

No. 26-5360

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STACY SEYB,
Plaintiff-Appellee,

v.

RAÚL LABRADOR, in his official capacity as Attorney General
of the state of Idaho, et al.
Defendants-Appellants.

On Appeal from the United States District Court for the District
of Idaho

Case No. 1:24-cv-00244-BLW | Hon. B. Lynn Winmill

***BRIEF OF 54 IDAHO STATE LEGISLATORS AS
AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS***

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Pursuant to Fed. R. App. P. 29(a)(4)(E), no party or person other than amici's counsel authored or funded the preparation of any part of this brief.

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INTEREST OF *AMICI*

Amici are a majority of the members of the Sixty-Eighth Idaho Legislature. As legislators, *amici* are responsible for representing their constituents in making policy choices, including abortion policy. All *amici* support protections for preborn life and were elected by their constituents in part to represent these views in the Legislature. In fact, many *amici* sponsored or supported the passage of the two laws at issue here—the Defense of Life Act and the Heartbeat Law.

The U.S. Constitution guarantees a republican form of government, U.S. Const. art. IV § 4, and leaves most policy decisions to the states, *id.* amend. X. The Idaho Constitution vests all lawmaking power in its legislators—*amici* and their colleagues. Idaho Const. art. III § 1.

Amici are troubled by the pronouncement of the district court that Idaho’s pro-life laws cannot be enforced as they were written and adopted by the people’s duly-elected representatives. Representative democracy is preserved only through the separation of powers, yet the reasoning of the district court relies on weighing the opinions of various experts on Idaho’s abortion laws rather than on the adjudication of the facts and law before the court. It is *amici*’s role to hear from experts, moral authorities, and the people, and to arrive at a policy decision—not the district court’s. Because the district court’s decision removes that authority from the Legislature and, by extension, the people, *amici* respectfully support the motion for a stay of the district court’s order pending appeal.

INTRODUCTION

“For Idahoans who oppose [Idaho’s abortion] law, the solution lies at the ballot box rather than the courthouse.” *Seyb v. Members of the Idaho Bd. of Med.*, No. 24-CV-00244, 2026 WL 2374617, at *30 (D. Idaho Aug. 13, 2026). But rather than letting Idahoans decide these questions at the ballot box, the district court took upon itself the prerogative to read a new right to abortion into the Fourteenth Amendment. This action—an exercise of “nothing but raw judicial power”—“usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people” and violated binding U.S. Supreme Court precedent. *Dobbs v. Jackson Women’s Health*, 597 U.S. 215, 269 (2022) (citation modified).

Amici are more than half of the state legislators elected by the people of Idaho. The Idaho Constitution obligates them with the difficult task of governing—developing a coherent scheme of laws to order society, advance the common good, and promote human flourishing. Idahoans elected them to exercise sound judgment on their behalf, and the people can hold them accountable through the democratic processes of Idaho’s republican form of government.

The district court’s injunction yanks policy-making authority away from these elected legislators and the citizens they represent, consolidating it in the federal courtroom. With each passing day, the district court’s injunction steadily erodes *amici*’s constitutional authority

and judgment, replacing it with the personal preferences of a lone federal judge. Waiting for resolution on the merits to dissolve the district court’s injunction would irreparably injure *amici*. Instead, the Court should act now. *Amici* respectfully ask that the Court grant Appellants’ motion for stay pending appeal, returning the authority to regulate abortion to where it belongs: in the hands of “the people and their elected representatives.” *Dobbs*, 597 U.S. at 259.

ARGUMENT

I. The people of Idaho through their elected representatives—not the district court—have the right to set Idaho’s abortion policy.

The authority to protect preborn life sits squarely with the people of each state, acting through their elected representatives. *Dobbs*, 597 U.S. at 292. The people of Idaho have chosen to protect preborn life. Through their legislature (including many of the *amici* here) and governor, Idahoans enacted protections for babies in the womb, like the Defense of Life Act and the Heartbeat Law. Idaho Code §§ 18-622, -8801 *et seq.* Idaho’s elected judiciary has also weighed in, upholding these laws against constitutional challenges. *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1147 (Idaho 2023). The people of Idaho, through all three branches of government, have repeatedly approved these protections for preborn life. Idaho grounds these laws in its moral interest in protecting life, finding that a new human life begins at

fertilization and is worthy of protection. *E.g.*, Idaho Code § 18-8802 (legislative finding that “The life of each human being begins at fertilization, and preborn children have interests in life, health, and well-being that should be protected.”); *Gov. Little Signs ‘Fetal Heartbeat Bill’ into Law, Protecting the Lives of the Preborn*, Governor Brad Little (April 17, 2021), <https://gov.idaho.gov/pressrelease/gov-little-signs-fetalheartbeat-bill-into-law-protecting-the-lives-of-the-preborn/> (statement of Idaho’s governor while signing Idaho’s Heartbeat legislation that “Idaho is a state that values the most innocent of all lives – the lives of babies.”).

The district court’s injunction subverts the separation of powers by wielding the exact sort of judicial fiat that *Dobbs* disavowed. 597 U.S. at 269. The injunction takes away Idahoans’ ability to deliberate and ultimately decide these issues, instead judicially enforcing the district court’s own policy preference for how to balance the interests of the mother and the preborn baby. As Justice Antonin Scalia once observed, every time a court unilaterally “defines another right in the Constitution, it reduces the scope of democratic debate.” Antonin Scalia, Speech at University of Vermont (Oct. 8, 2004), <https://www.uvm.edu/theview/pdfs/101304.pdf>. The district court’s injunction does just that. As this Court made clear after *Dobbs*, “the people’s representatives—not judges—decide whether to allow, ban, or regulate abortions. And in turn, courts play only a modest and minor role: We merely apply a highly deferential rational basis review in assessing the constitutionality of an

abortion-related law.” *Raidoo v. Moylan*, 75 F.4th 1115, 1118 (9th Cir. 2023).

The very structure of the trial shows that the district court’s process was fundamentally legislative rather than adjudicative. The trial record shows that virtually no adjudicative factfinding took place in this case. Instead, the bench trial consisted entirely of expert testimony, and the district court made findings on which studies and experts it found credible and which it did not. Then it used those findings to arrive at a policy decision on a moral question. Justice Rehnquist’s prophetic remarks in his *Roe v. Wade* dissent echo here: “[T]he conscious weighing of competing factors that the Court’s opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.” 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting). This kind of raw judicial policymaking converts the courtroom into a one-man legislature and denigrates the witness stand to a lobbyist’s lectern. Once a court loses sight of the parties before it and begins weighing policy concerns, it is no longer adjudicating—it is legislating.

In the Federalist Papers, James Madison warned that a judge enacting policy from the bench would expose Americans’ “life and liberty . . . to arbitrary control, for the *judge* would then be *the legislator*.” The Federalist No. 47 (emphasis in original). Policymaking is a legislative function that the American founders never intended federal judges to perform. The Constitution created three distinct branches of government.

The judiciary’s power is limited to interpreting and applying the laws created by legislative bodies—not making them. *See Patchak v. Zinke*, 583 U.S. 244, 249 (2018).

The district court’s decision is still riding the repudiated policymaking wake of *Roe* and *Casey*: “judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 953 (1992) (Rehnquist, C.J., concurring in the judgment and dissenting in part). Crafting new policy and evaluating the wisdom of existing policy is the job of legislators like *amici*, not courts. *See Lochner v. New York*, 198 U.S. 45, 69 (1905) (Harlan, J., dissenting) (“Under our systems of government the courts are not concerned with the wisdom or policy of legislation.”). As the district court itself aptly observed, “This country is a democracy, and the decisions of our elected representatives deserve great deference.” *Seyb*, 2026 WL 2374617, at *16. *Amici* wholeheartedly agree.

II. The district court ignored Idaho’s rich pro-life history in finding a “deeply rooted” right to certain abortions.

Idaho is and always has been a pro-life state. Even before statehood, Idaho protected preborn life. In 1864, the First Idaho Territorial Legislature *unanimously* passed legislation criminalizing abortions except in cases when a physician “deem[ed] it necessary to produce the miscarriage of any woman in order to save her life.” *Planned*

Parenthood, 522 P.3d at 1177 (quoting Act of Feb. 4, 1864, ch. IV, § 42, 1863–64 Idaho Terr. Sess. Laws 443). Those penalties were modified but never removed pre-*Roe*. *Id.* at 1149–53. What’s more, only three years before *Roe*, the people themselves directly rejected adding a “right to privacy” to the state constitution, which likely would have included a right to abortion. *See Planned Parenthood*, 1148 P.3d at 1148 (citing 1970 Idaho Sess. Laws 739, 740).

Even in the *Roe* era, Idaho did what it could to protect the preborn. The Legislature banned partial-birth abortions, regulated chemical abortions, secured freedom of conscience regarding abortion for healthcare professionals, required parental consent for abortions performed upon minors, and permitted only physicians to perform abortions. Idaho Code §§ 18-613 (partial-birth abortion ban), -617 (chemical abortion regulation), -611 (conscience protections), -609A (parental consent), -608A (physician requirement). Idaho passed the Pain-Capable Unborn Child Protection Act in 2011. Idaho Code § 18-501 *et seq.* In 2020, in anticipation of the inevitable demise of *Roe*, the Legislature passed the Defense of Life Act with a trigger mechanism so that Idaho would protect preborn life as soon as it could. Idaho Code § 18-622. In 2022, the Idaho Legislature adopted the Heartbeat law, which established statutory damages for abortions performed when a fetal heartbeat can be detected. Idaho Code § 18-8807. And, to remove all doubt as to its position regarding the protection of preborn life, the Idaho

Legislature declared it to be “the public policy of this state” to “prefer live child birth over abortion” in legal interpretation. Idaho Code § 18-601.

Idaho’s pro-life laws were not mere aspirational statements, either. They were routinely enforced. The *Planned Parenthood Great Northwest* decision catalogued numerous reports of prosecutions for abortions in Idaho’s early history. 522 P.3d at 1180–83. Those prosecutions continued into the twentieth century. *E.g.*, *State v. Rose*, 267 P.2d 109, 110 (Idaho 1954) (affirming a criminal conviction for procuring an abortion not necessary to “preserve the life of the woman”). One notable Idaho Supreme Court opinion upheld a prosecution for abortion, calling the crime “one of the worst known to law” because it “violates decency, the best interests of society, the divine law, the law of nature, [and] the criminal statutes of this state.” *State v. Alcorn*, 64 P. 1014, 1016, 1019 (Idaho 1901). The opinion went on to note that the “law ought to be strictly enforced” because it was “destructive of a life unborn” and “place[d] in jeopardy” the life of the pregnant woman. *Id.* Even further, courts attached civil consequences to Idaho’s abortion laws—for example, refusing to allow medical malpractice claims for women who consented to illegal abortions. *See Nash v. Meyer*, 31 P.2d 273, 280–81 (Idaho 1934).

Although the district court was dealing with an Idaho law, it did not grapple with this extensive Idaho history of protecting preborn life. Instead, the court discussed Massachusetts state court decisions at length, *Seyb*, 2026 WL 2374617, at *19–20, examined a controversial

newspaper column from New York, *Seyb*, 2026 WL 2374617, at *22, and traversed the Atlantic to detail an English case from *seventy years after* the ratification of the Fourteenth Amendment, *Seyb*, 2026 WL 2374617, at *21. And, to prove its hypothesis that the common law protected a right to abortion, the decision cites a modern opinion from the Supreme Court of North Dakota interpreting a provision in the North Dakota Constitution, *Seyb*, 2026 WL 2374617, at *25, all while ignoring the *Idaho* Supreme Court's clear determination that "[n]othing in the territorial laws of Idaho, the record of the 1889 constitutional convention, the surrounding common law and statutes, the surrounding publications of the times, or Idaho's medical regulations at that time show abortion was viewed as a right entitled to heightened protection from the legislature's regulatory power." *Planned Parenthood*, 522 P.3d at 1148.

The district court contradicts itself while attempting to apply historical analysis to its substantive due process theory. The court recognized that theory would fall apart if some states had only life-of-the-mother exceptions to their abortion laws in early America: "If these laws, like Idaho's policy, indeed permitted abortion only when necessary to prevent the mother's death, this history could cut against the existence of a broader right to a health-preserving abortion." *Seyb*, 2026 WL 2374617, at *19. But the court later admits that there were many such state laws. The district court makes the case that, contrary to the plain statutory text, many states with life-only exceptions actually permitted

other exceptions as well—but admits that in at least five different states, courts summarily quashed this kind of interpretation. *Seyb*, 2026 WL 2374617, at *24 (“To be sure, some authorities took the opposite view.”).

Idaho’s own pro-life history shows that the district court’s historical analysis was repeatedly wrong. The court claimed, for example, that early abortion statutes were only concerned with protecting the mother, not the child. But Idaho’s pre-*Roe* laws criminalized abortion not just for the abortionist, but also for the woman. *See Planned Parenthood*, 522 P.3d at 1150 (citing Idaho Rev. Stat. (R.S.) § 6795 (1887)). And the case law of the era made abundantly clear that Idaho’s abortion statutes were meant to protect “the unborn child and through it society.” *Nash*, 31 P.2d at 276.

Idaho and the many other states that followed its example conclusively confirm that there is no “deeply rooted” tradition of abortions that do not save the life of the mother. Without such a showing, there can be no fundamental right to such abortions under a substantive due process framework. Idaho’s deeply rooted tradition is just the opposite: protecting preborn life at all stages, except when the life of the mother is at risk.

III. A stay is necessary to protect *amici*’s interest in their legislative authority and to preserve the democratic processes.

This Court should stay the district court’s injunction pending appeal—and not merely because the decision below is likely to be reversed on the merits. When considering a motion to stay, this Court also considers “where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 434 (2009). As representatives chosen by the people of Idaho to represent their public interests, *amici* are uniquely qualified to opine on this factor. President Lincoln once observed, “the instant” that court decisions fix policy, “the people will have ceased to be their own rulers.” First Inaugural Address of President Abraham Lincoln (Mar. 4, 1861). *Amici* are concerned about just such an intrusion, and a stay is the appropriate remedy to prevent harm to the democratic system while the merits of this case are examined.

Firstly, the district court’s decision authorizes violations of state law, which constitute an irreparable injury to Idaho’s public interest. *See Nken*, 556 U.S. at 436 (holding continuing violations of federal law cause irreparable injury to the government’s interests). *Amici*’s legislative enactments are supposed to be entitled to a presumption of constitutionality under long-standing principles of constitutional law. *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257–58 (1931). That is especially true of health-related regulations on abortions, for which there is a “strong presumption of validity.” *Dobbs* at 301. A stay of the district court’s decision appropriately affords Idaho’s laws this

presumption in the face of a dubious, sweeping proclamation of a new fundamental right against the clear holding of *Dobbs*.

Second, the district court's decision troublingly undermines representative democracy since voters are already poised to decide the fate of Idaho's abortion laws this November at the ballot box. Proposition 1 would largely eliminate Idaho's current abortion laws and could moot this case before this Court has issued a merits ruling. The cavalier proclamation of a new right to abortion, with the imprimatur of the federal judiciary, is highly disruptive to the democratic process at work and strips Idahoans of the ability to consider the initiative based on their values. As Justice Scalia observed in *Casey*, such a decision "foreclos[es] all democratic outlet for the deep passions this issue arouses," "banish[es] the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight," and imposes "a rigid national rule instead of allowing for regional differences." *Casey*, 505 U.S. at 1002 (1992) (Scalia, J., concurring in the judgment in part, dissenting in part). It is hard for voters to make a free, uninhibited decision to keep Idaho's abortion laws as they are when the district court has already told them they cannot.

Contrast this set of public interests with the absence of irreparable harm to the Appellee. Dr. Seyb did not claim that he (or the women he claims to represent through third-party standing) faced irreparable harm without an injunction at the district court. In fact, Dr. Seyb never once

requested preliminary relief in this case. Perhaps that is not surprising because it is doubtful whether he alleged any injury that would have provided standing to bring his challenge in the first place. *Dobbs* criticized the abortion cases it overruled for using the same third-party standing workaround that Dr. Seyb relies on here. *Dobbs*, 597 U.S. at 286–87 (“The Court’s abortion cases have diluted the strict standard for facial constitutional challenges. They have ignored the Court’s third-party standing doctrine.”). Not a single woman seeking an abortion appeared as a party or witness before the district court. That undermines the district court’s jurisdiction to issue relief in the first place. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102–04 (1998).

Standing is important because it protects the public from advisory opinions that encroach on the state’s legislative authority. *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (“When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.”). Federal courts adjudicate cases; they don’t set policy. If this Court has doubts as to whether there was an Article III case or controversy that adequately gave the district court jurisdiction to opine on new meanings for the Fourteenth Amendment—and there are reasons to be skeptical—a stay is an appropriate prophylactic measure.

The people of Idaho have a profound interest in maintaining their protections for preborn life. With the exception of the *Roe* era, Idaho has had substantially the same protections in place for the last century and a half. Those laws reflect the considered moral decision that taking the life of an innocent child is immoral if it is not necessary to save the mother's life. In every abortion performed under the auspices of the district court's injunction, a child will die—truly irreparable harm. The public interest sharply outweighs the plaintiff's interest in keeping the district court's untenable order in place.

CONCLUSION

The district court improperly made policy for the people of Idaho. It may have thought its policy was better than the Legislature's, but that was not its judgment to make. The authority to consider Idaho's abortion policies and create reasonable and moral exceptions sits firmly and solely with *amici* and their colleagues.

Every day that the district court's injunction remains in place, it erodes the twin cornerstones of our system of government—separation of powers and federalism. It stifles the voices of the people of Idaho, as they speak both indirectly through their representatives and directly at the ballot box. These harms should not wait for redress until full briefing and consideration of the merits. For these reasons, *amici* respectfully support Appellants' request for a stay of the district court's injunction.

Dated: August 27, 2026.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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