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Idaho Supreme Court
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No. 51631-2024

IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY TUCKER, *ET AL.*,

Plaintiffs-Appellants,

v.

STATE OF IDAHO, *ET AL.*,

Defendants-Respondents.

ON APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, Case No. CV-2015-10240

Honorable Samuel A. Hoagland, District Judge, Presiding

BRIEF OF FORMER IDAHO ATTORNEYS GENERAL WAYNE KIDWELL AND W. ANTHONY PARK AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

Of Counsel:

Rachel G. Miller-Ziegler
Stephany Reaves
Kyle A. Schneider
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Avenue NW
Suite 500E
Washington, DC 20001
(202) 220-1100

Deborah A. Ferguson, ISB No. 5333
Craig H. Durham, ISB No. 6428
FERGUSON DURHAM, PLLC
223 N. 6th Street
Suite 325
Boise, ID 83702
(208) 724-2617
daf@fergusondurham.com

Counsel for Amici Curiae

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici curiae—Wayne Kidwell and W. Anthony (Tony) Park—are former Attorneys General of the State of Idaho. Collectively, they served as the State's chief legal representative for eight years. They have compiled decades of public service to Idaho and the United States in all three branches of government and on both sides of the political aisle. They are familiar with scores of legislative developments and judicial decisions in Idaho, and they remain actively engaged with various issues affecting Idahoans today. Most relevant here, amici have observed Idaho's past attempts to reform deficient public services, including its public defense system. Amici thus have an interest in this case and are well suited to explain (1) how the State has long promised reforms to failing public services that have not come to fruition, and (2) how the State's unsuccessful attempts to provide adequate indigent defense date back over a century.

[1] Pursuant to Idaho Appellate Rule 8(c)(4), amici declare that (i) no party or party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (iii) no person or entity, other than amici or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

Justice Wayne Kidwell served as Idaho's Attorney General from 1975 to 1979, having run as a Republican. He was elected to the Idaho Supreme Court in 1999 and served until 2005. Justice Kidwell also served in the Idaho Senate where, from 1970 to 1972, he was the Republican Majority Leader. After his tenure as Idaho Attorney General, President Reagan appointed Justice Kidwell to serve as a United States Associate Deputy Attorney General. Justice Kidwell also represented the Republic of the Marshall Islands as its appointed Attorney General, and he was an officer in the United States Army. He was born in Council, Idaho, and raised in Boise.

General Tony Park served as Idaho's Attorney General from 1971 to 1975, having run as a Democrat. After Justice Kidwell succeeded General Park as Attorney General, he practiced law in Boise for almost four decades. He has actively engaged in civic and political activities over many years. He served on the Board of Directors of Radio Free Europe/Radio Liberty and as President of the ACLU of Idaho. Mr. Park also served in the United States Army. He was born in Blackfoot, Idaho, and raised in Boise.

Amici have no interest in this case except in their capacities as former Idaho Attorneys General and concerned Idaho citizens. This brief represents their

individual views, not the views of any institution with which they are or have been affiliated.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court's mootness conclusion is based on the faulty premise that new legislation alone will suddenly and comprehensively solve Idaho's longstanding public defense crisis, notwithstanding the history of similar efforts failing outside of the public defense context. As amici have witnessed time and again, structural deficiencies in Idaho's public services have rarely (if ever) been solved with the stroke of a pen. In reality, solving those types of systemic problems takes immense time, resources, investment from a variety of stakeholders, and oversight and administration. An aspirational new standard on the books is therefore far from tantamount to fixing on-the-ground issues.

Indeed, in a variety of contexts, the State has long promised structural reforms that were never realized. Amici here focus on two such examples, each of which involved assurances by the State that new legislation or policies would solve a problem challenged in litigation. In both instances, the State acted to address structural deficiencies with public services, and told the courts that it had taken care of the issue. But in each case, those promises were broken, and the issues persisted

for decades. Amici offer these examples to illustrate the common-sense notion that this Court should be skeptical that new legislation will fully solve Idaho's stubborn public defense crisis after previous attempts have proven ineffective.

Amici first discuss the Legislature's long history of unfulfilled promises to adequately fund public schools, as best captured in the long-running Idaho Schools for Equal Educational Opportunity ("ISEEO") litigation. There, plaintiffs challenged the level and method of funding for Idaho's public schools. During six trips to this Court, the State repeatedly insisted that the Legislature had remedied, or was on the precipice of remedying, the constitutional deficiencies with Idaho's public schools. But this Court rejected the State's multiple requests to dismiss the case for mootness, and for good reason. Despite years of litigation, the Legislature making numerous changes aimed at fixing the underlying problems, and the State repeatedly contending that those developments mooted the litigation, the constitutional violations persisted for decades and endure today.

Amici next examine a similar chronicle with regard to Idaho's public services to children suffering from severe emotional and mental disabilities. Once again, litigation over intractable infirmities spanned decades. And as in the school funding setting, the State promised repeatedly that it was working on the problems, that it

would soon fix the problems, and at times that it *had* fixed the problems. But as the U.S. Court of Appeals for the Ninth Circuit observed in 2004—well before the litigation concluded—"[t]he history of this case is a sad record of promises made and broken over two decades." *Jeff D. v. Kempthorne*, 365 F.3d 844, 847 (9th Cir. 2004). Indeed, even though the State "repeatedly promised to provide appropriate services to the plaintiffs," *id.*, litigation that began in 1980 continued for over three decades.

More generally, beyond those recent examples of broken promises, the Legislature's unsuccessful efforts to provide adequate indigent defense in Idaho date back over a century. Criminal defendants' right to counsel in Idaho predated Idaho's statehood and existed nearly a century before the equivalent federal guarantee was recognized. Despite that head start, bridging the gap between the on-the-books right to counsel and the reality of providing effective court-appointed counsel has always been, at best, a work in progress in the State. Indeed, as the district court here recognized, "[t]he State has been in the process of implementing changes to indigent defense for over a decade." Amended Memorandum Decision and Order ("Order") at 17. And the State has twice relied on those changes to urge this Court not to reach

the merits in this very case. But this Court rightly rejected those contentions because structural deficiencies in Idaho's public defense remained. And they continue today.

In short, the State has long failed to make good on its abstract commitment to provide a functional public defense system. This Court should acknowledge that reality when assessing the State's latest assurances that it has fixed the system for good.

ARGUMENT

I. The State Has Long Promised Reforms That Have Not Been Realized

The district court's mootness holding is predicated on a finding that defies reality: that the Legislature's latest public defense reforms "will likely be effective" at eliminating the constitutional deficiencies that plaintiffs have identified. Order at 20. Amici know from experience that inadequate public services are seldom mended overnight by legislative or executive command. Remedying such multi-dimensional, intransigent problems demands that the State have "the means, the rules, and the oversight to assure constitutional mandates are met." *Tucker v. State*, 168 Idaho 570, 581, 484 P.3d 851, 862 (2021) (*Tucker II*). New legislation or executive action cannot be counted on to be immediately effective for any number of reasons—for example, inadequate funding, implementation difficulties, or simply

poor design. Enacting new laws is accordingly often the *first* step to solving the State's most serious problems, not the last. That is all the more true in the context of legislation enacted in response to litigation, where legislation is often at best a symbolic gesture, and at worst a cynical litigation tactic.

It is thus unsurprising that broken promises of reform to public services are nothing new in Idaho. Amici discuss two such examples: (1) public school funding, and (2) public services to severely emotionally and mentally disabled children. Both of these examples involved assurances by the State—made in response to litigation—that new legislation or policies would remedy the complained-of shortcomings. And in each case, the State asked the courts to rely on those assurances to end the litigation. But time after time, the State broke its promises, and the deficiencies lingered for years.

These two examples are, of course, just that—examples. There are salient factual and procedural differences between each example and this case. Amici do not seek to relitigate the judicial decisions involved in those examples. Amici likewise do not intend to impugn defendants' intent in enacting the State Public Defender Act. Rather, these examples are meant to underscore why this Court should approach with caution the State's pledge that new legislation will completely

solve Idaho's public defense morass after previous efforts have foundered. At the very least, these examples demonstrate that it would be premature for this Court to declare the legislation effective based on the State's word alone.

A. Public School Funding

Amici first address the decades-long history of ineffective legislative efforts to adequately fund the State's public schools, which largely played out in the ISEEO litigation. That litigation lasted over 15 years and resulted in this Court "issu[ing] Opinions an unprecedented (for Idaho) six different times, a number which does not include follow-on cases litigated in both state and federal court." John E. Rumel, *Promises Made, Promises Broken: The Anatomy of Idaho's School Funding Litigation*, 57 Idaho L. Rev. 382, 383 (2021).

The litigation began in 1990, when ISEEO filed a lawsuit "seeking a declaratory judgment that the level and method of funding for Idaho's public schools was unconstitutional." *Joki v. State*, 162 Idaho 5, 9 n.4, 394 P.3d 48, 52 n.4 (2017). ISEEO named the Legislature as a defendant, among other State officials. *Id.* ISEEO's claim was based on a provision of the Idaho Constitution which provides that "[t]he stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the Legislature of Idaho, to establish

and maintain a general, uniform and thorough system of public, free common schools." Idaho Const. art. IX, § 1. In its first encounter with the case, this Court held that it is the judiciary's duty to define what constitutes a "thorough" system of public schools. *See Idaho Schs. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 583, 850 P.2d 724, 734 (1993) (*ISEEO I*).

After that ruling, the Legislature made a number of changes to Idaho's school system, such as increasing school appropriations and directing the State Board of Education to develop new rules and standards. *See Idaho Sch. for Equal Educ. Opportunity By & Through Eikum v. Idaho State Bd. of Educ. By & Through Mossman*, 128 Idaho 276, 280, 912 P.2d 644, 648 (1996) (*ISEEO II*). Accordingly, the State defendants "argued that the lawsuit had become moot due to" those "legislative enactments regarding funding and standards." *Id.* The district court agreed, concluding that the "primary issues of the lawsuit had or would shortly change, and that sufficient changes had taken place to declare the action moot." *Id.* at 281.

This Court reversed the mootness ruling. The Court acknowledged that "[t]he 1994 legislature passed five bills that year applicable to public school funding." 128 Idaho at 282. But the Court did not agree that the 1994 legislation rendered the case

moot and thus held "that a justiciable issue does indeed exist." *Id.* at 283. That was so, the Court explained, because the mere enactment of new legislation did not guarantee that Idaho's schools would be fixed, and so did "not answer the question whether a constitutionally 'thorough' education is provided." *Id.* It was "not enough to make the case moot," in other words, that "there was a *potential* for legislation to alter the factual predicate of questions." *Id.* (emphasis added). In reaching that conclusion, this Court rejected the State's argument—which bears a striking similarity to its contentions here—that the plaintiffs' complaint was moot because "[i]t had not been updated to take into account the [Legislature's] extraordinary changes in funding levels, funding formulas, and definition of thoroughness." *ISEEO II*, Brief of Respondents, 1995 WL 17199732, at *16; *compare id.*, *with* Order at 21 (accepting the State's mootness argument "based on the changes made by the State since the Second Amended Complaint was filed").

The Court's concern that the 1994 legislation might not resolve the existing constitutional infirmities proved prescient, as that legislation was just the beginning of the Legislature's attempts to fulfill its promise of adequately funding Idaho's public schools. After this Court remanded for further proceedings in *ISEEO II*, the Legislature and Board of Education implemented yet another set of rules, this time

related to school facilities. *See Joki*, 162 Idaho at 9 n.4. The trial court then granted summary judgment to the State on the merits, and the plaintiffs appealed once more. *See Idaho Sch. for Equal Educ. Opportunity v. State*, 132 Idaho 559, 563, 976 P.2d 913, 917 (1998) (*ISEEO III*). But in *ISEEO III*, this Court ruled that even with those additional legislative and administrative actions, the State had not lived up to its "duty to provide a means for school districts to fund facilities that offer a safe environment conducive to learning," which is "inherently a part of a thorough system of public, free common schools that Article IX, § 1 of our state constitution requires the Legislature to establish and maintain." *Id.* at 563, 566. The Court accordingly specified, "[o]n remand, the trial court shall conduct a trial or other appropriate proceeding" to decide whether the Legislature had satisfied that constitutional mandate. *Id.* at 568.

Following this Court's direction, on remand the district court conducted a trial. At the trial's conclusion in 2001, the court held "that the system of school funding established by the Legislature was insufficient to meet" the Constitution's demands. *Idaho Sch. for Equal Educ. Opportunity v. State*, 140 Idaho 586, 589, 97 P.3d 453, 456 (2004) (*ISEEO IV*). The district court "deferred any remedial action to allow the Legislature time to address its findings." *Id.* The Legislature, however,

"failed to take appropriate action." *Id.* So, after a year had elapsed without any legislative activity, "the district court began implementing its remedial measures, including a phase of information gathering and the appointment of a Special Master." *Id.* Then in 2003, while that remedial process was ongoing, the Legislature enacted HB 403, which was designed "at least in part as an effort to resolve the lawsuit." *Id.* But the district court swiftly held HB 403 unconstitutional, and this Court affirmed. *Id.* at 464.

It was against that backdrop that this Court "finally addresse[d] the district court's 2001 Findings" that the school-funding scheme "is not adequate to meet the constitutional mandate to establish and maintain a general, uniform, and thorough system of public, free common schools." *Idaho Sch. for Equal Educ. Opportunity v. State*, 142 Idaho 450, 454, 129 P.3d 1199, 1203 (2005) (*ISEEO V*). Once again, the State pointed to new legislation (initially passed in 2000, prior to HB 403, and amended in subsequent years), contending that those legislative developments rendered the lawsuit moot. *Id.* at 457. Alternatively, the State sought to evade merits review by arguing that "any ruling by the district court was actually premature, rather than moot, because of the legislative changes." *Id.*

This Court emphatically concluded, "[s]uch legislation does not, however, make this case moot." 142 Idaho at 457. This Court "note[d] the significant strides the Legislature has made in providing additional funds to Idaho schools for building replacement and repair." *Id.* But this Court nonetheless concluded that there was "little to show that the present system of funding is adequate to stop the further accumulation of dangerous or inadequate buildings." *Id.* at 457-58.

Turning to the merits, this Court "affirm[ed] the conclusion of the district court that the current funding system is simply not sufficient to carry out the Legislature's duty under the constitution." 142 Idaho at 459. In short, "[w]hile the Legislature has made laudable efforts to address the safety concerns of various school districts, the task is not yet complete." *Id.* Notwithstanding that finding, this Court went on to explain, "[t]he appropriate remedy . . . must be fashioned by the Legislature and not this Court." *Id.* For that reason, this Court "retain[ed] jurisdiction to consider future legislative efforts to comply with the constitutional mandate to provide a safe environment conducive to learning." *Id.* at 460.

Following *ISEEO V*, the Legislature continued to fall short on its promise to make the State's school funding constitutionally adequate. For instance, in 2006, ISEEO "filed a report with the Idaho Supreme Court advising the court that during

the 2006 legislative session the Idaho Legislature failed to adequately fulfill its constitutional mandate regarding funding of the public school system." *Kress v. Copple-Trout*, 2008 WL 352620, at *1 (D. Idaho Feb. 7, 2008).[2] Moreover, well founded concern about the constitutional adequacy of public schools remains. For example, former Idaho Supreme Court Justice Jim Jones wrote as recently as 2022 that "[t]he Legislature is clearly shirking its constitutional duty to provide a thorough system of public schools." Jim Jones, *The Legislature Is Violating Its Constitutional Duty to Adequately Fund Idaho's Public Schools*, Idaho Capital Sun (Jan. 13, 2022); *see also Rumel*, 57 Idaho L. Rev. at 432 ("[I]t is clear that the Court never suggested that the Legislature had adequately and thoroughly funded public schools at any time after its Opinion in *ISEEO V*.").

Amici recount this detailed history of the *ISEEO* decisions to illustrate that the arguments put forth by the State in *this* case are nothing new. To the contrary, as *ISEEO* shows, the Legislature has an unfortunate history of enacting supposed fixes to systemic problems that do not actually solve the problems. In the context of

[2] In *State v. District Court of Fourth Judicial District*, 143 Idaho 695, 152 P.3d 566 (2007) (*ISEEO VI*), this Court resolved the "narrow" issue of whether the trial court had "properly ordered the State to pay the special master's costs during the pendency of the litigation." *Id.* at 700.

school funding, lawsuits were filed over 30 years ago, the Legislature made scores of changes that would allegedly solve the underlying problems, and the State repeatedly argued that the litigation was moot (or otherwise nonjusticiable) because of those legislative developments. But despite all of that, on-the-ground constitutional violations persisted for decades—and continue to this day.

B. Public Services to Severely Emotionally Disabled Children

Amici next turn to a similar saga regarding Idaho's public services for children suffering from severe emotional and mental disabilities. The so-called *Jeff D.* litigation over this issue "has been pending in one form or another for over 40 years." *Jeff D. v. Little*, 2023 WL 7220754, at *1 (D. Idaho Nov. 1, 2023).[3] In 1980, the plaintiff class (indigent children in Idaho suffering from severe emotional and mental disabilities) sued State officials, alleging that they were providing inadequate care and had thereby violated the plaintiffs' constitutional rights. *Id.* The complaint alleged, among other things, that some of the plaintiffs had been hospitalized in unfit

[3] The case has a tortured history, including at least five appeals to the Ninth Circuit and one decision by the U.S. Supreme Court. *See Evans v. Jeff D.*, 475 U.S. 717 (1986). Amici address that history only as relevant to the issues in this case.

facilities along with adults, some of whom were known sexual predators and child molesters. *See Kempthorne*, 365 F.3d at 847.

In 1983, the parties reached an agreement and the district court entered a consent decree requiring the State to address many of the plaintiffs' grievances. "The agreement provided for continuing jurisdiction by the district court for five years 'or until [the district court was] satisfied by stipulation or otherwise that the claims as alleged in the Complaint have been adequately addressed.'" *Jeff D. v. Otter*, 643 F.3d 278, 281 (9th Cir. 2011). But by the late 1980s, after years of inaction, "there were serious concerns about the state's compliance with the consent decree and the plaintiffs filed a motion to enforce it." *Kempthorne*, 365 F.3d at 848. So the parties negotiated a supplemental consent decree, which the district court entered in 1990. *Id.* That agreement reiterated the defendants' obligation to prevent hospitalization of children in adult facilities, and it "also required the defendants to prepare legislative budget requests to fund the programs that were agreed upon." *Id.*

That second consent decree also failed to deliver. For instance, "[i]n 1993, the plaintiffs filed a motion with the district court requesting that the defendants be ordered to comply with the decrees." *Kempthorne*, 365 F.3d at 848. The court granted that motion, but it did not lead to material changes. *Id.* A similar pattern

continued for years: "[t]he following seven years witnessed additional charges of non-compliance, admissions of failure, court intervention, outside auditing, compliance reviews, and finally, in March 1998, a motion by the Plaintiffs for a finding of contempt against the Defendants based on the negative findings of the most recent compliance review." *Otter*, 643 F.3d at 281. Although the district court "noted that it was growing weary with the state's failure to comply with the consent decrees, the court gave additional time for the defendants to comply with the Court's orders and to fulfill the promises embodied by the Consent Decrees." *Kempthorne*, 365 F.3d at 849 (internal quotation marks omitted). That eventually led to a third consent decree, in which the State agreed to provide an action plan. *Otter*, 643 F.3d at 282.

But the third time was not the charm. The State's inaction persisted and the plaintiff class continued to suffer, leading the district court to decide "that it must take a more active role in enforcing the Decrees." *Otter*, 643 F.3d at 282 (quoting the district court). The court accordingly ordered the parties to develop a new compliance plan providing "a comprehensive blueprint of how the defendants would meet the requirements of the decrees." *Id.* (quoting the district court). The court eventually adopted an "Implementation Plan," which contained 252 "Action Items"

for the State to complete. *Id.* For years, the parties reported that they were making progress, but that the State's tasks were not yet done. *See id.* (the State "file[d] regular status reports 'documenting their compliance with deadlines, addressing any non-compliance, and listing the measures they are taking to bring any areas of non-compliance into compliance'" (quoting the district court)). The court then held a final compliance hearing in 2006, which led it to conclude that with respect to 21 of the Action Items, the defendants had violated the consent judgment and "the violation was not based on good faith and reasonable interpretation of the judgment." *Id.* (quoting *Jeff D. v. Kempthorne*, 2007 WL 461471, at *3 (D. Idaho Feb. 7, 2007)). Shortly thereafter, the State filed affidavits of further compliance, and the district court vacated the consent decrees, holding that the State "had substantially complied with all the Action Items." *Id.* at 283.

On appeal, the Ninth Circuit reversed, concluding that the district court erred in vacating the consent decrees. *Otter*, 643 F.3d at 283. More specifically, the court of appeals held that the district court failed to put the "burden o[n] the Defendants to establish that they had substantially complied with the requirements of the consent decrees, and that any deviation from literal compliance did not defeat the essential purposes of the decrees." *Id.* at 284.

On remand, the parties finally reached a settlement agreement in 2015. The agreement provided that its "purpose" was "to direct and govern the development and implementation of a sustainable, accessible, comprehensive, and coordinated service delivery system for publicly-funded community-based mental health services to children and youth with serious emotional disturbances ('SED') in Idaho." Settlement Agreement 2, *Jeff D. v. Otter*, No. 4:80-cv-04091 (D. Idaho June 12, 2015), ECF No. 741.[4]

As the Ninth Circuit observed in 2004—with much of the case still to go—"[t]he history of this case is a sad record of promises made and broken over two decades." *Kempthorne*, 365 F.3d at 847. That court recognized that the State "repeatedly promised to provide appropriate services to the plaintiffs." *Id.* Yet state officials consistently broke "the promises they have made . . . to a class of some of Idaho's most vulnerable citizens." *Id.* at 855. As *Jeff D.* illustrates all too vividly, systemic governmental change to address a deep-seated problem takes time, vast resources, and is not usually effectuated overnight. Amici urge this Court to take that lesson to heart here.

[4] https://yes.idaho.gov/wp-content/uploads/2021/04/JeffDOfficialAgreement.pdf.

II. The State's Unsuccessful Attempts to Provide Adequate Indigent Defense Date Back Over a Century

The above two cases supply ample grounds for skepticism with respect to the State's assurances in this case. Further, the State's longstanding conduct in the context of public defense resolves all doubt. Indeed, the State's unsuccessful efforts to provide adequate indigent defense in Idaho date back over a *century*. Examination of that broader historical arc provides essential background for evaluating the State's current assertion that this time will be different and fatally undercuts the district court's mootness conclusion here.

At least in theory, if not in practice, individuals in Idaho have been guaranteed the right to counsel for over a century. As early as 1874—16 years before Idaho became a State—the Territorial Criminal Practice Act provided criminal defendants the "right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had." Territorial Criminal Practice Act of 1874, § 143. Approximately a decade later, the 1887 Idaho Revised Statutes reaffirmed the right to appointed counsel before arraignment: the law stated that a defendant "must be informed" of his right to counsel, and "[i]f he desires and is unable to employ counsel, the court must assign counsel to defend him." Idaho Rev. St. § 7721 (1887). When Idaho obtained statehood, it crystalized in the Idaho Constitution the right of

"the party accused" to "appear and defend in person and with counsel." Idaho Const. art. I, § 13.

This Court expressly recognized that vital right in 1923. In *State v. Montroy*, 37 Idaho 684, 217 P. 611 (1923), this Court emphasized that it is "the public policy of this state," as reflected in "constitutional guaranties," to provide "not only a fair and impartial trial, but every reasonable opportunity to prepare [the accused's] defense." *Id.* at 614. And the Court made clear that "[i]n the case of indigent persons accused of crime, the court *must* assign counsel to the defense at public expense." *Id.* (emphasis added). Indeed, were that not the case, having the right to counsel would "penalize[]" the accused "for having accepted the assistance to which the statute entitled him." *Id*.

Those state statutory and constitutional guarantees put Idaho well ahead of the rights provided under federal law. It was not until 1963, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that the U.S. Supreme Court recognized the federal Sixth Amendment right to appointed counsel for an indigent defendant facing a felony charge in state court.

Despite Idaho's head start, bridging the gap between the theoretical right to counsel and the reality of providing effective court-appointed counsel has been, at

best, a continual work in progress. For the better part of the twentieth century, no statewide guidance even *existed* regarding how Idaho courts should provide appointed counsel. Then in 1967, the Legislature established a Board of County Commissioners for each county and delegated the responsibility for providing indigent representation to the counties. *See* I.C. § 19-859 (1967 version). That legislation allowed for counties to (a) "establish[] and maintain[] an office of the public defender," (b) "arrange with the courts in the county to assign attorneys," or (c) "adopt a combination of these alternatives." *Id*. But in practice, most counties contracted with private attorneys to provide indigent defense rather than establish a county public defender's office. Indeed, even as of 2023, only 14 of Idaho's 44 counties had a public defender's office. *See* Idaho State Public Defender, *Institutional Offices*, https://spd.idaho.gov/institutional-offices/.

The State's attempts at reform continued in fits and starts for decades until this litigation commenced. *See* Order at 17 ("The State has been in the process of implementing changes to indigent defense for over a decade."). For example, in recognition of the problems caused by having each county establish its own system, funding, and standards for indigent defense, the Legislature in 1998 established the Office of the State Appellate Defender. *See* I.C. § 19-869 (1998). In a similar vein,

the Legislature allocated funding for Capital Defense to ensure that minimum standards were met for individuals facing the death penalty. I.C. § 19-863A (1998). Next came a 2005 Governor's Executive Order creating the Idaho Criminal Justice Commission ("CJC"). *See* Idaho Criminal Justice Commission, https://icjc.idaho.gov. Eventually, the CJC requested the National Legal Aid & Defender Association ("NLADA") to assess trial-level indigent defense in the State. NLADA, in turn, concluded in 2010 that "Idaho fails to provide the level of representation required by our [federal] Constitution for those who cannot afford counsel in its criminal and juvenile courts," and that "none of the public defender systems in the sample counties are constitutionally adequate." NLADA, *The Guarantee of Counsel: Advocacy & Due Process in Idaho's Trial Courts* at iii, 2 (2010) ("NLADA Rep.").[5]

After years of handwringing in response to those findings—and around the time that plaintiffs filed this lawsuit—the Legislature amended the public defense statutes in 2014. Among other things, the amendments created the Public Defense Commission ("PDC"), which was tasked with creating standards to ensure

[5] https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2022/standingcommittees/220301_hjud_other_meet_time-Minutes_Attachment_1.pdf.

constitutional levels of public defense service to indigent clients. *See* I.C. §§ 19-859(1)-(4) (2014), 19-849 (2014), 19-850 (2014). But even after that legislation, Governor Otter admitted in 2015 that the State's "method of providing legal counsel for indigent criminal defendants does not pass constitutional muster." Am. Compl. 2022 ¶¶ 4, 137; Answer ¶ 112. Moreover, it was only after plaintiffs filed this action that the Legislature enacted further laws mandating that the PDC promulgate and enforce appropriate public defense standards. *See* I.C. § 19-850 (2014).

Despite the State's recurring refrain that change is coming, Idaho's public defense crisis endures. Indeed, the State has already twice contended in this very case that this Court should not reach the merits because newly enacted legislation would soon resolve plaintiffs' grievances. Each time, this Court rejected that unfounded contention. *See Tucker v. State*, 162 Idaho 11, 27-28, 394 P.3d 54, 70-71 (2017) (*Tucker I*); *Tucker II*, 168 Idaho at 582. Plaintiffs have provided ample evidence to show that none of the State's reforms have eradicated the issues they sought to address. *See, e.g.*, Appellants' Br. 36-45. Indeed, even the district court here expressed "serious concerns over the adequacy" of Idaho's public defense system. Order at 20. And the State's recent abandonment of the PDC-based system itself *confirms* that the State's prior public defense system failed to deliver

constitutionally adequate services. Indeed, the latest round of legislation would be unnecessary if the previous regime had been effective.

* * *

In short, Idaho has failed for years on end to make good on its promise to provide a functional public defense system, and the State has provided scant reason to think that this time will be different. History has shown that these enduring problems will not be solved overnight. This Court should consider that history when considering the State's latest assurances that it has fixed the problem.

CONCLUSION

This Court should reverse the judgment of the district court.

Of Counsel:

Rachel G. Miller-Ziegler
Stephany Reaves
Kyle A. Schneider
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Avenue NW
Suite 500E
Washington, DC 20001
(202) 220-1100

/s/ Deborah A. Ferguson
Deborah A. Ferguson, ISB No. 5333
Craig H. Durham, ISB No. 6428
FERGUSON DURHAM, PLLC
223 N. 6th Street
Suite 325
Boise, ID 83702
(208) 724-2617
daf@fergusondurham.com

Dated: September 23, 2024

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 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:

Joseph M. Aldridge
Keegan C. Hahn
SCANLAN GRIFFITHS + ALDRIDGE
913 W. River Street, Suite 310
Boise, Idaho 83702

James E. M. Craig
CIVIL LITIGATION DIVISION
OFFICE OF THE ATTORNEY GENERAL
700 W. Jefferson Street, Suite 210
PO Box 83720
Boise, Idaho 83720

Slade D. Sokol
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, Idaho 83702

Robert B. Duncan
Joe Cavanaugh
Jimmy McEntee
Devin Urness
Alessandra Carozza
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, D.C. 20004

Richard Eppink
Emily Croston
ACLU OF IDAHO
P.O. Box 1897
Boise, Idaho 83701

Elizabeth C. Lockwood
ALI & LOCKWOOD LLP
300 New Jersey Ave, N.W., Suite 900
Washington, D.C. 20001

Emma Andersson
Ashika Verriest
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street 18th Fl.
New York, New York 10004

Dated: September 23, 2024

By: */s/ Deborah A. Ferguson*
Deborah A. Ferguson