IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY TUCKER, JASON SHARP, NAOMI MORLEY, JEREMY PAYNE, on behalf of themselves and all others similarly situated,	)	Supreme Court No. 43922
Plaintiffs–Appellants,	)	Ada Co. Case No. CV–OC–2015–10240
vs.	)	
STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho, HON. LINDA COPPLE TROUT, DARRELL G. BOLZ, SARA B. THOMAS, WILLIAM H. WELLMAN, KIMBER RICKS, SEN. CHUCK WINDER, and REP. CHRISTY PERRY, in their official capacities as members of the Idaho State Public Defense Commission,	)	
Defendants–Respondents.	)	

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County.

The Honorable Samuel A. Hoagland, District Judge, presiding.

Richard Alan Eppink, residing at Boise, Idaho; Jason D. Williamson, residing at New York, New York; Kathryn M. Ali and Brooks Hanner, residing at Washington, D.C.; and Andrew C. Lillie, residing at De nver, Colorado; for Appellants.

Steven L. Olsen, Michael S. Gilmore, Shasta Kilminster–Hadley, and Scott Zanzig, residing at Boise, Idaho, for Respondents State of Idaho, Hon. Linda Copple Trout, Darrell G. Bolz, Kimber Ricks, Sen. Chuck Winder, and Rep. Christy Perry.

Cally A. Younger, residing at Boise, Idaho, for Respondent Governor C.L. "Butch" Otter.

Daniel J. Skinner, residing at Boise, Idaho, for Respondents Sara B. Thomas and William H. Wellman.

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I. INTRODUCTION

Clarence Earl Gideon was convicted and imprisoned in 1961 and, from a Florida State Prison where he was facing five years, petitioned on his own for the United States Supreme Court to hear his case alleging that the state had violated his right to counsel. *See* Bruce A. Courtade, *Gideon at 50: A Clarion Call Still Muted?*, Mich. Bar J. 14, 14 (Mar. 2013). There was no state official in Florida at that time in charge of public defense. In fact, there was no statewide system at all. *See Gideon v. Wainwright*, 153 So. 2d 299, 300 (Fla. 1963).

Defendants' ("State") position in this case suggests that, if it had been up to them, Mr. Gideon would have had no recourse but to suffer conviction and imprisonment before being able to raise his civil rights claims from prison. And, even then, he may have only raised his claim in the context of a criminal appeal or post–conviction relief petition. Because there was no Florida state official in charge of public defense, or local officials directly responsible, the State would argue that Mr. Gideon had standing to sue nobody. For nobody "caused" his right to counsel violation; nobody could "redress" it; and no official had sufficient "connection" to it to be a proper defendant. By the State's argument, Idaho, or any state for that matter, could repeal all existing provisions for public defense tomorrow and yet be untouchable in any civil lawsuit for such a rank constitutional transgression. Any criminal defendant aggrieved would have to risk criminal conviction and imprisonment, and raise claims *pro se*, as defenses in a criminal case, even if it meant having to do so from prison.

Section 1983, however, created another avenue for criminal defendants, among others. The purpose of § 1983 is to provide a ***civil*** cause of action for persons deprived of federal

constitutional rights by state actors. *See Mitchum v. Foster*, 407 U.S. 225, 239 (1972). A primary purpose of § 1983 is "to protect" *id.* at 242, "not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). Accordingly, neither Clarence Earl Gideon, nor the plaintiffs in this case, were required to endure the indignities of conviction and/or imprisonment before being permitted to bring civil rights claims against an unconstitutional indigent defense system and those officials responsible for its demise. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)) (holding that § 1983 plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) ("'It would,' indeed, 'be odd to deny an injunction to inmates who plainly proved an unsafe, life–threatening condition in their prison on the ground that nothing yet had happened to them.'"); *Patsy v. Bd. of Regents*, 457 U.S. 496, 504 (1982) (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)) (noting that § 1983 was intended to provide an immediate, civil court remedy for civil rights violations notwithstanding any state–imposed barriers). Instead, Plaintiffs in this case, as Mr. Gideon did in 1961, may pursue a civil claim under § 1983 to halt the unconstitutional system in equity before more harm is done; rather than merely attempting to unwind a criminal conviction after the fact, based on a framework that will never allow a court to address the underlying systemic issues. *See State v. Waters*, 370 S.W.3d 592, 607 (Mo. 2012) ("No case suggests that a court analyze whether the Sixth Amendment right to counsel has been preserved at all critical stages only by retrospectively determining that the lack of such counsel deprived a defendant of a fair trial.").

The State Public Defense Commission ("PDC") is unmistakably in charge of Idaho's statewide system of public defense. The PDC sets standards for that system and is charged with remedying material violations of those standards wherever they occur in the State. The Governor appoints the majority of its members and, as the supreme executive power of the State, must take action to ensure that all of the State's officers are fulfilling their duties, or else provide a remedy if they are not. The PDC's members and the Governor are the obvious defendants in a case over statewide deficiencies in Idaho's public defense system. They are directly responsible for that system and are the only State actors anywhere in Idaho who can remedy statewide deficiencies—a responsibility no individual county could ever fulfill.

> Plaintiffs allege state–level deficiencies that the counties themselves cannot address.
>
> > If a county system is constitutionally inadequate under the standards we have set today, i.e., a finding of widespread and systemic instances of deprivation of counsel and deficient performance resulting from a flawed county system of providing indigent representation, but the county is in full compliance with existing state law and mandates, the cause of the constitutional deficiencies will necessarily flow from failures by the state.

Duncan v. State, 284 Mich. App. 246, 326 n.24, 774 N.W.2d 89, 136 n.24 (2009), *rev'd on other grounds*, 486 Mich. 1071, 784 N.W.2d 51 (2010), *aff'd on recons.*, 488 Mich. 957, 866 N.W. 2d 407 (2010). The issue in this appeal is not whether Plaintiffs will prove that the cause of those constitutional deficiencies flow from failures by the State, but instead merely "whether the party is entitled to offer evidence to support the claims." *Fuchs v. State*, 152 Idaho 626, 629, 272 P.3d 1257, 1260 (2012) (quoting *Young v. Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002)); *accord Duncan*, 284 Mich. App. at 326 n.24, 774 N.W.2d at 136 n.24 ("We, as an appellate court,

should not engage in trying the case, [and] deny plaintiffs the opportunity to present their proofs."). Because Plaintiffs and Defendants are appropriate parties, and it is this Court's unique and solemn role to set the constitutional parameters that ensure fundamental rights are protected in Idaho, the Court should reverse and remand so that Plaintiffs may put on their proof.

II. ARGUMENT[1]

A. Standing

The parties all agree that the district court erred; the only question is how. Though the State could find no argument to support many of the district court's conclusions, it still contends that the PDC and Governor are not causally connected to Idaho's public defense system and have no ability to improve that system. The PDC is explicitly tasked with standardizing that system, monitoring it, and remedying its deficiencies. The Governor has the power to appoint the majority of the PDC members and is responsible, through executive order or otherwise, for making sure federal law—and especially the supreme law of the land, the United States Con stitution—are carried out throughout the state.

1. Plaintiffs Have Sufficiently Alleged Injury–in–Fact, and Their Claims are Ripe.

Even the State agrees that the lower court erred, at least in part. The State does not offer any argument that Plaintiffs have not alleged injuries sufficient to establish standing or that

[1] Plaintiffs rest on, and hereby preserve, their arguments regarding attorney fees on appeal, as articulated in their opening brief, App. Br. at 10-13, but offer no further argument on that issue here. *See* I.A.R. 41(a).

Plaintiffs' claims are not ripe for review.[2] Resp'ts Br. at 7. Neither issue was contested by Defendants in their Motion to Dismiss. *Id.* at n.4. Amicus arguments from the United States and the Idaho and National Associations of Criminal Defense Lawyers ("NACDL") only further bolster Plaintiffs' showing of injury–in–fact and ripeness: the lower court erred in concluding that the nature and extent of Plaintiffs' injuries could only be determined by examining the ultimate outcome of the case under the *Strickland v. Washington* framework. *See* NACDL Amicus Br. at 8–12; United States Amicus Br. at 29–30; *see also Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1132–33 (W.D. Wash. 2013); *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988); *Hurrell–Harring v. State*, 15 N.Y.3d 8, 18–19, 930 N.E.2d 217, 221–22 (N.Y. 2010); *Duncan*, 284 Mich. App. at 263–65, 774 N.W.2d 89 at 102–03; *Phillips v. State*, No. 15CECG02201, slip op. at 4–5 (Cal. Superior Ct. April 13, 2016) (appended as an exhibit to Appellants' Br.).

Plaintiffs and the class they seek to represent have suffered and will continue to suffer very real injuries—including prolonged pretrial detention, inability to communicate effectively with counsel, and lack of investigation of their cases—as a result of the actual and constructive denial of counsel that remains ongoing in Idaho's courts, notwithstanding the final dispositions of their cases. *See* R. pp. 40–42 ¶¶ 115–18, p. 53–54, ¶¶ 156–59, pp., 37–52 ¶¶ 101–54.

[2] In light of the recent passage of amendments to Idaho's indigent defense legislation, the State argues in its response briefing that Plaintiffs' claims are not yet ripe for review as they relate to the revised law. Resp'ts Br. at 21. Plaintiffs' address that argument below. The State does not, however, adopt the district court's assertion that the claims are not ripe because Plaintiffs had not yet been convicted and sentenced at the time the court made its decision.

2. The Causal Connection Between Defendants' Inaction and Plaintiffs' Injuries is More Than Sufficient.

In the briefing about causal connections, the State acknowledges that the lower court got it wrong in yet another way.[3] The State agrees with Plaintiffs that there is no way to reconcile the district court's conclusion that the Governor and PDC have "a more than sufficiently close connection or nexus to the enforcement of public defense in Idaho," R. p. 485, with its conclusion that "[t]he connection of the claimed injury to the Governor and the PDC are too remote to be fairly traceable" to any of the defendants. R. p. 490. The State concedes that these conclusions conflict. *See Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999) (quoting *Okpalobi v. Foster*, 190 F.3d 337, 347 (5th Cir. 1999)) (noting that whether a sufficient connection exists under *Ex parte Young* and whether a causal connection exists under the traditional standing analysis, are "closely related—indeed overlapping—inquir[ies]," and finding that a sufficient connection existed under *Ex parte Young* "for the same reasons that the [plaintiff] has demonstrated that a case and controversy exists.").

In attempting to contend that neither the Governor nor the PDC have sufficient connections with Idaho's public defense system, the State resorts to separating individual connections and arguing that each, standing alone, is insufficient. The fallacy of that approach is that it misses the rope by focusing on the individual threads. Though the Governor's general

[3] The lower court was also wrong as a factual matter when it stated that none of the named Plaintiffs had been convicted and sentenced at the time of the court's decision. In fact, Plaintiff Tracy Tucker had been convicted and sentenced, and therefore cleared, even the lower court's injury-in-fact standard. A plaintiff need not wait for a threatened injury to occur before seeking declaratory or injunctive relief. *See, e.g.*, *Babbitt*, 442 U.S. at 298.

responsibility to ensure that the laws of the state are faithfully executed may not alone be sufficient to make him liable for the harm caused by Idaho's broken indigent defense system, neither the district court, nor Plaintiffs, rely exclusively on the Governor's general responsibility. The Governor has "direct supervisory authority over those responsible to establish standards for a constitutionally sound public defense system." R. p. 485. Though the State wonders what this supervisory authority is, Idaho's statutes spell it out: the Governor not only appoints the majority of the PDC, Idaho Code § 19–849(1)(c), but the State Appellate Public Defender also, Idaho Code § 19–869(2), and in some cases county commissioners as well, Idaho Code § 59–906A. He is also expressly required "[t]o supervise the official conduct of all executive and ministerial officers" and "[t]o see that all offices are filled, and the duties thereof performed, ***or, in default thereof, apply such remedy as the law allows*** . . . ." Idaho Code §§ 67–802(1), (2) (emphasis added).

In *Kitchen v. Herbert*, the Tenth Circuit held that Utah's governor had a sufficient connection to the challenged conduct because he was "statutorily charged with 'supervis[ing] the official conduct of all executive and ministerial officers' and 'see[ing] that all offices are filled and the duties thereof performed.'" 755 F.3d 1193, 1202 (10th Cir. 2014) (quoting Utah Code §§ 67–1–1(1), 67–1–1(2)) (footnote omitted). Idaho's governor bears the identical responsibilities under Idaho Code § 67–802(1) and (2). *Cf. Estep v. Comm'rs of Boundary Cty.*, 122 Idaho 345, 346, 834 P.2d 862, 863 (1992) (addressing the executive branch functions of Idaho county commissioners and other officials). Therefore, because Governor Otter is "responsible for the general supervision of the administration by the local . . . officials," there is a sufficient

connection here. *Kitchen,* 755 F.3d at 1204 (internal quotation marks and citation omitted). Similarly, because of comparable responsibilities, Georgia's governor had sufficient connection in a suit challenging deficiencies in the state's provision of indigent defense services there. *See Luckey,* 860 F.2d 1012at1013.

Like the governor in *Los Angeles Cty. Bar Ass'n v. Eu*, the Idaho Governor's connection as an appointing and supervising power over Idaho's public defense system means he has a sufficient connection here. Recall that in *Eu*, there was a sufficient connection for both standing and *Ex Parte Young* purposes in a suit over limits on the number of county judges—not because the governor had power to increase or decrease the number of assignments, but merely because he had appointment powers to fill judicial vacancies. 979 F.2d 697, 704 (9th Cir. 1992). Here, Idaho's Governor has the same kind of appointment powers over the PDC, the State Appellate Public Defender's Office, and boards of county commissioners. The Governor has far more than general responsibilities over Idaho's indigent defense system, especially as compared to the governor in *Eu*. Indeed, Governor Otter has other substantial and direct connections to Idaho's statewide system. This combines with the Governor's demonstrated authority to issue executive orders related to indigent defense reform. The governor did just that, creating the Idaho Criminal Justice Commission and ultimately tasking it with developing recommendations for reform, and prompting an increase in funding for public defense. Just a few months ago Governor Otter recommended a $5 million budget allocation to public defense reform for fiscal year 2017, braiding a thick rope connecting him with public defense throughout Idaho.

With regard to the PDC—the State agency expressly entitled the "State Public Defense

Commission" and expressly responsible for supervising public defense throughout the State—a statewide commissioner of an agency is a properly named defendant in a lawsuit regarding that agency's duties. *See Finstuen v. Crutcher*, 496 F.3d 1139, 1151 (10th Cir. 2007) (holding that the Oklahoma Commissioner of Health wasan "appropriately named defendant" in a lawsuit challenging an amendment to a state statute preventing recognition of adoptions by same–sex couples). For instance, in *Lakeside Roofing Co. v. Nixon*, No. 4:10CV01761, 2011 WL 1465593 (E.D. Mo. Apr. 18, 2011), the court denied a motion to dismiss in a case naming the Governor of Missouri and three Commissioners of the Missouri Labor and Industrial Relations Commission. The court found that the law "provides a sufficient connection between the Commissioners and the enforcement of the Law to make the Commissioners potentially proper parties for injunctive relief." *Id.* at *4 (citation omitted). There, the Commissioners were required to provide a list of nonrestrictive states to the Department of Labor, which would in turn determine which laborers are prohibited from working state jobs during a period of excessive unemployment. *Id.* The court reasoned that:

> [a]lthough the Commissioners are not the final decisionmakers, the Commissioners assist in giving effect to the allegedly unconstitutional law because they make the requisite determination for what constitutes a restrictive state. Thus, the Commissioners are an indispensable part of the process of enforcing the Law and their presence in this lawsuit may be required for complete relief."

Id.

The State focuses on the PDC's authority under prior statutes. Previously, the PDC's duties included promulgating rules for public defender training and public defense data collection, and making recommendations to the Legislature regarding potential changes to the

state's indigent defense system. Even under the prior statutes, therefore, the PDC was statutorily tasked with developing ways to improve Idaho's indigent defense system—making it the only statutorily–created agency in the state that focuses exclusively on indigent defense reform. That alone was enough to establish an adequate connection. *See Eu*, 979 F.2d at 701 (finding that the connection between the Governor of California and litigation delays in Los Angeles County was "tenuous," but still sufficient to confer standing.); *see also United States v. SCRAP*, 412 U.S. 669, 686–87 (1973).

The enactment of House Bill 504 in March 2016, however, leaves no doubt that the PDC has a more–than–substantial connection to Idaho's public defense system, and that it has authority to address the issues Plaintiffs raised in their complaint. Defendants concede that "claims for injunctive or other relief are adjudicated under the law in effect when the court decides the case, be the case before the trial court or an appellate court, because such relief operates *in futuro*." Resp'ts Br. at 20 (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 273–74, 114 S. Ct. 1483, 1501 (1994)). In other words, when the forms of injunctive relief that a court may issue change during the pendency of a case, the court must follow the law in effect at the time of the court's ruling. *Id.* Here, that means the PDC's authority under the current statute is what matters when evaluating the justiciability questions at issue on this appeal.

This Court, therefore, must evaluate the extent of the PDC's "connection" to indigent defense delivery in Idaho based on the PDC's current duties and authority, including those bestowed upon them by HB 504, which took effect on July 1, 2016. In addition to their previous responsibilities, the PDC's new duties now include developing and enforcing statewide

performance standards for public defenders, Idaho Code §§ 19–850(1)(a)(vi), (vii); providing grant funding to counties seeking to bring their respective public defender offices into compliance with the statute, Idaho Code § 19–862A; and intervening in any county that fails to comply with the statute by taking responsibility itself for ensuring compliance, Idaho Code § 19–862A(11).

Rather than confront the PDC's actual authority, the State sidesteps the issue by suggesting that, because the new law just went into effect, it is not yet ripe for this Court's review, since "Plaintiffs can only speculate that the PDC will act inconsistently with its new authority." Resp'ts Br. at 21. The State argues that the case is not ripe due to "APA ripeness concerns," and suggests that Plaintiffs must first exhaust administrative remedies by seeking an order under the Idaho Administrative Procedure Act before they may raise their constitutional claims under 42 U.S.C. § 1983. The State, however, cites no legal authority for its argument. *See id*. at 21. That is because its argument was long ago rejected by the U.S. Supreme Court: exhaustion of state administrative remedies is not a prerequisite to bringing a § 1983 action.[4]

[4] Whether the PDC might someday cure the deficiencies Plaintiffs complain of will only become relevant at summary judgment or trial. If, by that time, Idaho's public defense system meets constitutional muster, either the case will be moot or Plaintiffs will lose for lack of proof. For now, the Court must liberally construe Plaintiffs' complaint and presume all facts alleged there are true. *Argonaut Ins. Co. v. White*, 86 Idaho 374, 376, 386 P.2d 964, 964 (1963). Plaintiffs allege that the public defense system in Idaho violates constitutional minima due to state level systemic issues that the counties themselves cannot remedy. *See* R. p. 55, ¶¶163–69.

Notably, as well, since the PDC was created in 2014, it has repeatedly failed to fulfill its statutory responsibilities. R. pp. 24–25, ¶¶ 48–49. For instance, the PDC was required to "make recommendations to the Idaho legislature for legislation on public defense system issues" on or before January 20, 2015, "and by January 20 of each year thereafter as deemed necessary by the commission." Idaho Code § 19-850(b). To date, the PDC has yet to submit any recommendations

Patsy, 457 U.S. at 516.

Though the State complains that Plaintiffs are asking for a "default" defendant responsible for Idaho's broken public defense system, that is precisely what the Governor and the PDC are under Idaho law. The Governor is to ensure that all offices are filled, including county commissioners, and that the duties of those offices are actually performed—"or, ***in default*** thereof, apply such remedy as the law allows." Idaho Code § 67–802(2) (emphasis added); *cf.* Idaho Code § 59–906(1). The PDC, likewise, is required by statute to monitor all public defense in the state to ensure compliance with indigent defense standards and, if any county fails to comply, either require that the county comply, or remedy the noncompliance on its own. Idaho Code § 19–862A(9), (11). The Governor and PDC are the backstop for the constitutional right to counsel in Idaho. *Cf. Idaho Bldg. & Const. Trades Council, AFL–CIO v. Wasden*, 32 F. Supp. 3d 1143, 1148 (D. Idaho 2014) ("If a challenged statute is not of the type to give rise to enforcement proceedings, a state official nonetheless may be named as a defendant under *Ex parte Young* if he has responsibility to 'give effect' to the law.") (quoting *Eu*, 979 F.2d at 704); *HRPT Properties Tr. v. Lingle*, 715 F. Supp. 2d 1115, 1127 (D. Haw. 2010) ("If there is no state official charged with enforcing [a law], then it stands to reason that [the governor] is the person with the power to instruct state officials in the executive branch to enforce" it.). The Governor and PDC ***are*** the

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to the legislature. The statute further directed the PDC to promulgate rules establishing "uniform data reporting requirements" designed to track "caseload, workload and expenditures" among public defenders across the state. Idaho Code § 19-850(a)(ii). To date, the PDC has yet to establish any such data reporting requirements. *See* Idaho Admin. Code r. 61.01.01 The PDC has done nothing to demonstrate that it will fulfill its statutory duties in a timely manner, if at all.

default defendants here, and they are causally connected to systemic right to counsel violations in Idaho because when such systemic violations occur, it is the Governor under Idaho Code § 67–802(2) and the PDC under Idaho Code § 19–862A(11) who are expressly responsible for applying a remedy.

3. Plaintiffs' Claims Are Redressable by Defendants, Particularly Following the Passage of the Amendments to Idaho Code § 19–850.

The State ultimately admits that the PDC's "new authority, once brought to bear, will promote improved public defense services." Resp'ts Br. at 21. Redressability simply requires that a court possess the ability to remedy the harm that a petitioner asserts. *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 975–76 (9th Cir. 2003). The State concedes that this Court can provide a remedy in this case on its own. Resp'ts Br. at 10 n.6 ("Given this Court's constitutional supervisory power over the lower courts, Idaho Constitution, Article V, § 2, there are no constitutional impediments to this Court issuing remedial directions to District Judges and Magistrates regarding public defense."). Orders requiring the PDC or Governor to take actions they are already authorized to take could provide a remedy as well. So could a declaratory judgment.

As for the PDC, the State contends that "the PDC is still not statutorily obligated to provide constitutionally adequate public defense services ***itself***." Resp'ts Br. at 21 (emphasis added). That statement is belied by the fact that Idaho Code § 19–862A(11)(b) gives the PDC itself the authority to take over indigent defense services in a given county in order to bring that county into compliance with the statute—a statute specifically enacted to address the

longstanding constitutional deficiencies in public defense services in Idaho. The State argues, though, that the fact that the PDC is empowered to take control of indigent defense in a given county only if that county fails to comply with statewide standards proves their point—"that the PDC has no general statewide mandate to ensure the constitutional adequacy of public defense services." Resp'ts Br. at 21–22.

That argument misses the mark. Indeed, the very reason that Plaintiffs filed suit—and why the Legislature established the PDC and recently expanded its powers—is that the counties have proven unable to provide constitutionally–adequate services, thereby necessitating greater involvement of and investment by the state. *See* R. p. 38 ¶ 102. If the statewide standards set by the PDC do not meet constitutional muster, this Court or the district court can order the PDC to develop appropriate standards. If the standards do meet constitutional muster, but counties across the state are still unable to make the changes necessary to meet those standards, then this Court or the district can enjoin the PDC to remedy the deficiencies itself. *See* Idaho Code § 19–862A(11)(b).

Regarding the Governor, the State contests the notion that the Governor has authority to issue executive orders that could impact indigent defense reform in Idaho. The State argues that Executive Order No. 2015–11, which required the state's Juvenile Justice Commission to ensure compliance with a federal statute—the federal Juvenile Justice & Delinquency Prevention Act of 2002 (JJDPA)—is distinguishable from any executive order the Governor could issue with regard to public defense. Resp'ts Br. at 14. The State points out that the Governor issued EO 2015–11, authorizing Idaho's Juvenile Justice Commission to ensure compliance by local

jurisdictions, because "Federal law requires just that." *Id.*. If the Governor can issue an executive order to empower an executive branch commission to supervise local compliance with a federal ***statute***, then surely the Governor can issue an executive order to empower a commission to supervise local compliance with the federal ***Constitution***. *See* Idaho Code § 67–802:

> The supreme executive power of the state is vested . . . in the governor, who is expressly charged with the duty of seeing that the laws are faithfully executed. In order that he may exercise a portion of the authority so vested, the governor is authorized and empowered to implement and exercise those powers and perform those duties by issuing executive orders . . . .

cf. Idaho Const. art. I, § 3 ("[T]he Constitution of the United States is the supreme law of the land.").

The State fails to explain why the Governor is not equally bound by the federal and Idaho constitutions to task his Criminal Justice Commission, or some other executive branch body or official, with ensuring compliance with the foundational legal principles established by the Sixth and Fourteenth Amendments. Just as EO 2015–11 does only what federal law requires, any executive order directing state officials to ensure the provision of constitutionally adequate indigent defense services would do only what the federal and state constitutions require. After all, as has already been well established, it is the State's affirmative responsibility to execute the promise articulated in *Gideon* and its progeny, and the Governor is the "supreme executive power" in Idaho. Idaho Const. art. IV, § 5; Idaho Code § 67–802. If Plaintiffs prove at summary judgment or trial that there are ongoing violations of the right to counsel in Idaho, and that those violations are due to systemic, statewide failures that the counties cannot remedy, then this Court or the district court can order the Governor to take action, including issuing executive orders at

his discretion, to fulfill the constitutional guarantee.

This Court and the district court also possess the ability to remedy the harm in this case through declaratory relief. Such a declaration would make it "substantially likely that the [Idaho] legislature, although its members are not all parties to this action, would abide by [the court's] authoritative determination." *Eu*, 979 F.2d at 701; *see also Utah v. Evans*, 536 U.S. 452, 464 (2002). Citing *Utah v. Evans*, the State argues that this case is not so simple, for "[i]f a letter from the Governor or the PDC would have cured the problems identified in the Complaint, the standing issue would be great[ly] simplified, if not wholly eliminated." Resp'ts Br. at 17. But this conclusion misses the point of that case. In *Evans*, it was a court order that the Court assumed would compel the President or Congress to act—not a mere letter from the Secretary of Commerce. *Evans*, 536 U.S. at 463–64. Likewise, it is not a "letter from the Governor or the PDC," but rather a declaration from the court that would move the Idaho Legislature to any necessary action. As this Court itself put it: "we are fully confident that once we have fulfilled our constitutional duty to interpret the constitution the other branches of government also will carry out their defined constitutional duties in good faith and in a completely responsible manner." *ISEEO v. Evans*, 123 Idaho 573, 583, 850 P.2d 724, 734 (1993) [hereinafter *ISEEO I*] (internal quotation marks omitted). This Court reiterated the same principle when it upheld the declaratory relief in *ISEEO V*: "We are firmly convinced the Legislature will carry out its constitutional duties in good faith and in a timely manner." *ISEEO v. State*, 142 Idaho 450, 460, 129 P.3d 1199, 1209 (2005) [hereinafter *ISEEO V*]. The prospect of such a declaration alone, which Plaintiffs request in their complaint, satisfies the redressability prong of the traditional

standing inquiry.

Finally, neither this Court nor the district court is bound by the specific requests included in Plaintiffs' Prayer for Relief. With respect to equitable relief, courts have broad discretion to fashion the remedy that it believes to be most appropriate under the circumstances. *See Riggs v. Fairman*, 399 F.3d 1179, 1193 (9th Cir. 2005) ("As a general principle, trial courts usually do have broad discretion to fashion remedies."); *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008) ("The imposition of equitable remedies is a question of fact because it requires the trial court to balance the equities of each party."). Hence, irrespective of the particular relief sought by Plaintiffs, the district court may fashion whatever remedial provisions are appropriate if Plaintiffs prove ongoing, systemic constitutional violations at the state level, as alleged in the complaint.

4. <u>This Court Has Set Forth a Relaxed Standing Analysis, Not Just a Relaxed Injury–In Fact Analysis.</u>

The State offers no argument that this matter does not pass the test for relaxed standing. *See Coeur d'Alene Tribe v. Denney*, No. 43169, 2015 WL 7421342, at *4 (Idaho Nov. 20, 2015). Instead, it contends that this Court did not actually establish a relaxed standing doctrine, but merely a relaxed standard for assessing injury–in–fact. *See* Resp'ts Br. at 18–19. In *Coeur d'Alene Tribe*, however, this Court expressly recognized that its ordinary standing analysis involves three distinct inquiries: (1) injury in fact; (2) causal connection; and (3) redressability. *Coeur d'Alene Tribe*, 2015 WL 7421342 at *3 (noting that "the test for standing" consisted of those three elements). Having identified those three separate components, the Court then held

that it would "relax ordinary ***standing*** requirements in . . . cases where: (1) the matter concerns a significant and distinct constitutional violation, and (2) no party could otherwise have standing to bring a claim." *Id.* at 4 (emphasis added). The State's argument only makes sense if this Court did not mean what it said.

If this Court concludes that this matter does not meet the ordinary standing analysis, then the complaint can and should be evaluated under the relaxed standing analysis set forth in *Coeur d'Alene Tribe*. *See Id.* at 4. Under that test, this Court is not bound by any "case or controversy" requirement or other like constraint. *Id.* at *3. Either way, this Court can obviously decide the important questions presented in this matter and vindicate fundamental constitutional guarantees.

B. Separation of Powers

The State does not dispute that Plaintiffs have sufficiently alleged ongoing constitutional violations in Idaho's courts. *See, e.g.*, R. p.12 ¶ 8. These violations include both constructive and actual denial of counsel, at critical stages of criminal proceedings. *See, e.g.*, R. pp. 13–14 ¶ 11–12. The State also does not dispute that Plaintiffs have sufficiently alleged that these ongoing constitutional violations are due to failures at the state level that the individual counties cannot remedy. *See* R. p. 12 ¶ 8, p. 38 ¶ 102 , p. 55 ¶ 169, p. 57 ¶¶ 176, 180, p. 58, ¶ 183; *cf.* p. 13 ¶ 12, p. 21 ¶ 36, p. 24 ¶¶ 44, 46–48, p. 25 ¶¶ 49, 52, 54, p. 26 ¶¶ 57, 58, p. 33 ¶¶ 85–87, p. 34 ¶ 91, p. 36 ¶ 96.

Instead, the State attacks a strawman: the specter of a judiciary legislating a new system from the bench. This is a strawman because Plaintiffs' complaint specifically asks the district court to leave up to the State's discretion how best to bring the system up to constitutional

muster. R. p. 58. It's an odd strawman, too. The State concedes in its own brief that this Court has constitutional authority to reform the system on its own. Resp'ts Br. at 10 n.6.

It is also a perilous strawman. The State is using it to try to foment fear and hesitation among the members of this Court. This is a big case. It has an obvious political backdrop, and this Court's decision, even at this early pleading stage, will carry a message to tens of thousands of Idaho families whose lives are touched by the criminal justice system as it plays out in our state courts. In cases with stakes this high, a decision–maker might begin to feel self–conscious. By using a strawman to deflect the Court's attention away from the constitutional questions in this case and instead toward legislative questions that might arise in its aftermath, the State is trying to provoke feelings of judicial self–consciousness to the point of paralysis. Everyone agrees that the Court cannot tell the Legislature what to do. But what the judicial branch—and only the judicial branch—can and must do is decisively set the constitutional parameters that define the other branches' discretion. That is "the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. 137, 178, 1 Cranch 137, 178 (1803).

The State's strawman is perilous because it urges a rule that would derogate that duty and hobble this Court's authority for years to come. There are two profound problems with the State's arguments. One, the State uses principles applicable to "negative" rights—rights that merely prohibit the government from taking certain actions against an individual—while ignoring that the right to counsel under *Gideon* is a "positive" right—a right that requires government to take affirmative steps to protect an individual. Two, the State's version of the separation of powers doctrine would eliminate, rather than protect, the checks and balances that

doctrine ensures.

1. The Right to Counsel is an Affirmative Duty and Therefore Its Enforcement Requires the State to Take Affirmative Steps.

Most of the individual rights guaranteed by the Bill of Rights and the Declaration of Rights in Article 1 of the Idaho Constitution are so–called "negative" rights. They only guarantee that the government refrain from doing certain things, like restricting a person's speech or unreasonably searching a person's home without a warrant. The remedy if the government violates a negative right is to "stop the infringement by striking the offending statute, prohibiting and punishing the action, and suppressing fruits obtained from the unconstitutional act." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 894, 179 P.3d 366, 381 (2008).

But the Bill of Rights and the Idaho Constitution also provide certain "positive" rights. Those require the government to take affirmative steps, such as to maintain a "thorough system of public, free schools," *ISEEO I*, 123 Idaho at 582, 850 P.2d at 733 (internal quotation omitted), or to provide adequate medical care to prisoners, *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976). *See also Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982) (holding that the government must provide involuntarily committed mental patients with such services as are necessary to ensure their "reasonable safety" from themselves and others"); *see also, e.g.*, *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) (holding that the government must provide medical care to suspects in police custody who have been injured while being apprehended); *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (holding that the government must prepare and furnish transcripts to indigent criminal defendants if transcripts are necessary for appeal). "The best

known example" of such a positive right requiring the government to act affirmatively is the right to counsel as interpreted in *Gideon*. *Archie v. City of Racine*, 847 F.2d 1211, 1222 (7th Cir. 1988) (en banc) (Easterbrook, J.); *cf. Bounds v. Smith*, 430 U.S. 817, 834 (1977) ("an indigent defendant's right under the Sixth Amendment places upon the State the ***affirmative duty*** to provide him with counsel for trials which may result in deprivation of his liberty" (emphasis added)); *Maine v. Moulton*, 474 U.S. 159, 171 (1985) (holding that "[t]he Sixth Amendment also imposes on the State an affirmative obligation").

When the government violates a positive right, the conventional remedies used for negative rights do not work.

> When a positive right has been violated, the typical remedy imposed for protecting negative rights—prohibiting government action—exacerbates the problem that arose when the government failed to act and fulfill its duties. To enforce a positive right, courts must mandate a positive remedy by requiring the state government to act and thereby fulfill the constitutional right.

Sebelius, 285 Kan. at 894, 179 P.3d at 381. Accordingly, courts that have found violations of positive rights have crafted remedies that declare a constitutional violation and enjoin state officials to take affirmative steps, *Alabama Coal. for Equity, Inc. v. Hunt*, No. CIV. A. CV–90–883–R, 1993 WL 204083, at *63 (Ala. Cir. Ct. Apr. 1, 1993), or declare a violation and "retain jurisdiction until a constitutional body of legislation is enacted and in effect," *Washakie Cty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 337 (Wyo. 1980), or declare a violation and reserve the ability to later "determine whether, within a reasonable time, appropriate legislative action has been taken," *McDuffy v. Sec'y of Exec.Office of Educ.*, 415 Mass. 545, 621, 615 N.E.2d 516, 556 (1993). *See also Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993)

(declaring constitutional violation and allowing legislature to fashion appropriate remedy); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 399 (Tex. 1989) (same); *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 90 Wash. 2d 476, 539, 585 P.2d 71, 105 (1978) (same). This Court itself used one of these remedies in *ISEEO V*, declaring a violation but retaining jurisdiction "to consider future legislative efforts to comply with the constitutional mandate." *ISEEO V*, 142 Idaho at 460.

Notably, these remedies are less intrusive than striking down a statute, the typical remedy in a negative rights case. When a court strikes down a legislative action, it is an absolute rebuke. The court nullifies the statute unilaterally, without any further say from the legislature or any other branch.[5] When, however, a court declares a constitutional violation but allows the other branches to make choices about how to address the violation, all three branches retain their independence. All the court does is set constitutional parameters and ensure that the other branches do not again make choices that violate constitutional minimums. As the Supreme Court

[5] This Court has not shied away from its duty to strike down entire statutes on constitutional grounds. *See, e.g.*, *Credit Bureau of E. Idaho, Inc. v. Lecheminant*, 149 Idaho 467, 470, 235 P.3d 1188, 1191 (2010) (Idaho Code § 11-204); *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Tr.*, 147 Idaho 117, 132, 206 P.3d 481, 496 (2009) (Idaho Code § 41-1830); *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 128, 15 P.3d 1129, 1136 (2000) (Idaho Code § 34-907B); *Thompson v. Hagan*, 96 Idaho 19, 23, 523 P.2d 1365, 1369 (1974) (Idaho Code § 49-2415); *see also State v. Bonner*, 138 Idaho 254, 259, 61 P.3d 611, 616 (Idaho Ct. App. 2002) (Idaho Code § 18–1508A(1)(d)). This Court has even edited legislative language by construing and limiting it to achieve a constitutional outcome. *State v. Poe*, 139 Idaho 885, 906, 88 P.3d 704, 725 (2004) (Idaho Code § 18-6409). And it has also permitted lower courts to ignore statutes with constitutional infirmities and suggested that those courts instead refashion their own "ad hoc" approaches to achieve constitutional results. *Smith v. State*, 146 Idaho 822, 829, 203 P.3d 1221, 1228 (2009) (Idaho Code §§ 18-8314, 18-8319, and 18-8321).

of Texas put it, the court needs to "decide only the nature of the constitutional mandate and whether that mandate has been met." *Edgewood Indep. Sch. Dist.*, 777 S.W.2d at 399. Plaintiffs ask for no more here.

2. Dismissal on Separation of Powers Grounds Eliminates Checks and Balances That This Court is Exclusively Bound to Provide.

The State's legislative interference strawman is also profoundly problematic because the separation of powers regime the State urges would give over to the other branches ultimate control over baseline constitutional requirements for Idaho's criminal justice system. To allow the legislature to be the final arbiter of whether and how to restructure the public defense system "would be giving to the legislature a practical and real omnipotence, with the same breath"—here, the Sixth Amendment and Article 1, § 13, of the Idaho Constitution—"which professes to restrict their powers within narrow limits." *Marbury*, 5 U.S. (1 Cranch) at 178.

This would be especially ironic in this case because it would give the Legislature control over what happens in the magistrate and district courts, whose supervision is constitutionally vested in this Court, Idaho Const. art. V, § 2, and the practice of law by Idaho public defenders, whose supervision is this Court's exclusive responsibility, *Talbot v. Ames Const.*, 127 Idaho 648, 651–52, 904 P.2d 560, 563–64 (1995) (collecting cases); *Rhodes v. Indus. Comm'n*, 125 Idaho 139, 141, 868 P.2d 467, 469 (1993) ("[T]he judicial department of the government is uniquely imbued with the power to regulate the practice of law."); *King v. Dep't of Emp't*, 110 Idaho 312, 314, 715 P.2d 982, 984 (1986) (holding that the regulation of the practice of law is the sole responsibility of this Court). The practical outcome of the State's arguments would be just as

ironic: if individuals are suffering systematic constitutional violations in Idaho's trial courts, this Court could not remedy the system; and the trial courts, which would also be powerless to fix such statewide, systemic violations, would have to wait to see whether the Legislature, Governor, or PDC took adequate action.

> Equity is indeed practical under these circumstances, as the State acknowledges.
>
> The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, they are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority.

Pearce v. Moffatt, 60 Idaho 370, 92 P.2d 146, 155 (1939). Whatever authority the Legislature may have over Idaho's public defense system, this Court has the power and duty to decide whether that system is operating within constitutional parameters and, if it is not, to ensure that changes are both planned and actually implemented to bring the system within those parameters.

For the same reasons of equity and practicality, litigating duplicative suits in 44 separate counties, or in thousands of separate individual criminal cases, is hardly a manageable way to determine whether the overall statewide system is constitutionally functional as currently implemented. The law is clear that where a state seeks to "commit[] the details of its operation to local officers," it must first provide "suitable machinery" that will enable such officials to fulfill the legal obligation in question. *Fenton v. Bd.of Comm'rs of Ada Cty.*, 20 Idaho 392, 403, 119 P. 41, 45 (1911); *see also Strickfaden v. Green Creek Highway Dist.*, 42 Idaho 738, 738, 248 P. 456, 458 (1926) ("Counties are generally . . . involuntary subdivisions or arms of the state through which the state operates for convenience."). Plaintiffs in this case allege that the State has not

provided the counties with suitable machinery to provide constitutionally adequate public defense. Accordingly, "the issue is systemic in nature," and the district court may make generalized findings. *ISEEO V*, 142 Idaho at 455. Here, just as the Idaho Supreme Court has had to point out previously, "the State fails to grasp the relevance of the adage 'the whole is greater than the sum of its parts.'" *Id.*

This case presents that statewide question squarely. This Court should reverse the district court's decision to dismiss the case and allow Plaintiffs to prove both that there are ongoing constitutional violations and that those violations are due to failures at the state level that the individual counties cannot remedy, as they have alleged. It would be "an abject abdication of [this Court's] role in the American system of government" if Idaho's judiciary refused to review the evidence and decide the issue. *ISEEO I*, 123 Idaho at 583, 850 P.2d at 734.

"[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it [is] clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Marbury*, 5 U.S. (1 Cranch) at 166. In turn, it is uniquely and "emphatically" the judiciary's responsibility to decide what the law is and provide a remedy if the government has violated it. *Id*. at 177–79. The State has not cited to any cases where the Idaho separation of powers doctrine has been applied to avoid a constitutional question that has not been explicitly assigned to another branch's exclusive discretion. Idaho courts cannot excuse themselves from upholding the constitutional rights of its citizens by relying on separation of powers grounds. A declaratory judgment in this case would not require the court to establish guidelines or mandate that a branch enact legislation to meet those

standards. *See ISEEO V,* 142 Idaho at 459, 129 P.3d at 1208. Plaintiffs do not ask this Court, or the district court, to order any statutory change. Plaintiffs ask only that the judiciary, rather than the Legislature, Governor, or PDC, set the constitutional parameters within which Idaho's public defense system must operate.

C. The State's Extraneous Arguments

The State argues that Idaho Rule of Civil Procedure 3(b) means Plaintiffs cannot seek injunctive relief against the State of Idaho. That Rule has been changed and the "Designation of party" provision that the State quotes no longer exists. *See* I.R.C.P. 3(c) (July 1, 2016). Nor does the old rule even say that the State cannot be named as a party. Rather, it expressly allows that a "governmental unit" can be named and, if so, designated "in its governmental . . . name only . . . ." I.R.C.P. 3(b) (2015). It would be odd, otherwise, for a procedural rule about how to designate parties in a civil caption to foreclose substantive relief on a constitutional issue. The State also mischaracterizes the opinion in *Weyyakin Ranch Prop.Owners Ass'n, Inc. v. City of Ketchum*, 127 Idaho 1, 3, 896 P.2d 327, 329 (1995). In that case, the district court had held City of Ketchum officials in contempt. *Id.* But the complaint named only the City of Ketchum, not the individual officials held in contempt. *Id.* at 2–3, 896 P.2d at 328–29. This Court, accordingly, held that the district court could not hold the officials in contempt, because "the trial court never obtained jurisdiction over them, and therefore did not have the authority to find them in contempt." *Id.* at 3, 896 P.2d at 329. Notably, the district court in this case rejected the State's I.R.C.P. 3(b) argument out of hand. R. p. 494.

The State also contends that this Court cannot grant declaratory relief against the State of Idaho, despite the fact that granting declaratory relief against the State of Idaho is exactly what this Court did in *ISEEO V*. 142 Idaho at 453, 129 P.3d at 1202 (affirming judgment against State of Idaho in systemic reform litigation). This Court again permitted a declaratory judgment action against the State of Idaho last year. *Doe v. State*, 158 Idaho 778, 784, 352 P.3d 500, 506(2015). Idaho's declaratory judgment statues are "broad and comprehensive," *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 797–98, 154 P.2d 156, 158 (1944), and must be "liberally construed and administered," Idaho Code § 10–1212. They unequivocally allow the State no defense on the grounds that Plaintiffs seek declaratory relief: "No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for." Idaho Code. § 10–1201.

The State attempts to attack the amici briefs by questioning their interest in state laws that result in federal constitutional violations. The State's argument about *Luckey* fails to mention that, in fact, the *Luckey* court did conclude that Georgia's governor had sufficient connection in a suit challenging deficiencies in Georgia's provision of indigent defense services. *Luckey*, 860 F.2d at 1013. Furthermore, the State ignores other cases that contradict its arguments that no state official should be held responsible for statewide government services that result in constitutional violations. *See, e.g.*, *Utah Republican Party v. Herbert*, No. 2:14–CV–00876–DN–DBP, 2015 WL 6395587, at *4 (D. Utah Oct. 22, 2015) (holding that allegations that the Governor was the supervisor of all official conduct of all executive and ministerial officers, which included the chief election official in charge of enforcement of the challenged provision of SB54, were

enough to show that the Governor had "'some connection' to the enforcement of the challenged provision of SB54, and a 'particular duty' to enforce the law"); *Hall v. State*, 983 F. Supp. 2d 820, 832 (M.D. La. 2013) (holding that the governor and attorney general were proper defendants because the complaint alleged that they had "some connection" with the enforcement of the 1993 Judicial Election Plan, or that they are specifically charged with the duty to enforce the Plan and are currently exercising and/or threatening to exercise that duty.). Similarly, the State discounts *Hurrell–Harring* as not being a "clean" Sixth Amendment case, but even quotes that court as saying it has "consistently held that enforcement of a clear constitutional or statutory mandate is the proper work of the courts." Resp'ts Br. at 35 (quoting *Hurrell–Harring*, 15 N.Y.3d at 27, 930 N.E.2d at 227) (emphasis removed). *See also id.*, 15 N.Y.3d at 18–19, 930 N.E.2d at 221–22 (explaining that the issue in that case was whether New York had "met its foundational obligation under *Gideon* to provide legal representation").

All of these arguments are extraneous and unavailing. They should not distract the Court from ensuring constitutional compliance in Idaho's criminal proceedings.

III. CONCLUSION

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The State argues for a regime in Idaho that would leave the fundamental right to counsel beyond this Court's ability to ensure in any systemic way. The Court should reverse and remand so that Plaintiffs can submit their evidence.

Respectfully submitted, Dated: August 12, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August, 2016, I caused to be served a true and correct copy of the foregoing by U.S. mail, first class postage prepaid, and by electronic mail, addressed to each of the following:

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