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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

PLANNED PARENTHOOD OF THE 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,

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.

Docket No. 49615-2022

**MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO STRIKE PORTIONS OF THE DECLARATIONS OF KRISTINE SMITH AND DR. CAITLIN GUSTAFSON**

## I. INTRODUCTION

By submitting declarations in support of their claims against Senate Bill 1309 and its trailer bill Senate Bill 1358 (collectively the "Heartbeat Act"), Petitioners admit that they require factual allegations to prevail. The district court, with its well-crafted tools of civil procedure designed to develop and test evidence, is best placed to address the factual allegations raised in these declarations. But, even if this Court were to adjudicate these claims, Petitioners cannot ignore the Idaho Rules of Evidence, on top of the constitutional requirements and court rules that render their claims inappropriate for an original action. This Court should strike as inadmissible much of the testimony in the declarations of Kristine Smith and Dr. Caitlin Gustafson, which Petitioners offer as Exhibits 3 and 4 to their Brief in Support of Verified Petition for Writ of Prohibition and Application for Declaratory Judgment. Under the Idaho Rules of Evidence, the inadmissible claims in paragraphs 4, 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26 of the declaration of Kristine Smith, and in paragraphs 4, 9, 10, 17, 18, 19, 20, 24, 25, 26, and 29 of the declaration of Dr. Caitlin Gustafson should be stricken as they contain speculative statements that are inadmissible under Rules 602, 701, and 702.

## II. ARGUMENT

Petitioners rely upon two declarations to support the claims and arguments made in their Verified Petition for Writ of Prohibition and Application for Declaratory Judgment and supporting brief: the declaration of Kristine Smith, the Area Services Director of Planned Parenthood (Ex. 3), and the declaration of Dr. Caitlin Gustafson, a medical doctor who performs abortions for Planned Parenthood (Ex. 4). Neither of these declarations specifically identify Smith or Dr. Gustafson as experts, so it is unclear whether their testimony is offered as expert testimony. In any case, whether viewed as lay or expert testimony, many of the assertions made in these declarations are

speculative in nature and/or fall outside the scope of the declarant's personal knowledge. As such, most of the content in each declaration should be stricken as inadmissible under the Idaho Rules of Evidence and well-settled legal precedent.

Idaho Rule of Evidence 701, which governs the testimony of lay witnesses, provides that testimony in the form of opinions or inferences is limited to those opinions or inferences which are "(a) rationally based on the witness's perception; [and] (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue[.]" I.R.E. 701. The Idaho Supreme Court has explained, speculative testimony is generally impermissible under the Idaho Rules of Evidence. *See Schwan's Sales Enterprises, Inc. v. Idaho Transp. Dep't*, 142 Idaho 826, 830, 136 P.3d 297, 301 (2006); I.R.E. 602, 701.

Expert testimony, including opinion, is admissible under Idaho Rule of Evidence 702 "if the expert's scientific, technical, or other specialized knowledge" will assist the trier of fact in understanding the evidence or resolving a disputed fact. I.R.E. 702. However, like lay testimony, expert testimony "must be based upon a proper factual foundation." *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999). Expert opinion that is "speculative, conclusory or unsubstantiated by facts in the record" is inadmissible. *Id*. "An expert opinion that merely suggests possibilities, not probabilities, would only invite conjecture and may be properly excluded." *Nield v. Pocatello Health Services, Inc.*, 156 Idaho 802, 815, 332 P.3d 714, 727 (2014) (citing *Slack v. Kelleher*, 140 Idaho 916, 923, 104 P.3d 958, 965 (2004)). Finally, "expert opinion that is speculative or unsubstantiated by facts in the record is inadmissible because it would not assist the trier of fact to understand the evidence or determine a fact that is at issue." *Nield*, 156 Idaho at 815, 332 P.3d at 727 (citing *Karlson v. Harris*, 140 Idaho 561, 565, 97 P.3d 428, 432 (2004)).

**A. Most of Kristine Smith's declaration should be stricken because her testimony is speculative and lacks the necessary foundation.**

Smith's declaration contains a multitude of speculative statements. She identifies herself as the "Area Service Director of Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky (Planned Parenthood)." Pet'rs' Br. Ex. 3, ¶ 2. While Smith's asserted qualifications no doubt give her the ability to make factual statements as to the operational aspects of Planned Parenthood, the services that Planned Parenthood offers, and the general client data that one could reasonably expect to be stored in Planned Parenthood's records, she far exceeds the scope of her knowledge and qualifications with numerous speculative claims and assertions in her declaration. These inadmissible statements should be stricken. Each of them is set forth below:

1. Paragraph 4

In paragraph 4, Smith asserts that "[f]etal heartbeat is not a medical term." But Smith is not a medical professional, so she is not qualified to give testimony on what is or is not an appropriate medical term. This sentence falls outside the scope of her personal knowledge and/or experience and should be stricken.

2. Paragraph 5

In paragraph 5, Smith asserts that Planned Parenthood will "be unable to provide most Idaho patients seeking abortions with that service in our Idaho health centers" if the Heartbeat Act goes into effect. Smith's statement is unsupported by fact. The Act does not prohibit a medical provider from providing an abortion. It merely provides a private cause of action for abortions performed *after* detection of fetal heartbeat. Given the lack of any factual foundation for this assertion, the second sentence of paragraph 5 should be stricken.

3. Paragraph 9

Numerous statements in paragraph 9 should be stricken. In that paragraph, Smith begins by appropriately discussing the number of abortions provided in Idaho by Planned Parenthood, the demographic information of Planned Parenthood's patients, the insurance or Medicaid status of Planned Parenthood patients, and the assertion that Idaho abortions are essentially self-funded due to Idaho's laws surrounding Medicaid and private insurance. However, Smith goes far beyond the information specific to Planned Parenthood patients and engages in a discussion of national poverty statistics and her interpretation of those statistics:

> Nearly 75% of pregnant persons who seek abortions nationwide live under 200% of the federal poverty level; and nearly 49% live under the federal poverty line. Currently 10.1% of Idaho's population lives in poverty. The poverty rate among women between 18 and 64 years old is 12.7%. The rate is also disproportionately high among people of color; as of 2020, 19.7 percent of Asian-Americans, 18.2 percent of Latinos, and 29.2 percent of Native Americans in Idaho live below the poverty line. The federal poverty level is widely considered an inadequate measure poverty, as it does not take into account the cost of child care, medical expenses, utilities or taxes. (In 2021 the federal poverty level for a family of four was $26,500). Thus, there are more Idaho residents struggling with poverty than these statistics indicate.

These statements should be stricken from paragraph 9 as they are speculative and fall well outside the scope of Smith's knowledge as an Area Services Director of Planned Parenthood. Smith has not identified herself as a sociologist who could appropriately opine as to these poverty statistics, let alone hypothesize that there are more Idaho residents struggling with poverty than the very statistics she puts forward would indicate. Because the statements set forth above are speculative and/or outside the scope of Smith's personal knowledge, they should be stricken from paragraph 9.

4. Paragraph 10

Smith's assumption in the first sentence of paragraph 10 that Idaho women seeking abortions face "barriers" imposed by the State and the assumption in the last sentence of paragraph 10 that Idaho's 24-hour waiting period "can contribute to delay" should also be stricken. Smith has established no personal knowledge as to how Idaho's abortion laws impact Idaho women. Because these statements—the first and third sentences of paragraph 10—are unsupported by any factual foundation or by Smith's experience, they should be stricken.

5. Paragraphs 11 and 15

Smith's assumption that advanced practice clinicians "can safely provide abortions" lacks personal knowledge. Again, Smith is not a medical professional and has not established any source of knowledge or expertise that would allow her to make these assertions. As such, paragraph 11 should be stricken in its entirety.

Similarly, the assertion that Idaho is medically underserved in paragraph 15 lacks foundation. The availability of medical care throughout all of Idaho is not within the personal knowledge or expertise of the Area Services Director of Planned Parenthood, nor has Smith established that she is qualified to lay a foundation for socioeconomic and/or demographic statistics. Thus, paragraph 15 should also be stricken in its entirety.

6. Paragraphs 12, 13, and 17

These paragraphs are based on assumptions that lack foundation about the availability of abortion services outside of Planned Parenthood facilities within and without Idaho and the circumstances and choices of third parties (including other abortion providers and Idaho women) after the Heartbeat Act becomes effective. Smith has established no source of personal knowledge about the location of every single abortion provider outside of Planned Parenthood, nor has she

established the requisite knowledge about the availability of abortion in Idaho via mail and telehealth. Smith has also not established personal knowledge regarding the choices that third parties will make about abortions after the Act goes into effect, nor has she established personal knowledge regarding the specific circumstances of Idaho women seeking abortions. Accordingly, Respondent requests that the Court strike paragraphs 12, 13, and 17 in their entirety.

7. Paragraphs 14 and 16

In paragraph 14, Smith declares that the Heartbeat Act will effectively ban abortions in Idaho after "approximately 6 weeks LMP" and that it exposes Planned Parenthood to "substantial monetary liability." Smith's statements lack any factual basis. The plain language of the Act does not ban abortions, and it certainly makes no reference to "6 weeks LMP."

Similarly, Smith has no way of knowing whether any individuals will file suit under the Heartbeat Act or about how any such hypothetical suits would progress in the courts. Therefore, she cannot competently assert, as she does in paragraph 14, that Planned Parenthood could face "substantial monetary liability" or that "Planned Parenthood will be forced to stop providing abortion services after approximately six weeks LMP if [the Heartbeat Act] takes effect." Nor can Smith competently assert, as she does in paragraph 16, that the Heartbeat Act will "prevent Planned Parenthood. . . . from fulfilling [its] mission." Thus, paragraphs 14 and 16 should also be stricken in their entirety.

8. Paragraph 18

In paragraph 18, Smith purports to represent the experience of Texas residents after a Texas law similar to the Heartbeat Act took effect. These statements should be stricken as they are beyond the scope of her personal knowledge. Smith has no personal knowledge of the effect of Texas Senate Bill 8, nor does she have personal knowledge about how the Heartbeat Act will impact

Idaho women, including whether they would have to travel long distances to obtain care. Because all of paragraph 18 falls outside the scope of Smith's personal knowledge and/or is speculative in nature, the paragraph should be stricken in its entirety.

9. Paragraph 19

Paragraph 19, which opines that "people who want an abortion generally seek one as soon as possible, but face many logistical challenges," should also be stricken in its entirety as this broad overgeneralization is outside Smith's asserted personal experience in a managerial role. If, for example, Smith were a counselor who could lay a foundation for what patients frequently report, or if Smith were a sociologist who could lay a foundation for and then analyze data about experiences in seeking abortion, such an assertion might be appropriate. Here, though, a blanket generalization about the private and personal reasons a person might seek an abortion generally and how soon they wish to obtain one is simply too speculative and should be stricken.

10. Paragraphs 20 through 25

Paragraphs 20 through 25 of Smith's declaration contain a litany of assumptions and speculation about women and the circumstances they might face if they decide they wish to obtain an abortion in some hypothetical future scenario.[1] Smith has no medical training or personal knowledge for the medical facts she assumes nor has she established the necessary foundation for her speculation about the circumstances that women might face in a theoretical future situation. None of these statements are based on Smith's personal knowledge, nor do they fall under any

[1] It is not lost on Respondent that, in both declarations, Smith and Dr. Gustafson repeatedly opine about possible burdens and obstacles that will be faced in the future, further demonstrating that these declarations attempt to bootstrap in legal arguments as to possible or theoretical effects of the Heartbeat Act. These are legal arguments based on hypothetical facts and have no place in a declaration of facts made under penalty of perjury.

expertise that Smith might have. Smith has identified her duties as managerial in nature. She is not qualified to opine on medical, sociological, psychiatric or economic issues nor may Smith speculate about hypothetical future scenarios. Every one of these paragraphs should be stricken in their entirety.

11. Paragraph 26

In Paragraph 26, Smith states that the Heartbeat Act will be costly for medical professionals, which is purely speculative because Smith has no knowledge of whether any individual will file suit under the Act or of whether any damages will ever be awarded under the Heartbeat Act's civil action. Moreover, Smith makes an improper legal conclusion when she states that the "bill allows patients and certain family members to sue without claiming any injury" and when she assumes that "it is no defense to a civil action under [the Heartbeat Act] that the patient consented to the abortion." This paragraph should be stricken as speculative and as containing improper legal conclusions.

**B. Large parts of the declaration of Dr. Caitlin Gustafson should also be stricken as speculative and lacking necessary foundation.**

Dr. Caitlin Gustafson is a physician who has been licensed in Idaho since 2004. Pet'rs' Br. Ex. 4, ¶ 1. While Dr. Gustafson's many years as a medical doctor and specific experience in the realm of obstetrics clearly provide her with a basis of knowledge to explain medical aspects of abortion procedures, medical risks inherent to abortion or to pregnancy, and other specific medical information, her declaration goes far beyond her qualifications and personal knowledge. At several points, Dr. Gustafson makes assertions that are speculative and beyond her personal knowledge as set forth more fully below that should be stricken.

1. Paragraphs 4 and 9

In paragraph 4, Dr. Gustafson fails to provide any factual foundation to support her assumption that the Heartbeat Act "bans most abortions in Idaho" and would "force" her to stop providing abortions after a fetal heartbeat can be detected. Again, the Act does not ban any abortions; it merely provides a private cause of action for certain abortions performed in Idaho. As such, the second sentence in paragraph 4 should be stricken.

For the same reason, the first sentence of paragraph 9, in which Dr. Gustafson inaccurately claims that the Act "bans abortion" after a fetal heartbeat is detected, should be stricken as well.

2. Paragraph 10

In the final sentence of paragraph 10, Dr. Gustafson states that in her experience, "women are often fearful or reluctant to report cases of rape or incest to anyone, let alone government officials." This statement about women generally, without a specific link to Dr. Gustafson's practice or an articulated number of patients who have reported this to her, is so broad and overgeneralized as to be speculative. Therefore, the final sentence of paragraph 10 should be stricken.

3. Paragraph 17

Dr. Gustafson asserts that she "believe[s] other providers will be forced [to stop providing abortions], and therefore, abortion will become unavailable after approximately six weeks LMP in Idaho." This sentence should be stricken as Dr. Gustafson has no knowledge of how other medical providers might react once the Heartbeat Act goes into effect, and, therefore, she has no way of knowing whether all abortions will become unavailable after six weeks LMP in Idaho.

4. Paragraphs 18 and 19

Both of these paragraphs, which speculate about the circumstances of women who discover

they are pregnant in Idaho after the Heartbeat Act goes into effect, should be stricken in their entirety. Dr. Gustafson has established no knowledge of what abortion services will be available in Idaho after the Heartbeat Act goes into effect beyond her own determination that she will stop performing abortions after six weeks gestational age. She cannot extrapolate from her own decision-making that all other providers will make the same decision or that Idaho women will not be able to obtain medication abortions through other sources. Further, in the final two sentences of paragraph 18, Dr. Gustafson speculates about potential logistical issues that might be faced by patients seeking abortions in the future, and she continues from these assumptions to make more assumptions about the impact of her assumptions on Idaho women. Because these assertions are speculative and not based on Dr. Gustafson's personal knowledge or any factual data, they should be stricken.

5. Paragraph 20

The first two sentences of paragraph 20 should be stricken. Dr. Gustafson opines about the reasons that someone might seek an abortion and provides examples of hypothetical non-medical reasons. Because Dr. Gustafson lacks the personal knowledge of what non-medical and personal considerations a person might have for seeking an abortion, these sentences should be stricken.

6. Paragraphs 24, 25, and 26

Paragraph 24 should be stricken in its entirety as outside the personal knowledge of Dr. Gustafson. Dr. Gustafson theorizes that those who carry an unwanted pregnancy to term may find it harder to emerge from poverty. She goes on to assert that individuals unable to access abortion are marginally employed, unemployed, or more likely to be enrolled in a public safety net. Dr. Gustafson cites to several sources for these assertions, but these citations only serve to highlight the fact these economic and sociological assertions fall outside the scope of Dr. Gustafson's

knowledge as a medical doctor. Paragraph 25, which asserts that the Heartbeat Act will disproportionally affect indigenous individuals and individuals of color, and paragraph 26, which asserts that the Act will disproportionally affect victims of intimate partner violence, should be stricken for these reasons. Dr. Gustafson simply has not provided a foundational basis to offer these sociologically based hypotheses.

7. Paragraph 29

In paragraph 29, Dr. Gustafson asserts that the Heartbeat Act "denies my patients access to safe care" and will "greatly harm many Idahoans." These statements are based purely on Dr. Gustafson's speculation as to the future consequences of the Act. Furthermore, these statements are argumentative and lack factual support. Paragraph 29 should be stricken.

## CONCLUSION

For all the foregoing reasons, the speculative and inadmissible claims in the declarations of Kristine Smith and Dr. Caitlin Gustafson should be stricken.

DATED: April 28, 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 28th day of April, 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:

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