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### III. INTRODUCTION

According to Metro, the State *must* become a full party defendant—even against its wishes—whenever it seeks to intervene to defend the constitutionality of a state statute. Under this theory, the State would have to become a party defendant to certain divorce litigation. *See, e.g., Stark v. Stark*, No. W2021-01288-COA-R3-CV, 2023 WL 5098594, at \*5 (Tenn. Ct. App. Aug. 9, 2023), *app. denied* (Tenn. Feb. 13, 2024) (noting that the State intervened in a limited capacity to defend constitutionality of state statute in divorce litigation). The State also would have to become a party defendant to tort litigation between private parties. *See, e.g., SmileDirectClub, Inc. v. NBCUniversal Media, LLC*, No. M2021-01491-COA-R3-CV, 2024 WL 4233949, at \*5 (Tenn. Ct. App. Sept. 19, 2024) (noting that the State intervened in a limited capacity to defend constitutionality of state statute in tort litigation). The State would have to become a party defendant in a host of other litigation in which it has no role or interest other than defending the constitutionality of a challenged state statute, too.

This would make no practical sense. That presumably is why Metro never argued that position below, where Metro urged, instead, that “the Court should deny the State’s motion to intervene in this manner.”<sup>1</sup> Nevertheless, Metro now insists that the “longstanding, unremarkable principle” that litigants who intervene as of right become parties both was the basis for the trial court’s ruling below and is correct. *See* Metro’s Br. at 12.

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<sup>1</sup> R. (Vol. 3) at 433.

Metro misses the issue, which is whether “the trial court err[ed] by ordering that the State be made a party defendant when the State opposed that relief.” Appellants’ Br. at 10. Both the Appellants and the State argue that this was error, including because it violated party-presentation rules. *Id.* at 25–26 (citing *State v. Bristol*, 654 S.W.3d 917, 924 (Tenn. 2022)); State’s Br. at 13 (“The State agrees that the chancery court’s decision—which “granted” relief to the Attorney General that the Attorney General did not seek and did not want—introduces serious party-presentation problems.”). And although this error requires reversal, Metro offers no contrary argument in response. *See generally* Metro’s Br. Whether the trial court erred by granting the State relief that it did not seek also comes before the different question of whether intervenors as of right necessarily must be made party defendants.

Alternatively, Metro argues that the trial court’s decision should be affirmed because the State is a necessary party here. But its arguments for that proposition are unpersuasive. Metro’s incorrect argument that the Appellants lack standing to maintain this appeal is easily dispatched, too, not only because the Appellants have their own personal interests in reversal, but also because cross-appeals were abolished years ago and the State has asserted its own rights independently.

For all of these reasons, this Court should reverse.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT ERRED BY ORDERING THE STATE TO BE MADE A PARTY DEFENDANT AGAINST ITS WISHES, AND METRO OFFERS NO ARGUMENT IN RESPONSE TO THIS CASE-DISPOSITIVE ERROR.**

The State moved to intervene below: (1) “for the limited purpose of

defending the constitutionality of Tennessee law”<sup>2</sup> and (2) “[u]nlike a party defendant[.]”<sup>3</sup> The State also argued—in reply to Metro’s argument that “[b]ecause the State seeks to intervene as a non-party, the Court should deny the State’s motion to intervene in this manner”<sup>4</sup>—that “[t]he Court should grant the Motion and allow the State to intervene for the limited purpose of defending Tenn. Code Ann. § 38-8-312(q)(1)(D).”<sup>5</sup>

The trial court then ruled that “the State’s motion to intervene should be granted” without specifying whether the State was being made a party defendant.<sup>6</sup> Later, the trial court entered a “clarifying” order that stated: “the State, having intervened as of right under its statutory duty to defend the constitutionality of a state statute, is a party defendant in this action.”<sup>7</sup> Never—anywhere—did the trial court address whether the State may be made a party defendant *involuntarily and against its wishes*.

That is the first issue presented on appeal. *See* Appellants’ Br. at 10 (“Did the trial court err by ordering that the State be made a party defendant when the State opposed that relief?”). The Appellants also have presented several reasons why the trial court erred by “granting” the State relief that the State said it did not want, including because that order violated party-presentation rules. *See id.* at 25–26 (citing *Bristol*, 654 S.W.3d at 924); *see also id.* at 9 (“the trial court erred by ordering

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<sup>2</sup> R. (Vol. 3) at 391.

<sup>3</sup> R. (Vol. 3) at 396.

<sup>4</sup> R. (Vol. 3) at 433.

<sup>5</sup> R. (Vol. 3) at 459.

<sup>6</sup> R. (Vol. 4) at 477.

<sup>7</sup> R. (Vol. 5) at 612.

relief that the State never requested”). The State makes the same argument. *See* State’s Br. at 13 (“The State agrees that the chancery court’s decision—‘which “granted” relief to the Attorney General that the Attorney General did not seek and did not want—introduces serious party-presentation problems.’”).

Metro offers no response to this argument, though. *See generally* Metro’s Br. Instead, Metro ignores the party-presentation error and the first question presented in this appeal, arguing instead that:

1. “when a person moves to intervene as of right, and the motion is granted, that person becomes a party to the suit[,]” *see* Metro’s Br. at 12;
2. this was the “actual rationale” for the trial court’s ruling below, *see id.* at 2; and
3. “Plaintiffs and the State have failed to grapple with the basic, unrefuted principles supporting the Chancery Court’s actual ruling[,]” *id.* at 11.

Even assuming, for the sake of argument, that all of these things were true, though, it still does not follow that a trial court may properly “grant” an intervenor relief *that it did not seek and does not want*. Thus, the threshold question here—which must be answered first—is whether the trial court erred by granting the State relief that it did not seek and affirmatively opposed, not whether successful intervenors as of right must always be made parties.

During the proceedings below, *no one*—not Metro (which urged that

the State’s motion should be “den[ied]”<sup>8</sup>), not the State (which asked for limited non-party intervention only<sup>9</sup>), and not the Appellants (who asserted that “the State is right”<sup>10</sup>)—argued that the trial court had authority to make the State a party defendant involuntarily. The trial court did not have any such authority, and its contrary ruling violated party-presentation rules. *See* Appellants’ Br. *id.* at 25–26 (citing *Bristol*, 654 S.W.3d at 924).

Metro’s brief makes no attempt to explain how a trial court may lawfully grant a litigant relief that the litigant both disclaims and expressly opposes. *See generally* Metro’s Br. Thus, Metro leaves the trial court’s party-presentation error undefended. *Id.* Further, having mustered no response to the Appellants’ argument on this threshold issue, Metro’s opposition to this case-dispositive error is waived. *Cf. Dominy v. Davidson Cnty. Election Comm’n*, No. M2022-00427-COA-R3-CV, 2023 WL 3729863, at \*1 (Tenn. Ct. App. May 31, 2023) (“Because the Election Commission presented a well-developed and well-supported argument in favor of mootness and because the Plaintiffs have failed to respond to that argument, we conclude that opposition to the Election Commission’s mootness argument has been waived.”).

**B. THE STATE SHOULD HAVE BEEN PERMITTED TO INTERVENE FOR A LIMITED PURPOSE.**

Because the trial court erred by “granting” the State relief that it expressly opposed, *see supra*, the next question is how that error should

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<sup>8</sup> R. (Vol. 3) at 433.

<sup>9</sup> *Id.*

<sup>10</sup> Tr. of Proceedings at 12:16–19.

be remedied. Should the trial court have “den[ied]” the State’s motion to intervene because it sought only limited-purpose intervention, as Metro argued below?<sup>11</sup> Or should the trial court have granted the limited-purpose intervention that the State sought in its motion?

The answer is that the State’s motion to intervene for a limited purpose should have been granted. Several considerations support this outcome.

**1. Practical considerations support allowing the State to intervene for a limited purpose.**

Consider, first, the practical reality of the trial court’s ruling and Metro’s newfangled defense of it. Constitutional challenges to statutes arise in all kinds of litigation in which it would be improper for the State to participate as a party for any purpose other than defending the constitutionality of a challenged statute. Under the trial court’s view, though, the State must become a full party to all such disputes if it wishes to exercise its right to defend the constitutionality of state statutes.

Enforcing such a rule would produce amazing absurdities, even though courts are supposed to avoid absurdities and promote “harmonious operation of the laws.” *Fletcher v. State*, 951 S.W.2d 378, 382 (Tenn. 1997); *see also State v. Howard*, 504 S.W.3d 260, 269 (Tenn. 2016) (“courts are to avoid a construction that leads to absurd results.”). Take *Stark v. Stark* as an example. *Stark*, 2023 WL 5098594, at \*5. *Stark* arose out of a divorce dispute, during which Mrs. Stark asserted that Tennessee’s speech-restricting statutory injunction, Tenn. Code

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<sup>11</sup> R. (Vol. 3) at 433 (“Because the State seeks to intervene as a non-party, the Court should deny the State’s motion to intervene in this manner.”).

Ann. § 34-4-106, was unconstitutional. *Id.* at \*5. Because Mrs. Stark was challenging the constitutionality of a state statute, “the trial court allowed the State to intervene for the limited purpose of defending the constitutionality of the statute.” *Id.*

If the trial court in *Stark* had ruled as the trial court did here, though, the State would (involuntary) have been made a party defendant and become embroiled—as a party—in *a divorce dispute*. The State thus would have had to answer the plaintiff’s complaint for divorce. The State also would have obtained a right to participate in custody and parenting plan determinations, alimony disputes, the framing of the final divorce decree, and other matters about which divorcing couples fight—all without having any conceivable interest in the litigation’s outcome.

This result would be ridiculous. Nor would it be limited to cases like *Stark*. Imagine forcing the State to become an involuntary party defendant in a lease dispute, see *In re Liquidation of United Am. Bank of Knoxville*, No. E1999-00270-COA-R3-CV, 2000 WL 145078, at \*1 (Tenn. Ct. App. Feb. 9, 2000) (“On December 17, 1996, SPELI notified the Attorney General, who intervened for the sole and limited purpose of defending the constitutionality of the statute.”), *no app. filed*; a legal malpractice dispute, see *Newton v. Cox*, No. 02A01-9202CH000041, 1992 WL 220189, at \*1 (Tenn. Ct. App. Sept. 14, 1992) (“The Attorney General intervened at the trial level for the limited purpose of defending the constitutionality of the challenged statute.”), *rev’d*, 878 S.W.2d 105 (Tenn. 1994), or other private tort litigation, see, e.g., *SmileDirectClub, Inc.*, 2024 WL 4233949, at \*5. That is the absurd result—a required

condition of intervening to defend the constitutionality of any state statute—that Metro urges here.

There is no practical justification for such a rule. Metro also does not suggest one. Thus, under these circumstances, common sense and practical considerations support only one conclusion: the State should be permitted to intervene for a limited purpose when it wishes to do so.

**2. Litigants’ right to determine their own interests supports allowing the State to intervene for a limited purpose.**

Our justice system “rests on the premise that the parties ‘know what is best for them[.]’” *Bristol*, 654 S.W.3d at 923. Thus, parties enjoy autonomy in litigation, and they are empowered to assert their own interests (or not). That includes affording litigants a right to waive their rights for strategic reasons when they believe that doing so would benefit them. *See Chattem, Inc. v. Provident Life & Acc. Ins. Co.*, 676 S.W.2d 953, 955 (Tenn. 1984) (“A waiver is a voluntary relinquishment by a party of a known right.”).

The trial court’s ruling below undermines that autonomy. Instead, it holds that while the State may intervene as of right, it may not waive any of the rights that come with doing so. The trial court cited no authority for this premise, and Metro offers none in its place. Metro also offers no persuasive justification for depriving the State of its right to autonomy as a litigant, including the right to waive its rights.

**3. Standing considerations support allowing the State to intervene for a limited purpose.**

Involuntarily requiring a litigant who has no enforcement authority—and from whom no party can obtain any benefits—to become

a full party to litigation is inconsistent with elementary standing principles. Standing requires traceability: an injury “has to be ‘fairly ... trace[able] to the challenged action of *the defendant*, and not ... th[e] result [of] the independent action of some third party not before the court.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added) (cleaned up). Standing also requires redressability: a litigant must be able to obtain “a favorable court decision against the *particular defendant(s)* involved.” *Lawson v. Hargett*, No. 3:24-CV-00538, 2024 WL 3867526, at \*7 (M.D. Tenn. Aug. 19, 2024).

Here, all agree that the Attorney General has not caused the Appellants’ asserted injuries; that he has no authority to enforce any provision that is being challenged here; and that the Appellants cannot obtain any favorable relief against him. Thus, the Appellants have no plausible standing to sue the Attorney General, because their injuries are not traceable to him and a favorable ruling against the Attorney General would not redress them. *Lujan*, 504 U.S. at 560.

Likewise, the Attorney General has no general interest in litigation as an intervenor other than to defend the constitutionality of a challenged statute. Thus, the Attorney General’s own standing to participate here is properly limited to that narrow issue as well.

Under these circumstances, forcing the Attorney General to become a party involuntarily would interfere with basic standing requirements. The same, of course, would be true if the Attorney General were forced (as Metro insists it must be) to become a full party to divorce litigation, or private tort litigation, or other litigation in which it has no more than a narrowly restricted interest in defending the constitutionality of a

challenged statute. But standing is an “indispensable” requirement of a justiciable controversy between litigants. *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013). Thus, the trial court’s ruling—and Metro’s recent determination to defend it—cannot be correct.

**C. THE STATE CANNOT BE A NECESSARY PARTY GIVEN THAT ITS RIGHT TO INTERVENE IS DISCRETIONARY.**

If the trial court erred by awarding the State relief it neither sought nor wanted, then the Metro Defendants argue alternatively that this Court should affirm on the different ground that the State is a necessary party to this action. *See* Metro Defs.’ Br. at 15–24. But the State cannot be a necessary party when so many independent provisions of Tennessee law make clear that the Attorney General’s right to intervene is *discretionary*. *See, e.g.*, Tenn. Code Ann. § 8-6-109(b)(9) (no duty to defend a statute’s constitutionality “in those instances where the attorney general and reporter is of the opinion that such legislation is not constitutional”); Tenn. Code Ann. § 29-14-107(b) (municipalities “shall be made a party” in constitutional litigation, while the Attorney General “shall . . . be served with a copy of the proceeding and be entitled to be heard.”); Tenn. R. Civ. P. 24.04 (requiring that “notice be given the Attorney General,” not that the Attorney General be made a party); Tenn. R. Civ. P. 24.04 adv. cmt. (“If the Attorney General feels that the State’s interest so requires, he or she will be in a position to intervene or take other appropriate action.”).

Notably, Tennessee Code Annotated § 29-14-107(b) is a near-verbatim recitation of Section 11 of the Uniform Declaratory Judgments Act. That section provides:

In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney-General of the State shall also be served with a copy of the proceeding and be entitled to be heard.

Unif. Declaratory Judgments Act § 11.

Relying on the clear textual difference between a “municipality” (which “shall be made a party”) and “the State” (which “shall . . . be served with a copy of the proceeding and be entitled to be heard”) under this provision, a host of jurisdictions that, like Tennessee, have enacted Section 11 of the Uniform Declaratory Judgments Act agree that the statute requires only that the State be given *notice*, not that it be made a party. *See, e.g., Midwest Freedom Coal, LLC v. Koster*, 398 S.W.3d 23, 26–27 (Mo. Ct. App. 2013) (“In section 527.110, the legislature required that the municipality be made a party in actions challenging the validity of ordinances, but did not employ that language when it immediately thereafter addressed actions challenging the constitutionality of laws. Instead, it provided that in those circumstances that the Attorney General ‘be served a copy of the proceeding and be entitled to be heard.’ . . . Because the legislature did not employ the phrase, ‘shall be made a party’ in addressing the Attorney General’s role, we cannot interpret the provision to suggest otherwise. . . . Thus, the Attorney General is not a necessary party to constitutional challenges under section 527.110.”) (internal citation omitted); *Martin Mem’l Med. Ctr., Inc. v. Tenet Healthsystem Hosps., Inc.*, 875 So. 2d 797, 799–800 (Fla. Dist. Ct. App. 2004) (“[W]e can find no support in section

86.091 for the proposition that the Attorney General is either a necessary or an indispensable party to this appeal. To the extent pertinent, section 86.091 . . . reads merely that, ‘[i]f [a] statute, charter, ordinance, or franchise is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard.’ The purpose of this statute would appear from its language to be relatively clear—to ensure that the state (in the person of the Attorney General or appropriate state attorney) is aware of any litigation in which a plaintiff seeks a declaratory judgment that any of the enumerated forms of legislation is unconstitutional, and afforded an opportunity to present the state’s position.”); ***Lawson v. City of Mammoth Spring ex rel. Smith*, 287 Ark. 12, 15 (1985)** (“[N]otice of the proceedings was served on the attorney general. That is all that Ark. Stat. Ann. § 34–2510 requires.”) (citation omitted); ***Ralston Purina Co. v. Hagemeister*, 188 N.W.2d 405, 409 (N.D. 1971)** (“We therefore hold that in any proceeding for declaratory judgment brought against the members of the Poultry Improvement Board for a declaration of rights, status, and other legal relations of the plaintiff under the Act, it is not necessary to join the State of North Dakota as a party defendant, so long as the Attorney General of the State is served with a copy of the proceeding and is permitted to be heard in the trial of the action.”); ***Pressman v. State Tax Comm’n*, 204 Md. 78, 86 (1954)** (“Nor was the Attorney General of Maryland a necessary party to the proceedings. Section 11 of the Declaratory Judgments Act provides: ‘In any proceeding which involves the validity

of a municipal ordinance, or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney-General of the State shall also be served with a copy of the proceeding and be entitled to be heard.’ Hence, the Attorney General was entitled to have notice of the proceedings, and to have the opportunity to decide whether to intervene on behalf of the State or any State agency affected.”), *superseded by statute on other grounds as recognized by Comptroller of Maryland v. Comcast of California*, 484 Md. 222 (2023); ***Wichita Cty. v. Robinson*, 155 Tex. 1, 4–5 (1954)** (“The Attorney General was given full information. He was furnished by mail with a copy of the petition and declined to intervene or take part. He is not here complaining of any lack of notice and the rights of the litigants could not have been affected adversely by the failure to make him a party.”).

That commonsense reading is appropriate here. The Appellants and the State also have presented the Court with many other reasons to apply the straightforward text of Tennessee Code Annotated § 29-14-107(b), Tennessee Rule of Civil Procedure 24.04, and the Tennessee Supreme Court’s decision in *Cummings v. Shipp*, 3 S.W.2d 1062 (Tenn. 1928), in holding that the State is not a necessary party to this case, among other grounds for reaching that conclusion. *See generally* Appellants’ Br. at 15–27; State’s Br. at 8–14.

If this Court agrees with the Metro Defendants that the Tennessee Supreme Court’s decision in *Cummings v. Beeler*, 223 S.W.2d 913 (Tenn. 1949), requires a different outcome, though, then this Court should say

so directly; flag the fact that, as the State notes, *Beeler* “conflicts with the best reading of Tennessee precedent, the Declaratory Judgment Act’s statutory text, and historical practice[,]” see State’s Br. at 10; and enable the Tennessee Supreme Court to overrule it. *Cf. Nat’l Republican Senatorial Comm. v. Fed. Election Comm’n*, 117 F.4th 389, 394 (6th Cir. 2024) (“Even if a holding of the Supreme Court ‘appears to rest on reasons rejected in some other line of decisions,’ we must nonetheless follow it, ‘leaving to [the Supreme Court] the prerogative of overruling its own decisions.’”).

**D. NO STANDING DEFECT PRECLUDES ADJUDICATING THIS APPEAL.**

Metro concludes its brief by insisting that “Plaintiffs do not have standing to prosecute this appeal.” Metro’s Br. at 24–26. For two reasons, Metro is wrong.

*First*, Metro argues that the Appellants “lack standing to pursue this appeal on behalf of the State” and “have made no effort to demonstrate how they are ‘aggrieved’ by the Chancery Court’s ruling, nor can they.” *Id.* at 24–25. But the Appellants are not pursuing this appeal on behalf of the State; they are pursuing it on their own behalf. And the reasons why the Appellants are personally aggrieved by the trial court’s ruling are manifest: (1) it forces the Appellants to engage in full, contested litigation—including potential discovery—with an additional party defendant who sought only to contest a narrow issue in this case; (2) it forces the Appellants to incur additional litigation expenses by, at minimum, allowing the State to participate in all of this case’s hearings and in its discovery process; and (3) it forces the Appellants to litigate this case in a different forum (the three-judge chancery panel) than the

one that the Appellants chose and prefer.

All of these injuries are concrete and personal to the Appellants. The Metro Defendants also are visibly confused between the Appellants' *injuries*—i.e., how the trial court's ruling harms the Appellants—and the *legal arguments* that the Appellants have advanced to support reversal, which are different things. *See id.* at 25 (complaining that “the purported injuries caused by the Chancery Court's ruling”—like the fact that it interferes with litigant autonomy and contravenes sovereign immunity principles—“belong to the state”).

Second, the Metro Defendants assert that “although this appeal concerns the Chancery Court's ruling on the State's motion to intervene, only Plaintiffs have appealed that ruling.” *See id.* at 3; *see also id.* at 25 (“a party lacks standing to appeal an order entered against a co-party who has elected not to appeal that order.”). But the Metro Defendants appear to be unaware that Tennessee abolished cross-appeals many years ago. *See* Tenn. R. App. P. 3(h) (“Consistent with Rule 13(a), cross appeals and separate appeals are not required. Consequently, upon the filing of a single notice of appeal in a civil case, issues may be brought up for review and relief pursuant to these rules by any party.”); *id.* at 2015 adv. cmt.; Tenn. R. App. P. 13(a) (“Cross-appeals, separate appeals, and separate applications for permission to appeal are not required.”). Thus, the State was not required to file a separate notice of appeal after the Appellants appealed. After this timely appeal was filed by a different party, the State also raised its own arguments urging reversal. *See generally* State's Br.

For these reasons, Metro is wrong that “only Plaintiffs have appealed” the trial court’s ruling. Metro’s Br. at 24. Because cross-appeals are not required, the State has “appealed” the trial court’s ruling by filing a brief urging this Court to reverse it. *See generally* State’s Br.

Further, even if Metro were correct that the Appellants lack standing of their own (it is not), the State’s standing—which is uncontested—is all that is necessary to adjudicate this appeal. *See, e.g., Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007) (“Only one of the petitioners needs to have standing to permit us to consider the petition for review.”); *Am. C.L. Union v. Nat’l Sec. Agency*, 493 F.3d 644, 652 (6th Cir. 2007) (“it is only necessary that one [litigant] has standing” to appeal).

For both of these reasons—or for either of them—there is no standing defect here. Thus, this Court should adjudicate this appeal on its merits.

#### **IV. CONCLUSION**

For the foregoing reasons, the trial court’s order making the State a party defendant without its consent should be reversed. Afterward, this Court should remand with instructions to grant the State’s motion to intervene according to the relief the State sought.

Respectfully submitted,

By: /s/ Daniel A. Horwitz

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## **VI. CERTIFICATE OF COMPLIANCE**

Pursuant to Tennessee Supreme Court Rule 46, § 3.02(b), this brief contains 4,283 words as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font.

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## **VII. CERTIFICATE OF SERVICE**

I certify that on December 21, 2024, a copy of the foregoing was served via the Court's electronic filing system upon the following parties:

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