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IN THE SUPREME COURT OF THE STATE OF IDAHO

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, REP. DAVID CANNON, HON. LINDA COPPLE TROUT, DAN DINNING, BEN ANDERSON, SEN. MELISSA WINTROW, and ERIC LEHTINEN, in their official capacities as members of the Idaho State Public Defense Commission,

Defendants-Respondents.

Supreme Court Docket No. 51631-2024

Ada County District Court No. CV-OC-2015-10240

RESPONDENTS' OPPOSITION TO APPELLANTS' MOTION TO MODIFY INJUNCTION AND FOR AN ORDER TO SHOW CAUSE WHY FURTHER RELIEF ON DECREE SHOULD NOT BE GRANTED

Respondents State of Idaho, Darrell G. Bolz, Angela Barkell, Rep. David Cannon, Hon. Linda Copple Trout, Dan Dinning, Ben Anderson, Sen. Melissa Wintrow, and Eric Lehtinen, by and through their attorneys of record, hereby submit this memorandum in opposition to Appellants' Motion to Modify Injunction and for an Order to Show Cause Why Further Relief on Decree Should Not Be Granted ("Motion to Modify" or "motion").

I. INTRODUCTION

If Appellants want to attack the new public defense system, they need a new lawsuit. They need new class representatives: the current ones have not been harmed by the new system and lack standing to challenge it. They need a new defendant: their motion seeks relief against the State Public Defender, who is not a party to this appeal. They need new evidence—in fact, they admit they need new evidence, taking the unprecedented step of asking the court to leave the record open and permit continuous augmentation until 21 days before oral argument.

There is a name for a period when the record can be augmented freely: it's called discovery, and it happens in trial courts.

The Idaho Supreme Court is the court of last resort in Idaho—not of first resort. It does not usurp the trial court's role by taking new evidence and adjudicating disputed issues of fact, as Appellants are asking it to do. Its appellate rules do not permit or provide any framework for the factual development and adjudication that Appellants' motion demands.

To invoke this Court's appellate jurisdiction, Appellants call their filing a "motion to modify injunction," but it is no such thing. Filed only three months after the SPD took over public defense in Idaho, and one month before the SPD goes before the legislature ***for the first time*** to request a budget, the motion does not seek to modify the district court's injunction against

returning to the county-based system. Instead, it invites this Court to adjudicate—in the first instance—the adequacy of a brand-new statewide system that had not taken effect when this appeal started and which is certain to change substantially before the appeal concludes.

Because Appellants' motion is not actually a motion to modify an injunction but seeks entirely new relief outside the scope of the underlying case, this Court lacks jurisdiction to hear it and it should be denied.

II. PROCEDURAL HISTORY[1]

On February 6, 2024, the District Court dismissed this case and entered an injunction prohibiting the State from reverting back to a county-based or state-assisted indigent defense system. R. at 5573-74. Appellants filed their Notice of Appeal on February 20, 2024. R. at 5578-93. The parties filed their initial appellate briefs in the fall of 2024, and in the intervening time the SPD took over all public defense responsibilities in Idaho.

On December 23, 2024, Appellants filed their reply brief, along with the current Motion to Modify and multiple declarations and exhibits which are not part of the Clerk's Record on Appeal.

On December 31, 2024, Respondents filed a Motion to Extend Time, requesting: 1) An extension to January 31, 2025, to file a responsive brief addressing whether Appellants' motion is proper from a jurisdictional and procedural perspective; and 2) If the Court determines it will consider new evidence on appeal, an extension granting Respondents sufficient time to prepare and submit their own evidence, and for the Court to provide the parties with the procedural

[1] As the Court is aware, this case has a long and complex procedural history as the Respondents have previously provided. *See* Respondents' Brief, at 2-9.

framework for adding parties, obtaining discovery, and ruling on the admissibility of new evidence.

On January 3, 2025, this Court granted Respondents' Motion to Extend Time. This opposition brief follows.[2]

III. ARGUMENT

Appellants' motion appears to be asking for four broad categories of relief: (1) immediate injunctive relief for their new claims; (2) injunctive relief for their original claims pending on appeal; (3) augmentation of the record with new evidence; and (4) expedited review. The Respondents will address each in turn.

A. Appellants' request for immediate injunctive relief is improper and should not be considered because: 1) the Court does not have appellate jurisdiction to grant entirely new relief; 2) Appellants have not asked the Court to invoke its original jurisdiction; and 3) the class representatives do not have standing.

The Idaho Supreme Court's jurisdiction is limited to original and appellate jurisdiction. IDAHO CONST. art. V, § 9; Idaho Code §1-202.[3] And a party wishing to invoke this Court's jurisdiction must have standing to do so. *Reclaim Idaho v. Denney*, 169 Idaho 406, 418, 497 P.3d 160, 172 (2021) (citing *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002)). These jurisdictional requirements are fatal to Appellants' motion.

1. Appellants' request for immediate injunctive relief seeks entirely new relief for which the Court does not have appellate jurisdiction.

[2] Idaho Appellate Rule 32 does not contemplate a reply brief in support of a motion, and Respondents maintain fundamental fairness dictates Appellants **not** be permitted what would amount to a fourth bite at the apple in the form of a reply brief in support of their Motion to Modify.
[3] Appellants have not petitioned the Court to invoke its original jurisdiction to hear the claim. *See* IDAHO CONST. art. V, § 9; I.A.R. 5(a), (c).

Appellants ask the Court to enter immediate injunctive relief requiring "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." *Motion to Modify*, at 19.[4]

Appellants ostensibly claim Idaho Rule of Civil Procedure 62(g)(1) and Idaho Code § 10-1208 provide this Court with appellate jurisdiction that would allow it to grant their new request for immediate relief under the guise of "modifying" the injunction entered by the District Court. *Motion to Modify*, at 18. But the immediate relief requested in Appellants' motion to modify is new relief that was never requested in Appellants' underlying complaint. *See generally* R. at 80-87; C.R. 142-207.[5]

The actual injunctive relief the District Court provided was future prospective injunctive relief:

> Thus, to the extent Plaintiffs seek a decree that the state-based system cannot revert to the county-based system or even the state-assisted county-based system as it existed when summary judgment was sought, the Court will oblige. This means that Idaho's public defense system cannot be revived in any of its previous states. If in the future, Idaho's public defense system were to revert back to a county-based system (even if state-assisted), this decree may act as a means to relief for future plaintiffs. To that extent, Plaintiffs' Motion for Summary Judgment is GRANTED.

R. at 5574.

[4] While outwardly claiming otherwise, Appellants acknowledge this is new relief by also requesting the Court enter an injunction granting "the full relief they have requested all along," specifically: (1) declaratory relief providing Idaho's indigent defense system is unconstitutional; (2) injunctive relief requiring the State to create and implement a plan to remedy the alleged violations; and (3) appointing an independent monitor. *Motion to Modify*, at 18-19.

[5] Limited Clerk's Record on Appeal prepared for *Tucker II*.

Appellants new request for relief is not a "modification" of the existing injunctive relief granted by the District Court. Appellants are asking for individual indigent defendants to be released from custody—an entirely different injunction (which has never been asked for) than the future prospective systemic injunctive relief entered by the District Court. Appellants' new request for relief is beyond the Court's appellate jurisdiction. While Respondents do not dispute that this Court has appellate jurisdiction to review the District Court's decisions in this matter, the limited prospective injunctive relief provided by the District Court does not confer this Court with appellate jurisdiction to enter entirely new relief—which Appellants have never previously prayed-for and is not requested in their Complaint.

The Ninth Circuit has come to the same conclusion that a court may not provide relief beyond that requested in a party's complaint, holding that "[a] court's equitable power lies only over the merits of the case or controversy before it. When a plaintiff seeks injunctive relief based on claims not pled in the complaint, the court does not have the authority to issue an injunction." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 633 (9th Cir. 2015).

In *Pac. Radiation Oncology*, the appellant's complaint raised unfair trade practices claims. 810 F.3d at 633. During litigation, some discovery was inadvertently filed with unredacted patient information. *Id*. at 634. The appellant subsequently filed a "motion for a temporary restraining order, or alternatively a preliminary injunction" alleging the respondent had violated HIPPA and the Hawaii Constitution. *Id*. at 634. In affirming the district court's denial of the motion, the Ninth Circuit noted that the appellant was "seeking to enjoin [respondent]'s use of private patient information—a remedy that will not be provided if [appellant] succeeds in its underlying unfair trade practices suit." *Id*. at 637. The Ninth Circuit reasoned the appellant could have sought leave

to amend its complaint to raise its new claims or bring a separate suit. *Id*. at 638. The court found the appellant was not entitled to relief because it had failed to do so. *Id*. *See also Am. Career Coll., Inc. v. Medina*, No. CV 21-698 PSG (SKX), 2021 WL 8742155, at *3 (C.D. Cal. Dec. 9, 2021) ("But it is beyond dispute that the Court 'does not have the authority to issue an injunction based on claims not pled in the complaint,' so Plaintiffs' attempt to put the cart before the horse also does not entitle them to the extraordinary relief they seek.").[6]

In the present case, though the relief sought in Appellants' motion is distinct, the considerations are comparable to those in *Pac. Radiation Oncology*. In their Complaint, Appellants seek systemic reform of indigent defense in Idaho, not the individualized relief they currently ask for in their Motion to Modify. *See Tucker v. State*, 162 Idaho 11, 19, 394 P.3d 54, 62 (2017) ("*Tucker I*") ("[Appellants] have not asked for any relief in their individual criminal cases. Rather, they seek to effect systemic reform."). Appellants' request for immediate injunctive relief would not "grant 'relief of the same character as that which may be granted finally.'" Because the requests for relief are entirely distinct, the Court lacks authority to grant the requested relief under its appellate jurisdiction.

Appellants claim the Court should grant the same relief as was granted in *Betschart v. Garrett*, 700 F. Supp. 3d 965, 981 (D. Or. 2023), a federal habeas corpus case in Oregon brought by two groups of pretrial defendants who were without access to an attorney. *See Motion to Modify*, at 20-21. However, Appellants' arguments are misplaced, as *Betschart* is procedurally

[6] *See also* 42 Am. Jur. 2d Injunctions § 235 ("Plaintiffs cannot seek injunctive relief not requested in the complaint. . . . In the absence of a complaint requesting particular relief, and setting out the basis for jurisdiction, a court lacks the jurisdiction to grant either a temporary restraining order (TRO) or a preliminary injunction.").

distinguishable from the present case. As provided in the original *Betschart* decision, the petitioners filed a Writ of Habeas Corpus, specifically seeking the immediate release for the class representatives and class members in custody that had not been appointed counsel. *Betschart v. Garrett*, No. 3:23-CV-01097-CL, 2023 WL 5288098, at *1 (D. Or. Aug. 17, 2023).[7] The petitioners also filed a motion seeking a provisional class certification and a motion for a temporary restraining order. *Id*. After considering the merits, the court provisionally certified—and eventually did certify—the "Custody Class," which specifically included:

> (1) indigent and unable to afford an attorney, (2) facing criminal charges in Washington County, (3) who are physically housed in a Washington County Detention Center, and (4) who have not had an attorney appointed to represent them within ten days of their initial appearance, (5) or have had an attorney appointed to their case who subsequently withdrew and no substituted counsel has been appointed within ten days of their withdrawal.

Id. at *5.[8] The court found the class met the Rule 23 requirements, and that the class representatives adequately represented the interests of the class. *Id*.

In Appellants' case, their motion is the first time they have sought this type of relief—in a case initially brought in June 2015. Unlike *Betschart*, where the petitioners were seeking that exact relief, Appellants have only sought systemic reform rather than relief in the class members' individual cases. *See Tucker I*, 162 Idaho at 19, 394 P.3d at 62. And unlike *Betschart*, the

[7] *On reconsideration*, 700 F. Supp. 3d 965 (D. Or. 2023), *amended*, 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).

[8] The petitioners also sought a second class made up of defendants "who were released in the community on restrictive conditions." *See Betschart v. Garrett*, 700 F. Supp. 3d 965, 978 (D. Or. 2023). The court denied certifying this second class because it failed to meet the commonality requirement. *Id*. at 979. The court also found the *Younger* abstention doctrine applied to the "restrictive conditions" class. *Id*. at 977-78.

allegations in Appellants' motion arise from the actions of a new state agency that is not a party to the current appeal, on behalf of individuals who have not suffered the same alleged harm as the named class representatives. To bring the new claims alleged in their motion, Appellants would need to file a new lawsuit.

2. Appellants have not sought to invoke this Court's original jurisdiction.

"The Idaho Constitution vests this Court with 'original jurisdiction' to issue writs of mandamus and prohibition, 'and all writs necessary or proper to the complete exercise of its appellate jurisdiction.'" *The Associated Press v. Second Jud. Dist.*, 172 Idaho 113, 120, 529 P.3d 1259, 1266 (2023) (quoting IDAHO CONST. art. V, § 9). A party seeking to have the Court exercise its original jurisdiction must apply to the Court "for the issuance of any extraordinary writ or other proceeding." I.A.R. 5(a), (c).

Appellants have not petitioned the Court to invoke its original jurisdiction. Nor would the Respondents be required to respond to such an application unless requested to by the Court. I.A.R. 5(a).

3. Appellants' class representatives do not have standing to seek the requested immediate relief, as they have not suffered the injuries alleged in Appellants' motion.

Appellants' request also fails because the class representatives do not have standing to bring this new request for immediate injunctive relief. "Standing is a preliminary question to be determined by this Court before reaching the merits of the case." *Young*, 137 Idaho at 104, 44 P.3d at 1159 (citing *Miles v. Idaho Power Co.,* 116 Idaho 635, 637, 778 P.2d 757, 759 (1989)). *See also Tucker v. State*, 168 Idaho 570, 574, 484 P.3d 851, 855 (2021) ("*Tucker II*"). "Standing focuses

on the party seeking relief and not on the issues the party wishes to have adjudicated." *Young*, 137 Idaho at 104, 44 P.3d at 1159 (citations omitted).

"Under the traditional standing analysis, 'the plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'like[lihood]' that the injury 'will be redressed by a favorable decision.'" *Tucker I*, 162 Idaho at 19, 394 P.3d at 62 (quoting *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015)). "In a class action, standing is met if at least one named plaintiff satisfies the requirements of standing against every named defendant." *Id*.

Here, Appellants' four named class representatives have not suffered the new injury being complained of in Appellants' new request for immediate injunctive relief. "Injury in fact requires the injury to 'be 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Tucker I*, 162 Idaho at 19, 394 P.3d at 62. As discussed *supra*, Appellants are seeking an entirely new and distinct form of relief, not pled or prayed-for in their Complaint. The class representatives' criminal cases occurred prior to the SPD's enactment. None of the class representatives could have suffered from a failure to communicate "with any attorney within seven days of SPD's appointment." *Motion to Modify*, at 19. Nor could a class representative have suffered from the failure of an attorney to appear "to assist at any bond argument, preliminary hearing, trial, or sentencing" after the SPD was implemented. *Id*. The new state-based system took over indigent defense in Idaho less than three months from Appellants' motion. None of the class

representatives suffered—nor could have suffered—from the harm alleged in the motion.[9] As such, the class representatives do not have standing to bring the motion.

B. Appellants' apparent request to have the Court enter a preliminary injunction granting the ultimate relief requested in their Complaint is an improper attempt to usurp the appellate process.

As an initial matter, Appellants' request for relief is unclear but they appear to use their motion as a platform to again argue why the Court should grant their requested relief on appeal. *Motion to Modify*, at 22-25. If Appellants are not seeking immediate relief related to their appellate claims but are instead arguing in support of their appeal for a third time, the Court should dismiss Appellants' arguments out of hand. Appellants have already filed their opening and reply briefs. They are not entitled to a third appellate memorandum in support of their position (especially one which raises new issues, asks for additional monitoring, and improperly relies on facts outside the record).[10] *See* I.A.R. 34(c).

If indeed Appellants are asking the Court to enter an injunction granting the actual relief requested in their Complaint (in addition to their new request for relief addressed above) while the merits of the appeal are pending, *see Motion to Modify*, at 18-19, Appellants' request should be

[9] In addition, Appellants' class was not certified for this issue and is improper for the new relief Appellants seek. The class representatives fail the commonality, typicality, and adequacy requirements under Rule 77(a), as the class representatives did not suffer (nor could they have) suffered the harm alleged in Appellants' new request for relief. The Respondents have previously sought to decertify future class members post October 1, 2024, following the enactment of the SPD, because the named class representatives would no longer meet the requirements of Rule 77(a) or (b)(2). *See* R, at 1151. The District Court did not rule on merits of the Respondents' motion because it ultimately granted its Motion to Dismiss. *See* R. at 5575.

[10] If Appellants are attempting to improperly argue in favor of their appeal for a third time, this is in violation of Idaho Appellate Rules which only allow for an opening and reply memorandum from an appealing party. *See* I.A.R. 34(c). Appellants have not sought to augment their briefing pursuant to I.A.R. 34(e) or shown good cause as to why augmentation is necessary. Such a filing is improper.

denied. The request would not maintain the status quo, is improper under Idaho law, and would usurp the appeal process. *See McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012) ("[T]he purpose of a preliminary injunction is to preserve the status quo between the parties pending a resolution of a case on the merits.").

Appellants baselessly claim such a decision is proper "[f]or the reasons discussed in [Appellants]' Opening and Reply briefs." *Motion to Modify*, 22.[11] Appellants cite no other rules, and instead rely on case law that is procedurally and factually distinguishable.[12] The Court should deny Appellants' request as they have not met the high burden of showing a preliminary injunction is proper generally, let alone one altering the status quo while an appeal on the merits is pending.[13]

1. Appellants have not attempted to meet their burden to show that a preliminary injunction is proper under Rule 62(g) or Rule 65(a).

If indeed Appellants are asking the Court to grant their prayed-for relief while the merits of the appeal remain pending, they have not attempted to meet the burden required of them to do so. *Motion to Modify*, at 18-19, 22-25. Under the analogous federal rule of civil procedure, federal

[11] For the reasons provided *infra*, the Court should not consider the new evidence Appellants improperly attach to their motion.

[12] While Idaho does not have a parallel rule, the federal rules of appellate procedures ordinarily require the party seeking an injunction on appeal to first bring their request to the district court. F.R.A.P. 8(a)(1). *See also* 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2908 (3d ed. 2023). While it does not contemplate a party seeking an injunction, Idaho Appellate Rule 13(g) requires a party seeking a stay on appeal to "first make application to the district court." I.A.R. 13(g). *See also Payne v. Skaar*, 127 Idaho 341, 347, 900 P.2d 1352, 1358 (1995) (upholding the district court's decision to modify an injunction under Rule 62(c) while an appeal was pending).

[13] If Appellants' request is granted, it would very likely have the practical effect of mooting the pending appeal, as the State would be ordered to implement another entirely new system of indigent defense and bring in a monitor to oversee the implementation of indigent defense.

appellate courts have been highly skeptical of granting injunctive relief which would have the ultimate effect of granting the requested relief while the merits are still being considered:

> There is, of course, a considerable reluctance in granting an injunction pending appeal when to do so, in effect, is to give the appellant the ultimate relief being sought. Thus, to succeed in obtaining an injunction in these circumstances, the appellant will be required to show a great likelihood that he will prevail when the case finally comes to be heard on the merits and that a denial of interim relief will result in irreparable injury.

11 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2904 (3d ed. 2023).[14] *See also Kane v. De Blasio*, 19 F.4th 152, 163 (2d Cir. 2021) ("The 'purpose' of a preliminary injunction 'is not to award the movant the ultimate relief sought in the suit but is only to preserve the status quo by preventing during the pendency of the suit the occurrence of that irreparable sort of harm which the movant fears will occur.'"); *Dunn v. Retail Clerks Int'l Ass'n, AFL-CIO, Loc. 1529*, 299 F.2d 873, 874 (6th Cir. 1962) ("The mandatory order which appellants request is the ultimate relief sought in the District Court and in this appeal. T[o] obtain such relief appellants would have to prevail on the merits of the case. We ought not to grant temporary relief which would finally dispose of the case on its merits.").

"A preliminary injunction is the 'strong arm of equity' which, as an extraordinary remedy, must be exercised with great restraint." *Planned Parenthood Great Nw. v. State*, 172 Idaho 321, 325, 532 P.3d 801, 805 (2022) (citations omitted).[15] The Court will only grant a mandatory preliminary injunction in an "extreme case." *Harris v. Cassia Cnty.*, 106 Idaho 513, 518, 681 P.2d

[14] Wright & Miller provide their explanation in connection with F.R.C.P. 62(c) & (g), which are analogous to I.R.C.P. 62(c) & (g).

[15] The Court noted that the common law standard for a preliminary injunction, prior to Idaho becoming a territory, was: "(1) a preliminary injunction would issue only if the right to the ultimate relief requested was 'clear' and (2) such preliminary relief could *not* be issued in 'doubtful cases, or new ones, not coming within well established principles . . . ..'" *Id*. (emphasis in original).

988, 993 (1984) (quoting *Evans v. District Court of the Fifth Judicial District,* 47 Idaho 267, 270, 275 P. 99, 100 (1929)).[16] "One who seeks an injunction has the burden of proving a right thereto . . ." *Id*.

Idaho Rule of Civil Procedure 65(e) governs the entry of a preliminary injunction, and provide in relevant part:

> **(e) Grounds for Preliminary Injunction**. A preliminary injunction may be granted in the following cases:
>
> > (1) when it appears by the complaint that the plaintiff is entitled to the relief demanded, and that relief, or any part of it, consists of restraining the commission or continuance of the acts complained of, either for a limited period or perpetually;
> > (2) when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff[.]

I.R.C.P. 65(e)(1), (2). The Court has interpreted these rules to require a conjunctive standard. *Planned Parenthood Great Nw.*, 172 Idaho at 325, 532 P.3d at 805 (2022) (citations omitted). First, the party seeking a preliminary injunction "must demonstrate a *substantial* likelihood of success on the merits or a 'clear right' to the ultimate relief requested." *Id*. at 325, 27, 532 P.3d at 805, 807 (emphasis in original). Second, the party must demonstrate that "irreparable injury will flow" from the denial of the preliminary injunction. *Id*. at 325-26, 532 P.3d at 805-06. If a preliminary injunction granting their ultimate relief is indeed what Appellants' request in their motion, their request fails as they have not, nor can they, meet their burden.

i. Appellants have not shown there is a clear right to the ultimate relief requested or a substantial likelihood of success.

[16] "A mandatory injunction 'orders an affirmative act or mandates a specified course of conduct.'" *City of Boise v. Ada Cnty.*, 147 Idaho 794, 804, 215 P.3d 514, 524 (2009) (quoting 43A C.J.S. *Injunctions* 13 (2009)).

Appellants are seeking systemic reform to the indigent defense system in Idaho, not relief in their class members' individual cases. *Tucker I*, 162 Idaho at 19, 394 P.3d at 62. The State recognizes it has the "has ultimate responsibility to ensure that the public defense system passes constitutional muster." *Id*. at 21, 394 P.3d at 64. However, Appellants do not have a clear right to have the new system of indigent defense declared unconstitutional or to require the State to (again) implement a new system without first proving:

> [B]y a preponderance of the evidence that Idaho's public defense system suffers from widespread, persistent structural deficiencies that likely will result in indigent defendants suffering actual or constructive denials of counsel at critical stages of criminal proceedings.

Tucker II, at 585, 484 P.3d at 866. The District Court dismissed Appellants' suit, noting they had never actually proven their claims of widespread structural deficiency. R. at 5573.[17] Appellants have not provided any evidence to suggest they have a "clear right" to have an independent monitor look over the shoulder of the SPD—who is already tasked with monitoring indigent defense in the State. Nor have Appellants shown that an independent monitor would do anything to benefit indigent defense in Idaho, as the SPD is already statutorily tasked with monitoring, assessing, and advocating for indigent defense in the State. *See* Idaho Code § 19-6005.[18]

Likewise, Appellants cannot show they have a substantial likelihood of succeeding on the merits. "The substantial likelihood of success necessary to demonstrate that appellant[s] are entitled to the relief they demanded cannot exist where complex issues of law or fact exist which

[17] "[Appellants] have not yet actually proven the county-based system, or the state-assisted system, truly had 'widespread, persistent structural deficiencies' and was therefore unconstitutional." R. at 5573.

[18] *See also* Mia Maldonado, *Idaho Governor Recommends $88 Million for State Public Defender FY 2026 Budget*, IDAHO CAPITAL SUN, https://idahocapitalsun.com/2025/01/08/idaho-governor-recommends-88-million-for-state-public-defender-fy-2026-budget/.

are not free from doubt." *Harris*, 106 Idaho at 518, 681 P.2d at 993. *See also Planned Parenthood Great Nw.*, 172 Idaho at 327–28, 532 P.3d at 807–08. Appellants cannot seriously contend this case does not involve complex issues of law or fact. Rather, this is a state-wide class action lawsuit involving multiple constitutional issues and a vast record. Appellants filed their lawsuit in June 2015, and this is the third Supreme Court appeal.[19]

This Court, and the District Court, have recognized that indigent defense has been transformed under the new SPD Act. *See State v. Blazek*, No. 51842, 2024 WL 4982927, at *3 (Idaho Dec. 5, 2024) ("The State Public Defender Act, passed by the Idaho Legislature in 2023, transformed the manner in which indigent public services are delivered in Idaho."); R. at 5575-76. The new state-based system had been in existence for just under three months when Appellants filed their Motion to Modify. Appellants cannot show the new SPD system suffers from "widespread, persistent structural deficiencies" at this early stage. *See Tucker II*, at 585, 484 P.3d at 866.

Ultimately, Appellants do not have a clear right to a declaration that Idaho's new indigent defense system is unconstitutional, nor do they have a clear right to have the Court order the State to implement another new system. They have no clear right to have the Court appoint a monitor to do a job that is already being done. There is no question this case involves complex issues of law and fact, which are heavily disputed by both sides. Appellants cannot show there is a "substantial likelihood of success of succeeding on the merits."

[19] Further highlighting the legal complexity, *Tucker II* was an interlocutory appeal so the Court could provide the proper legal standard to be applied. *Tucker II*, at 583, 484 P.3d at 865.

ii. Appellants have not shown irreparable harm will flow if their relief is not granted.

To be entitled to a preliminary injunction in this matter, Appellants would have the burden of demonstrating that irreparable harm will flow unless the Court immediately declares the provision of indigent defense in Idaho unconstitutional, orders the State to create a new plan to provide indigent defense, and appoints an independent monitor to oversee indigent defense in Idaho. *See Harris*, 106 Idaho at 518, 681 P.2d at 993. They have made no such showing.

Appellants' motion does not appear to address the irreparable harm requirement—at least not in the proper context of this systemic class action case. As such, they have not met their burden in this regard. As the District Court noted in its *Amended Memorandum Decision*, intervention of the sort Appellants ask for "could further delay the efforts already underway, all while not offering an inkling of additional relief for Plaintiffs and the class members they represent." R. at 5575. The District Court's reasoning—which this Court should adopt—was that requiring such action could "at best, duplicate the State's efforts and waste finite public resources in the process. At worst it might invite inter-governmental confusion and conflict over the details of carrying out an agreed objective." *Id*. The same reasoning still applies. "Perhaps the lawyers would benefit, but it is difficult to see how anyone else would." *Id*.

The SPD has been operational since October 1, 2024, approximately three months from the time of Appellants' motion. Despite Appellants' attempts to simplify the statewide provision of indigent defense, such a system is not static. The SPD and Idaho legislature have not yet had a chance to go through a legislative session while the new state system is in effect. One known benefit of this state system is the centralized collection of data and information under one agency, rather than collecting data from Idaho's 44 counties. Yet Appellants ask the Court to order the

State to create another new indigent defense system—despite the SPD being in its infancy—before the State has time to continue to shape and improve the new system through legislation and budget increases.[20]

Appellants motion is a continuation of their "I'll know it when I see it" argument. They do not explain how a new system would immediately fix all of their alleged issues, nor why any new system would not also encounter bumps in the road. Instead, Appellants ask the State to create another new plan. As the Respondents have previously provided, this is exactly what the State did in enacting the SPD Act. In creating the system, prominent stakeholders from around the State spent time researching and studying different indigent defense systems around the country to figure out what would work in Idaho. *See* R. at 3644-45, 3652, 4442-48, 4535, 4539-40, 4645, 4647-49, 4665-67, 4670-75 4677-80, 4682. The enactment also took legislative support. *See generally id*. Appellants are asking the Court to have the State throw away all that work after less than three months of the state system. An immediate order by the Court would have the practical effect of taking time and legislative resources away from any immediate improvements to the current system.

2. The SPD is not a party to this lawsuit.

The relief Appellants request also requires action by the SPD, which is not a party to this case—a fact Appellants acknowledge. *See* App. Br. at 10 n.6. As such, the Court does not have personal jurisdiction over the agency. *See Hooper v. State*, 150 Idaho 497, 500, 248 P.3d 748, 751

[20] *See* Mia Maldonado, *Idaho Governor Recommends $88 Million for State Public Defender FY 2026 Budget*, *supra* note 18.

(2011) ("There must be personal jurisdiction over a party before a court may enter an order against it, whether in a civil or criminal case . . . .").[21]

C. Appellants' extraordinary request to augment the record should be denied because appellate review is limited to the record below and Appellants have not shown extraordinary circumstances.

Appellants ask for the extraordinary relief of supplementing the appellate record with new evidence, and to continue to do so "until 21 days before oral argument." *Motion to Modify*, at 26. Appellants ask this Court to act as a factfinder and to seemingly open up discovery—without the need for any discovery procedures[22]—to apparently only allow Appellants to supplement (and continue to supplement) the record. *Motion to Modify*, at 25-26. In doing so, Appellants ask the Court to abandon basic tenets of the appellate process.[23]

The Court has "long held that '[a]ppellate court review is limited to the evidence, theories and arguments that were presented below.'" *State v. Garcia-Rodriguez,* 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) (*Nelson v. Nelson*, 144 Idaho 710, 714, 170 P.3d 375, 379 (2007)). "As a court of appellate review, we do not act as a fact finder on appeal." *Angelos v. Schatzel*, 556 P.3d 441, 449 (Idaho 2024) (citing *Safaris Unlimited, LLC v. Von Jones*, 163 Idaho 874, 886, 421 P.3d

[21] If the Court does intend to consider Appellants' request for injunctive relief, Idaho Rule of Civil Procedure 65(c) requires a movant to provide a security before the "court may issue a preliminary injunction or a temporary restraining order." The Court has held this security is "mandatory, unless the trial court makes a specific finding based upon competent evidence that no such costs, damages or attorneys fees will result to the restrained party as a result of a wrongful issuing of the injunction or restraining order." *Hutchins v. Trombley*, 95 Idaho 360, 364, 509 P.2d 579, 583 (1973). *See also Miller v. Bd. of Trustees*, 132 Idaho 244, 247, 970 P.2d 512, 515 (1998). It does not appear such a security has been provided in this case. And the State would incur significant costs, including the cost of preparing a new indigent defense system, paying a monitor, and additional attorneys' fees.

[22] *See Appellants' Opposition to Motion to Extend Time*, at 1-2.

[23] Appellants also ask the Court not to consider Idaho Appellate Rule 30—the appellate rule dealing with augmentation—in favor of Idaho Appellate Rule 44 which allows the Court to alter any procedures upon a finding of "extraordinary circumstances."

205, 217 (2018)). *See also Siercke v. Siercke*, 167 Idaho 709, 716, 476 P.3d 376, 383 (2020) ("This Court can hear refined legal arguments regarding an issue heard and decided by the court below, but in fairness to the district court and the opposing party, we cannot usurp the district court's role by deciding new legal issues in the first instance."); *Frontier Dev. Grp., LLC v. Caravella*, 157 Idaho 589, 595, 338 P.3d 1193, 1199 (2014) ("Because this Court does not act as a trier of fact, we may not, for the first time on appeal, find that the Caravellas have proven all nine elements of fraud by clear and convincing evidence."); *Nelson*, 144 Idaho at 714, 170 P.3d at 379 ("Kyle's introduction of evidence before this Court by way of his briefing is improper and will be disregarded."); *State v. Islas*, 165 Idaho 260, 265–66, 443 P.3d 274, 279–80 (Ct. App. 2019); *State v. Two Jinn, Inc.*, No. 36339, 2010 WL 1980405, at *2 n.1 (Idaho Ct. App. May 19, 2010), *aff'd*, 151 Idaho 725, 264 P.3d 66 (2011) ("Appellate court review is limited to the evidence that was presented in the trial court, and an attempt to introduce new evidence on appeal by attaching documentation to an appellate brief 'is improper and will be disregarded.'").

Appellants cite Appellate Rule 44 and *Patterson v. Alabama*, 294 U.S. 600 (1935) for their claim the Court may alter the rules upon "extraordinary circumstances." The Respondents are unaware of any Idaho case where the Court has granted relief in the manner Appellants are requesting. Appellants claim augmentation is necessary because of their claims that the indigent defense system under the SPD is unconstitutional, and because augmentation will promote judicial economy. Appellants' claim fails on both grounds.

1. **The enactment of the new state system is not an extraordinary circumstance that would warrant augmenting the record.**

Appellants are attempting to capitalize on cherry-picked issues stemming from the State's recent overhaul of the indigent defense system in Idaho. However, as national indigent defense

proponents recognize, implementing a new system takes time and is not necessarily a smooth transition.[24] Appellants themselves acknowledged that the adequacy of the new state system in Idaho "will not be known for some time." App. Br. at 11. The District Court also recognized it would take time to determine if the state system suffers from structural problems. R. at 5574. ("Currently, there are no criminal defendants or cases under the new state-based system. It will take at least a few years before sufficient cases move through the judicial process before any determination could be made whether there are any 'widespread, persistent, structural deficiencies' in existence.").

Appellants' request highlights the wisdom of the District Court's decision to dismiss this case based on the prudential mootness doctrine. The District Court identified that the new state system was a massive undertaking that completely changed indigent defense in Idaho and would take time to implement. R. at 5574-76. Appellants decried the District Court's reasoning. App. Br. at 32 n.18. However, by asking the Court to augment (and to continue to augment) the record, Appellants implicitly recognize evidence from the prior system is not relevant to the current state of indigent defense. As the Respondents have provided, and as was recognized by the District Court, Appellants proper course of action is to file a new lawsuit if they believe the new system

[24] See, e.g., Public Defenseless, *Unveiling the National Public Defender Workload Standards and the Strategy to Implement Them w/ Stephen Hanlon*, Hunter Parnell (Host) featuring Stephen F. Hanlon (Guest), (September 12, 2023) at timestamp 20:55-21:20, https://tr.ee/vWv0PtFHLn ("We're not going to dig it out overnight. . . . I think about in five years, we need to correct this wrong. . . . We're going to have specific plans. . . . Five years, okay, for you to be able to get this. . . .into compliance."); Aditi Goel, *Revised ABA Ten Principles: A new public defense roadmap for policymakers*, The Sixth Amendment Center (August 8, 2023), https://sixthamendment.org/revised-aba-ten-principles-a-newpublic-defense-roadmap-for-policymakers/ ("While this offers a critical roadmap for policymakers, implementing these revisions will not be easy and will take time.").

suffers from "widespread, persistent, structural deficiencies." A desire to forego the ordinary course of litigation and instead obtain a different result from an appellate court based on new evidence does not constitute an extraordinary circumstance.

Finally, Appellants' self-serving claim that the new SPD system is unconstitutional is not evidence of extraordinary circumstances. It's the continuation of a circular strategy of declaring the system is unconstitutional because they've repeatedly said it's unconstitutional. Appellants have never proven that the *prior* system was unconstitutional (*see* R. at 5573), let alone the new state-based system. And Appellants have never sought relief for class members' individual criminal cases, but for systemic reform. *See Tucker I*, 162 Idaho at 19, 394 P.3d at 62. Systemic changes do not happen overnight.[25] Appellants' continued claim that the system is unconstitutional is not evidence of "extraordinary circumstances."

2. Augmenting the record would not promote judicial efficiency and is not warranted by extraordinary circumstances.

Augmenting the record (and continuing to augment the record) as Appellants propose would not promote judicial efficiency—and is the antithesis of appellate review. As the Court has provided, Appellants must prove "Idaho's public defense system suffers from widespread, persistent structural deficiencies that likely will result in indigent defendants suffering actual or constructive denials of counsel at critical stages of criminal proceedings." *Tucker II*, 168 Idaho at 584-85, 484 P.3d at 865-66. Appellants do not explain how evidence from the initial days of the new state system could be considered "widespread" and "persistent." Instead, Appellants maintain the contradictory view that the new state-based system is both a continuation of the prior system

[25] Appellants acknowledge the State's implementation of a plan to remedy their claimed deficiencies should deliver "constitutional public defense within two years." App. Br. at 45.

(which it is not), and at the same time the new state-based system is cause for immediate extraordinary relief (which it is not).[26]

Appellants also contend that augmenting the record would avoid the delays of reengaging in discovery after *Tucker III*. *Motion to Modify*, at 26. First, Appellants' claim incorrectly assumes they will be successful on the merits of their appeal. This is mistaken, as the District Court properly dismissed Appellants' Complaint. Second, augmenting the record would create more delays and issues on appeal, as it would require the Court to implement a procedural framework for engaging in discovery, rule on the admissibility of evidence, deciding discovery disputes, etc.—all of which this Court does not do in its appellate capacity.

D. Appellants have not shown extraordinary circumstances that would justify expediting the appellate process.

This is Appellants' second request to expedite oral argument in this matter. *See Motion to Expedite Briefing and Oral Argument* (filed March 14, 2024).[27] For the same reasons as the Respondents previously provided, Appellants' have not shown "exceptional circumstances" necessitating expediting the appellate process. In addition to the previously provided reasons, the legislative session has recently begun. This will be the first chance the legislature will have to address any potential amendments to the SPD Act or consider requests for additional funding or other measures since the new state-based system took effect.[28] Appellants are asking this Court to order the State to create another entirely new system before the State has had its first chance to

[26] Appellants previously took the position that the new state-based system was merely empty promises by the State and a "reshuffling." *See generally* R. at 3922, 5193.
[27] On April 15, 2024, the Court entered its Order Denying Motion to Expedite Briefing and Oral Argument.
[28] *See* Mia Maldonado, *Idaho Governor Recommends $88 Million for State Public Defender FY 2026 Budget*, *supra* note 18.

legislatively assess the new system it just built. Appellants have not demonstrated how expediting this appeal would have any impact at all on the efforts that are already being taken by the State to monitor, fund, and administer a constitutionally-sound indigent defense system. Ultimately, Appellants have not provided any "extraordinary circumstances" that necessitate an expedited appellate schedule.

E. If the Court does intend to consider Appellants' new claims and evidence, the Respondents request the Court provide a procedural mechanism that would allow them a fair opportunity to properly respond.

The Respondents adhered to the rules of this Court and limited their arguments to matters within the record on appeal. To have a fair opportunity to respond to Appellants' new claims and new evidence, the Respondents would, at a minimum, need a procedural mechanism for asserting defenses, adding necessary parties, engaging in written discovery, deposing witnesses, challenging class certification, submitting evidence, offering expert opinion testimony, and obtaining rulings on the admissibility of evidence. The Idaho Appellate Rules do not provide for such procedural structure—particularly when this Court is acting under its appellate jurisdiction. The Idaho Rules of Civil Procedure do. That is why trial courts are courts of first resort and this Court is a court of last resort. It is the province of state courts of general jurisdiction to decide new legal issues in the first instance and to serve as a trier of fact.

If the new state system is to be tried as an adolescent in this Court, the parties will need some procedural structure for the fair and orderly administration of the proceedings.

IV. CONCLUSION

For these reasons, the Respondents respectfully request the Court deny Appellants' Motion to Modify.

Alternatively, as the Respondents provided in this Opposition and in their December 31, 2024, *Motion to Extend Time*, if the Court is going to consider Appellants' new request for relief and new evidence, the Respondents request the Court provide a procedural structure that would allow the Respondents the ability to properly respond.

DATED January 31, 2025.

SCANLAN GRIFFITHS + ALDRIDGE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 31, 2025, I electronically filed the foregoing document using the iCourt E-File system, which sent a Notice of Electronic Filing to the following persons:

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