No. 51631-2024

IN THE SUPREME COURT
OF THE STATE OF IDAHO

TRACY TUCKER, et al.,

Plaintiffs–Appellants,

v.

STATE OF IDAHO, et al.,

Defendants–Appellees.

On Appeal from a District Court of the Fourth Judicial District
Case No. CV-OC-2015-10240, Hon. Samuel A. Hoagland

BRIEF OF IDAHO STATE LAW SCHOLARS AS AMICI CURIAE SUPPORTING APPELLANT AND REVERSAL

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INTERESTS OF THE AMICI CURIAE[1]

Amici are individual professors and legal scholars at universities in the State of Idaho. They have studied and published widely on topics that bear directly on this Court's consideration of this appeal, including civil rights litigation, constitutional law and doctrines, and state constitutions—including this State's constitution. *Amici* not only teach and write on these topics, but also continue to litigate cases in Idaho's state and federal courts. As scholars, teachers, and litigators, *Amici* accordingly have a substantial interest in how this Court resolves some of the issues in this case, including particularly the application of prudential mootness to the facts of this case and the interaction of that doctrine with Idaho's constitution.

John Rumel is Professor of Law at the University of Idaho College of Law. Prior to his faculty appointment, he served for sixteen years as General Counsel for the Idaho Education Association. His most recent publication concerns the right to jury trial in civil cases under the Idaho Constitution, tracing its origins as well as its jurisprudential development in Idaho's courts. John E. Rumel, *The Right to Jury Trial in Idaho Civil Cases: Origins, Purpose, and Selected Applications*, 65 Advocate 26 (2022). He previously published an article concerning Idaho's protracted *ISEEO* litigation that discusses the standard for determining unenumerated constitutional rights under Idaho law and a state constitutional provision affording its citizens more and different rights than those afforded under

[1] This brief has been authored entirely by *Amici* and their counsel, and no Party or Party counsel, or any other person or entity, has contributed money or other financial support to fund the preparation or filing of this brief.

the federal constitution. John E. Rumel, *Promises Made, Promises Broken: The Anatomy of Idaho's School Funding Litigation*, 57 IDAHO L. REV. 381 (2021).

McKay Cunningham is a member of the Idaho State Bar and is the Director of Experiential Learning & Research at the College of Idaho, where he also teaches constitutional law. Previously, he was a tenured Associate Professor of Law at Concordia University School of Law in Boise and previously taught constitutional law at the University of Idaho College of Law as well. He served for four years as a Staff Attorney for the Texas Supreme Court and has testified before the Idaho Legislature on constitutional law issues.

Samuel Newton is a professor at the University of Idaho College of Law, where he has taught after he was a professor of criminal justice at Weber State University in Ogden, Utah. Newton's research explores the intersection of the criminal law, civil disobedience, violence, and resistance to law in American history. In his most recent work, "Towering Rock," soon to be published by Oxford University Press, Newton uses early nineteenth-century Mormonism as a means to explore the emergence of civil disobedience as an acceptable form of resistance in the American mindset. His work has been cited by courts, media organizations, and respected publications, including the Harvard Law Review, Virginia Law Review, and Alabama Law Review.

INTRODUCTION

While Appellants make several arguments about prudential mootness in their own brief, *Amici* would offer this Court some additional context about that doctrine—particularly, its interaction with Idaho's state constitution. Idaho's constitution, including Art. I, § 18, protects the rights of Idahoan litigants to access the courts of our state, and has long served to protect Idahoans from certain types of non-substantive procedural rules or doctrines that would abrogate that access. This includes, as most relevantly here, Idaho courts applying the doctrine to protect indigent defendant litigants in *post-conviction* proceedings who lack access to legal materials or learned counsel—precedent hard to square with the court here declining to protect indigent defendant litigants in an earlier stage of criminal proceedings where they have a right to counsel.

Amici also observe that application of prudential mootness—a discretionary doctrine accepted by only some courts—conflicts with state appellate precedents concerning Art. I, § 18. Although state courts have not always given that provision its most expansive reading, the dispute between justices in cases interpreting it has generally been over whether the legislature could validly abrogate court access or remedies via statute. Under some justices' view, the provision would prevent even the legislature from doing so in many circumstances. Under others' view, the legislature may do so in many circumstances. But what all justices have agreed on is that in order to abrogate the common law right of access to courts or any common law remedies present at the framing and incorporated into the provision, the state legislature must actually enact legislation to modify it. In the absence of such an

enactment, those rights and remedies still exist. And here, there has been no such enactment.

Even if the prudential mootness doctrine had been authorized by the legislature, however, it would still not apply in this case. Appellants have explained why at greater length, and *Amici* will not belabor that point. But the facts in the record do not support its application, and it would undermine our state constitution's incorporation of common law remedies for people who, like Appellants, have suffered—and here, proven—clear injuries to their rights and interests. To maintain uniformity of precedent and the promise of available remedies for violations of rights in our state constitution, this Court should reject the District Court's application of prudential mootness.

ARGUMENT

I. The Idaho constitution protects access to courts and remedies, including specifically for litigants challenging aspects of the criminal justice system.

Idaho's state constitution has several provisions that bear upon the purported application of prudential mootness doctrine. As relevant to this brief, Art. I, § 18 specifically provides for access to courts and legal remedies for litigants in the state. That protection is more expansive than analogous federal protection, and Idaho's appellate courts, including this Court, have long interpreted it to protect litigants in the face of trial judges who would otherwise accept invitations—especially from government defendants—to decline to exercise their jurisdiction. These cases stretch back decades. And the precedents offer particularly apt guidance here, because one of this Court's most notable Art. I, § 18 precedents protects access to courts and remedies for people caught up in the criminal justice system. That case, protecting access for people challenging their criminal convictions, addresses a part of the criminal legal process only barely downstream from the functioning of the criminal defense representation system during the initial criminal proceedings of the sort at issue here.

Article I, § 18 of the Idaho Constitution provides that "[t]he courts of justice shall be open to every person and justice shall be administered without sale, denial, delay, or prejudice." Its framers intended "to secure to the citizen the rights and remedies that the law as it then existed, or as it might be changed from time to time by the legislature, afforded." *Moon v. Bullock*, 65 Idaho 594, 603 (1944), *overruled on other grounds by Doggett v. Boiler Eng. Supply Co.*, 93 Idaho 888 (1970). While it did not

create freestanding substantive rights, Article I, § 18 "admonishes Idaho courts to dispense justice and to secure citizens the rights and remedies afforded by the legislature or by the common law." *Gomersall v. St. Luke's Reg'l Med. Ctr.*, 168 Idaho 308, 316 (2021).

This provision has some federal constitutional analogues, but it exceeds them in scope and protection. Courts have observed, for example, that in some contexts it "is similar to the United States Supreme Court's description of 'a corollary of the Fourteenth Amendment's Due Process Clause[.]" *Martinez v. State*, 130 Idaho 530, 535 (Idaho Ct. App. 1997) (quoting *Procunier v. Martinez*, 416 U.S. 396, 419 (1974)). And to the extent that Art. I, § 18 concerns access to courts, the Idaho Constitution more generally does not impose federal standing requirements in the same way that U.S. Constitution Article III federal courts do. *See, e.g.*, *Regan v. Denney*, 165 Idaho 15, 21 (2019) (allowing claims concerning "significant and distinct constitutional violations" to proceed even where "no party could otherwise have standing to bring a claim"). And while this Court has for some years self-imposed federal standing jurisprudence on itself, it has still "relaxed traditional standing requirements" in various cases to allow more expansive access to courts. *Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 514 (2015); *see also Idaho Watersheds Project v. State Board of Land Commissioners*, 133 Idaho 55, 56-57 (1999); *Regan*, 165 Idaho at 21.[2] Indeed, failing

[2] This Court has acknowledged some tension between *Regan* and its having "allegedly . . . adopted federal standing principles" in at least some cases. *Reclaim Idaho v. Denney*, 497 P.3d 160, 173 n.6 (Idaho 2021). But both the *Reclaim* majority and concurrence signaled support for an explicit return to common law principles "dating back to Idaho's early statehood" *id.*, specifically based on Article I, § 18. *Id.*

to allow access to courts in those situations would undermine or even abrogate substantive rights-conferring provisions. *See Coeur d'Alene Tribe*, 161 Idaho at 514 (citation omitted).

Idaho's judges have long pointed to Art. I, § 18 to ensure that injured parties can access courts to seek remedies, including to protect such parties from application of jurisprudential or other claims-processing doctrines. This often arises in the context of tolling or other doctrines maintaining plaintiffs' access to courts despite otherwise applicable statutes of limitations. As one example, this Court long ago implemented a version of the discovery rule to toll a statute of limitations, *Billings v. Sisters of Mercy of Idaho*, 86 Idaho 485, 497 (1964), over a strong dissent that strict application of the statute of limitations would have posed no "encroachment upon the rights guaranteed by Idaho Const., Art. I, § 18." *Id.* at 506 (Smith, J., dissenting). As another example, when this Court protected a woman who had received faulty radiation that caused grievous but later-occurring spinal damage from application of the statute of limitations, two Justices concurred to offer an alternative basis for the same result, as they rejected "a literal application of the language" of the relevant statute of limitations because that language could "conflict with *art. 1, § 18* of the Idaho Constitution." *Davis v. Moran*, 112 Idaho 703, 710 (1987) (Bistline, J., specially concurring) (emphasis in original); *see also id.* at 711 (Huntley, J., specially concurring) (pointing to "serious conflict with art. I, § 18 of the Idaho Constitution as

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at 195 (Stegner, J., specially concurring); *see also id.* at 197 (Stegner, J., specially concurring) (calling for this Court to make "the trek back to the true course—the *Idaho* constitution") (emphasis in original).

his basis to reach the result). Justice Bistline observed that the "simple direct language" of the "Idaho Constitution directs that the courts of this state be open to *every person*, and a speedy remedy afforded for *every* injury suffered." *Id*. at 711 (internal citation omitted) (emphasis in original). Similarly, Justice Bistline offered the same rationale when concurring with the Idaho Supreme Court's decision not to allow enforcement of the statute of limitations against taxpayers who could not have discovered accounting malpractice on their tax returns within the statutory period, because of his view that the Court's recognition of the discovery rule "inexorably" followed because it was "constitutionally mandated pursuant to art. I, § 18." *Streib v. Veigel*, 109 Idaho 174, 179 (1985) (Bistline, J., specially concurring).

Appellate courts of the state have also applied Article I, § 18 to protect access to courts for state litigants, like Appellants here, challenging aspects of the criminal justice system. The most important and analogous example: the Idaho Court of Appeals has held that the State could not enforce the statute of limitations for post-conviction challenges against state prisoners trying to challenge their convictions while incarcerated in other states without access to Idaho-specific legal materials, because "[w]ithout either access to Idaho legal reference books with which to research their rights and prepare their own pleadings, or the availability of representation by persons trained in Idaho law and procedure, prisoners would find the Art. I., § 18 guarantee that 'courts of justice shall be open to every person,' a hollow promise." *Martinez*, 130 Idaho at 536. With no access to reference materials, and no "adequate legal assistance," the state had "effectively foreclosed" any mechanism for Martinez to challenge his conviction and the "meaningful access to Idaho Courts to which he

was entitled under Art. I, § 18 of the Idaho Constitution." *Id*. To the extent that *Martinez* held that Article I, § 18 required meaningful access to legal research materials or "representation by persons trained in Idaho law and procedure," *id*., to give effect to the court access provision even in the post-conviction context, it would make little sense to diminish those rights in this case, which addresses the right to counsel during the criminal proceeding itself.

II. Applying prudential mootness in this case conflicts with state law precedent requiring statutory intervention to bar access to courts.

At the very least, courts cannot purport to apply prudential mootness to abrogate rights under Article I, § 18 without statutory authorization—and no such authorization exists here. The legislature may, within limits, modify the availability of common law actions and remedies that existed at the state constitution's framing. *See Jones v. State Bd. of Medicine*, 97 Idaho 859, 864 (1976); *see also Gomersall*, 168 Idaho at 316 ("Article I, Section 18 of the Idaho Constitution does not prohibit the legislature from abolishing a common law right or remedy") (internal citations omitted).[3] But the legislature must affirmatively abrogate the protections that existed at its framing in order to limit them. *See, e.g.*, *Struhs v. Protection Technologies, Inc.*, 133 Idaho 715, 722 (1999) ("Idaho citizens enjoyed certain rights and remedies under the law at the time the Constitution was adopted, and the

[3] The most expansive view of Article I, § 18 would foreclose even many legislative modifications. *See, e.g.*, *Strieb*, 109 Idaho at 179 (Bistline, J., specially concurring) (explaining that because he viewed the discovery rule was "constitutionally mandated pursuant to art. I, § 18," even "attempts to repeal or modify it by the legislature . . . are invalid and should be held unconstitutional").

purpose of Article I, Section 18 is to secure these rights as they have been modified by the legislature."); *see also Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 103 Idaho 19, 24 (1982).

This matters in no small part because of how expansive the common law access to courts was at the framing of the Idaho Constitution. During early statehood, Idahoans could sue state officers directly under state law. *See, e.g.*, *Orr v. State Bd. of Equalization*, 2 Idaho 923 (1891), and they could even enforce tax laws and purport to hold their government accountable for its use of tax dollars. *See* Michael S. Gilmore, *Standing Law in Idaho: A Constitutional Wrong Turn*, 31 IDAHO L. REV. 509, 538 (1995). While some cases have recognized and declined to invalidate various statutory limitations placed on litigants' access to courts, they have done so because a majority of Justices in those cases believed that the legislature could validly place those limits to modify the early common law rights baked into the Idaho Constitution. *See,* Section I, *supra*. But the disputes in those cases were about whether the legislature's action had been valid. *See, e.g.*, *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 717 (1990) (holding that "a statute placing limitations on remedies *does not contradict*" Article I, § 18 (emphasis added)). By contrast, the Idaho state legislature has never statutorily authorized prudential mootness. Where, as here, the legislature has enacted no legislation to modify the background common law access to courts or common law access to remedies, even the most limited view of Article I, § 18 would recognize that Idahoans retain access to those background common law access and remedies, and that dismissing this case in the absence of a statutorily authorized basis to do so must fail.

III. Regardless of whether prudential mootness ever comports with state law, defendants cannot clear the high bar to invoke it in this one.

No matter how this Court feels about the interaction of prudential mootness and the Idaho Constitution or this Court's own precedents, the circumstances of this case do not justify it. Courts that have adopted the doctrine set out an extremely high bar for litigants seeking to invoke it to clear. The Tenth Circuit, for example, has held that such a party must show that "circumstances [have] changed since the beginning of the litigation that forestall any occasion for meaningful relief." *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997). The Tenth and D.C. Circuits have similarly said that in the absence of actual mootness, the controversy must be "so attenuated that considerations of prudence and comity" justify application of prudential mootness. *Building and Const. Dep't v. Rockwell Intern.*, 7 F.3d 1487, 1491 (10th Cir. 1993) (quoting *Chamber of Commerce v. United States Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980)). The Ninth Circuit has rejected its application even where a case "may become moot in the near future" because until that point, courts "are not required to dismiss a live controversy" in reliance on a party's promise. *Hunt v. Imperial Merchant Serv.*, 560 F.3d 1137, 1142 (9th Cir. 2009).

For a controversy to be "so attenuated" or for a plaintiff to no longer have "any occasion for meaningful relief," Courts do not credit mere promises of government defendants about their proposed non-enforcement of laws. This owes partly to the role that "[a] voluntary-cessation evaluation" plays as an "important component of the overall analysis with respect to both constitutional and prudential mootness." *Rio*

Grande v. Bureau of Reclamation, 601 F.3d 1096, 1122 (10th Cir. 2010). Accordingly, a defendant seeking to invoke prudential mootness—"usually the government"—must show that it "has already changed or is in the process of changing its policies" or that "any repeat of the actions in question is otherwise highly unlikely." *Rockwell Intern.*, 7 F.3d at 1492 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). It might do so by showing that it has already given effective relief, and that "[i]f some other form of meaningful relief is available for this alleged injury," the plaintiff "has not requested it." *Southern Utah Wilderness Alliance*, 110 F.3d at 729. It might do so in the bankruptcy context, for example, by showing that no debtor assets remain for distribution. *See Deutsche Bank Nat'l Trust Co. v. F.D.I.C.*, 744 F.3d 1124, 1135 (9th Cir. 2014). Viewed from the opposite perspective, a litigant resisting its application must merely show that "there exists some cognizable danger of recurrent violation, something more than mere possibility. . ." *W.T. Grant*, 345 U.S. at 633. And that possibility may be quite slight. Even an immigration petitioner removed during the course of status proceedings still has a pending legal adjudication of his rights that forestalls application of prudential mootness to dismiss a pending appeal, if he has even possibly re-entered the country or might in the future. *Maldonado v. Lynch*, 786 F.3d 1155, 1161 & n.5 (9th Cir. 2015) (en banc) (discussing and crediting the possibility petitioner had returned to the United States post-removal).

Under the circumstances, this case cannot support application of prudential mootness. The state has adopted a new public defense system, but even the trial court here recognized that historically, the state's promised changes have not actually

panned out. Record at 5542. Indeed, the fact that the state has restructured the public defense system twice *during this case* undercuts the state's view that its current set of changes will be effective and, more to the point for prudential mootness purposes, durable. *See* Appellants' Br. at 26 (discussing state's restructuring process). And in any event, at bottom, the plaintiffs' claims here cannot be solved by restructuring without additional infusions of funding to hire more people and reduce caseloads—and even if Idaho had promised to increase such funding going forward, which they did not, *see* Appellant's Br. at 27 (discussing lesser monetary allocation), governments subsequently cut public defense budgets all the time. *State v. Devlin*, 164 Wash. App. 516 (Wash. Ct. App. 2011). Appellants have discussed this at some length, and *Amici* would not belabor the point. But where, especially, the doctrine of prudential mootness conflicts with Idaho's constitution and state law precedents; where the state legislature has not abrogated Article I, § 18's common law access and remedies in this context, such as by authorizing a questionable doctrine; and where, even if it had authorized such a doctrine, the State has not cleared the high bar to invoke it, this Court should reverse.

CONCLUSION

The judgment of the trial court should reversed.

Respectfully submitted,

/s/ Jim Davy

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September 23, 2024

CERTIFICATE OF SERVICE

I certify that on September 23, 2024 this brief was filed using the Court's E-filing system, which sent a Notice of Electronic Filing to all participants in the case.

/s/ Colleen R. Smith

Colleen R. Smith