IN THE COURT OF APPEALS OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 40789
Plaintiff-Respondent,	)	
	)	Ada Co. Case No.
vs.	)	CR-MD-2011-13091
	)	
ERIC JAMES SCOTT,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF IDAHO FOUNDATION AS *AMICUS CURIAE*

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

The Honorable Thomas P. Watkins, Magistrate Judge
The Honorable David D. Manweiler, Magistrate Judge
The Honorable Kathryn A. Sticklen, District Judge

Eric James Scott, *pro se*,
residing at Boise, Idaho, for Appellant.

Mark W. Olson,
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I. STATEMENT OF THE CASE

This *amicus curiae* brief hones in on two important constitutional problems with Eric Scott's criminal conviction for criticizing a judge. First, it focuses on the constitutional limits to a court's power to criminally punish an attorney for the words in a brief. The U.S. Supreme Court has long established that an attorney's words alone "cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty." *In re McConnell*, 370 U.S. 230, 236 (1962). Second, it points out the troubling offense charged in this case, which the State confesses was not specified anywhere in statute or clearly set out in any reported Idaho case, but instead was defined by the offended judge in the complaint he drafted. Brief of Respondent 9 n.2 (July 11, 2013). If Idaho's contempt law allows for this kind of "unforeseeable and retroactive judicial expansion of narrow and precise statutory language," then Idaho's contempt offense is unconstitutional. *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). The first problem invalidates Scott's conviction. The second means that the nebulous criminal contempt elements that the State urges are impermissibly vague and overbroad.

II. INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Idaho Foundation ("ACLU") is a statewide, nonprofit, nonpartisan public interest organization dedicated to the principles of liberty and fairness embodied in the U.S. and Idaho constitutions. Since its founding in 1993, the ACLU has frequently appeared before Idaho state and federal courts in cases involving constitutional questions, both as direct counsel and as *amicus curiae*. This case raises important questions

about the freedom of speech in Idaho's courts and the vitality of a vigorous, independent Idaho bar. The proper resolution of this case is, therefore, a matter of significant concern to the ACLU and its members throughout Idaho.

III. ARGUMENT

This case presents several issues of great consequence to the Idaho bar and bench, some of them issues of first impression to Idaho's higher courts and many of them bearing directly on fundamental liberties guaranteed by the United States Constitution. This brief discusses just two of them: (1) whether an attorney may be criminally punished, in addition to formal bar discipline, for words in his brief that did not disrupt the proceeding in which he filed it; and (2) whether a judge can define the elements of criminal contempt *ad hoc* to exclude the statutory and constitutional requirement that the State prove that words of criticism actually cause a disruption. Under U.S. Supreme Court precedent, the answer to both questions is "no."

A. Standard of Review.

This Court reviews constitutional questions *de novo*. *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 67 (2001). Court filings are pure speech on public issues and thus "occup[y] the highest rung of the hierarchy of First Amendment values . . . ." *In re Kendall*, 712 F.3d 814, 824 (3d Cir. 2013) (quoting *Snyder v. Phelps*, ___ U.S. ___, ___, 131 S.Ct. 1207, 1215 (2011)). Because a state court may have deprived a person of a fundamental constitutional right in this case, this Court should conduct its own independent examination of the whole record. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1038 (1991); *Craig v. Harney*, 331 U.S. 367, 373 (1947). The constitutional problems with Scott's conviction call for free and careful review.

B. Long-Standing U.S. Supreme Court Precedent Prohibits Convicting an Attorney of Contempt Unless He Has Actually Obstructed the Administration of Justice.

For decades, the U.S. Supreme Court has held fast to the long-established principle that the criminal contempt power may never be wielded to punish speech merely to protect a court's public esteem. Although the parties' briefing ranges across not only the constitutional limits of criminal contempt, but the distinct areas of attorney discipline and juror contact as well, Scott's conviction is not constitutionally permissible regardless of which standard applies. The interest that the State asserts—sheltering a judge from criticism—is not a recognized government interest protected under any of those standards.

To start, it is helpful to disentangle the separate standards and situations that the State and Scott intermix in their briefs. One type of case involves the courts' age-old authority to regulate the practice of law and discipline attorneys. *E.g.*, *Gentile*, 501 U.S. at 1066. The *Gentile* Court noted the settled rule that restrictions on speech are constitutional only when they are narrowly tailored to achieve a state interest cognizable under the *First Amendment*, and it confirmed that the same doctrine applies even when the speaker is an attorney representing a party in a pending case. *Id.* at 1075–1076. In searching for a legitimate government interest, the Court zeroed in on the "State's interest in fair trials" and, in particular, on "two principal evils: (1) comments that are likely to influence the actual outcome of the trial and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found." *Id.* at 1075. The resulting standard, which limits restrictions on attorney speech during pending cases "to preventing *only* speech having a substantial likelihood of materially prejudicing the proceeding,"

focuses exclusively on preserving the right to a fair trial—not on eliminating criticism. *Id.* at 1073, 1074–1076 (emphasis added).

This Court recently analyzed a second type of case: challenges to court rules against post-verdict juror contact. *Hall v. State*, 151 Idaho 42, 45 (2011). The Idaho Supreme Court, following *Gentile*, acknowledged that even attorneys actively participating in a case enjoy *First Amendment* protections. *Id.* at 47. Looking for a State interest to justify restraining attorney speech, this Court, just like the *Gentile* Court, zeroed in on the need to prevent obstructions to fair trial, holding that the "widespread" practice of restricting post-verdict juror contact by court rule was sufficiently tailored to protect "public policy interests in preserving a full and fair trial, protecting juror privacy and protecting the finality of verdicts." *Id.* at 47, 48.

A third set of cases, most pertinent here, encompasses a variety of scenarios arising from comments about ongoing court proceedings. Among the speakers whose criminal convictions have been reversed are newspapers, *e.g.*, *Craig*, 331 U.S. at 368, attorneys giving comments to newspapers, *e.g.*, *Garrison v. State*, 379 U.S. 64, 65 (1964), attorneys contacting grand jury members, *e.g.*, *Cammer v. United States*, 350 U.S. 399, 400 (1956), attorneys making remarks in open court, *e.g.*, *McConnell*, 370 U.S. at 231, and—as Scott here—attorneys filing papers with a court, *e.g.*, *Holt v. Commonwealth*, 381 U.S. 131, 133 (1965).

Putting aside all of the cases involving lay speakers or attorneys speaking extra-judicially (such as to the press[*]), the U.S. Supreme Court still emphasizes that the "contempt power over

[*] The State, oddly, seems to prefer that Scott have aired his criticism widely through the mass media, rather than in a motion filed with the Magistrate Division in an obscure misdemeanor

counsel, summary or otherwise, is capable of abuse" because "[m]en who make their way to the bench sometimes exhibit . . . weaknesses to which human flesh is heir." *Sacher v. United States*, 343 U.S. 1, 12 (1952). *Actual* obstruction of the judicial process is, in this type of case just as in the others, the touchstone. So, for instance, an attorney slamming his hand down on counsel table in anger and then refusing to sit down—all in open court during a live hearing—was not an "open, serious threat to orderly procedure" justifying a contempt conviction. *In re Greenberg*, 849 F.2d 1251, 1255 (9th Cir. 1988). Simply put, a lawyer's arguments to a court "cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty." *McConnell*, 370 U.S. at 236.

Criticizing a judge in a paper filed with the Court is not the sort of act that actually obstructs the judicial process. The Missouri Supreme Court recently had to decide whether an attorney could be convicted of criminal contempt for filing a paper that suggested that the judge and prosecutor were engaged in "a conspiracy . . . to threaten, instill fear and imprison innocent persons to cover-up and chill public awareness of their own apparent misconduct using the power of their positions to do so." *Smith v. Pace*, 313 S.W.3d 124, 126–127 (Mo. 2010) (en banc). After reviewing the line of cases challenging criminal contempt convictions on

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case. Brief of Respondent at 17. The risk that Scott's comments could have adversely affected the administration of justice would have been far greater had they been published in the *Idaho Statesman* or broadcast on television. The government interest in regulating speech in papers filed in routine court proceedings is not as great as its interest in regulating attorney speech before mass audiences. *In re Green*, 11 P.3d 1078, 1086 (Colo. 2000). "[F]or comments restricted to the adversarial setting, . . . First Amendment scrutiny requires closer attention to the somewhat reduced governmental interest at stake in this context than in the case of public comments to the press." *Id.* at 1087.

constitutional grounds, the Court held that "[w]ords that degrade or make impotent or impede or embarrass, by themselves, are not enough to support a finding of criminal contempt under United States Supreme Court precedent." *Id.* at 136–137. In another related case, the Supreme Court of Pennsylvania had to decide whether an attorney should have been convicted of criminal contempt for saying "[h]e's such a [f——— a———]" (as the court printed it) after the trial judge sustained an evidentiary objection. *Williams v. Williams*, 554 Pa. 465, 567 (1998). Though noting that referral to the disciplinary board might have been appropriate, the court held that a "mere affront to the trial judge is not sufficient to sustain a conviction for criminal contempt," because "inappropriate and even ill-mannered conduct which does not obstruct or delay the trial" does not rise to the level of criminal contempt. *Id.* at 470, 471.

In this case, we know from the underlying trial judge's own testimony that Scott's critical comments did not actually obstruct the judicial process or imperil the opportunity for a full and fair trial of *State v. Lormior*. In Scott's case, the trial judge in the underlying case testified that Scott's filing "did not interrupt the trial" and, in fact, that the case was "proceeding as scheduled." Tr. (Oct. 7, 2011), p. 28, LL. 20–21; p. 29, LL. 18–20. The judge testified that he did not believe that Scott's motion to withdraw would obstruct the judge's rulings at all. Tr. (Oct. 7, 2011), p. 29, LL. 21–25. The only possible "delay" the judge could identify was due to the contempt proceedings that the judge, not Scott, decided to initiate. Tr. (Oct. 7, 2011), p. 28, L. 22 – p. 29, L. 6; *see also* Memorandum Decision and Order, R., p. 173 (noting that the trial judge "had to defer his judicial duties and obligations to testify at Scott's contempt trial and subsequent sentencing"). That the due process attendant to adjudicating a contempt charge could

justify making the charge in the first place is an idea that collapses in upon itself. In such a jurisprudence, *everything* anyone ever did in a courtroom would be contemptuous whenever any judge decided to initiate contempt proceedings over it.

United States Supreme Court precedent requires more: an actual obstruction to the underlying proceedings. *McConnell*, 370 U.S. at 236. It is Scott's criticism *per se*, not any later proceedings, that must by itself imperil the court's administration of justice. *See Weiss v. Burr*, 484 F.2d 973, 980 (9th Cir. 1973). Although the State contends that several examples show that attorneys can be held in contempt for their speech alone, none support that contention. One of the State's examples, *In re Buckley*, 10 Cal. 3d 237, 247–249 (1973), from the California Supreme Court, relies repeatedly on the authority of *In re Ciraolo*, 70 Cal. 2d 389, 394–395 (1969), for the principle that a judge can use his contempt powers to protect his reputation. But the California Supreme Court ignored that Mr. Ciraolo had been vindicated in his federal habeas corpus petition, which the Ninth Circuit held must be granted, noting the constitutional requirement that contemptuous conduct "must be so disruptive of the court's business that immediate suppression is necessary" before intemperate in-court language may be criminally punished. *Ciraolo v. Madigan*, 443 F.2d 314, 319 (9th Cir. 1971). Each one of the State's remaining examples involved not just actual disruption but repeated warnings as well. *Pounders v. Watson*, 521 U.S. 982, 990 (1997) (upholding finding that counsel's questions "permanently prejudiced the jury in favor of her client"); *United States v. Schiffer*, 351 F.2d 91, 94 (6th Cir. 1965) (holding that counsel's remarks "delayed the trial, obstructed the administration of justice and interfered with the Court in the performance of his judicial duties"); *In re Cohen*, 370 F.

Supp. 1166, 1176 (S.D.N.Y. 1973) (finding that counsel's behavior was "disruptive of the trial court's business so as to amount to an obstruction of justice . . . . from the very start to the end of the trial"); *Werlin v. Goldberg*, 129 A.D.2d 334, 342 (1987) (finding that "the petitioner's conduct clearly disrupted the continuity of the trial"); *Paul v. Pleasants*, 551 F.2d 575, 578 (4th Cir. 1977) ("The court also found that the statements were made in a disruptive manner and were an apparent attempt to force the court to declare a mistrial.")

Here, the only "disrupt[ion] to the administration of justice" that the contempt trial court found was from "impu[g]ning the character and legal abilities" of a particular judge. Memorandum Decision and Order, R., p. 170. That alone, however, is not contempt. As the U.S. Supreme Court has admonished, "[t]rial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." *In re Little*, 404 U.S. 553, 555 (1971). Without a constitutional basis, Scott's conviction should not stand.

C. <u>The Helpful Example of *In re Kendall*.</u>

The Third Circuit's very recent decision in *In re Kendall* contains a thorough review of Supreme Court precedent in just the kind of criminal contempt case that Scott's presents. 712 F.3d at 823–830. In that case, the trial judge in a murder case responded to a writ of mandamus, issued by the Virgin Islands Supreme Court, with a harshly worded opinion criticizing the writ's issuance. *Id*. at 819–820. The trial judge described the writ as "'improper,' having 'no rational basis,' lacking 'merit,' and 'making no sense.'" *Id*. at 820**.** Going even further, the trial judge's published opinion stated that the writ "was apparently sought and issued to facilitate [the prosecution's] blatant misconduct and perpetrate a fraud on the [trial] Court." *Id*. The trial judge

went on to attack the Supreme Court directly, writing that the writ's issuance was "contrary to law and all notions of justice." *Id.* In reply, the Supreme Court charged, tried, and convicted the trial judge of criminal contempt for writing and publishing that opinion. *Id.* at 820–821.

On appeal, the Third Circuit conducted a thoroughgoing review of U.S. Supreme Court precedent about the constitutional limitations to courts' contempt powers. Under that precedent, the court held, court filings must actually "interrupt the orderly process of the administration of justice, or thwart the judicial process" to justify criminal punishment. *Id.* at 828 (citation omitted). The threat must, furthermore, be "imminent, not merely likely." *Id.* (citation omitted). Noting that criticizing prior judicial action is insufficient to meet the clear and present danger standard, the court held that the trial judge's critical opinion was not contemptuous because it could not have affected the Supreme Court Justices' ability to fairly decide the issue at bar. *Id.* (citation omitted). Despite "the Virgin Islands Supreme Court's interests in protecting the reputation of its judges and maintaining [its] institutional integrity," the court ultimately held, those interests were simply "insufficient to justify the subsequent [criminal] punishment of speech." *Id.* (citation and internal quotation marks omitted).

Scott's motion to withdraw seems to pale in comparison to a published, inferior court's opinion that "scathingly" attacks a Supreme Court's decision. *Id.* at 820, 829. Not only did the trial court in *In re Kendall* impugn the character and legal abilities of the Virgin Islands Supreme Court Justices—going so far as to accuse them of issuing a writ "to facilitate . . . blatant misconduct and perpetrate a fraud on the [lower] court"—it openly defied a higher court's mandate, undermining the fundamental structure of the judicial branch. *Id.* The act was

"strong," "intemperate," and "unfair." *Id.* at 830. Formal discipline certainly might have been appropriate. *See id.* at 826. But "contempt is not discipline." *Id.* at 827. It "is no mere disciplinary tool," and "the government has no greater authority to hold someone in criminal contempt for their speech about ongoing proceedings than it would to criminally punish any speech." *Id.* at 826.

Scott was formally disciplined by the Idaho State Bar. *Eric Scott: Public Reprimand*, THE ADVOCATE, Nov.–Dec. 2012, at 12; *see also* R., pp. 72–73. The question in this case, therefore, is not whether Scott should be punished, but whether he can be convicted of criminal contempt for his speech alone, where that speech caused no disruption other than the contempt proceedings that the trial judge himself triggered by alleging contempt. Constrained by the *First Amendment* applied to the State through the *Fourteenth Amendment*, the State cannot fine or jail a citizen merely for using words that tend to belittle a judge or make him unpopular. *See In re Kendall*, 712 F.3d at 828, 830 (quoting *Citizens United v. FEC*, 558 U.S. 310, 349 (2010)).

D. A Criminal Offense Nowhere Defined until the Complaint is Drafted is Unconstitutionally Vague and Overbroad.

An even graver constitutional problem lies in the contempt charge undergirding this case. Not only was a particular criminal contempt defendant, Scott, convicted for mere words that did not actually obstruct the administration of justice, but the State further contends that actual obstruction is not even a necessary element of criminal contempt in Idaho. Brief of Respondent at 27. Despite that I.C. § 7-601(1) expressly states that behavior toward a judge is only punishable as contempt if it "tend[s] to interrupt the due course of a trial or other judicial

proceedings," the State argues that "this was not a required element of the contempt charge against Scott because Judge Watkins' complaint did not quote or otherwise allege the conduct described in this portion of I.C. § 7-601(1)." Brief of Respondent at 27. Without that element, though, these criminal contempt offenses in Idaho—including those described in the State's brief and at I.C. § 18-1801(1)—are impermissibly vague and overbroad.

1. Defining the Contempt Offense *Ad Hoc* Fails to Provide Fair Notice.

Beyond the serious jurisdictional issues raised by a charging instrument that does not even cite the offense charged, *see State v. Murray*, 143 Idaho 532, 537 (Ct. App. 2006), the court below charged Scott with an offense defined for the first time ever in the complaint. Brief of Respondent at 9 n.2 ("[T]he type and scope of the contempt alleged was, in fact, *defined by the court in the complaint*, and not by any statute." (emphasis added)). This is the archetype of an offense that "fails to provide fair notice to those to whom [it] is directed." *Gentile*, 501 U.S. at 1048. It is, therefore, void for vagueness.

Vagueness is objectionable because it fails to provide fair warning and can inhibit the exercise of *First Amendment* freedoms. *California Teachers Association v. Board of Education*, 271 F.3d 1141, 1150 (9th Cir. 2001). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Criminal offenses, accordingly, are "more searchingly examined for vagueness" than other laws. *Levas & Levas v. Village of Antioch*, 684 F.2d 446, 452 (7th Cir. 1982). Offenses that can be used to punish speech require even closer, additional scrutiny, because those laws must be written with "narrow specificity." *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002);

see also Sharkey's Inc. v. City Waukesha, 265 F. Supp. 2d 984, 990 (E.D. Wis. 2003) (noting that vagueness review "should be applied with special exactitude where a statute might impinge on basic First Amendment freedoms") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)). Invalidating impermissibly vague laws that could suppress speech within the criminal defense bar "is of particular relevance" because of those lawyers' "professional mission to challenge actions of the State." *Gentile*, 501 U.S. at 1051.

Here, it was impossible for Scott to have any notice of the offense the State charged. By the State's own admission, the offense was "defined by the court in the complaint." Brief of Respondent at 9 n.2. What is more, although common law offenses may sometimes be adequately defined by court decisions, *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 942 (9th Cir. 1997), the State confesses that no reported Idaho case has addressed conduct like Scott's. Brief of Respondent at 12. Although the State wishes it could dispense with the actual obstruction element express in I.C. § 7-601(1) and fall back on an undefined, amorphous common law contempt crime, the U.S. Supreme Court has emphatically rejected that argument, holding that "deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie*, 378 U.S. at 352. To make sure it was clear, the Court went on: "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Id.* (quoting *Pierce v. United States*, 314 U.S. 306, 311 (1941)). In Scott's case, "[t]he lawyer has no principle for determining when his remarks pass from the safe harbor . . . to the forbidden sea," *Gentile*, 501

U.S. at 1049, because the trial judge defined criminal contempt anew in Idaho when he drafted the complaint. The criminal contempt offense that the State argues for is void for vagueness.

2. Without an "Actual Obstruction" Element, a Criminal Offense Punishing "Insolent" Speech is Viewpoint-Discriminatory and Overbroad.

Even if a judge could revise the elements of criminal contempt simply by drafting a contempt complaint, he cannot leave out the well-established requirement that words alone may not be criminally punished unless they also cause an actual disruption. As explained above, even in court, "[t]he vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice." *Little*, 404 U.S. at 555.

The Ninth Circuit recently reviewed a law, like the one charged here, that criminalized speech without requiring proof of actual disruption. That case, *Acosta v. City of Costa Mesa*, analyzed a prohibition on "disorderly, insolent, or disruptive behavior" at city council meetings. 718 F.3d 800, 806 (9th Cir. 2013). In assessing whether that offense was invalid under *First Amendment* principles, the court recognized that a law is impermissibly overbroad if "a substantial amount of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *Id.* at 811 (quoting *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010)). The court held that unless the offense required proof of "actual disruption," the city could not use it to restrict speech. *Acosta*, 718 F.3d at 811. Moreover, the court held that an offense—like the charge here—that lists "insolent" behavior among its prohibitions must be expressly limited only to speech that causes actual disruption. *Id.* at 815. Thus, the court held, the city's ordinance was

viewpoint discriminatory because it banned non-disruptive speech that was subjectively "insolent," yet allowed non-disruptive complimentary comments. *Id.* Citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989), the court noted that government cannot punish expression simply because it finds the ideas expressed disagreeable or offensive. *Acosta*, 718 F.3d at 816.

Not only does the criminal charge in this case, R., pp. 6–7, suffer from the same *First Amendment* infirmities, but I.C. § 18-1801(1) (an alternative ground for Scott's conviction) does as well. Both criminalize "insolent" comments even if they do not cause any disruption. The written charge in Scott's case specifically omitted that required element. Brief of Respondent at 27. Under I.C. § 18-1801(1), subjectively "insolent" comments can be criminally punished if they either tend to interrupt proceedings *or* merely "impair" a court's respect. *Cf. Filer Mutual Telephone Co. v. Idaho State Tax Commission*, 76 Idaho 256, 261 (1955) ("the term 'or' should ordinarily be given its normal disjunctive meaning"). This allows judges to engage in viewpoint discrimination, just as the city ordinance at issue in *Acosta* permitted the city council to discriminate on the basis of viewpoint. *Acosta*, 718 F.3d at 815 n.8. And just as in *Acosta*, because both the amorphous criminal contempt offense that the State urges and I.C. § 18-1801(1) are susceptible of regular application to protected speech, both are unconstitutionally overbroad. *See Acosta*, 718 F.3d at 817 (citing *City of Houston v. Hill*, 482 U.S. at 451, 467 (1987)).

IV. CONCLUSION

For all of these reasons, the ACLU urges this Court to carefully and independently examine the record in this case. That examination should find that Scott, who has already been formally disciplined by the Idaho State Bar, has been criminally punished for pure speech that

never imperiled the full and fair trial of *State v. Lorimor* or the administration of justice. Allowing the trial judge to pick and choose elements of the criminal contempt offense, excluding any requirement of actual disruption, leaves that offense constitutionally infirm in Idaho.

Scott's comments were improper and unfair. The liberty and due process our constitutions guarantee, however, are not. This Court should vacate the conviction and remand this case for proceedings consistent with the established constitutional limits described above.

Respectfully submitted this 19th day of September, 2013,

AMERICAN CIVIL LIBERTIES UNION
OF IDAHO FOUNDATION

/s/ Richard Alan Eppink
Attorney for the *amicus curiae*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of September, 2013, I served two true and correct copies of the foregoing document by email to each of the interested parties listed below:

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