The Honorable Robert S. Lasnik
The Honorable David G. Estudillo
The Honorable Lawrence Van Dyke

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BENANCIO GARCIA III,

Plaintiffs,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, and the STATE OF WASHINGTON,

Defendants,

NO. 3:22-cv-5152-RSL-DGE-LJCV

PLAINTIFF'S RESPONSE TO DEFENDANT STATE OF WASHINGTON'S MOTION FOR INQUIRY CONCERNING POTENTIAL CONFLICTS OF INTEREST

Plaintiff Garcia opposes this Motion for Inquiry Concerning Potential Conflict of Interest ("Inquiry Motion"), (*Garcia* Dkt. # 29)[1], because there is no procedural basis allowing it, it is brought in a court that has no jurisdiction to hear it, and the motion has no factual basis to support it. Instead, the Motion is essentially a thinly-veiled attempt to sneak in through the back door that which the Court would not allow in through the front: namely, a prohibition on undersigned

[1] Because *Palmer v. Hobbs*, No. 3:22-cv-5035-RSL, and *Garcia v. Hobbs*, No. 3:22-cv-05152-RSL-DGE-LJCV have been consolidated for purposes of discovery and trial, this Response cites to both dockets. Citations to the instant docket appear as "*Garcia* Dkt. # __," whereas cites to the *Palmer* docket appear as "*Palmer* Dkt. # __."

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counsel representing clients who defend a Voting Rights Act ("VRA") claim while simultaneously representing another client who pursues a Fourteenth Amendment claim against the same map. The *Palmer* Court has already rejected that argument. (*See Palmer* Dkt. # 69 at 9–10.)

Defendant State of Washington's ("State's") Inquiry Motion is as lacking in merit as it is in procedural grounding. To quote the Bard, this Motion is "full of sound and fury, signifying nothing." William Shakespeare, Macbeth act 5, sc. 5, l. 26–27. This is evident from the Motion's own terms, as the Motion seeks not relief, but for the Court to "inquire" as to instant counsel's communications and relationship with their clients. The attorney-client ethics rules were intended as a shield for clients, but here, the State attempts to use them as a sword to sever an attorney-client relationship, despite the fact that the clients do not seek such severance. This Court should roundly reject the State's gamesmanship and deny the Motion.

Responding to a motion devoid of a procedural grounding is tricky business. However, the *Palmer* Intervenor-Defendants ("*Palmer* Intervenors") and the *Garcia* Plaintiff ("Mr. Garcia") are confident that the Court will see the State's Inquiry Motion for what it is: over-the-top gamesmanship designed to disqualify and smear counsel on the eve of dispositive motion briefing deadlines. Such a tactic is designed not to serve the sanctity of the Court, nor to ensure the adequacy of representation, nor to adhere to the duty about which the State opines. Rather, the purpose of the State's frivolous Inquiry Motion is to disadvantage the *Palmer* Intervenors and Mr. Garcia—with dispositive motion due dates for both cases just days away—in hopes that

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it makes the State's job easier.[2] For the reasons explained below, the Court should deny the State's Motion and take whatever steps the Court deems necessary regarding its actions.[3]

I. There is No Procedural Basis for the State's Inquiry Motion.

Even if this Court has jurisdiction and the State has standing, there is no procedure upon which the State may base an Inquiry Motion related to *potential conflicts* in a *civil* matter. Indeed, undersigned counsel is not aware of a single case where the government has made an inquiry motion in a civil matter for potential attorney conflicts.

Notably, inquiry motions are generally reserved for criminal matters. *See, e.g.*, *United States v. Razo-Quiroz*, No. 1:19-cr-00015-DAD-SAB, 2019 U.S. Dist. LEXIS 32410, at *33 (E.D. Cal. Feb. 27, 2019) (allowing the filing of an inquiry motion regarding potential conflicts *in a criminal matter* but denying a concurrent disqualification motion because any potential

[2] The State is undoubtedly in a tactical catch-22 between the *Garcia* and *Palmer* lawsuits. As discovery has made clear, the Commission considered race when drawing the Legislative Map because some members believed (without a strong basis) that doing so was necessary to comply with the VRA. So, if the State (with undersigned counsel's help) succeeds in defending against a Section 2 claim in *Palmer*—by showing that no majority-minority district is required in LD 15—then the State has doomed its case in *Garcia*, where the State must show (in opposition to undersigned counsel) that the boundaries of LD 15 were drawn without consideration of race. The easiest solution for the State? Benefit from undersigned counsel's already-provided help in *Palmer*, and attempt to get undersigned counsel removed from both cases before their presence becomes a problem for the State in *Garcia*. In short, the State must find a more meritorious method to defend the *Palmer* and *Garcia* suits.

[3] While a motion as frivolous as this does not warrant the time or effort of a separate motion for sanctions, *Palmer* Intervenor-Defendants and Mr. Garcia note that the Court may issue such sanctions against the State and/or its lead counsel Mr. Hughes should it so decide. *See, e.g.*, *Perez v. Jie*, No. C13-877-RSL, 2014 U.S. Dist. LEXIS 45001, at *7 (W.D. Wash. Mar. 31, 2014) ("Under its inherent power, a court may sanction an attorney or party who has acted . . . in bad faith…." (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991))); *Ortego v. Lummi Island Scenic Estates Cmty. Club, Inc.*, No. C14-1840-RSL, 2017 U.S. Dist. LEXIS 50645, at *9 (W.D. Wash. Apr. 3, 2017) ("One facet of a federal court's inherent power is that it may assess attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" (citing *F.D. Rich Co., Inc. v. U.S. for Use of Indus. Lumber Co., Inc.*, 417 U.S. 116, 129 (1974))); *accord* LCR 11 ("An attorney or party who . . . presents to the court unnecessary motions . . . or who otherwise so multiplies or obstructs the proceedings in a case may, in addition to or in lieu of the sanctions and penalties provided elsewhere in these rules, be required by the court to satisfy personally such excess costs and may be subject to such other sanctions as the court may deem appropriate."). Indeed, "[w]here disqualification motions are meritless and brought solely for tactical reasons, the Ninth Circuit has upheld the award of costs and attorney's fees as a sanction under Section 1927." *United States Fire Ins. Co. v. Icicle Seafoods*, 523 F. Supp. 3d 1262, 1270 (W.D. Wash. 2021) (citing *Optyl Eyewear Fashion Int'l Corp. v. Style Companies, Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985)).

conflicts had been waived); *United States v. Medina*, No. CR 06-00144-JSW, 2007 U.S. Dist. LEXIS 21156, at *1–2 (N.D. Cal. Mar. 26, 2007) (same); *United States v. Wegers*, No. CR05-0231C, 2005 U.S. Dist. LEXIS 30856, at *14–15 (W.D. Wash. Nov. 10, 2005) (same). If this were a criminal matter, the State could perhaps point to Fed. R. Crim. P. 44(c) as the basis for its Motion. *See Wegers*, 2005 U.S. Dist. LEXIS 30856, at *3. However, this is a civil matter, which does not carry the same implications because there is no constitutional right to representation in a civil suit as there is with a criminal prosecution. *See United States v. W. Titanium, Inc.*, No. 08-cr-4229-JLS, 2010 U.S. Dist. LEXIS 79508, at *38 (S.D. Cal. Aug. 6, 2010) ("However, once alerted to even a potential conflict of interest, the Court has an independent duty to ensure that *criminal defendants* receive a trial that is fair and does not contravene the Sixth Amendment." (emphasis added)). This is perhaps why the State is unable to cite a single procedural rule to serve as the basis for this *civil* Motion. (*See generally Garcia* Dkt. # 29.)

Thus, the State's filing of an inquiry motion about a potential conflict in a civil matter is an enigma. Indeed, in civil cases, inquiry motions are usually made to inquire about a docket or some aspect of a case's status. *See, e.g.*, *Klucka v. Ostrovsky*, No. 2:15-cv-1062-JCM (VCF), 2015 U.S. Dist. LEXIS 91260, at *1 (D. Nev. July 7, 2015) ("Plaintiff's instant motion for inquiry does not ask for relief. Plaintiff merely asks for clarification from the court regarding the status of his case."); *Gray v. Ryan*, No. CV-17-00963-PHX-GMS, 2019 U.S. Dist. LEXIS 195846, at *1 n.1 (D. Ariz. Nov. 12, 2019) (denying a petitioner's "Motion for Inquiry of the General Docket," whereby the "Petitioner request[ed] the status of his Third Amended Petition"); *Newton v. Nevada*, No. 2:16-cv-01824-KJD-GWF, 2017 U.S. Dist. LEXIS 25521, at

*1 n.1 (D. Nev. Feb. 21, 2017) (denying "Plaintiff's inquiry [motion] about his financial certificates as moot"); *Silver v. Wolfson*, No. 2:18-cv-01106-JAD-CWH, 2019 U.S. Dist. LEXIS 70121, at *1 (D. Nev. Apr. 4, 2019) ("Presently before the court is plaintiff's motion for inquiry . . . [on] the status of his *in forma pauperis application*, the court's screening order, and his motion for permission for electronic case filing."); *Hill v. Harper*, No. 2:20-cv-01655-KJD-DJA, 2021 U.S. Dist. LEXIS 230779, at *6 (D. Nev. Dec. 2, 2021) (denying a plaintiff's "motion of inquiry" that "appear[ed] to ask the Court . . . to send him a copy of Defendant's response to Plaintiff's [] motion"); *Patterson v. California*, No. 2:12-cv-2475-KJM-EFB P, 2014 U.S. Dist. LEXIS 28349, at *42 (E.D. Cal. Mar. 4, 2014) ("[P]laintiff also filed a motion styled as a 'motion of inquiry' in which Patterson requests the status of his petition."). However, instead of using this motion as a docket-monitoring mechanism, the State's counsel attempts to use it for an advantage in litigation. *See infra* Part III.

What's more, even when an inquiry motion on purported conflicts of interest is filed in a *criminal* matter, it is generally construed as a motion to disqualify. *See United States v. Rasco*, No. CR408-100, 2009 U.S. Dist. LEXIS 65246, at *7 (S.D. Ga. July 29, 2009) ("Conveniently, courts have been faced with motions to disqualify mistakenly labeled as motions for inquiry before. Generally, the motions are construed as motions to disqualify."); *see also United States v. Hanania*, 989 F. Supp. 1187, 1192 (M.D. Fla. 1997) (construing a "Notice of Conflict of Interest" and "Amended Notice of Conflict" as "a Motion to Disqualify Defendant's Counsel," which the court denied); *United States v. Collins*, No. 1:08-cr-47, 2008 U.S. Dist. LEXIS 39848, at *1 (N.D. Ohio Apr. 21, 2008) (treating a notice "of a potential conflict involving Defendant's counsel" as a motion to disqualify and denying it) (unpublished); *United States v. Evanson*, No.

2:05-cr-805-TC, 2006 U.S. Dist. LEXIS 76244, at *1 (D. Utah Oct. 18, 2006) (construing motion for inquiry as motion to disqualify). And, in this Circuit, such an inquiry motion is usually filed with a corresponding motion to disqualify. *See, e.g.*, *Razo-Quiroz*, 2019 U.S. Dist. LEXIS 32410, at *33; *Medina*, 2007 U.S. Dist. LEXIS 21156, at *1–2; *Wegers*, 2005 U.S. Dist. LEXIS 30856, at *14–15.

Here, however, the State has not moved to disqualify counsel. Thus, to construe its Inquiry Motion as a motion to disqualify would be inappropriate. *See Rasco*, 2009 U.S. Dist. LEXIS 65246, at *6 ("[T]he Court is not aware of any law allowing the Government to move the Court for *sua sponte* action in a case where the disqualification is for the benefit of the Government, and the Government has provided none."). Crucially, here, the State contends that it "does not take a position on whether disqualification is necessary or appropriate here." (*Garcia* Dkt. # 30 at 2.) Simply put, the Court should not construe the motion as asking for a remedy that the state has not requested.

II. The Court Lacks Jurisdiction to Hear the State's Controversy-less Motion.

As an initial matter, this Motion is procedurally defective as the State has not moved for disqualification. Instead, the State invites this Court to appoint itself the arbiter of the attorney-client relationship between undersigned counsel and his clients. Contrary to the State's errant belief, federal courts are not roving tribunals, musing over imagined ethical dilemmas or issuing advisory opinions about what would happen if those hypotheticals were reality.

Article III of the U.S. Constitution limits the jurisdiction of federal courts to hear "Cases" and "Controversies." *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992), thereby "confin[ing] the federal courts to a

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properly judicial role," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To demonstrate standing, the party invoking federal jurisdiction must prove that (1) it suffered an injury in fact, (2) the opposing party caused that injury, and (3) a favorable decision would be likely to redress that injury. *Lujan*, 504 U.S. at 560–61.

However, "neither the United States Supreme Court nor the Ninth Circuit has addressed the particular question of whether the standing doctrine bars a nonclient party from moving to disqualify the opposing party's counsel on the grounds of a conflict of interest." *Icicle Seafoods*, 523 F. Supp. 3d at 1269 (quoting *FMC Techs., Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1156 (W.D. Wash. 2006)) "[C]ourts in [the Western District of Washington] have found that the nonclient 'must establish a personal stake in the motion to disqualify sufficient to satisfy the irreducible constitutional minimum of Article III.'" *Id.* (citation omitted). The State lacks such a personal stake here for two reasons.

First, the State has *not moved for disqualification*. (*See Garcia* Dkt. # 30 at 2.) The entire inquiry centers around whether the opposing party has standing to *move to disqualify* opposing counsel. *Icicle Seafoods*, 523 F. Supp. 3d at 1269. However, the State *has not filed a disqualification motion*. Instead, it has moved for the Court to *inquire* about whether a *potential* conflict exists. Thus, the "merely 'speculative'" nature of the State's motion demonstrates that standing is lacking here. *See Lujan*, 504 U.S. at 561 (citation omitted). For all its bluster, the State's Inquiry Motion is actually a request that this Court issue an advisory opinion, which the Court is constitutionally prohibited from doing. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968).

Second, the State has not been injured because no one has been injured. There is no un-waivable (or un-waived) conflict here. *See infra* Part III; *see also Icicle Seafoods*, 523 F. Supp.

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3d at 1269 n.3 (finding that "the record does not support a finding of conflict of interest" and that the movant "fail[ed] to meet standing requirements in the first instance"). Undersigned counsel's clients have not filed an ethics complaint, raised an issue with this court, or expressed displeasure with the underlying goals of the *Palmer* or *Garcia* litigation. In short, there is no issue other than the one the State has conjured in its imagination.

In sum, the State has not been injured, and its motion presents no opportunity for redressability but, instead, seeks an impermissible advisory opinion. Consequently, the State lacks standing for the instant motion, and the Court should deny the State's Motion for lack of jurisdiction. *See Flast*, 392 U.S. at 95 ("[N]o justiciable controversy is presented . . . when the parties are asking for an advisory opinion . . . and when there is no standing to maintain the action." (internal citations omitted)).

III. Even if the Court has Jurisdiction, and the State's Motion had a Procedural Basis, the Inquiry Motion is Wholly Without Merit.

As an initial matter, the State attempts a burden-bait-and-switch here. Although the State has not moved for disqualification and avers that it takes no position on the appropriateness of disqualification, (*Garcia* Dkt. # 30 at 2), it later contends that undersigned counsel here bears the burden of demonstrating that disqualification is inappropriate, (*id.* at 8) (citing *Icicle Seafoods, Inc.*, 523 F. Supp. 3d at 1268–69). Put differently, the State suggests that undersigned counsel must disprove a motion that the State has not made. This contradictory suggestion alone is sufficient to deny the State's Motion, as it really seeks nothing but an advisory opinion.

Moreover, even if the State had moved for disqualification, the very case it cites regarding the burden of proof indicates that the burden likely does not rest with the law firm whose disqualification is sought. *See id.* at 1269 n.3 (indicating that the recent decision of the

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Washington State Supreme Court in *Plein v. USAA Casualty Insurance Company*, 195 Wash. 2d 677, 687 (2020), raises concern "that federal district courts [have] misinterpreted Comment 6 to ABA Model rule 1.9 in concluding that the burden rests with the firm whose disqualification is sought" but declining to rule on whether the same is true of Rule 1.7 because there was no conflict and the movant lacked standing). Indeed, such an interpretation would accord with other jurisdictions where "[t]he party moving to disqualify counsel bears the burden of proving the grounds for disqualification." *In re BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003) (collecting cases from the Second, Fifth, and Eighth Circuits). Thus, if the burden rests with the State, its speculative motion has come nowhere near meeting its burden because it does not contend that there is an *actual* conflict, only a *potential* one. (*See generally Garcia* Dkt. # 30.)

Regardless, even if the burden rests with the non-movants here, they can easily meet it should the Court order any inquiry.[4] First, this Court already rejected the State's argument that undersigned Counsel's defense of a VRA claim against Washington's Legislative Map conflicts it from simultaneously pursuing a Fourteen Amendment claim against the same map. (*Palmer* Dkt. # 69 at 9–10.) As the Court previously ruled when *Palmer* Intervenors filed their Motion to Intervene, "the Court does not perceive an insurmountable conflict between the claims set forth in *Garcia* . . . and intervenors' opposition to plaintiffs' Section 2 claim." (*Id.* at 9.) Nothing of substance has changed since that ruling other than the depths to which the State will descend to prevent undersigned counsel from performing his duty to his clients.

[4] As the Motion before the Court is simply one to decide if the Court should convene an inquiry, it would be premature and inappropriate for *Palmer* Intervenors and Mr. Garcia to present evidence opposing an inquiry or motion for disqualification *that has not yet been filed*.

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Indeed, in an attempt to breathe new life into this argument, the State misconstrues the litigants' goals and testimony.[5] The *Palmer* Intervenors believe that the map should not be redrawn because it does not dilute the votes of Hispanics in LD 15; but if it must be redrawn, then it should be redrawn in a race-blind manner as not to be discriminatory. *Garcia* Plaintiff believes that the map must be redrawn—without consideration of race—because race predominated in the original drawing of LD 15. Both parties agree fundamentally that a race-blind map is appropriate, which is what the Constitution demands in this and all instances. Neither Ismael Campos, Alex Ybarra, Jose Trevino, or Benancio Garcia are attorneys or experts in the nuances of redistricting law, nor is that required of them. Cherry-picked and misleading questions and answers[6] provided in a deposition by a non-attorney regarding the intricacies of redistricting law should be given little—if any—weight.[7] How can anyone expect a lay party to

[5] For example, the State contends that Mr. Trevino testified in his deposition that he did not believe the map to be a racial gerrymander, (*Garcia* Dkt. # 30 at 9), but the terms "racial gerrymander" or "gerrymander" were never used in Mr. Trevino's deposition (*see generally Palmer* Dkt. # 127–2), and the citation the State provides does not suggest otherwise. The State similarly misleads when it contends that Mr. Ybarra does not want the Legislative Map lines to change, (*Garcia* Dkt. # 30 at 4), as Mr. Ybarra's deposition testimony was clearly more equivocal than the absolute position presented by the State. (*See Palmer* Dkt. # 127-1 at 30.) Likewise, the State portrays Mr. Garcia's goals in a more absolute light than Mr. Garcia himself has done. (Exhibit A at 42:16–43:21.)

[6] For example, Plaintiffs' counsel asked Mr. Garcia if he knew that Mr. Stokesbary, in his capacity as a state legislator, "voted in favor of the plan that you are challenging." (Exhibit A at 65:23–24.) As a lawyer attempting to practice redistricting law in Washington, counsel knows (or should know) that such a question is misleading at best. Under the Washington Constitution, the Commission passes the redistricting plan, and the state legislature may *amend*—not approve—that plan. Wash. Const. Art. II, § 43(6). Notably, the legislature's amendment authority is limited, as it "may not include more than two percent of the population of any legislative or congressional district." Wash. Rev. Code Ann. § 44.05.100. Thus, as a matter of law, the Washington Legislature does not vote to *approve* the Commission's map but, instead, votes to *amend* it and only in a limited capacity. Consequently, misleadingly framing the question as counsel being opposed to his client's legal perspective—and then asking how the client feels—is designed only to drive a wedge between counsel and client, and the State now attempts (unsuccessfully) to drive that wedge further here.

[7] Indeed, Mr. Garcia himself admitted that he does not even have a "lay understanding" of redistricting law. (Exhibit A at 24:19–25:1.) And Garcia, Campos, and Ybarra have admitted to getting the *Garcia* and *Palmer* cases confused. (*See* Exhibit A 20:6–10; *Palmer* Dkt. # 127–1 at 14; Exhibit B at 45:10–47:7.) Moreover, if a lay client's lack of legal understanding about a case should serve as a basis for disqualifying counsel, it is notable that the State has not made a similar motion regarding *Palmer* Plaintiffs, who also lack a strong legal understanding of their case. (*See, e.g.*, Exhibit C at 14–15.)

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understand the nuances of redistricting jurisprudence when such issues are regularly misconstrued and debated in the highest courts of the land? *See*, *e.g.*, *Merrill v. Milligan*, No. 21-1086, 142 S. Ct. 879 (U.S., Feb. 7, 2022) (Section 2 redistricting case presently pending in the United States Supreme Court); *Covington v. North Carolina*, 316 F.R.D. 117, 166 (M.D.N.C. 2016) (citing *Miller v. Johnson*, 515 U.S. 900, 921 (1995), aff'd *North Carolina v. Covington*, 137 S. Ct. 2211 (2017) (discussing the effect of a redistricting map that was drawn predominantly based on race, when the map drawers operated under the mistaken belief that the VRA required a majority-minority district).

Second, the State makes similar misrepresentation about the *Palmer* Intervenors and Mr. Garcia's knowledge about the litigation funding.[8] *Palmer* Intervenors and Mr. Garcia were advised of, and consented to, the existence of the third-party payor in their respective litigations. This financial arrangement has not adversely affected anyone's representation, and undersigned counsel has at all times adequately represented their clients. At no point in either litigation have any of undersigned counsel's clients claimed otherwise.

Third, as it relates to Mr. Garcia, a motion for inquiry based on an ongoing deposition is premature at best. Mr. Garcia's deposition is set to continue at a future date. (*See Palmer* Dkt. # 153.) Premising a motion on testimony that has yet to conclude is flawed *ab initio*. The State's action to the contrary has wasted the time and resources of the Court and the parties.

[8] For example, the State contends that Mr. Campos does not know who is paying for this litigation. (*Garcia* Dkt. # 30 at 10.) However, when asked, "[H]as anyone told you who is paying for the attorneys in this case," Mr. Campos replied, "Not that I recall. *If they did, I didn't pay attention because it wasn't coming out of my pocket.* So yeah, I guess it doesn't -- Yeah, I don't know." (Exhibit B at 84:25–85:15) (emphasis added). Mr. Garcia also testified that he knew that a third party was paying for this suit and that—although he didn't know the name of the entity during the deposition—he would discuss it later with his lawyer. (Exhibit A at 103:6–24)

In sum, to the extent the State brings up purported new information, it is—at best—a misconstruction of the facts. To the extent it raises previously rejected arguments, they should again be rejected. Undersigned counsel has more than met its burden—assuming arguendo that it is even their burden to bear—and the State cannot rebut it. Therefore, the Court should deny this motion.

IV. Conclusion.

For the forgoing reasons, the Court should dismiss the State's Inquiry Motion as improvidently filed and take whatever other steps the Court deems necessary regarding the State's conduct.

DATED this 27th day of February, 2023.

/s/ Andrew R. Stokesbary
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DECLARATION OF SERVICE

I hereby certify that on this day I electronically filed the foregoing document with the Clerk of the Court of the United States District Court for the Western District of Washington through the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 27th day of February, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certify that this Response contains 4,028 words and complies with LCR 7(e)(6).

Respectfully submitted,

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