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Idaho Supreme Court
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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, 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.

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

REPLY IN SUPPORT OF MOTION TO MODIFY INJUNCTION AND FOR AN ORDER TO SHOW CAUSE WHY FURTHER RELIEF ON DECREE SHOULD NOT BE GRANTED

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Idahoans across the state are in jail without access to counsel and are appearing in court without even a warm body to nominally assist them. This is an indisputable fact, evidenced by judges taking notice and dismissing cases where the State has not provided counsel, as well as the SPD leadership's own acknowledgement—on the record—that the most they can do is provide ineffective assistance of counsel.

The State does not address or refute any of this. Instead, it props up and strikes down a series of strawmen that have nothing to do with the relief Plaintiffs seek in their Motion. At bottom, this case has always been about the State's ongoing systemic failure to ensure indigent defendants receive constitutional representation, and this Court can and should issue Plaintiffs' request for emergency relief, record augmentation, and expedited consideration to stem the tide of rampant constitutional violations.

ARGUMENT

I. This Court Has Jurisdiction To Remedy Plaintiffs' Ongoing Constitutional Injuries and Enter Their Requested Relief.

Make no mistake: this Court has ample authority to enter the relief that Plaintiffs seek. Idaho Rule of Civil Procedure 62(g)(1) unambiguously refers to the Supreme Court's power to "modify . . . or grant an injunction, while an appeal is pending." *See also* I.R.C.P. 1(b) ("These rules should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding."). Plaintiffs have requested that the Court do just that, in connection with the same constitutional right to counsel claims that they have pursued throughout this case, by modifying the partial decree issued by the District Court. And this Court also unquestionably has the power to issue an Order to Show Cause as to why that decree should not be modified—as Plaintiffs requested—and hold proceedings to hear from the State as to whether that modification is appropriate. I.C. § 10-1028; I.R.C.P. 72. This Court is no stranger to

this process: just a few months ago, it invoked Idaho Appellate Rule 48 and Idaho Rule of Civil Procedure 72 when it issued an Order to Show Cause Why State Public Defender, State Appellate Public Defender, and/or Counties Should not be Financially Responsible for Cost of Preparing Transcript on Appeal for Indigent Defendants. *State v. Blazek*, No. 51842, 2024 WL 4982927, at *2 (Idaho Dec. 5, 2024). Given this authority, it makes no difference that Plaintiffs have not invoked original jurisdiction. *See* Opp'n to Appellants' Mot. to Modify Injunction and for an Order to Show Cause (hereinafter "Opp'n") at 9 (also failing to explain why it matters that Plaintiffs have not invoked original jurisdiction).

The State advances four additional arguments to attempt to evade this Court's jurisdiction. Each fails. *First*, the State cannot seriously contend that Plaintiffs' Motion seeks relief outside the scope of their Complaint. Plaintiffs have always sought injunctive relief to "[e]njoin the State from continuing to violate" the constitutional "rights of indigent defendants"; to "[d]eclare that the State of Idaho is obligated to provide" constitutional representation, "including at their initial appearances"; and to "[g]rant any other relief the Court deems necessary and proper to protect Plaintiffs and the Class from further harm." R., p. 185-86. This case is therefore nothing like *Pac. Radiation Oncology*, where the Ninth Circuit merely recognized that the district court did not abuse its discretion when it declined to grant injunctive relief related to the alleged misuse of confidential patient information, where plaintiff "admitted" that this request had "nothing to do with the underlying claim" for "violations of due process [and] unfair and illegal trade practices." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 637 (9th Cir. 2015). Instead, here,

the emergency relief Plaintiffs seek via their motion fits squarely within Plaintiffs' decade-old demands.

Second, the State's entire response to the merits of Plaintiffs' request for emergency relief, *see* Opp'n at 12-18, completely misconstrues the nature of the rights and harm at issue here. Plaintiffs' request for immediate injunctive relief, Mot. to Modify Injunction and for an Order to Show Cause (hereinafter "Mot.") at 19-21, seeks to enforce Plaintiffs' clear right to counsel at "any critical stage before trial," as is constitutionally required. *Id.* at 20 (citing *Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 212 (2008)). The State never addresses this right, much less the fact that indigent defendants' attendant "deprivation of constitutional rights . . . unquestionably constitutes irreparable injury" under the preliminary injunction analysis. *Id.* at 21 (citing *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017)). The State instead engages in an irrelevant debate regarding whether Plaintiffs have a "clear right to have the new system of indigent defense declared constitutional" and whether "irreparable harm will flow unless the Court immediately declares the provision of indigent defense in Idaho unconstitutional." Opp'n at 15-18. This is a strawman. Plaintiffs' request for immediate relief under Idaho Rule of Civil Procedure 65 seeks to vindicate their right to counsel at critical stages and prevent irreparable constitutional injury related to the attendant actual denials of counsel.[1] *See* Mot. at 19-21. Plaintiffs, of course, also seek

[1] The Court should also waive the Idaho Rule of Civil Procedure 65(c) bond requirement because Plaintiffs seek an injunction of unconstitutional conduct by a governmental entity, and because there is no risk of harm to Defendants if eventually found to be wrongfully enjoined. Plaintiffs are, by definition, indigent. "[R]equiring a bond to issue before enjoining potentially unconstitutional conduct by a governmental entity simply seems inappropriate, because . . . protection of those rights should not be contingent upon an ability to pay." *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291, 1302 n.6 (C.D. Cal. 2008) (citation omitted); *see also Sacramento Homeless Union v. Cnty. of Sacramento*, No. 222CV01095TLNKJN, 2022 WL 4022093, at *8 (E.D. Cal. Sept. 2, 2022) (injunction without bond for homeless plaintiffs); *Governing Council of Pinoleville Indian Cmty. v. Mendocino Cnty.*, 684 F. Supp. 1042, 1047 (N.D. Cal. 1988) (injunction

injunctive relief in connection with their ongoing appeal, including through the imposition of an independent monitor to ensure Idaho's provision of indigent defense finally passes constitutional muster. *See Id.* at 22-25; Opening Br. at 35-36; Reply Br. at 21-28. But Plaintiffs' request for immediate relief focuses on indigent defendants' ongoing blatant denials of counsel—an issue that the State never acknowledges or discusses.

Third, for all the reasons discussed in Plaintiffs' briefing on the merits, *see* Reply Br. at 18-21, the named plaintiffs continue to have standing to seek relief on behalf of Plaintiffs' certified class. And to the extent the State believes the named plaintiffs no longer face a risk of harm under the SPD's leadership, that position is belied by the uncontroverted record. As just one example, lead Plaintiff Tracy Tucker has been represented by the SPD since the State transitioned public defense authority to that office on October 1, 2024, and even was sentenced in Kootenai County in November 2024, during the same time that the SPD Chief for the First District told the court there that the SPD was providing only "ineffective assistance of counsel." Ex. JJ to Pearce Decl. (filed December 23, 2024) at 12:16–23; *see* CR28-24-11345 (sentencing hearing held November 21, 2024, and judgment of conviction issued Dec. 4, 2024); CR28-24-9513 (appointing State Public Defender on November 21, 2024).[2]

Fourth, as the State rightly recognizes, it has the "ultimate responsibility to ensure that the public defense system passes constitutional muster." Opp'n at 15 (citing *Tucker v. State*, 162 Idaho

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without bond for indigent Indian tribe); *Haitian Ctrs. Council, Inc. v. McNary*, 789 F. Supp. 541, 548 (E.D.N.Y. 1992) (injunction without bond for plaintiffs serving immigrant clients). Additionally, there is no chance of harm—much less monetary injury—to Defendants, if it is eventually determined that they were wrongfully enjoined, and therefore "certainly no bond is necessary." *Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782-83 (10th Cir. 1964); *see Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011).

[2] Plaintiffs request that the Court take judicial notice of the existence of these criminal proceedings, where named Plaintiff Tracy Tucker is an indigent defendant, as these facts are "not subject to

11, 21, 394 P.3d 54, 64 (2017) ("*Tucker I*")); *see also id.*, *Tucker I*, 162 Idaho at 19-20, 394 P.3d at 62-63 (recognizing the State's non-delegable "obligation to provide constitutionally adequate public defense"). It necessarily follows that the State has the ability (and responsibility) to provide the relief that Plaintiffs seek, regardless of the agency to which it has delegated authority for administering public defense. It makes no difference that the State Public Defender does not appear in the case caption yet; the responsibility lies with the State as the primary defendant in this case. *See* Opp'n at 18-19. Idaho Appellate Rule 7 provides that in a situation such as this, where the State transferred the administration of public defense from the Public Defense Commission to the State Public Defender, the SPD's substitution as a party is a mere formality.

II. There Is No Authority for the State (or Ada County) to Imprison Idahoans Without Access to Counsel.

Neither the State nor the Ada County Prosecuting Attorney identify any authority that allows them to proceed on criminal charges against people who have no counsel or even meaningful access to counsel, much less to hold them in jail.[3] Both the State and the Ada County prosecutor try their best to ignore those constitutional violations. The "actual problem of which the Appellants complain," which the Ada County brief misstates (Proposed Br. of Amicus Curiae at 1), is that "[t]he State of Idaho has violated the Sixth Amendment [and Article 1, Section 13, of the Idaho Constitution] because it has failed to ensure that all indigent criminal defendants receive

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reasonable dispute" and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." I.R.E. 201(b); *see also IDHW v. Doe (2023-24)*, 172 Idaho 891, 899, 537 P.3d 1252, 1260 (2023) (affirming judicial notice of specific adjudicative facts).

[3] The Ada County Prosecuting Attorney admits that its proposed amicus brief does not address constitutional right to counsel issues at all. Proposed Br. of Amicus Curiae at 1 (filed Jan. 31, 2025). But those are *the* issues in this case. Because that proposed brief does not address those issues and fails to identify any basis for continuing prosecutions against indigent defendants without access to counsel, the brief is irrelevant and Plaintiffs object to the proposed amicus's appearance and filing of the proposed brief. I.A.R. 8(e).

meaningful and effective legal representation at all critical stages of their cases, including at initial appearances, resulting in the actual and constructive denial of counsel," and that "public defenders in Idaho are continually laboring under an actual conflict of interest, since their efforts to represent one indigent client are necessarily carried out at the expense of others . . . ." R., p. 181 ¶¶ 207, 210. The Ada County prosecutor even harps on the importance of strict compliance with Idaho Criminal Rule 46(c), calling for courts to consider certain factors when making decisions about pretrial release and bail, but ignores entirely Idaho Criminal Rule 44(a), which mandates that "[e]very defendant who is entitled to appointed counsel under law ***must*** have counsel assigned to represent the defendant ***at every stage*** of the proceeding from initial appearance before the magistrate or district court" (emphasis added), absent waiver. That rule, of course, implements longstanding and fundamental constitutional rights—the very rights that this class action is about, and which both the State and the Ada County Prosecuting Attorney now try to wave away in the face of overwhelming evidence that those rights are being systemically denied across Idaho.

III. The Remedies Plaintiffs Request Are Necessary to Mitigate Urgent and Ongoing Constitutional Violations and Protect the Rudimentary Integrity of Idaho's Courts.

When the State does not assure that those accused of crimes have meaningful access to counsel, it violates constitutional and statutory requirements. *Tucker I*, 162 Idaho at 20, 394 P.3d at 63. As the United States Supreme Court explained, now over 60 years ago, whatever the public's interest in prosecution may be, the state must counterbalance it by fulfilling the constitutional guarantee to counsel: though indeed "[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime . . . . [t]hat government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are

necessities, not luxuries." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Thus, the Court stressed, "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Id.*

Idaho must assure that all indigent defendants get that right, because "[t]he Sixth Amendment is not a haphazard jack-in-the-box that occasionally appears when cranked." *Betschart v. Oregon*, 103 F.4th 607, 621 (9th Cir. 2024). "The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment," either.[4] *Id.* at 620 (quoting *United States v. Cronic*, 466 U.S. 648, 654-55 (1984)).

As both the *Betschart* court and the United States Supreme Court have recognized, no "order requiring the State to adjust its incarceration and criminal justice policy" comes without some "risk that the order will have some adverse impact on public safety." *Id.* at 625-26 (quoting *Brown v. Plata*, 563 U.S. 493, 534 (2011)). Clear and ongoing violations of fundamental constitutional rights sometimes require prisoners to be released even so, because "[t]he State's desire to avoid [release] creates a certain and unacceptable risk of continuing violations of the rights of [Plaintiffs], with the result that many more will needlessly suffer." *Id.* (cleaned up) (quoting *Brown*, 563 U.S. at 533–534 (2011)). That's the evidence here: ongoing, systemic, and egregious violations of the fundamental constitutional right to counsel, not "harmless" and "nonconstitutional error" such as slight delay in a detention hearing in conflict with statutory

[4] Trial courts, of course, may enter orders for reassignment or orders to show cause as to any attorneys who risk their license by failing to communicate with or appear for clients after appointment even though they have the actual capacity to do so.

timelines—with counsel present and assisting—such as in *United States v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990).[5]

The history of this case, including the various reshufflings of Idaho's system that the Legislature has trotted out since this case was filed a decade ago, make clear that without judicial intervention Idaho's public defense system continues to flail. Neither the State nor the prospective amicus offer any alternatives to the remedies Plaintiffs propose, nor any justification for the widespread constitutional violations Plaintiffs identify—only another plea for thousands upon thousands of imprisoned Idahoans to "wait and see." But the basic integrity of the Idaho judiciary,

[5] Notably, study after study shows that bail reform and other pretrial release initiatives are not associated with increases in crime. *See, e.g.*, Paul Heaton, Quattrone Ctr. for the Fair Admin. of Just., *The Effects of Misdemeanor Bail Reform* 39 (Aug. 16, 2022) ("Misdemeanor pretrial reform produced more lenient outcomes and reduced the system's imprint without adversely impacting public safety."), https://www.law.upenn.edu/live/files/12290-the-effects-of-misdemeanor-bail-reformpdf; Peter Mayer, *Justice, Safety, & Prosperity: New York's Bail Reform Success Story* 6 (2023) ("Re-arrest rates for cases affected by bail reform remained largely the same before and after the implementation of bail reform."), https://www.fwd.us/wp-content/uploads/2023/02/Justice-Safety-and-Prosperity-New-Yorks-Bail-Reform-Success-Story.pdf. The Ada County prosecutor cites to a lone law review article criticizing a report published by the Chief Judge in Cook County, Illinois, which found that "the increase in pretrial release has ***not*** led to an increase in crime." Paul G. Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, 55 Wake Forest L. Rev. 933, 937 (2020) (emphasis added). But a later analysis of pretrial release increases in 11 jurisdictions—including Cook County—found no clear or obvious connection between pretrial release reform and crime rates. Don Stemen & David Olson, *Is Bail Reform Causing an Increase in Crime?* 1 (2023), https://www.hfg.org/wp-content/uploads/2023/01/Bail-Reform-and-Crime.pdf. As a brand-new book review published by the Federalist Society explained: "[T]he evidence that [pretrial detention] actually contributes to public safety is . . . mixed at best. High-profile cases to the contrary, the rates of new crimes committed by persons released pending trial are low. The best federal analysis found that in the years 2011 to 2018, the rate of new arrests among defendants released pretrial was about 2.1 percent (though revocations of release for 'technical' violations like failing to report to a probation officer were much more common)." Arthur Rizer, *Using Originalism to Attack Mass Incarceration: A Review of Rachel Barkow's Justice Abandoned*, The Federalist Soc'y (Feb. 3, 2025), https://fedsoc.org/commentary/fedsoc-blog/using-originalism-to-attack-mass-incarceration-a-review-of-rachel-barkow-s-justice-abandoned.

and the public's faith in it, depend on courts honoring Idahoans' bedrock rights in the proceedings those courts oversee. Plaintiffs therefore urge this Court to intervene to stem the metastasizing disaster unfolding in Idaho's criminal legal system as a direct result of the State's latest reckless rejiggering now, before it gets even worse.

CONCLUSION

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

Dated: February 7, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

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