No. 49817-2022

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.

MOTION OF IDAHO CONSTITUTIONAL LAW PROFESSORS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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Idaho scholars of our State's Constitution—Dr. David Adler, Professor Elizabeth Brandt, Professor Donald Crowley, Professor McKay Cunningham, and Professor John Rumel —respectfully move this Court under Idaho Appellate Rule 8 for leave to file an amicus brief. The prospective amici do not support any of the parties in this case. Their proposed brief, which accompanies this motion as an appendix, will inform the Court about the history and development of the Idaho Constitution as pertinent to the portentous issues at stake in this case.

In addition to the proposed amicus curiae brief accompanying this motion, the prospective amici support their motion with a brief in support, setting forth the reasons why leave should be granted.

Leave is sought only to file the proposed amicus brief appended to this motion. These prospective amici do not request to participate in oral argument.

DATED: September 9, 2022

/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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APPENDIX

Proposed Brief of Idaho Constitutional Law Professors

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STATEMENT OF IDENTITY OF AMICI CURIAE[1]

Amici Curiae are Idaho law professors and legal scholars who teach, research, and write about state constitutions and issues arising under state constitutions. Amici present this brief to provide analysis regarding the interpretation of applicable provisions of the Idaho Constitution—and analogous provisions under other state constitutions—as to the breadth of fundamental rights under the Idaho Constitution. Amici's expertise will provide insight on the issues presented and will provide meaningful assistance to this Court in reaching a determination.

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 United States 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

[1] No counsel for any party participated in the drafting of this Amici Curiae brief. No counsel or party made a monetary contribution to fund the preparation or submission of this brief.

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).

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).

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.

STATEMENT OF THE CASE

In recent years, the Idaho legislature has passed a series of measures narrowing abortion access in the state. Planned Parenthood has challenged those measures as contrary to rights guaranteed to Idaho citizens under the Idaho Constitution. This case requires the Court to interpret the Idaho Constitution to determine the extent to which this foundational document—which was intended to safeguard the individual rights of Idahoans—constrains the legislature's authority to curtail abortion access.

As this Court has observed, this question raises "complex issues of law" that this Court has not previously had to grapple with so directly. Amici, scholars and professors of state constitutional law, are well practiced in unravelling questions such as this in accordance with state constitutional principles and, in particular, the body of caselaw interpreting the Idaho Constitution. As the Michigan Court of Claims recently noted in addressing Michigan's abortion banning statute, amicus briefs can be "particularly helpful" when examining the scope and breadth of state constitutional provisions in this context. *Planned Parenthood of Mich. vs. Michigan*, Op. & Order Den. Mot. for Stay of Proceedings, Case No. 22-000044-MM (Mich. Ct. Cl. Sept. 7, 2022).

Whatever the Court's final decision, the Court's analytical approach will stamp the interpretation of 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. Having studied Idaho's history, constitution, and caselaw in depth over decades, we offer the Court a framework for applying that history and law to these cases.

DISCUSSION

I. The Idaho Constitution Requires the Recognition of Fundamental Rights, Including Rights Relevant to this Case

A. The Formulation of the Idaho Constitution Differs Importantly from the United States Constitution

The Idaho Constitution's text differs from the United States Constitution in ways that underscore the need to interpret it independently from the federal constitution. The first section of Article I—the Idaho Declaration of Rights—is unique and does not parallel language in the United States Constitution. It safeguards not only unspecified "inalienable rights" (words not found in the federal Constitution), but specifically enumerates "life and liberty . . ., pursuing happiness and securing safety" as rights secured thereunder for the people of Idaho.[2] Section 21 of the Idaho Declaration of Rights goes on to make clear that the listing of particular protections in the constitution should not be "construed to impair or deny rights retained by the people."

These linguistic and organizational differences between the state and federal constitutions are significant. They require—as they were intended to do—that the Idaho Constitution be interpreted independent of the federal Constitution. The people of Idaho do not live in a generic state marked only by boundaries relevant for taxing. Rather, Idaho is a unique sovereign entity,

[2] The inclusion of "inalienable rights" in the Idaho Constitution was a reference back to the Declaration of Independence which states "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." *See* Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1312-24 (2015) (finding that, based on legislative history, state constitutions incorporated the Declaration of Independence to substantively limit government action, not merely to state aspirational principles); *see also State v. Donato*, 135 Idaho 469, 472 (2001) (listing cases in which this Court has provided greater protection than the federal constitution based, in part, on the "uniqueness" of the Idaho Constitution).

whose founders, aware of the language of the federal Constitution, chose to express the protection for individual liberty in carefully crafted ways unique to Idaho.

This Court has in the past readily shouldered its responsibility to interpret the Idaho Constitution—even language paralleling the United States Constitution—with the same unique, well crafted, and nuanced independence. It has construed the language of the Idaho Constitution in light of the unique politics, culture, and history of this state. It should do so again here.

B. The Federal Constitution Establishes a "Floor" of Protections, While State Constitutions Can, and Do, Offer Greater Protections for Individual Rights

This Court has recognized that the Idaho Constitution may guarantee broader protections to individuals than does the federal Constitution. *See State v. Guzman*, 122 Idaho 981, 987, 842 P.2d 660, 666 (1992); *State v. Webb*, 130 Idaho 462, 467, 943 P.2d 52, 57 (1997) ("It is well-settled that when interpreting the Idaho Constitution, this Court is free to confer broader protection to Idaho citizens than that provided by the United States Constitution."). *See also State v. Green*, 158 Idaho 884, 887, 354 P.3d 446, 449 (2015), *abrogated by State v. Clarke*, 165 Idaho 393, 446 P.3d 451 (2019). This approach is consistent with the well-established analysis that the federal constitution simply provides a floor for protections guaranteed to individuals and that state constitutions can—and often do—provide greater protections against government intrusion. *See, e.g.*, *Kansas v. Carr*, 577 U.S. 108, 129, 136 S. Ct. 633, 648 (2016) (Sotomayor, J., dissenting) ("The Federal Constitution guarantees only a minimum slate of protections; States can and do provide individual rights above that constitutional floor."). Individual states are "free to interpret their own constitutions as providing greater protection to citizens" than the federal Constitution. *Green*, 158 Idaho at 887, 354 P.3d at 449; *see also Virginia v. Moore*, 553 U.S.

164, 172, 128 S. Ct. 1598, 1604–05 (2008). This is true even when the federal constitution and state constitution at issue share common language[3] or philosophical roots.[4]

C. The Idaho Constitution Uniquely Declares the Rights to Procure Happiness and to Secure Safety as Inalienable Rights

Idaho's Constitution contains unique language protecting the "inalienable rights" of people in Idaho, including the right of the people to secure their own safety. Article I, Section 1 of the Idaho Constitution provides:

> INALIENABLE RIGHTS OF MAN. All men are by nature free and equal, and have certain inalienable rights, *among which are* enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.

Idaho Const. art. I, § 1 (emphasis added).[5] This language shares similarities with the federal Declaration of Independence[6] but includes a more expansive list of inalienable rights. The Court has interpreted these inalienable rights to include, *inter alia*, "the right to wear one's hair in a manner of his choice," *Murphy v. Pocatello School District Number 25*, 94 Idaho 32, 38, 480 P.2d 878, 884 (1971); and "[t]he right to follow a recognized and useful occupation," *Berry v. Summers*, 283 P.2d 1093 (Idaho 1955). This Court has not yet had the opportunity to interpret

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[3] *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); *see also* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859 (2021). Indeed, "more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977).

[4] *Planned Parenthood of Mich. vs. Michigan*, Op. & Order Den. Mot. for Stay of Proceedings, Case No. 22-000044-MM (Mich. Ct. Cl. Sept. 7, 2022).

[5] The inclusion of the words "among which are" coupled with Article I, Section 21, discussed *infra*, make clear that this is not a complete or absolute list of Idahoans' inalienable rights.

[6] *See* note 2 and related text, *supra*.

Section I, Article 1's rights to happiness or "securing safety," but it is reasonable to assume that these unique constitutional provisions carry some significance to Idahoan's constitutional rights.

D. Idaho Courts Have Interpreted Idaho's Constitution to Provide Greater Protections Than the Federal Constitution, Even Where the State Constitutional Language Parallels That of the Federal Constitution

Idaho courts have construed the Idaho Constitution independently of the federal Constitution, and have interpreted Idaho's to be more rights-conferring than rights-limiting. They have done so even where the language of the Idaho Constitution is similar to the language of the United States Constitution. For example, in *State v. Clarke*, this Court invalidated a state statutory subsection on state constitutional grounds where it diverged from the 1889 constitutional standard as informed by statutes and common law preexisting constitutional adoption. 165 Idaho 393, 397, 446 P.3d 451, 455 (2019), *reh'g denied* (Aug. 26, 2019). The invalidated section allowed probable cause-supported warrantless arrests for misdemeanor assault and battery committed outside the presence of an officer, such as in domestic violence situations. *Id.* at 396. The Court explained that "[w]hen construing the Idaho Constitution, 'the primary object is to determine the intent of the framers,'"—the best resource being the compilation of the Proceedings and Debates of the Constitutional Convention of Idaho 1889, and then Idaho statutes of 1889 and the common law as it developed across the United States and England prior to 1889, when Idaho's constitutional convention was in session. *Id.* at 397.

This Court further explained that Idaho statutes had shifted over time from a rule that a warrantless arrest was lawful if the arresting officer had probable cause to believe a felony had been committed or if the offender had committed a misdemeanor in the officer's presence, to a rule that permitted warrantless arrests for misdemeanors committed outside the officer's

presence where there is probable cause. *Id.* at 396. This, the Court explained, was where the constitutional standard and statutory standard had "diverged" over time. *Id.* The divergent statute, the Court held, "must yield to the requirements of the Idaho Constitution," even if "powerful policy considerations" support upholding the statute. *Id.* at 400. Citing *Clarke*, the Justices again, last year, held that a warrantless arrest made for a misdemeanor DUI the officer did not witness was unlawful—and unanimously struck down another Idaho statute permitting officers to make warrantless arrests for serious misdemeanors they did not witness on state constitutional (Article I, Section 17) grounds. *Reagan v. Idaho Transp. Dep't*, 169 Idaho 689, 696, 502 P.3d 1027, 1034 (2021) ("[T]he framers of the Idaho Constitution did not intend to allow warrantless arrests for misdemeanors committed outside an officer's presence.").

This Court has, in several other cases, further elucidated its view that the Idaho Constitution was intended to confer more rights than the federal one. *See State v. Guzman*, 122 Idaho 981, 987, 842 P.2d 660, 666 (1992) (expressing in reference to Article 1, Section 17 search and seizure protections, that the Idaho Supreme Court "is free to interpret our state constitution as more protective of the rights of Idaho citizens than the United States Supreme Court's interpretation of the federal constitution." This Court expressed the same sentiment in *Smith v. Glenns Ferry Highway District*, which held that, under Idaho constitutional law, the issue of front pay as a remedy in an employment termination case must be left in the hands of the jury (unless that right is waived). 166 Idaho 683, 462 P.3d 1147 (2020). *See also State v. Henderson*, 114 Idaho 293, 299, 756 P.2d 1057, 1063 (1988) ("The Idaho Constitution can, where appropriate, grant more protection than its federal counterpart."). This Court has explained that it can go further "even when the constitutional provisions implicated contain similar phraseology . . . [l]ong gone are the days when state courts will blindly apply United States Supreme Court

interpretation and methodology when in the process of interpreting their own constitutions." *State v. Newman,* 108 Idaho 5, 10 n.6, 696 P.2d 856, 861 n.6 (1985).

But this Court has gone beyond merely expressing the abstract notion that the Idaho Constitution confers more rights than the federal; the Court has applied the same principle. In *Guzman*, the Court rejected the federal good faith exception to the exclusionary rule, holding that Idaho law enforcement officers effectuating arrests based on defective warrants cannot rely on their good faith in the warrant's validity. *State v. Guzman*, 122 Idaho 981, 993, 842 P.2d 660, 672 (1992). The Court reasoned that deterrence of police misconduct and judicial integrity mandate the exclusionary rule in Idaho; it "encourages judges to take seriously their obligation to ensure that the probable cause requirement of Article I, Section 17 is met before a warrant is issued." *Id.* The Court "finally and unequivocally [elected to] no longer adhere to a policy of sheepishly following in the footsteps of the U.S. Supreme Court in the area of state constitutional analysis." *Id.* at 998.

Similarly, in *Idaho v. Cada*, 129 Idaho 224, 923 P.2d 469 (Idaho Ct. App. 1996), the Idaho Court of Appeals announced a broader test than the United States Supreme Court's for determining the extent of curtilage protected from unreasonable searches and seizures. The Appeals Court found the view of curtilage expressed by the United States Supreme Court to be unduly restrictive and unreflective of the scope of the privacy interest protected by Article I, Section 17 of the Idaho Constitution. *Id.* The Appeals Court

> shar[ed] the perception, expressed by the Court of Appeals of New Mexico . . . that the scope of Fourth Amendment protection established by decisions of the United States Supreme Court may depend on concepts that 'have evolved in areas with very different customs and terrain. In New Mexico [and in Idaho] lot sizes in rural areas are often large, and land is still plentiful. Our interpretation and application of the state constitution must take into account the possibility that such differences in custom and terrain gave rise to particular expectations of privacy when the state constitution was adopted.

Id. at 475.

In *State v. Thompson*, 114 Idaho 746, 760 P.2d 1162 (1988), the Idaho Supreme Court again conferred expansive rights to Idahoans when it rejected the United States Supreme Court's conclusion that the use of a pen register to record numbers called on a telephone is not a Fourth Amendment-protected search. The Court instead determined that in Idaho there *does* exist a legitimate and reasonable expectation of privacy in telephone numbers dialed, and that this privacy interest is protected by Article I, Section 17 of the Idaho Constitution. This Court explicitly "reaffirm[ed] that in interpreting provisions of our constitution that are similar to those of the federal constitution we are free to extend protections under our constitution beyond those granted by the United States Supreme Court under the federal constitution." *Id.* at 748.

That same year, this Court held that warrantless roadblocks established to apprehend drunk drivers were unconstitutional under Article I, Section 17, again noting that the Idaho Constitution can grant more protection than the federal. *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (Idaho 1988). The Court cited to a string of other state court opinions providing expansive rights under their respective state constitutions and also expressed the view that "the most important attribute of our way of life in Idaho is individual liberty. A citizen is free to stroll the streets, hike the mountains, and float the rivers of this state without interference from the government. That is, police treat you as a criminal only if your actions correspond." *Id.* at 298.

In short, this Court has recognized "'the unique rural tradition and custom in Idaho that defines Idahoans' sense of protected space, and expectation of privacy, within their property'" as the basis for broader protections than the federal Fourth Amendment provides. *CDA Dairy Queen, Inc. v. State Ins. Fund*, 154 Idaho 379, 384, 299 P.3d 186, 191 (2013) (quoting *State v. Donato,* 135 Idaho 469, 472, 20 P.3d 5, 8 (2001)). Although expressed most commonly in

connection with the Fourth Amendment and its Idaho counterpart, the same principles apply more broadly to other provisions of the Idaho Constitution that have analogous federal counterparts.[7]

E. This Court has Frequently Emphasized that the Idaho Constitution's Protection for Unenumerated Rights Is not Merely Hortatory

The Declaration of Rights makes clear that the Idaho Constitution does not contain a comprehensive list of all rights to which the people of the state are entitled:

> RESERVED RIGHTS NOT IMPAIRED. This enumeration of rights shall not be construed to impair or deny other rights retained by the people.

Idaho Const. art. I, Sec. 21. While the language of this provision appears to be similar to that of the 10th Amendment, there are significant and important differences in the intention and motivations of the drafters of the two documents.

The 10th Amendment is a reservation of governing powers to the states and to people. This reservation was crucial to the Bill of Rights, which was drafted as a limitation on the powers of the federal government conferred in the United States Constitution itself. The drafters of the Bill of Rights intended the document to be a limited incursion on the powers of the government established in the Constitution.

In contrast, the Idaho Declaration of Rights is the very first provision of the state's Constitution. It is a positive statement of the rights of people in the state at the head of the very document that established Idaho's statehood government. For this reason, the drafters of the

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[7] *See* Byron J. Johnson, *The Shah of Persia v. the Pope's Decree: Can the Shah of Persia (The United States Supreme Court) Interfere with the Pope's Decree (The Idaho Constitution) As Interpreted by the Idaho Supreme Court?*, 31 Idaho L. Rev. 391 (1995) (discussing Idaho's historical Constitution provisions and comparable Bill of Rights provisions and noting that, even beyond the search-and-seizure context, the Idaho Constitution offers broader protections than the Bill of Rights in the federal Constitution).

Idaho Constitution included language making clear that this affirmative enumeration of rights was not intended to be exclusive, or to limit the rights of the people of Idaho in favor of the State.

Notably, the Idaho Constitution was enacted in 1890. Idaho had the benefit of learning from state constitutions that were ratified during the century after the birth of our United States Constitution, as well as judicial decisions interpreting rights under both the federal and state constitutions.[8] Framers in western states chose to implement rights-conferring language from other state constitutions, even when such language was noticeably absent in the federal Constitution.[9] These states "had the opportunity to ponder more than 100 years of United States History before penning their own constitution, allowing them to adopt or adjust provisions employed by the federal government or other states to meet [their] needs," and consistently opted to include unenumerated rights.[10] Idaho was among them.

As this Court has long held, a right is "fundamental" under Idaho law if it is either "expressed as a positive right" in the Idaho Constitution, or "implicit in [Idaho's] concept of ordered liberty." *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 581-82 (1993); *see also Reclaim Idaho v. Denney*, 169 Idaho 406, 427 (2021); *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 126 (2000); *cf. Idaho Schs. for Equal Opportunity v. Evans*, 123 Idaho 573, 582, 850 P.2d 724, 733 (1993) (holding that education is not a

[8] "While federal judges bickered about whether the Fourteenth Amendment protects unenumerated rights, state constitutional drafters repeatedly protected such rights in black and white language. So much so that they eventually wound up in two-thirds of our state constitutions." Anthony B. Sanders, *Baby Ninth Amendments Since 1860: The Unenumerated Rights Americans Repeatedly Want (and Judges Often Don't)*, 70 Rutgers U.L. Rev. 857, 861 (2018).

[9] Idaho Const. art. I, § 2 ("All political power is inherent in the people.")

[10] Clint Bolick, *Principles of State Constitutional Interpretation*, 23 Federalist Society Review 1 (Mar. 24, 2022), https://fedsoc.org/commentary/publications/principles-of-state-constitutional-interpretation.

fundamental right because the Idaho Constitution imposes an express duty upon the legislature to establish a school system); *Thompson v. Engelking*, 96 Idaho 793, 805, 537 P.2d 635, 648 (1975) (Article 9, Section 1 of the Idaho Constitution "on its face . . . mandates action by the Legislature. It does not establish education as a basic fundamental right."). Relying on Article I, Sections 1 and Section 21, this Court has found and enforced numerous rights not explicitly listed in the text of the Idaho Constitution.

1. Personal Autonomy

This Court has long interpreted the Idaho Constitution, and specifically Article I, Section 1, as independently protective of rights related to privacy and personal autonomy. In *Murphy v. Pocatello School District Number 25*, 94 Idaho 32, 38, 480 P.2d 878, 884 (1971), this Court struck down a school district regulation that allowed a principal to suspend a student based on the student's hair length. The Court relied on both Article I, Section 1 and Article I, Section 21 of the Idaho Constitution and held that "the right to wear one's hair in a manner of his choice" was "a protected right of personal taste not to be interfered with by the state" absent passing the substantial burden test. *Id.* In *Johnson v. Joint School District Number 60, Bingham County*, this Court considered a constitutional challenge to a school dress code provision that would have otherwise prevented female students from wearing pantsuits and slacks to school on the reasoning that"[g]irls are expected to wear dresses and skirts which are not more than two inches above the knee." The Court, relying on the analytical framework in *Murphy*, upheld the trial court's determination that the dress code did not meet the substantial burden test. 95 Idaho 317, 317, 508 P.2d 547, 547 (1973).[11]

[11] This Court did so even while Justice Bakes, writing for the Court, acknowledged that he himself did not agree with the reasoning in *Murphy* but nevertheless found it to "represent the opinion of a majority of this Court and thus is the law applicable to this case." 95 Idaho at 319, 508 P.2d at 549.

2. How to Raise Children

This Court has also found that parents have fundamental right to direct the upbringing of their children. *Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 612-13, 308 P.2d 225, 231-32 (1957). Relying on Article I, Section 21, this Court recognized that "under our constitution parents have a right to participate in the supervision and control of the education of their children." *Big Butte*, 78 Idaho 602, 612, 308 P.2d 225, 231 (1957). The Court further found that this was a right[] accorded to parenthood before the [Idaho] constitution was adopted" and it therefore was "retained by the people." *Id.* Indeed, an even earlier case recognized that "[t]he right of a parent to the custody, control, and society of his child is one of the highest known to the law." *Martin v. Vincent*, 34 Idaho 432, 434, 201 P. 492, 493 (1921).[12]

3. Right to Procreate

This Court has long acknowledged that the right to decide whether to procreate is a fundamental right under the Idaho Constitution. *See, e.g.*, *Stucki v. Loveland*, 94 Idaho 621, 623 n.14, 495 P.2d 571, 573 n.14 (1972) (listing procreation among other "fundamental interests"); *Newlan v. State*, 96 Idaho 711, 713-14, 535 P.2d 1348, 1350 (1975) (discussing "fundamental rights such as . . . procreation"); *Tarbox v. Tax Comm'n of Idaho*, 107 Idaho 957, 960 n.1, 695 P.2d 342, 345 n.1 (1984) (same); *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 582, 850 P.2d 724, 733 (1993) ("This is not to say that the state constitution is the exclusive source of fundamental rights . . . . [T]his Court has stated that procreation is a fundamental right, and the right to procreate is not explicitly mentioned in the state constitution."). This, read

[12] Indeed, "privacy has been generally considered a more broadly protected right under the Idaho Constitution than under the United States Constitution." *Planned Parenthood of Idaho, Inc. v. Kurtz*, No. CVOC0103909D, 2001 WL 34157539 (D. Idaho Aug. 17, 2001); *see also* Idaho Const. art. I, § 17.

alongside other fundamental rights recognized by this Court, suggests that beyond the specific unenumerated rights discussed herein lies a broader, fundamental, "right to be left alone." *See Murphy*, 94 Idaho at 37, 480 P.2d at 883.

II. Other States Have Expanded Constitutional Protections Similar to Those in Idaho's Constitution to Include Abortion

Idaho is not alone among states in recognizing and protecting unenumerated rights provided by its Constitution.[13] Other states have held, when faced with questions similar to those before the Court today, that those states' unenumerated rights extend to provide constitutional protections for abortion, either as a positive right or through an implied concept of ordered liberty, and because state constitutions "should be interpreted in a manner that preserves and protects the health of [their] citizens." [14]

A. Some States Have Found Abortion to be a Positive Right

Interpreting a state constitutional provision materially identical to Idaho's Article I, Section 1, the Supreme Court of Kansas held that abortion was a fundamental right under the Kansas Constitution. *Hodes & Nauser, MDs, P.A. v. Schmidt*. 309 Kan. 610, 440 P.3d 461 (2019). Kansas's constitution provides that "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Const. Bill of Rts. § 1 (ratified 1859); *compare id. with* Idaho Const. art. I, § 1 ("All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and

[13] *See* Louis Karl Bonham, Unenumerated Rights Clauses in State Constitutions, 63 Tex. L. Rev. 1321, 1325–26 (1985) (noting that states have interpreted their "Mini Ninth Amendments" to include "a wide spectrum of individual rights."; *see also* Carroll v. Johnson, 263 Ark. 280, 291, 565 S.W.2d 10, 16 (1978) (father's right to have his children carry his surname); *In re J.P.*, 648 P.2d 1364, 1372-73 (Utah 1982) (parental rights to custody of children).

[14] *Planned Parenthood of Mich. vs. Michigan*, Op. & Order Den. Mot. for Stay of Proceedings, Case No. 22-000044-MM (Mich. Ct. Cl. Sept. 7, 2022).

liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety."). Based on that provision, the court held:

> We are now asked: Is this declaration of rights more than an idealized aspiration? And, if so, do the substantive rights include a woman's right to make decisions about her body, including the decision whether to continue her pregnancy? We answer these questions, "Yes."
>
> We conclude that, through the language in section 1, the state's founders acknowledged that the people had rights that preexisted the formation of the Kansas government. …
>
> Included in that limited category is the right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This right allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy. Although not absolute, this right is fundamental. Accordingly, the State is prohibited from restricting this right unless it is doing so to further a compelling government interest and in a way that is narrowly tailored to that interest.

Hodes & Nauser, 309 Kan. at 613-14, 440 P.3d 461 at 466.

In its meticulous 69-page opinion, the Kansas court first explains that the express recognition of inalienable rights in Kansas's constitution "acknowledges rights that are distinct from and broader than the United States Constitution," pointing to the latter's omission of analogous language. *Id.* at 624-25. It then explains that the language of Section 1 (like Idaho's) invokes the concept of Lockean "natural rights"—in essence, "constitutionally protected unenumerated individual liberty rights" based on "the ideal that all men retain some of their natural rights after subscribing to the social compact." *Id.* at 625-26 (quoting Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1303, 1316-17 (2015)).[15] Further,

[15] *See also Hodes & Nauser*, 309 Kan. at 631 ("This broad wording of Kansas' section 1, with its unenumerated natural rights guarantee, was not unlike the natural rights guarantees in at least 14 other states' constitutions in place at the time of the Wyandotte Convention [in 1859]. Although the wording of each state's constitutional natural rights guarantee varied, the provisions shared

Section 1's textual indication (like Idaho's) that life, liberty and the pursuit of happiness were "among" the rights recognized by the provision, made it clear that the list "was not intended to be exhaustive." *Id.* at 626. In addition, Section 1's omission (like Idaho's) of the phrase "without due process of law" "demonstrates an emphasis on substantive rights—not procedural rights," and that its "focus on substantive rights removes from our calculus one of the criticisms of *Roe* and other decisions of the United States Supreme Court relying on substantive due process rights under the Fourteenth Amendment." *Id.* at 627. The court went on to discuss why the inalienable rights in Section 1 are judicially enforceable. *Id.* at 627-38.

Having established that Section 1 of the Kansas Bill of Rights affords rights broader than and distinct from those in the Fourteenth Amendment of the United States Constitution, and that those rights are judicially enforceable, the court turned "to the specific questions of what a natural right entails and whether it includes a woman's right to decide whether to continue a pregnancy." *Id.* at 638. The Court assessed those questions under a historical lens and concluded that abortion was indeed protected:

> [I]ndividuals should be free to make choices about how to conduct their own lives, or, in other words, to exercise personal autonomy. Few decisions impact our lives more than those about issues that affect one's physical health, family formation, and family life. We conclude that this right to personal autonomy is firmly embedded within section 1's natural rights guarantee and its included concepts of liberty and the pursuit of happiness.
> [. . .]
> Denying a pregnant woman the ability to determine whether to continue a pregnancy would severely limit her right of personal autonomy. And abortion laws do not merely restrict a particular action; they can impose an obligation on an unwilling woman to carry out a long-term course of conduct that will impact her health and alter her life. Pregnancy often brings discomfort and pain and, for some, can bring serious illness and even death.
> [. . .]

three characteristics. They (1) "affirmed the freedom or equality of men (or both)"; (2) "guaranteed inalienable, inherent, or natural rights"; and (3) "guaranteed a right to enjoy life, liberty," property, the pursuit of happiness, or some combination of these words." (citation omitted)).

> Consistent with these and other states [having discussed constitutional decisions in other states to the same end], today we hold our Kansas Constitution's drafters' and ratifiers' proclamation of natural rights applies to pregnant women. This proclamation protects the right to decide whether to continue a pregnancy.

Id. at 645-50.

The court went on to address, and reject as "wholly unpersuasive," the argument that the existence of territorial and early state statutes criminalizing abortion at the time the Kansas Constitution was ratified suggested that the framers did not envision a right of a woman to terminate a pregnancy, citing and expanding on three reasons that likewise resonate in Idaho: "(1) the history of enactment provides no evidence that the legislation reflected the will of the people; (2) these statutes were never tested for constitutionality; and (3) the historical record reflects that those at the [Constitutional] Convention, while willing to recognize some rights for women, refused to recognize women as having all the rights that men had." *Id.* at 651.

Concluding its holding that the right to abortion is among the inalienable rights guaranteed by the Kansas Constitution, the court summarized its reasoning as follows:

> As discussed, we reach our conclusion that section 1 of the Kansas Constitution Bill of Rights protects a woman's right to make decisions about whether she will continue a pregnancy based on several factors. These include an analysis of natural rights, Lockean principles, the caselaw of Kansas, the rationale and holdings of court decisions from other jurisdictions reviewing broad constitutional natural rights provisions or other provisions similar to ours, and the history of early statutes limiting abortion in Kansas. These factors lead us to conclude that section 1's declaration of natural rights, which specifically includes the rights to liberty and the pursuit of happiness, protects the core right of personal autonomy—which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This right allows Kansans to make their own decisions regarding their bodies, their health, their family formation, and their family life. Pregnant women, like men, possess these rights.

Id. at 660. Notably, the people of Kansas—whose inherent rights the state constitution enshrines and protects from legislative infringement—effectively ratified this holding on August 2, 2022, by voting in a statewide referendum overwhelmingly to reject a proposed state constitutional

amendment that would have superseded *Hodes & Nauser* and withdrawn the right to abortion under Kansas constitutional law.[16]

Ohio courts have reached the same result, based on a materially identical state constitutional provision. Article I, Section 1, of the Ohio Constitution provides: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." Ohio Const. art. I, § 1. In *Preterm Cleveland v. Voinovich*—a decision cited favorably by the Supreme Court of Kansas—the Ohio Court of Appeals was asked to decide whether that provision "includes within the liberties afforded the right of a woman to choose to have an abortion." 89 Ohio App. 3d 684, 691, 627 N.E.2d 570, 575 (1993). The Court of Appeals answered in the affirmative, holding that Article I, Section 1, directly encompassed the right of a woman to choose—without first needing to locate a constitutional right to privacy, and then housed the right to abortion thereunder:

> In light of the broad scope of "liberty" as used in the Ohio Constitution, it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection. This necessarily includes the right of a woman to choose to have an abortion so long as there is no valid and constitutional statute restricting or limiting that right. Some courts have taken a circuitous route to reach a conclusion that the so-called "right to choose" has a constitutional foundation by first finding a constitutional right of privacy and then finding that the right of a woman to choose to have an abortion falls within this right of privacy. Although Ohio recognizes a common-law right of privacy, … it is not necessary to find a constitutional right of privacy in order to reach the conclusion that the choice of a woman whether to bear a child is one of the liberties guaranteed by Section 1, Article I, Ohio Constitution.

Id. at 691-92.

[16] *See, e.g.*, Katherine Swartz, *Kansas upholds right to abortion, a blow to anti-abortion movement in first Roe referendum*, USA TODAY, Aug. 3, 2022.

To the same end, the Supreme Court of Iowa, overturning its prior holding that abortion is a fundamental right warranting strict scrutiny and holding that undue burden applies, recognized that the presence of the inalienable rights clause in the Kansas Constitution justified the different outcome in *Hodes & Nauser*. *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 737 (Iowa 2022), *reh'g denied* (July 5, 2022); *see also id.* at 783-88 (Appeal J. Mansfield, dissenting) (collecting decisions of other state supreme courts recognizing abortion as a fundamental right).

B. Other States Have Found Abortion to Fall Within the Concept of Ordered Liberty

Other state supreme courts have considered whether the right to abortion is, as a matter of state law, inherent in the concept of ordered liberty. At least two high courts, in Alaska and Tennessee, have determined that it is. The Supreme Court of Alaska held as follows:

> We sometimes have taken a broad view of our role in defining state constitutional rights:
>
> > [W]e are under a duty to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.
>
> *Baker v. City of Fairbanks*, 471 P.2d 386, 401–02 (Alaska 1970) (extending the constitutional right to a jury trial). Thus, our articulation of the protection of reproductive rights under Alaska's constitution may be broader than the minimum set by the federal constitution. …
> […]
> A woman's control of her body, and the choice whether or when to bear children, involves the kind of decision-making that is "necessary for ... civilized life and ordered liberty." *Baker*, 471 P.2d at 401–02. Our prior decisions support the further conclusion that the right to an abortion is the kind of fundamental right and privilege encompassed within the intention and spirit of Alaska's constitutional language.

Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice, 948 P.2d 963, 968 (Alaska 1997) (emphases added, footnote omitted).

The Supreme Court of Tennessee concluded the same, although 14 years later the state amended its constitution to expressly abolish that right:

> The concept of ordered liberty embodied in our constitution requires our finding that a woman's right to legally terminate her pregnancy is fundamental. The provisions of the Tennessee Constitution imply protection of an individual's right to make inherently personal decisions, and to act on those decisions, without government interference. A woman's termination of her pregnancy is just such an inherently intimate and personal enterprise. This privacy interest is closely aligned with matters of marriage, child rearing, and other procreational interests that have previously been held to be fundamental. To distinguish it as somehow non-fundamental would require this Court to ignore the obvious corollary.

Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 4, 15 (Tenn. 2000), *superseded by* Tenn. Const. art. 1, § 36 (eff. Nov. 4, 2014).

III. The Idaho Legislature Did Not Attain Carte Blanche to Regulate in this Arena Merely Because the Supreme Court Returned the Question of Abortion to the States

A. The People and the Elected Representatives Are Not Interchangeable

The Supreme Court in *Dobbs v. Jackson Women's Health Organization*, ___U.S.___; 142 S. Ct. 2228; 213 L Ed 2d 545 (2022) (overturning *Roe v. Wade,* 410 US 959; 93 S Ct 1409; 35 L Ed 2d 694 (1973)) stated:

> The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. Roe and Casey arrogated that authority. We now overrule those decisions and return that authority to *the people and their elected representatives.*

142 S. Ct. at 2284 (emphasis added). The United States Supreme Court's decision in *Dobbs* expressly decoupled the question of abortion from a federal definition of fundamental rights such that it no longer supersedes each state's own definition. What *Dobbs* did was return the task of "regulating or prohibiting abortion" to "the people *and* their elected representatives" within each

state. 142 S. Ct. at 2284 (emphasis added). Notably, the Supreme Court distinguishes the citizenry of the states from their legislative bodies, rather than handing the task to the elected representatives alone, or even to the people *through* their elected representatives.

This Court has recognized the significance of this distinction. Perhaps most notably, the Idaho Constitution "is very broad in that the people have 'the power to approve or reject at the polls *any* act or measure passed by the legislature.'" *Idaho State AFL-CIO v. Leroy*, 110 Idaho 691, 696-97, 718 P.2d 1129, 1134-35 (1986) (emphasis in original) (quoting Idaho Const. art. III, § 1). The fact that the Idaho Constitution itself gives Idaho's citizens direct power to legislate independent of the legislature manifests the distinction between the people and the legislature. This distinction is especially important when it comes to constitutionally protected rights: the legislature cannot legislate rights into existence or non-existence because rights belong solely to the people. The legislature's role is merely to regulate the exercise of those rights such that one's exercise of freedom does not encroach upon another's, as framed in the classical liberal tradition. As this Court explained just last year:

> The ability of the legislature to make laws related to a fundamental right arises from the reality that, in an ordered society, few rights are absolute. However, the legislature's duty to give effect to the people's rights is not a free pass to override constitutional constraints and legislate a right into non-existence, even if the legislature believes doing so is in the people's best interest."

Reclaim Idaho v. Denney, 169 Idaho 406, 429 (2021).

B. Unlike at the Supreme Court, the Analysis Cannot End at Federalism

Finally, it is important to note that federal constitutional precedents regarding access to abortion, including the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*, ___ U.S. ___, 142 S. Ct. 2228 (2022), are often, if not always, decided against the

backdrop of federalism. *See, e.g.*, *id.* at 2259 (concluding that the Court does not have authority to "decide how abortion may be regulated in the States."

The *Dobbs* Court saw its precedents upholding reproductive rights as interfering with "the State's interest" and rejected *Roe's* holding that the point of viability was the key point at which "a State's regulatory authority should be substantially transformed." *Id.* at 2266. The Supreme Court's decision in *Dobbs* was, on its face, heavily influenced by a concern for the prerogatives of states. Indeed, the Court characterized itself as not making a decision about the underlying moral choices related to abortion, but instead leaving that decision to the states.

The practical import of this approach is that the United States Supreme Court, by design, underenforces individual rights in order to provide space for divergent states to determine what rights its citizens are entitled to.[17] This Court, by contrast, need not worry about what might be acceptable to citizens in some other state. The Idaho Supreme Court can (and should) read its constitutional provisions unencumbered by the need to establish a doctrine suited to Texas, or Oregon, or Massachusetts (for example). In other words, even if members of this Court agree with the United States Supreme Court that *Roe* was wrongly decided as a matter of federalism, the Court can still conclude, consistent with that position, that the Idaho Constitution nevertheless protects Idahoans from legislative efforts to restrict those same rights.[18] Federalism concerns are simply not present here, and the Court should instead apply its own Constitution

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[17] *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function,* 114 Harv. L. Rev. 1833, 1898-1901 (2001) (explaining that the U.S. Supreme Court strives to exercise self-restraint to permit states flexibility in civil rights enforcement, a concern not present at the level of state adjudication). *See also* Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights,* 3 Ga. St. U. L. Rev. 143, 165-171 (1986) (explaining that federalism concerns are "pervasive" in federal Supreme Court rights decisions, and that those concerns are inapplicable in state constitutional interpretation).

[18] *See generally* William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977); see also Jessica Bulman-Pozen & Miriam Seifter, The Democracy Principle in State Constitutions, 119 Mich. L. Rev. 859 (2021).

and its own precedent to determine—for its own people—the breadth of Idaho's constitutional protections on the issues before the Court today.

CONCLUSION

Amici respectfully urge the Court to consider the principles discussed in this amicus brief and to interpret the applicable provisions of the Idaho Constitution consistent with the drafters' intent and this Court's long line of precedent safeguarding the individual rights of Idahoans.

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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