

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN
Chief of Civil Litigation

MEGAN A. LARRONDO, ISB #10597
BRIAN V. CHURCH, ISB # 9391
DAYTON P. REED, ISB #10775
Deputy Attorneys General
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
megan.larrondo@ag.idaho.gov
brian.church@ag.idaho.gov
dayton.reed@ag.idaho.gov

Attorneys for Respondents

IN THE SUPREME COURT OF 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,

v.

STATE OF IDAHO; BRAD LITTLE, in his
official capacity as Governor of the State of
Idaho; LAWRENCE WASDEN, in his official
capacity as Attorney General of the State of
Idaho; JAN M. BENNETTS, in her official
capacity as Ada County Prosecuting Attorney;
GRANT P. LOEBS, in his official capacity as
Twin Falls County Prosecuting Attorney;
IDAHO STATE BOARD OF MEDICINE;
IDAHO STATE BOARD OF NURSING; and
IDAHO STATE BOARD OF PHARMACY,

Respondents,

Docket No. 49817-2022

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

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.

INTRODUCTION

The State Respondents respectfully request that this Court deny the motion from certain professors to file a proposed amicus curiae brief because (1) the motion is untimely and (2) the Professors should be treated consistently with other proposed amici who have sought to participate in the discussion raised by Petitioners of whether the Idaho Constitution contains a right to abortion.

ARGUMENT

A. The Professors' motion should be denied as untimely.

As the Professors acknowledge in their brief in support of their motion for leave to file, Idaho Appellate Rule 8 governs the timing of their filing. Rule 8(d), which became effective on July 1, 2022, sets out the time in which proposed amicus curiae brief must be filed:

An amicus curiae must file its brief, accompanied by a motion for leave to file, no later than seven (7) days after the initial brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than seven (7) days after the appellant's initial brief is filed. The court may grant leave for later filing, specifying the time within which an opposing party may answer.

Here, Petitioners filed their opening brief on June 27, 2022. Thus, under the language of Rule 8(d), proposed amici who did not support a particular party were required to file their motions

and briefs, or a motion for leave to file later, by July 5.¹ While Rule 8(d) did not take effect until July 1, it now governs this case and should be applied in a way that will promote justice.² Interpreting Rule 8(d) as not having any force until months after Petitioners' initial filing, as the Professors apparently argue, does not promote justice. Professor's Br., at 5. Given that the Petitioners had filed their initial briefs just before Rule 8(d) took effect, Rule 8(d) should be understood to require amici to file their motions and proposed briefs, or a motion requesting leave for later filing, within 7 days of the Rule's effective date, or by July 8. The Professors' failure to take these steps should bar their proposed filing.

The Professors' argument that they did not know that "substantive Idaho Constitutional issues would be paramount" until "this Court's August 22, 2022 opinion" does not stand up to scrutiny. Br. in Supp. of Mot. of Idaho Const. L. Professors for Leave to File Amicus Curiae Br., Dkt. 49899 ("Professors' Brief"), at 5.³ First, the opinion the Professors reference was issued on August 12, not August 22. See Op., Aug. 12, 2022. But even that date is of no moment. The Professors were on notice of the constitutional issue raised in Petitioners' three challenges before this Court's August 12 Opinion was issued.

The Petitioners first asked this Court to hold that a right to abortion existed under the Idaho Constitution with their Verified Petition and Brief in Support filed in Docket 49615 on March 30, 2022. Pet., Dkt. 49615, at 15, 17-18; Pet'rs' Br., Dkt. 49615, at 26-28, 34-39. The State Respondents and the Intervenor Respondents disputed this claim in their briefing filed on April

¹ The fact that the briefing on these cases has been expedited compels earlier, not later, filings.

² Nothing in Rule 8(d) disclaims application to already filed cases. Further, notice of the upcoming rule changes was given through this Court's April 28 order amending Rule 8. See https://isc.idaho.gov/rules/Amendments-to-the-Idaho-Appellate-Rules_eff070122.pdf (last visited Sept. 13, 2022).

³ This opposition cites to the pdf pages of the brief in support of the motion for leave to participate.

28, 2022. Resp'ts' Opp'n to Pet'rs' Br., Dkt. 49615, at 27-30. A few months later, three days after *Dobbs v. Jackson Women's Health Organization* was decided and the issue of abortion was returned to the states, Petitioners raised the issue as their primary argument in their Verified Petition and Brief in Support filed in Docket 49817 on June 27, 2022, challenging Idaho Code § 18-622. Pet., Dkt. 49817, at 12-17; Pet'rs' Br., Dkt. 49817, at 15-50. Petitioners re-raised the issue on July 25, 2022, with their Verified Petition and Brief in Support filed in Docket 49899 challenging Idaho Code §§ 18-8804 and 18-8805. Pet., Dkt. 49899, at 7-10; Pet'rs' Br., Dkt. 49899, at 9-14. And this issue was briefed again in the responses to the Court's Order Setting Hearing. Finally, the oral argument held on August 3 on the six procedural questions raised by the Court in the Orders Setting Hearing largely focused on whether a right to abortion existed under Idaho's Constitution.

The Professors' decision to wait over two months after Petitioners' initial filing and after Rule 8(d) became effective cannot be excused, particularly when the respondents have already filed their opposition briefing. The Respondents could have easily woven rebuttals of the Professors' arguments into their opposition briefs filed on September 2. Now, however, the Respondents will either be unable to rebut the Professors' intended arguments or forced to incur the time and expense of another responsive filing. And this Court will be burdened with reviewing another filing. The Professors' delay supports denying their motion.

B. The Professors should not be given preferential treatment over other proposed amici who have requested leave to weigh in on this important constitutional issue.

This Court denied the American Center for Law & Justice, Stanton Healthcare, and the Roman Catholic Diocese of Boise's requests to participate as amicus in Petitioners' first challenge filed in this Court raising the question of whether a right to abortion exists in the Idaho Constitution. Order Den. Pet. for Leave to Appear as Amicus Curiae by Roman Catholic Diocese

of Boise, Dkt. 49615, April 13, 2022; Order Den. Pet. for Leave to Appear as Amici Curiae, Dkt. 49615, April 25, 2022. The American Center for Law & Justice and Stanton Healthcare explicitly stated their intent to argue that

no provision of the Idaho Constitution—separately or taken together—creates a right to privacy that encompasses a right to abortion. While it cannot be disputed that the Constitution offers Idahoans rights of privacy and autonomy in various ways and under different circumstances, the termination of one’s unborn progeny is a ‘right’ nowhere grounded in that text.

Mem. in Supp. of ACLJ and Stanton Healthcare’s Pet. for Leave to Appear as Amici Curiae, Dkt. 49615, at 4. Their proposed brief would also have engaged in the very inalienable rights analysis contained in the Professors’ proposed brief. *Id.* at 4-5.

Different treatment between these proposed amici is not justified. All amici must be invested in achieving some outcome or they would not have voluntarily chosen to seek leave to participate. This Court is well able to evaluate the quality of legal reasoning in the briefs that it reviews.

CONCLUSION

The State Respondents respectfully request that the Professors’ untimely request for leave to file a brief as amicus curiae be denied.

DATED: September 13, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: /s/ Megan A. Larrondo
MEGAN A. LARRONDO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September, 2022, I electronically filed the foregoing with the Clerk of the Court using the iCourt e-file system which sent a Notice of Electronic Filing to the following persons:

Michael J. Bartlett,
BARTLETT & FRENCH LLP

michael@bartlettfrench.com

Alan E. Schoenfeld
Rachel E. Craft
WILMER CUTLER PICKERING
HALE AND DORR LLP (New York, NY Office)

alan.schoenfeld@wilmerhale.com
rachel.craft@wilmerhale.com

Sofie C. Brooks
WILMER CUTLER PICKERING
HALE AND DORR LLP (Boston, MA Office)

sofie.brooks@wilmerhale.com

Attorneys for Petitioners

Daniel W. Bower
MORRIS BOWER & HAWS PLLC

dbower@morrisbowerhaws.com

Monte Neil Stewart
Attorney at Law

monteneilstewart@gmail.com

Attorneys for Intervenor/Respondents

AND I FURTHER CERTIFY that on such a date I served the foregoing on the following non-iCourt registered participant in the manner via electronic mail:

Kenneth McKay Cunningham*
Professor at the College of Idaho

kcunningham@collegeofidaho.edu

Robert B. Duncan*
Hogan Lovells US LLP (Washington, DC)

robert.duncan@hoganlovells.com

Elizabeth A. Och*
Hogan Lovells US LLP (Denver, CO)

elizabeth.och@hoganlovells.com

*Attorneys for Amici Curiae
Pro Hac Vice Pending**

/s/ Megan A. Larrondo
MEGAN A. LARRONDO
Deputy Attorney General