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Idaho Supreme Court
Melanie Gagnepain, Clerk of the Court
By: Corby King-Clark, Deputy Clerk

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, 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.	Case No. 49615-2022

PETITIONERS' BRIEF IN OPPOSITION TO STATE OF IDAHO'S MOTION TO STRIKE PORTIONS OF THE DECLARATIONS OF KRISTINE SMITH AND DR. CAITLIN GUSTAFSON

ORIGINAL JURISDICTION

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INTRODUCTION

The State's attempt to strike portions of Petitioners' declarations is nothing more than an obvious effort to hide from this Court the devastating impacts of SB 1309. The law will have disastrous consequences for real people. The declarations, properly based on the declarants' personal knowledge acquired in their respective roles, make clear the harms of SB 1309 to the patients and communities that both declarants have spent years serving. The declarations are plainly admissible under the Idaho Rules of Evidence and are properly before this Court on Petitioners' application for a Writ of Prohibition. The State may prefer to engage in an abstract legal exercise, but Petitioners respectfully encourage this Court to recognize and address the very real threat SB 1309 creates for the people of Idaho. These declarations properly assist the court in doing so.

ARGUMENT

I. The Declarations Do Not Undermine Petitioners' Request For A Writ Of Prohibition.

In the introduction to its motion, the State makes a drive-by argument, unsupported by any authority, that Petitioners' declarations render original jurisdiction over this action improper and defeat their request for relief because the declarations "admit that [Petitioners] require factual allegations to prevail." That is inaccurate. As this Court recently explained, it accepts original jurisdiction where a petitioner "alleges sufficient facts concerning a possible constitutional violation of an urgent nature." *Reclaim Idaho v. Denney*, 497 P.3d 160, 172 (Idaho 2021) (quoting *Sweeney v. Otter*, 119 Idaho 135, 138 (1990)) (emphasis added); *see also id.* at 169 (noting no impropriety in the fact of multiple declarations submitted in support of a request for a writ of

prohibition). The appropriate way to show both the constitutional violation and the urgent need for relief is through factual allegations and admissible evidence. That is what Petitioners have done here.

In the event this Court disagrees and strikes portions of the declarations, Petitioners should nevertheless prevail. As the Petition makes clear, the constitutional violation is plain—and a legal question—and the catastrophic implications of SB 1309 are readily apparent. Moreover, the remaining portions of the declarations, which the State does not move to strike, provide ample support for the factual allegations in the Petition.

II. Both Declarations Are Admissible In Full Under IRE 602.

All statements in the declarations are based on personal knowledge as required by Idaho Rule of Evidence 602, which states that a "witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony." I.R.E. 602.

Idaho Rule of Evidence 701 allows a lay witness to give testimony in the form of an opinion or inference, provided that the opinion or inference is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." An opinion or inference based on the witness's perception under I.R.E. 701(a) "must be based on the witness's personal knowledge of events or facts," that is, "the same personal knowledge of events as required by I.R.E. 602." *State v. Raudebaugh*, 124 Idaho 758, 767 (1993).

Petitioners do not offer the declarants as experts at this time, and so Idaho Rule of Evidence 702, which governs expert testimony, is inapplicable and irrelevant.

Lay witnesses may therefore provide facts and opinions "based on their experience, observations, and personal knowledge." *Reclaim Idaho,* 497 P.3d at 171. In *Reclaim Idaho*, the Court admitted the full declarations of three lay witnesses, including one from a member of the petitioner organization, opining on the effects of a redistricting law on an organizing campaign, certain historical statistics, and relevant comparable policies. *Id.*; *see also Reclaim Idaho v. Denney*, Case No. 48784-2021 (May 7, 2021), Verified Petition for Writ of Prohibition and Application for Declaratory Judgment, Ex. 1 (Decl. of Ben Ysursa in Support of Petition for a Writ of Prohibition), Ex. 4 (Decl. of David Daley in Support of Petition for a Writ of Prohibition), Ex. 5 (Decl. of Robin Nettinga in Support of Petition for a Writ of Prohibition). This Court found that the declarants drew on their "considerable personal knowledge and experience" to provide facts and opinions, and admitted the declarations in full. *See Reclaim Idaho*, 497 P.3d at 171. For the same reasons, this Court should find Petitioners' declarations admissible here in full.

A. Kristine Smith's Full Declaration Is Admissible.

The challenged statements in Kristine Smith's declaration fall squarely within Smith's personal knowledge from serving for eight years as Area Service Director of Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky. Her role encompasses management of the Planned Parenthood health centers in Idaho, which, as she describes in her declaration, means she is familiar with the centers' "operations, including the services [they] provide and the communities [they] serve." Smith Decl. ¶ 3. Planned Parenthood clinics provide a broad range of medical

services in Idaho. While Smith is not a doctor, her near-decade of managing Planned Parenthood heath centers dictates that she understands the basic medical needs of her clinics' patients and of the resources that those patients require to access care. The State takes no issue with this description of Smith's role or the knowledge she derives from it.

As Director, Smith has personal knowledge as to how SB 1309 would directly affect the communities and people she has served for nearly a decade. It is precisely within Smith's responsibilities managing health centers to be aware of the challenges—both personal and legal—facing the centers' patients, including "the costs associated with the procedure," and which communities are underserved. Smith Decl. ¶ 22. She therefore clearly has personal knowledge of the barriers people in the communities Planned Parenthood serves face in accessing medical care, including abortion. *See* Motion to Strike, Smith ¶¶ 4, 9, 10 (requesting the Court strike Smith Decl. ¶¶ 10, 19-22).

As the Director of the largest provider of reproductive health services in Idaho, Smith also has personal knowledge of the health risks people face when they have limited access to care. She is also familiar with the demographic disparities in access, given the wide range of patients that come to her centers for care. *See* Motion to Strike, Smith ¶ 10 (requesting the Court strike Smith Decl. ¶¶ 22-25). The State contends that because of Smith's lack of medical training, she must lack awareness of anything related to health. This demonstrates a fundamental misunderstanding of the role of a director of three *health* centers that provide reproductive care. Understanding the general barriers to abortion care in Idaho, *see* Smith Decl. ¶¶ 19-22, and the health risks of delaying abortion, *see id.* ¶¶ 23-25, is part and parcel of Smith's role and does not require medical training.

Smith's statements on this topic draw from her "considerable personal knowledge and experience," *see Reclaim Idaho*, 497 P.3d at 171, including a decade of interacting with patients that come to the health centers that she directly oversees to "rationally" infer that the communities her patients serve will suffer devastating effects in the face of SB 1309, *see* I.R.E. 701(a).

In her role as Director, Smith is also required to be familiar with the medical services provided by Planned Parenthood, and the terms used to discuss those services provided. If, after working at Planned Parenthood for a decade, she has not encountered medical use of the term "fetal heartbeat," she can appropriately observe that the term is not used in a medical context. *See* Motion to Strike, Smith ¶ 1 (requesting the Court strike Smith Decl. ¶ 4). Again, a decade of observing and working with the medical staff at the centers that Smith directly oversees constitutes significant personal experience from which she can draw to properly conclude that "fetal heartbeat" is not a term used by any staff member of the three health centers for which she is responsible.

Similarly, Smith is aware of the services offered—and not offered—within her region. As Smith explains, she is responsible for three Planned Parenthood health centers in Idaho, which are part of a Planned Parenthood affiliate that also provides care in five other states. *See* Smith Decl. ¶ 2. Smith does not need medical training to know that advanced practice clinicians "can safely provide abortions," given that other states in which Petitioner Planned Parenthood provides care

allow advanced practice clinicians to provide abortions.[1] *See* Motion to Strike, Smith ¶ 5 (requesting the Court strike Smith Decl. ¶¶ 11, 15).[2]

The State further argues that Smith cannot know the effects SB 1309 would have on physicians and patients in Idaho. Motion to Strike, Smith ¶¶ 2, 6-8, 11 (requesting the Court strike Smith Decl. ¶¶ 5, 12-14, 16-18, 26). The exact opposite is true. Smith is in the best position to know what impacts the threat of significant liability for performing an abortion after approximately 6 weeks LMP will have on the availability of abortion in the centers she manages. She understands, through her personal knowledge, that SB 1309 effectively will ban abortion in Idaho after approximately six weeks of pregnancy. Moreover, it is not speculative for Smith to assess the effects SB 1309 will have on communities that she personally interacts with, or to note the chilling effects of medical provider liability. Each of the challenged statements is based on Smith's observations and experience managing Planned Parenthood centers.

B. Dr. Caitlin Gustafson's Full Declaration Is Admissible.

Dr. Gustafson's statements are similarly based on her "considerable personal knowledge and experience." *Reclaim Idaho*, 497 P.3d at 171. Dr. Gustafson is a "physician licensed to practice medicine in the State of Idaho since 2004 and [has] been a practicing doctor in Idaho for nearly two-decades." Gustafson Decl. ¶ 2. She has been "a board-certified Family Physician with a fellowship in Obstetrics since 2007." *Id.* As part of her practice, she "provide[s] abortions at

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1 *See* Haw. Rev. Stat. § 457-8.7; Rev. Code of Wash. 9.02.110 (effective June 9, 2022).

2 Indeed, any individual with access to the internet could easily glean that many states, though not Idaho, permit advance practice clinicians to provide a variety of reproductive care, including abortion.

Planned Parenthood." *Id.* ¶ 3. The lion's share of the State's objections to Dr. Gustafson's declaration ignore this wealth of personal and professional experience.

Doctors are required to understand patients' decision-making, and from her many years of treating patients making these consequential decisions, Dr. Gustafson clearly has knowledge of her patients' personal circumstances and the obstacles they already face when seeking abortion care. Indeed, the Idaho Attorney General made this very point in a different case, where Idaho state officials sought to depose Planned Parenthood physicians, including Dr. Gustafson. *See Planned Parenthood of Great Northwest and the Hawaiian Islands v. Wasden*, 2020 WL 1976641, at *2 (D. Idaho Apr. 24, 2020). There, counsel argued that physicians are the "*only*" parties who "can provide: (1) their *personal knowledge* of the alleged burdens currently experienced by their individual patients; and (2) first-hand testimony about abortion access in Idaho, as it specifically related to [the physician's] individual circumstances." *Planned Parenthood of Great Northwest and the Hawaiian Islands v. Wasden*, Case No. 18-cv-555 (D. Idaho, Apr. 10, 2020), ECF No. 81 at 3 (Mem. ISO Defendants' Motion to Compel Discovery) (emphases added). The court agreed, and ordered Dr. Gustafson's deposition. *See Planned Parenthood*, 2020 WL 1976641, at *4. The very same principles apply here: As counsel for the State has successfully argued elsewhere, Dr. Gustafson clearly has personal knowledge of her patients' decision-making processes, *and* about abortion access in Idaho. This Court should reject the blatant about-face.

Dr. Gustafson plainly has personal knowledge of the "circumstances" and "personal and non-medical considerations" that patients face. Motion to Strike, Gustafson ¶¶ 2, 4-5 (requesting the Court strike Gustafson Decl. ¶¶ 10, 18-20). As a doctor practicing in Idaho for fifteen years,

Dr. Gustafson has helped patients work through those considerations, including, for example, any reluctance to report cases of rape or incest. Further, Dr. Gustafson regularly consults with patients about reproductive health decisions, including their considerations when deciding to seek abortion care.

Moreover, just as she is aware of her patients' personal considerations, she is also aware of the broader consequences of the healthcare decisions her patients make, including on their socioeconomic standing. *See* Motion to Strike, Gustafson ¶ 6 (requesting the Court strike Gustafson Decl. ¶¶ 24-26). As Dr. Gustafson explains, a "significant number of [her] patients are from rural and other underserved communities." Gustafson Decl. ¶ 3. When she speaks with her patients about their decisions to seek medical care, Dr. Gustafson does not do so in a vacuum: Her patients cannot be separated from their communities and economic circumstances. That Dr. Gustafson included helpful citations to articles and studies buttressing her statements that individuals forced to carry an unwanted pregnancy face a host of economic and familial harms—and that those harms are disproportionately felt by persons of color and indigenous individuals in Idaho—does not undermine her own personal knowledge. Rather, her statements are "rationally based" on her perceptions based on her decades of working with patients, many of whom are from underserved communities, and her citations serve only to reinforce those statements.

Dr. Gustafson's statements about the effects that SB 1309 will have on medical providers, and, hence, access to abortion, are also grounded in her personal knowledge. *See* Motion to Strike, Gustafson ¶¶ 1, 3 (requesting the Court strike Gustafson Decl. ¶¶ 4, 9, 17). The State does not challenge Dr. Gustafson's statement that she cannot take the risk of being subjected to the

monetary judgments prescribed in SB 1309 and thus she "will not be able to provide abortions for my patients past detection of a 'fetal heartbeat' if SB 1309 is allowed to take effect." Gustafson Decl. ¶ 27. But the State takes issue with the logical conclusion—not speculation—that flows from that statement: that, in the face of SB 1309, similarly situated physicians will have to stop providing abortions, and, thus, a large swathe of the Idaho population will be denied access to care. Yet, as a member of a small professional community of physicians providing abortion in Idaho, Dr. Gustafson is capable of observing the effects SB 1309 would have on that professional community, and on the availability of their services given the chilling effects of SB 1309's liability provisions. *See* Motion to Strike, Gustafson ¶ 7 (requesting the Court strike Gustafson Decl. ¶ 29).

Dr. Gustafson is in a perfect position to speak to the effects that reduced availability of abortion has on pregnant people, having worked with pregnant people in Idaho for nearly two decades, as well as to SB 1309's impact on the availability of abortion services in Idaho writ large.

CONCLUSION

Kristine Smith and Dr. Caitlin Gustafson's declarations provide this Court with information about the impact of SB 1309 on the people of Idaho. That information is firmly grounded in the declarants' personal knowledge. No portions of either declaration should be stricken.

Dated: May 12, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2022, I electronically filed the foregoing with the Clerk of the Court using the iCourt e-file system, and caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notification of Service:

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