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IN THE SUPREME COURT OF THE STATE OF IDAHO

PLANNED PARENTHOOD OF THE GREAT NORTHWEST, HAWAII, ALASKA, INDIANA, KENTUCKY, on behalf of itself, its staff, physicians and patients, and CAITLIN GUSTAFSON, M.D., on behalf of herself and her patients,

Petitioners,

v.

STATE OF IDAHO,

Respondent,

SCOTT BEDKE, in his official capacity as Speaker of the House of Representatives of the State of Idaho; CHUCK WINDER, in his capacity as President Pro Tempore of the Idaho State Senate, and the SIXTY-SIXTH IDAHO LEGISLATURE,

Proposed Intervenor-Respondent.

Case No. 49615-2022

MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO INTERVENE BY IDAHO LEGISLATURE

The Speaker of the House of Representatives for the State of Idaho, Scott Bedke, Senate President Pro Tempore Chuck Winder, and the Sixty-Sixth Idaho Legislature (collectively the "Legislature") seek to intervene in this action to defend the constitutionality of Senate Bill 1309

(S1309). The Legislature seeks intervention pursuant to Idaho Appellate Rule 7.1. The Legislature is prepared to comply with the time frames and deadlines set forth in this Court's Order Granting Motion to Reconsider filed on April 8, 2022. Accordingly, granting leave to intervene will not cause any delay.

In the event that this Court does not grant this Petition, the Legislature alternatively requests leave to file an *amici curiae* brief and to participate in oral argument pursuant to Rule 8 of the Idaho Appellate Rules.

BACKGROUND

The Second Regular Session of the Sixty-Sixth Idaho Legislature was convened on January 10, 2022. On February 11, 2022, SB 1309 was introduced to the Senate. At the time SB 1309 was being debated, the Idaho Attorney General's office issued a letter related to the bill. In that opinion letter, the Idaho Attorney General's office provided opinion as to whether SB 1309 constituted an unconstitutional delegation of the Idaho Governor's enforcement power and concluded that "S.B.1309 may be an unconstitutional delegation of the Governor's enforcement power to private citizens and violate the separation of powers under the Idaho Constitution." *See* Petitioners'Brief in Support of Verified Petition for Writ of Prohibition and Application for Declaratory Judgment file on March 30, 2022 ("Petitioners' Opening Brief"), Exhibit 6, pp-3-4.

SB 1309 passed the Senate by a vote of 28-6-1 on March 3, 2022, and the House on March 14, 2022, by a vote of 51-14-5. SB 1309 was signed by Governor Brad Little on March 23, 2022. *See* 2022 Session Law Chapter 152. However, on that same day, Governor Little issued a letter criticizing the bill he had just signed into law. In his correspondence to the Senate, he inserted himself into the present legal debate by suggesting that SB 1309's "novel civil enforcement

mechanism will … be proven unconstitutional and unwise" *See* Petitioners' Opening Brief, p. 9 (quoting March 23 Letter from Gov. B. Little to J. McGeachin at 1).

In response to SB 1309 being signed into law, the Petitioners, Planned Parenthood of the Great Northwest, Hawaii, Alaska, Indiana, Kentucky and Caitlin Gustafson (collectively "Petitioners") filed their Verified Petition for Writ of Prohibition and Application for Declaratory Judgment on March 30, 2022, asserting among multiple arguments that SB 1309 is unconstitutional because "the Legislature has stripped the Executive of its power to ensure that the laws of this State are fully executed and instead has empowered a group of private citizens to bring civil claims against medical professionals who attempt, perform, or induce abortions after approximately six weeks of pregnancy…." *See* Petitioners' Opening Brief, p.1. On the same day, Petitioners also filed a Motion to Expedite Briefing and Argument. And, a day later, on March 31, 2022, this Court issued an Order Re: Verified Petition for Prohibition whereby Petitioner's motion to expedite briefing and argument was granted and Respondent, the State of Idaho, was ordered to file a verified answer and separate response brief on or before April 14, 2022, with Petitioner's reply brief due on or before April 21, 2022.

The Idaho Attorney General's office, representing the State of Idaho, filed a Memorandum in Support of Respondent's Motion to Reconsider Order Re: Verified Petition for Writ of Prohibition and Application for Declaratory Judgment on April 1, 2022. That motion requested reconsideration of this Court's Order regarding Petitioner's request for expedited proceedings. Petitioners opposed the Idaho Attorney General's motion. On April 8, 2022, this Court issued an order granting the Idaho Attorney General's motion to reconsider. *See* April 8, 2022, Order Granting Motion to Reconsider, p.1. Per that Order, this Court required the State of Idaho to file its verified answer and separate response brief, consistent with Idaho Appellate Rule 32(e), no later

than April 28, 2022, with Petitioner's reply brief due fourteen days later. The Order also stayed the operation of SB 1309. *See* April 8, 2022 Order Granting Motion to Reconsider.

As explained below, the Legislature seeks to intervene and to file its response brief consistent with the deadlines set forth by this Court in the April 8, 2022 Order.

Petitioners' arguments challenging the constitutionality of SB 1309 directly implicate the Legislature's authority and, further, place the Legislature in conflict with the Executive Branch and with the prior statements of the Idaho Attorney General's office. Consequently, the Legislature has its own uniquely situated interests in this proceeding and, therefore, seeks to protect those interests through intervention.

ARGUMENT

I. The Legislature Should Be Permitted To Intervene Pursuant To Idaho Appellate Rule 7.1 Because The Legislature Is A Real Party In Interest Affected By The Outcome Of The Petition

Idaho Appellate Rule 7.1 allows for intervention by a "real party in interest." The rule provides:

> Any person or entity who is a real party in interest to an appeal or proceeding governed by these rules or whose interest would be affected by the outcome of an appeal or proceeding under these rules may file a verified petition with the Supreme Court asking for leave to intervene as a party to the appeal or proceeding and serve a copy thereof upon all parties to the appeal or proceeding. The petition shall be processed as a motion in accordance with Rule 32 of these rules, and if the Supreme Court finds that such petitioning person or entity is a real party in interest or would be affected by the outcome of the appeal or proceeding, the Court may, in its discretion, grant leave to the petitioning party to intervene as a party appellant or respondent; and if leave is so granted such petitioning party shall thereafter be a party to the appeal or proceedings for all purposes under these rules.

See I.A.R. 7.1.

Here, where the Legislature's interests would certainly be "affected by the outcome" of these proceedings, the Legislature is a "real party in interest." Regarding intervention at the district

court level, this Court, in applying Idaho Rule of Civil Procedure 24(a), has stated that there is "inherent power to grant intervention to persons who may be adversely affected by the outcome of a proceeding or when equitable principles otherwise require." *City of Boise v. Ada County*, 147 Idaho 794, 803, 215 P.3d 514, 523 (2009) (internal citations omitted). This Court has further declared that "courts [should] look with favor on intervention in a proper case, and … be liberal in permitting parties to intervene under the proper circumstances." *Id*. Here, the circumstances merit intervention. The Legislature has a powerful and important interest in defending the constitutionality of its enactments when, as here, that interest is or may be in conflict with the position of the named defendant/respondent and/or that interest merits a more vigorous defense than may be provided otherwise.

In *Coleman v. Miller*, 307 U.S. 433, 438 (1939), the United States Supreme Court held that state legislators suing in such sufficient numbers that their collective votes would be vindicated only if they succeeded on their legal theory "have a plain, direct and adequate interest in maintaining the effectiveness of their votes." The Court's holding in *Coleman* "stands … for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines v. Byrd*, 521 U.S. 811, 823 (1997); *see also Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 793-803 (2015) (finding Arizona Legislature had standing to challenge state constitutional amendment assigning districting responsibilities to an independent commission).

In the present case, the proposed intervenor is the Idaho Legislature, whose majority votes in support of the challenged legislation would also be "completely nullified" should the enacted legislation, SB 1309, be invalidated. *See Raines, supra*, 521 U.S. at 823. Thus, on this basis alone,

the Legislature should be permitted to intervene. Moreover, as set forth below, where the challenge to the proposed legislation creates a conflict with the position of the named defendant/respondent, intervention is even more appropriate and important to the presentation of the case.

II. The Legislature Should Be Permitted To Intervene Where The Separation of Powers Issue Is Clearly Presented And Puts The Interests Of The Legislature At Odds With The Executive Branch

The necessity of the Legislature defending its legislation is clear and certain in the present context, where there is a stated divergence between Idaho's legislative and executive branches. The Legislature is not simply defending challenged legislation, it is defending its authority as it relates to Idaho's executive branch of government.

A review of the Petitioners' first argument in their opening memorandum illustrates this point: "First, SB 1309 violates the separation of powers doctrine enshrined in the Idaho Constitution by eliminating the Executive's enforcement authority and discretion and exclusively handing civil enforcement to unaccountable private citizens." *See* Petitioner's Opening Brief, p.2. Petitioners' argument uncontrovertibly pits legislative power against executive power and highlights the need for Idaho's Legislature to have a separate and distinct voice in this proceeding.

This is perhaps best illustrated by Petitioners' support for that first argument. Petitioners identify and even attach as an exhibit, Governor Little's publicly expressed reservations related to SB 1309, including his separation of powers concerns and what he refers to as issues related to Idaho's "constitutional form of government." *See* Petitioner's Opening Brief, Exhibit 2.

This puts the Idaho Attorney General's office in an awkward and untenable position in relation to those two branches and its obligation to represent their separate interests. Per the Idaho Constitution, the Idaho Attorney General is an executive officer, as is the Idaho Governor. *See* Idaho Constitution, art. IV. Thus, here, where the assertion is that the Legislature is attempting to

"strip" power from Idaho's executive branch—of which the Governor and Idaho Attorney General are a part—the unavoidable concern is that the Legislature's interests and the arguments supporting those interests will not receive the vigorous advocacy that they merit and that this Court needs and deserves to hear. From the Legislature's perspective, this conclusion is underscored by the fact that the Idaho Attorney General's office has publicly opined that SB 1309 is likely unconstitutional for violating "separation of powers" principles. *See* Petitioners' Opening Brief, Exhibit 6 (Opinion of the Office of the Idaho Attorney General, p.4 ("Under the proposed legislation, the legislature arguably would be stripping the executive branch of its constitutional charge in violation of the constitutional separation of powers."). And, as they do with the Governor's letter to the Senate, Petitioners attach to their Petition the Idaho Attorney General's office's opinion letter as an exhibit and use it in support of their arguments.

Because of the Governor's letter and the opinion of the Attorney General's office, the belief is well nigh inescapable that the Idaho Attorney General's office may be muted, even compromised, in its advocacy for the Legislature and legislative power. The Legislature sincerely hopes that the Idaho Attorney General will vigorously defend the challenged statutes for the duration of this proceeding. But there is no escaping the powerful grounds for concluding that the Legislature needs its own, separate representation.[1] Hence, again, the rightness of allowing the Legislature to intervene pursuant to Idaho Appellate Rule 7.1.

[1] Perhaps understanding and appreciating this potential conflict and the need for the Legislature to have the opportunity to intervene in cases involving constitutional challenges, the Legislature passed and Governor Little signed SB 1289A. SB 1289A, that will be designated as Idaho Code § 67-465 provides:

> INTERVENTION IN ACTIONS REGARDING CONSTITUTIONALITY OF A STATUTE. When a party to an action challenges in state or federal court the constitutionality of an Idaho statute, facially or as applied, challenges an Idaho statute as violating or being preempted by federal law, or otherwise challenges the construction or validity of an Idaho statute, the legislature may intervene in the action as a matter of right by serving a motion

III. Alternatively, The Legislature Should Be Allowed To Participate As *Amici Curiae*

The Legislature prefers intervenor party status in this case and requests the same. However, in the event the Court rules otherwise, the Legislature requests leave to file an *amici curiae* brief and to participate in oral argument consistent with Idaho Appellate Rule 8. That rule states that a party "may appear as amicus curiae" in any proceeding "by leave of the Supreme Court" after setting forth "the interest of the applicant in the appeal or proceeding and the name of the party in whose support the amicus curiae would appear." *See* I.A.R. 8.

The purpose and classic role of the *amicus curiae* are to assist in the case of general public interest, supplement the efforts of counsel, and draw the court's attention to certain aspects of the law that might otherwise escape consideration. *See Funbus Sys., Inc. v. State of Cal. Pub. Utilities Comm'n*., 801 F.2d 1120, 1125 (9th Cir. 1986) (quoting *Miller-Wohl Co. v. Comm'r of Labor & Indus*., 694 F.2d 203, 204 (9th Cir. 1982)).

An *amicus* brief "should normally be allowed ... when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (citing *Miller-Wohl Co. v. Comm'r of Labor & Indus*., 694 F.2d 203 (9th Cir. 1982) (per curiam)); *see also Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 n.3 (9th Cir. 1987) (granting "amicus status" to "avail[ ] ourselves of the benefit of ... thorough" arguments from an official with an important perspective).

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upon the parties as provided in state or federal rules of civil procedure, whichever is applicable.

This law goes into effect July 1, 2022. Thus, by allowing the Legislature to intervene now will be consistent with what will ultimately be a matter of right on July 1, 2022.

In the present context, the Legislature would be valuable *amici*. To state the obvious, the Legislature is the author of the legislation being challenged. As set forth above, the Legislature has a direct interest in and will be materially affected by, the outcome of this proceeding. Second, the Legislature will offer the Court its unique perspective on the constitutionality of SB 1309, including the proper interpretation and application of the Idaho Constitution as it relates to SB 1309. The Legislature's *amici* brief and advocacy at oral argument will, therefore, present perspectives, arguments, insights, and facts related to the creation and purpose of the legislation unlikely to be found in the communications of Petitioners or of the Idaho Attorney General's office. Moreover, and probably of more lasting importance, the Legislature's involvement in this proceeding (best as an intervening respondent) will assure the kind of zealous advocacy that constitutional decision-making, more than any other kind, merits, indeed, demands. "More than any other kind" is the apt and accurate phrase because of the supreme, ultimate, and long-enduring nature of constitutional law.

CONCLUSION

To the benefit of this Court in its heavy decision-making responsibility in this historic proceeding, the Legislature will provide, uniquely, zealous, rigorous, and insightful advocacy for its proper powers and role granted it by the Idaho Constitution. Indeed, as the author of the at-issue legislation and as the branch of government being accused of usurping power, the Legislature will be a party well nigh indispensable to the full, fair, and proper resolution of this proceeding.

The Legislature, as both a "real party in interest" and a party who "would be affected by the outcome of the proceeding" is properly allowed to intervene in this matter. Alternatively, if it rules otherwise, this Court ought to grant the Legislature leave to file an *amici curiae* brief and participate in oral argument.

The Legislature respectfully presents these requests to the Court.

Dated this 14th day of April, 2022.

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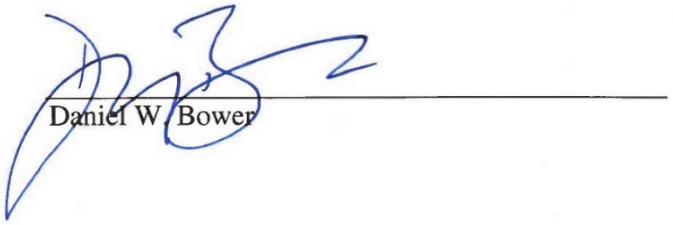

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2022, I filed and served the foregoing via the Odyssey File and Serve system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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