IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

STEPHANIE GASCA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 17-4149-CV-C-SRB
	)	
ANNE L. PRECYTHE, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION AND SUPPORTING
SUGGESTIONS FOR STAY PENDING APPEAL

Pursuant to Fed. R. App. P. 8(a)(1)(A), the Federal Rules of Civil Procedure, and Local Rule 7.0, Defendants Anne L. Precythe, et al., ("Defendants") respectfully move this Court for a stay of its order on remedy entered November 12, 2020, (Doc. 323), pending appeal of this matter.

A motion for stay of a district court's judgment or order pending appeal is governed by four equitable factors. *See, e.g.*, *Hilton v. Braunskill*, 481 U.S. 770, 776–78 (1987); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607, 609 (8th Cir. 2020); *Brakebill v. Jaeger*, 905 F.3d 553, 557–58 (8th Cir. 2018). A stay is warranted when the appeal presents "serious" legal issues and the balance of equities favors the stay applicant. *James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 545 (8th Cir. 1982). A stay is warranted in this case.

Although Defendants have several issues they will raise on appeal, one is sufficient to justify a stay, and it is this: Defendants have no authority to appoint counsel at parole revocation hearings. Nevertheless, the Court has significantly changed the parole revocation process in Missouri and required Defendants to "[r]efrain from proceeding with revocation hearings and reincarcerating parolees who are not represented by state-funded counsel when minimum due process so requires." Doc. 323, at 48. The Court also ordered Defendants to "[a]dopt and implement a new policy for appointing state-funded counsel to eligible parolees and update all forms to reflect the new policy." Doc. 323, at 49. Thus, this Court ordered changes to the parole

revocation hearing process in Missouri that no Defendant has the authority to implement. And despite Defendants' repeated objections and motions, the sole entity that has authority under Missouri law to appoint counsel – in fact, the entity that is mandated to provide appointed counsel – has not been joined (intentionally) in the action.

Nothing in Chapter 217 of the Revised Statutes of Missouri, which governs the Missouri Department of Corrections, mentions appointment of counsel. Missouri law also does not delegate the authority to appoint counsel to the Missouri Division of Probation and Parole or the Missouri Board of Probation and Parole, both of which are vested only with the authority granted to them by the Director of the Department of Corrections. *See* Mo. Rev. Stat. § 217.035 (director's powers and duties).

By contrast, under Missouri law, the Missouri Public Defender Commission is the sole entity that has the authority to appoint counsel when the Constitution requires it. The Missouri Public Defender Commission statute, Mo. Rev. Stat. § 600.042.4(5), provides that the "director and defenders ***shall*** provide legal services to an eligible person … [f]or whom the federal constitution or the state constitution requires the appointment of counsel[.]" (Emphasis added.). No similar provision is found in Chapter 217 of the Revised Statutes of Missouri. So, while the state of Missouri provides for appointed counsel at parole revocation hearings when due process requires, that responsibility falls within the exclusive province of the Missouri Public Defender Commission. In other words, it is up to the Missouri Public Defender Commission, not the Missouri Department of Corrections, to appoint counsel. But the Plaintiffs have refused to join the Missouri Public Defender Commission, despite Defendants' repeated objections and motions.

The Supreme Court's decision in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), does not (and cannot) change which entity, under Missouri law, has the exclusive authority to appoint counsel. Indeed, that determination does not derive from a Supreme Court decision; it derives from state

law. *Cf. Delta Fin. Corp. v. Paul D. Comanduras & Assocs.*, 973 F.2d 301, 305 (4th Cir. 1992) ("[A] federal court must look to the state-law relationships between the parties when determining which parties are, as a practical matter, necessary for a just adjudication of the case."). All the Supreme Court said in *Gagnon* was that "the decision as to the *need* for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system." *Id.* at 790 (emphasis added).[1] But this cannot mean that Defendants possess the responsibility to *appoint* counsel when the need arises simply because they administer the parole system. That authority rests exclusively with the Missouri Public Defender Commission. And, consistent with *Gagnon*, Defendants can determine whether counsel is necessary in a particular revocation hearing without ultimately appointing counsel. Indeed, the Defendants send requests to the Missouri Public Defender Commission to make appointments. Doc. 323, at 44-45, 48; Doc. 323-4, at 2.

The Court's changes to the parole revocation hearing process in Missouri will result in the significant use of time and resources to provide a new process no Defendant has the authority to provide. It further alters the process adopted by the Missouri General Assembly. As the Eighth Circuit recently reaffirmed, "it is in the public interest to uphold the will of the people, as expressed by acts of the state legislature, when such acts appear harmonious with the Constitution." *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 909 (8th Cir. 2020). Moreover, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351

[1] The Supreme Court in *Gagnon* rejected the contention that a state is constitutionally required to provide counsel at all parole revocation hearings. *Id.* at 787; *see also id.* at 790 ("[T]he presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings[.]").

(1977) (Rehnquist, J., in chambers)). The people of Missouri, through the Missouri General Assembly, provided that the Missouri Public Defender Commission, and not Defendants, be the exclusive entity that makes appointments of counsel. This is an essential question the Eighth Circuit must answer. And equity dictates that this Court grant a stay of contrary relief pending appeal.

CONCLUSION

For these reasons, Defendants respectfully request a stay of the Court's order on remedy dated November 12, 2020, until after resolution of the pending appeal through issuance of a formal mandate by the Eighth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2020, a true and correct copy of the foregoing was electronically filed using the Court's online case filing system, which will send notice to all counsel of record.

By: /s/ *Jeremiah J. Morgan*
Counsel for Defendants