

No. 20-35668

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ALMA ROSALES,
Plaintiff-Appellant

v.

IDAHO DEPARTMENT OF HEALTH & WELFARE, ET AL.,
Defendants-Appellees

On Appeal from the United States District Court for the District of Idaho
Civil Case No. 1:19-CV-00426
(The Honorable David C. Nye, C.J.)

**BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF IDAHO FOUNDATION
IN SUPPORT OF PLAINTIFF-APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Ninth Circuit Rule 26.1, amicus curiae American Civil Liberties Union of Idaho Foundation hereby states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

Amicus further states that no party or party's counsel authored this brief or contributed money to fund this brief's preparation or submission. No entity other than the amicus and its members contributed money specifically intended to fund the preparation or submission of this brief.

STATEMENT OF INTEREST OF AMICUS

The American Civil Liberties Union of Idaho Foundation is ("ACLU") is a statewide, nonprofit, nonpartisan public interest organization dedicated to the principles of liberty and fairness embodied in the U.S. and Idaho constitutions. Since its founding in 1993, the ACLU has frequently appeared before Idaho state and federal courts in cases involving constitutional questions, both as direct counsel and as amicus curiae. This case raises important access to justice and due process concerns for indigent people living with disabilities in Idaho. The proper resolution of this case is thus a matter of significant concern to the ACLU and its members throughout Idaho.

ARGUMENT

I. The District Court Did Not Apply Rule 17(c), a Rule that Obligates Federal Judges to Appoint Representatives or Find Another Way to Protect the Legal Interests of Those Unable to Do So Themselves

In the federal court system, Federal Rule of Civil Procedure Rule 17(c)(2) ensures access to justice for people impaired in their abilities to advocate for themselves. See *Davis v. Walker*, 745 F.3d 1303, 1310 (9th Cir. 2014) (citing *Gardner ex rel. Gardner v. Parson*, 874 F.2d 131, 140 (3d Cir.1989) (“The purpose of Rule 17(c) is to protect an incompetent person's interests in prosecuting or defending a lawsuit.”). More than that, this Court “read[s] Rule 17(c) to require a district court to ‘take whatever measures it deems proper to protect an incompetent person during litigation.’” *Id.* at 1311 (citing *United States v. 30.64 Acres*, 795 F.2d 796, 805 (9th Cir. 1986)). By *requiring* courts to appoint a guardian or issue another appropriate order, Rule 17(c) keeps the courthouse doors open to those like Ms. Rosales who need legal assistance to access justice.

But the District Court here did not apply Rule 17(c) or follow this Court’s clear command to take whatever measures necessary to protect a person unable to represent themselves due to a serious disability. Rather, the District Court, despite being on notice that Ms. Rosales had both serious cognitive and memory impairments plus limited English proficiency, left her “interests in the litigation completely unprotected and functionally operated as a dismissal with prejudice,”

exactly counter to Rule 17(c)'s purpose and this Court's command. *Id.* at 1311. Here, as in *Davis*, "[i]nstead of satisfying the obligation created by Rule 17(c) to ensure that [an unrepresented incompetent person's] interests in the litigation would be adequately protected, the district court closed the courthouse doors, aware of the strong probability that [the person] would not soon return." *See id.*

II. The District Court Had Options in Line with Rule 17(c) to Ensure that Ms. Rosales Had Adequate Pro Bono/Low Cost Legal Assistance

Free and low-cost legal services are in short supply everywhere, including in Idaho. That explains why Ms. Rosales failed to secure her own free or low-cost attorney, despite doing almost all that she (through her son Raul) could do. The District Court, though, did not do all that Rule 17(c) requires.

It was not enough for the District Court to assume that there is no one available to represent someone like Ms. Rosales and take no other step to protect an unrepresented person. *Davis*, 745 F.3d at 1306. In *Davis*, this Court ruled the district court failed to meet its Rule 17(c) obligation by relying upon the court pro bono coordinator's report that there was no individual to undertake representation of the incompetent plaintiff in that case. Here, the District Court did not even go that far. There is no evidence in the record that the court reached out to the pro bono coordinator or even that it acknowledged its Rule 17(c) obligation. It noted

that “it can be difficult to find attorneys willing to work on a case without payment” and moved on. 1-ER-15.

More was required and more was possible. *Davis* itself lays out several next steps. Although this Court acknowledged that there is a “limited supply of individuals willing to represent” clients like Davis and Ms. Rosales and that “this place[s] the district court in a difficult predicament . . . Nonetheless, in addition to consulting with its Pro Bono Coordinator, the court could have ‘sought counsel, made inquiry of the bar associations, or inquired as to whether law schools that may have clinical programs or senior centers with social workers would be willing to undertake the necessary representation.’ *Davis*, 745 F.3d at 1311 (quoting *Powell v. Symons*, 680 F.3d 301, 308 (3d Cir.2012)).

This amicus curiae serves as class counsel in *K.W. v. Armstrong*, litigated for over a decade before both the district court in Ms. Rosales’ case as well as this Court. *K.W.* provides another model for the district court here of the obligation and options federal courts have to ensure adequate representation for people unrepresented and incompetent to handle their own cases. *See K.W. v. Armstrong*, 789 F.3d 962 (9th Cir. 2015). The court there held that due process requires a Rule 17(c)-like obligation for the Defendant-Appellee Idaho Department of Health and Welfare (IDHW) officials. The court determined that the *K.W.* class members—people living with serious cognitive and developmental impairments—needed

assistance to access justice and so required the defendant state agency to ensure they had that assistance. Due process, the court held, requires IDHW officials to “reach out to a suitable representative, possibly including a competent family member, or appoint or seek judicial appointment of an advocate or guardian, before conducting the hearing and proceeding to a[n adverse] determination.” *K.W. v. Armstrong*, 180 F. Supp. 3d 703, 715 (D. Idaho 2016).

That is because, for those with significant disabilities such as Ms. Rosales, “[n]otice and an explanation will mean little” if they are required to pursue legal remedies on their own. *Id.* For those with significant disabilities, the court held that “due process requires more than just assuming someone will volunteer to assist the participant.” *Id.* Rather, IDHW officials must secure a commitment from someone who is competent to assist the person before depriving them of their assistance. *Id.*

The same is true here, though the requirement springs more explicitly from Rule 17(c). Once the District Court here was on notice that Ms. Rosales was unrepresented and had disabilities that prevented her from handling her case, the court needed to take steps under Rule 17(c) to protect her and the court’s own justice and fairness.

III. Requesting Pro Bono Assistance Would Not be a Futile Exercise Because Ms. Rosales’s Claims are Cognizable and Complicated and Different Than Those Advanced in *K.W.*

Ms. Rosales’ nonfrivolous claims against the Idaho Department of Health and Welfare stood a chance and a competent attorney could have identified and pressed them. In fact, her claims against the IDHW for violating due process by failing to provide adequate notice and opportunity to respond before reducing her food stamp benefits and eliminating her benefits under the Aged & Disabled Medicaid waiver *are akin to* those in *K.W.*, also against IDHW, where our class was awarded comprehensive and substantial relief, plus attorneys’ fees. The District Court was aware of this relief in *K.W.*, but it inexplicably mischaracterized *K.W.* as having remedied IDHW’s “insufficient notice issues back in January 2017” 1-ER-16. The District Court was mistaken, because while *K.W.* and Ms. Rosales’ case both trigger due process inquiries, *K.W.* concerned an entirely different IDHW program, called the “DD Waiver” program, 789 F.3d 962 at 966, with different notice forms and procedures than the program Ms. Rosales complains about. *Compare* Idaho Admin. Code §§ 16.03.10.320–330 (describing procedures governing Aged & Disabled program, one of those that Ms. Rosales was in) *with id.* §§ 16.03.10.500–515 (describing procedures applicable to Developmental Disabilities program, which *K.W. v. Armstrong* concerns); *see also*

id. chapter 16.03.04 (governing Idaho Food Stamp Program, another that Ms. Rosales brought claims regarding).

Although the litigation in *K.W.* identified certain due process issues with one of IDHW's programs, that case does not apply to Ms. Rosales or any of the IDHW programs she wishes to litigate claims against. A resolution in *K.W.* does nothing to help Ms. Rosales and so citing to relief there (and dismissing Ms. Rosales' case partly on that basis) improperly denied access to justice here.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment dismissing Ms. Rosales' suit and remand to the District Court with the instruction to assist Ms. Rosales in obtaining counsel willing to serve for little or no compensation.

Dated: April 18, 2022

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that this **BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES FOUNDATION OF IDAHO IN SUPPORT OF PLAINTIFF-APPELLANT** complies with the length limits permitted by Fed. R. App. P. 29(a)(5) and 31-1(a). This brief is 1,948 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Aadika Singh
Aadika Singh
Counsel for Amicus Curiae

Dated: April 18, 2022

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 18, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Aadika Singh
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Dated: April 18, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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