants across the State. Plaintiffs therefore request that this Court (i) issue

emergency relief now, as detailed further herein; (ii) augment the record with the evidence attached to this Motion; and (iii) resolve this appeal—and/or this Motion—as quickly as possible.

I. FURTHER EMERGENCY AND IMMEDIATE RELIEF IS APPROPRIATE AND NECESSARY.

The District Court issued a decree and injunction partially granting Plaintiffs' motion for summary judgment "to the extent that Idaho's public defense system cannot revive the old county-based system in any materially similar form." R., p. 5621. This "decree," the District Court ruled, "may act as a means to relief for future plaintiffs." R., p. 5619. This Court retains jurisdiction to "modify . . . or grant an injunction, while an appeal is pending." *See* I.R.C.P. 62(g)(1). And this Court, now having jurisdiction over this case, may grant "[f]urther relief based on a declaratory judgment or decree . . . whenever necessary or proper." I.C. § 10-1208. Whenever a sufficient application for further relief on a decree is filed, "the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith." *Id.*; *see also* I.R.C.P. 72 (outlining procedure on applications for orders to show cause).

The evidence Plaintiffs submit with this motion shows that indigent defendants across the State are experiencing very real and worsening constitutional injuries—and are incredibly likely to continue suffering them. Plaintiffs therefore request that this Court issue further relief of two kinds. *First*, the Court should enter immediate injunctive relief while this appeal remains pending, to mitigate Appellants' ongoing constitutional injuries. *Second*, as discussed in Plaintiffs' Opening and Reply briefs, the Court should grant Plaintiffs the full relief they have requested all along: (i) a judgment declaring that the State's provision of public defense violates the United States and Idaho Constitutions, (ii) an injunction requiring the State to create and implement a plan to remedy

its constitutional violations; and (iii) the appointment of an independent monitor to ensure that the State fulfills its constitutional obligations.

A. Immediate Injunctive Relief.

As Plaintiffs' new evidence shows, there is a widespread and worsening trend of class members—both in and out of custody—waiting weeks, if not months, for counsel to be assigned to their case, and then receiving no guarantee that their attorney can actually show at their court appearances. Plaintiffs respectfully request that this Court issue emergency interim injunctive relief to these indigent defendants, by ordering that the State release from custody and pretrial liberty restrictions any indigent defendant (i) who has had no communication with any attorney within seven days of SPD's appointment, or (ii) for whom no attorney appeared to assist at any bond argument, preliminary hearing, trial, or sentencing.

Even beyond this Court's authority to remedy ongoing constitutional violations occurring in Idaho courtrooms by granting further relief under Idaho Code Section 10-1208 and modifying the District Court's injunction to prevent these worsening constitutional violations while this appeal is pending, where "no provision is made by statute" or the appellate rules this Court's proceedings "shall be in accordance with the practice usually followed in such or similar cases, or as may be prescribed by the Court or a Justice thereof." I.A.R. 48. And under Idaho Rule for Civil Procedure 65, a "preliminary injunction" may be appropriate where "it appears by . . . affidavit that the commission or continuance of some act during the litigation would produce . . . great or irreparable injury to the plaintiff." *See also Planned Parenthood Great Nw. v. State*, 172 Idaho 321, 324-25, 532 P.3d 801, 804-05 (2022) (applying Idaho Rule of Civil Procedure 65 to a request for preliminary injunctive relief during the pendency of an appeal). Plaintiffs' request for interim injunctive relief—to be issued while the litigation on the merits proceeds—closely mirrors

the type of "preliminary" relief described by Rule 65. Plaintiffs' request is therefore appropriate where there is a "*substantial* likelihood of success on the merits *or* a 'clear right' to the ultimate relief requested," and (ii) "irreparable injury will flow from [the right's] refusal." 172 Idaho at 327-27, 532 P.3d at 806-07 (emphasis added) (citation omitted). Both prongs are satisfied here, where Plaintiffs request enforcement of their clear right to counsel at critical stages, and where irreparable constitutional injuries are already flowing from the State's failure to fulfill its constitutional duties.

Clear right to counsel at critical stages. Plaintiffs' emergency request seeks to enforce the "State's obligation to provide constitutionally adequate public defense," including its obligation to ensure no indigent defendant "goes unrepresented at a critical stage of prosecution." *Tucker v. State*, 162 Idaho 11, 19-20, 394 P.3d 54, 62-63 (2017); *see also Estrada v. State*, 143 Idaho 558, 562, 149 P.3d 833, 837 (2006) ("The Sixth Amendment guarantees a criminal defendant the right to counsel during all 'critical stages' of the adversarial proceedings against him") (citations omitted). The Sixth Amendment unequivocally requires that "counsel *must* be appointed within a reasonable time after" the right to counsel attaches "to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 212 (2008). "This leaves two avenues for a Sixth Amendment violation: (1) lack of counsel at a critical stage, or (2) unreasonable delay in appointment that fails to provide for adequate representation at the critical stage." *Betschart v. Garrett*, 700 F. Supp. 3d 965, 981 (D. Or. 2023), *amended by*, No. 3:23-CV-01097-CL, 2023 WL 7621969 (D. Or. Nov. 14, 2023), and *appeal dismissed sub nom. Betschart v. Oregon*, No. 23-2270, 2024 WL 2801587 (9th Cir. May 31, 2024), and *aff'd sub nom. Betschart v. Oregon*, 103 F.4th 607 (9th Cir. 2024). These critical stages include arraignments, bail hearings, preliminary hearings, and guilty pleas. *Id.* (collecting

cases). Lack of counsel at these stages "not only interferes with indigent criminal defendants' progression to critical stages by delaying those stages but also prevents any meaningful advocacy." *Betschart*, 103 F.4th at 620. Moreover, the "Sixth Amendment requires not just that counsel show up on the day of a critical stage but prepare for it too." *Id.* Idaho similarly guarantees the right to counsel by statute, providing that every indigent defendant is entitled "to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney." I.C. § 19-6009(2)(a).

Irreparable injury stemming from their denial of counsel. Appellants' requested relief seeks to remedy this "deprivation of constitutional rights" which "unquestionably constitutes irreparable injury." *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)); *Betschart*, 103 F.4th at 617 (finding it was not an abuse of discretion for the district court to find irreparable harm based on in-custody defendant's ongoing pretrial detention without counsel). When an alleged violation of a constitutional right is involved, "most courts hold that no further showing of irreparable injury is necessary." *Baird v. Bonta*, 81 F.4th 1036, 1042 (9th Cir. 2023); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (same); *see also Arevalo v. Hennessy*, 882 F.3d 763, 767 (9th Cir. 2018) ("Deprivation of physical liberty by detention constitutes irreparable harm.").

Appellants therefore respectfully request that this Court order that the State immediately release from custody and pretrial liberty restrictions any indigent defendant (i) who has had no communication with any attorney within seven days of SPD's appointment, or (ii) for whom no attorney appeared to assist at any bond argument, preliminary hearing, trial, or sentencing.

B. Permanent Injunctive Relief & Appointment of Independent Monitor.

For all the reasons discussed in Plaintiffs' Opening and Reply briefs, this Court also has the authority to decide this case on the merits in favor of Plaintiffs as part of the disposition of this appeal, and remand this case to the District Court for the appointment of an independent monitor to review and oversee the State's implementation of a plan to remedy Plaintiffs' demonstrated deficiencies and achieve the delivery of constitutional public defense. To assist that monitor with its work, Plaintiffs further request that the Court require the following:

1. Weekly reports:

    (a) reporting the number of newly appointed cases since the last report (or, for the first report, since 10/1/24), according to (i) SPD's records and (ii) this Court's data department

    (b) reporting the number of newly appointed cases in which no attorney has both reviewed the case and communicated with the client within 7 days (or, for the first report, since 10/1/24)

    (c) indicating for (a) and (b) how many of those class members are in custody at the time of the report and how many have release conditions restricting their liberty and, pursuant to protective order, identifying the names of each such class member

    (d) reporting the total number of cases assigned to each SPD attorney (employees and contractors) and reporting the total number of cases each attorney has handled since 10/1/24

2. Monthly reports:

    (a) reporting the number of cases in which an attorney has been unable to either (i) communicate with the client in advance of or (ii) appeared to assist the client at: any bond argument (including initial appearance and bond reduction motions), preliminary hearing, trial, or sentencing

    (b) reporting the number of both (i) filled and (ii) open SPD positions, by category: full-time attorney employees, contract attorneys, investigators, paralegals, social workers, legal assistants, and other support staff reporting the number of open

(c) reporting the frequency of use of investigators and expert witnesses in SPD cases (both employee- and contractor-handled)

(d) reporting the number of full-time primary attorneys and contract attorneys (by category) employed by or contracting with SPD

(e) reporting the number of open attorney positions within SPD, by category (i.e., full-time primary attorneys, contract attorneys)

(f) submitting any court orders (i) finding the SPD or its contractor failed to appear on an indigent defendant's behalf, (ii) requiring the SPD or its contractors to provide additional money or resources for an indigent defendant's defense, or (iii) related to the SPD or its contractors' failure to timely and adequately assign counsel to an indigent defendant

3. Quarterly file review: require the State to provide, pursuant to protective order, 100 case files randomly selected from among pending SPD matters (both employee- and contractor-handled) to class counsel so they may evaluate SPD's reports

4. Written notice:

(a) to all current SPD clients and, within 72 hours of appointment, all newly appointed SPD clients, regarding (i) how to contact class counsel to make a complaint about lack of representation or communication; and (ii) any interim orders requiring release of pretrial detainees under certain conditions, as requested above

(b) to all SPD staff and contractors regarding how to contact class counsel (including anonymously) to make a complaint about deficiencies

These are the same kinds of remedies that other courts have fashioned to address malfunctioning public defense systems. In *Wilbur v. City of Mount Vernon*, the court had to consider "the constitutional adequacy of the public defense system" implemented across two cities in Washington State. 989 F. Supp. 2d 1122, 1123 (W.D. Wash. 2013). After finding that public defenders were able to do little to no investigation in most of their cases, that "[m]ost interactions" between public defender and client "occurred in the courtroom," and that "indigent defendants had virtually no relationship with their assigned counsel," therefore concluding that the system "makes it impossible for appointed counsel to provide the sort of assistance required by the Sixth

Amendment" and "works irreparable harm," the court then turned to how to use its broad equitable powers to craft a remedy. *Id.* at 1124, 1133, 1134. Despite that by the time of decision counsel were "appointed in a timely manner" and the systems were "definitely trending in the right direction," the court ordered an extensive toolbox of remedial measures set out over four pages. *Id.* at 1129, 1131, 1134-37. In addition to requiring the cities to hire a "public defense supervisor" to closely monitor their public defense delivery, the court required specific checks to ensure "public defenders are making contact (in-person or by phone) in a confidential setting with each new client within 72 hours of appointment" and "prior to the client's first court hearing," collection of data "showing . . . frequency of use of investigators and expert witnesses," and periodic review of a sample of "randomly selected" case files. *Id.* at 1135-37. The court also ordered establishment of a "process for clients to pursue a complaint" about public defense delivery. *Id.* at 1135.

Most recently, the Ninth Circuit considered the statewide public defense system in Oregon in a class action challenge. *Betschart v. Oregon*, 103 F.4th 607 (9th Cir. 2024). It had before it evidence eerily similar to that Plaintiffs submit with this motion. *See, e.g.*, *id.* at 612-13 (noting that "an innocent person may languish in jail for months awaiting trial, simply because no lawyer has been provided to review or investigate his case" and that "[w]hen one Petitioner asked the judge at a pretrial hearing when he would be appointed counsel, the judge simply responded, 'I don't know.' "). Observing that it was "Oregon's uncharted refusal to adequately pay lawyers, not some new-fangled right" that presented extraordinary cause for urgent remedy, the Circuit affirmed an injunction mandating that "counsel must be provided within seven days of the initial appearance, or within seven days of the withdrawal [of] previously appointed counsel," or else the defendants lacking prompt access to counsel "must be released from custody" forthwith. *Id.* at 614, 622 (citation omitted). Plaintiffs here seek that same species of remedy to halt the ongoing

constitutional violations that class members are now suffering under the State's system, combined with reporting and notice measures like those in *Wilbur*, intended to bring this system into constitutional compliance over the near term.

II. AUGMENTATION OF THE RECORD IS APPROPRIATE AND NECESSARY.

For all the reasons discussed in Plaintiffs' Opening and Reply briefs, the District Court's decision to dismiss this case on prudential mootness grounds was wrong based on the record before it. That record shows that the State of Idaho's public defense system—no matter how it has been packaged—has long suffered from systemic deficiencies that are deeply rooted and well-documented. *See, e.g.*, Pls.' Opening Br. at 6-16. The District Court erred by concluding that those deficiencies and the attendant risk of harm that they create would suddenly disappear upon the SPD's transition. And we now know, based on the evidence discussed herein, that this prediction was simply wrong.

Although in a typical appeal this Court would look to Idaho Appellate Rule 30 to determine whether augmentation of the record is appropriate, Idaho Appellate Rule 44 provides that the Supreme Court "by order may alter, shorten, or eliminate any step or procedure . . . upon finding extraordinary circumstances." Especially when considering constitutional rights of significant moment, as are at issue here, appellate courts are "bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." *Patterson v. Alabama*, 294 U.S. 600, 607 (1935). This case presents all of these circumstances, for two reasons.

First, as the District Court rightly recognized, this case presents "issues of substantial public interest that present an inherent need for guidance." R., p. 5613. Plaintiffs' certified class includes tens of thousands of indigent defendants who are challenging statewide deficiencies in this State's public defense services—a pillar of the criminal legal system. Plaintiffs have raised

legitimate concerns that the State's public defense services are unconstitutional—even SPD leadership admits the system creates a risk of ineffective representation—and barreling quickly towards disaster. These are extraordinary circumstances that warrant both this Court's consideration of the facts as they stand today, as well as further (and urgent) relief.

Second, augmenting the record in particular would promote the Court's interest in judicial efficiency. For the first time, this Court will consider whether prudential mootness has any place in Idaho courts, and whether it should be applied to a systemic constitutional challenge to the State's delivery of public defense. This requires consideration of, among other things, the "bona fides of the expressed intent to comply" and the "effectiveness of the discontinuance" in remedying Plaintiffs' injuries. Pls.' Opening Br. at 24-25 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). And although there is a strong basis to infer from the record that there is no possible way for the State to carry its burden on these issues, the attached evidence regarding the State's disastrous rearrangement of Idaho's public defense system shows, without a doubt, that Plaintiffs' injuries were never remedied, and have only compounded. By augmenting the record with this evidence now, the Court can avoid any unnecessary delays that could come with yet another round of discovery after *Tucker III*.

For all of these reasons, Plaintiffs respectfully request that the Court supplement the record with Appellants' attached evidence and allow Appellants to continue to supplement the record until 21 days before oral argument.

III. EXIGENT CIRCUMSTANCES COUNSEL IN FAVOR OF RESOLVING THIS APPEAL AS SOON AS POSSIBLE.

For all of the reasons discussed at length in Plaintiffs' opening brief and reply, the District Court erred when it dismissed Plaintiffs' claims as prudentially moot, and this Court can and should

grant summary judgment in Plaintiffs' favor. And as the evidence submitted to this motion shows, indigent defendants across the State are suffering irreparable ***and worsening*** constitutional harms ***now***, while this appeal remains pending. Plaintiffs therefore respectfully request that the Court resolve this appeal as soon as possible, including by setting oral argument for the earliest possible date. But in the event the Court is unable to resolve the entire appeal in an expedited manner, Plaintiffs alternatively request that the Court immediately schedule oral argument on this motion, so that it may assess whether interim relief is appropriate while the appeal remains pending.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court (i) issue interim emergency relief in Plaintiffs' favor, as described herein; (ii) permit Plaintiffs to supplement the appeal record with the evidence submitted with this Motion; and (iii) expedite oral argument, or alternatively set oral argument on this Motion as soon as possible.

Dated: December 23, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 23, 2024, a true and correct copy of the foregoing document was filed using the E-File system, which sent a Notice of Electronic Filing to the following:

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