

No. 49899-2022

IN THE SUPREME COURT FOR THE STATE OF IDAHO

PLANNED PARENTHOOD 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,

Petitioners,

v.

THE STATE OF IDAHO;

Respondent,

and

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

Intervenors-Respondents.

**BRIEF IN SUPPORT OF MOTION OF IDAHO CONSTITUTIONAL LAW
PROFESSORS FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

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Whatever this Court's final opinion in the *Planned Parenthood v. State* cases, it will stamp Idaho's constitutional law for many decades to come. The questions that these cases present about the meaning of the Idaho Constitution are among the most momentous ever laid before this Court. And as this Court observed in its first opinion in these cases, on August 12, 2022, those questions raise "complex issues of law" that this Court has not previously had to grapple with so directly.

These prospective amici, comprising a group of our State's leading scholars of the Idaho Constitution, can provide the Court with careful, informed, academic analysis of those complex issues. Their perspective is wholly distinct from the three organizations previously denied leave to file amicus curiae briefs in case no. 49615-2022. Those organizations (the American Center for Law & Justice, Stanton Healthcare, and the Roman Catholic Diocese of Boise) are invested toward a particular outcome, expending substantial resources on policy and legal advocacy that presses for abortion restrictions and bans. The prospective amici here, however, are professors and scholars whose common feature is special expertise and focus on the Idaho Constitution.

David Adler has taught on constitutional issues and individual rights at all three of Idaho's public universities. Dr. Adler held a joint appointment in the College of Law and Department of Political Science at the University of Idaho, where he also held the McClure Professorship and was the Director of the James

and Louise McClure Center for Public Policy Research. At Boise State University, he held the Andrus Professorship and served as Director of the Andrus Center for Public Policy. At Idaho State University he was a Professor of Political Science and Director of the Center for Constitutional Studies. Dr. Adler's scholarly writing has been quoted by the U.S. Supreme Court, lower federal courts, the United States Attorney General, and both Republicans and Democrats in both houses of Congress.

Elizabeth Brandt is the James E. Wilson Distinguished Professor of Law Emerita at the University of Idaho College of Law, and previously served as Associate Dean of the College of Law. She has also been a member of the faculty or visiting faculty of Case Western Reserve University, Notre Dame University School of Law, Washburn University School of Law, and Gonzaga School of Law. She has served on this Court's Child Protection Committee and Committee on Children and Families in the Court, as well as on the Executive Committee of the Family and Juvenile Law Section of the Association of American Law Schools and the Editorial Board of the American Bar Association's Family Law Quarterly. Brandt has twice been honored with the Idaho State Bar Family Law Section's Award of Distinction.

Donald Crowley is Professor Emeritus of Political Science at the University of Idaho. He taught constitutional law and civil liberties for thirty years at the University of Idaho. He published several articles on the right to privacy and co-authored a book, *The Idaho Constitution: A Reference Guide* (1994).

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.

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

The interest of these prospective amici is to lend this Court the collective

knowledge their specialized research, scholarship, and experience regarding the Idaho Constitution. Their proposed brief, attached to the accompanying motion, outlines how the formulation of the Idaho Constitution differs importantly from the United States Constitution, requires recognition of fundamental rights relevant to these cases, and provides greater protections for individual rights, particularly in the area of privacy and personal autonomy, than the federal Constitution. The brief also outlines how other states have expanded constitutional protections similar to those in Idaho's Constitution to cover unenumerated rights.

The amici do not support any of the parties in this case. Not until this Court's August 22, 2022, opinion vacating and terminating stays of the challenged laws was it clear that the substantive Idaho constitutional issues would be both paramount to this Court's review *and* decided on an expedited schedule. The petitioners' initial briefing, of course, was filed well before then. In the meantime, Idaho Appellate Rule 8 governing amicus curiae was amended effective July 1, 2022, to set a deadline for filing amicus briefs where there had been none before. The petitioners' first briefs filed since the rule change and the Court's August 22, 2022 opinion, however—the petitioners' reply briefs—are not due until today. Considering this unusual timeline, including an intervening rule change, it is appropriate to grant leave under Rule 8(d) for these amici to file their brief, especially because ample time for the parties to respond to the proposed amicus brief still remains before the

September 29, 2022, consolidated hearing.

For all of these reasons, the Court should GRANT the Motion for Leave to File Amicus Curiae Brief accompanying this brief in its support.

Respectfully submitted,

/s/ Kenneth McKay Cunningham
Kenneth McKay Cunningham

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 9, 2022 a true and correct copy of the foregoing document was filed with the Clerk of the Court using the iCourt E-File system which sent a Notice of Electronic Filing to the following persons:

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