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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

RESPONDENT'S REPLY TO PETITIONER'S OPPOSITION TO MOTION TO STRIKE

Petitioners chose to bring an original jurisdiction case that, by their own admission, requires fact-finding. In so doing, Petitioners conceded that this case is inappropriate for the exercise of original jurisdiction. When faced with the State's motion to strike, Petitioners made another choice—to introduce new factual assertions not set forth in their declarations and to argue that the speculative opinions proffered by Kristine Smith and Dr. Caitlin Gustafson should not be stricken. In so doing, Petitioners concede that their declarations do not provide sufficient factual foundation to support their speculative claims and opinions. Petitioners also concede that they offer declarants as lay witnesses who are simply testifying from personal knowledge; they expressly rule out a finding of expert qualifications by stating that I.R.E. 702 is "inapplicable and irrelevant." *See Pet'rs' Opp.*, 2-6; *see also* I.R.E. 701, 702.

Just as Petitioners' choices as to the claims they decided to bring before this Court are fatal to their entire case, Petitioners' choices as to how to respond to the State's motion to strike are fatal to the challenged portions of the declarations. Both declarations fail to establish personal knowledge necessary to support the challenged testimony. This Court should grant the State's motion to strike the statements made 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 as inadmissible.

I. ARGUMENT

Petitioners admit that the Idaho Rules of Evidence apply to declarations filed in support of an original action. *Pet'rs' Opp.*, 1. Testifying witnesses—such Smith or Dr. Gustafson whose testimony is offered here via declaration—may only testify to a matter "if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." I.R.E. 602 (emphasis added); *Reclaim Idaho v. Denney*, 169 Idaho 406, 497 P.3d 160, 171 (2021) (admitting

declarations in full after sufficient facts were provided to establish the declarant's experience, observation, and personal knowledge). Since Smith and Dr. Gustafson admit that Rule 702 is "irrelevant," their testimony is only admissible as lay testimony. *Pet'rs' Opp.*, 3. A lay witness may only offer an opinion when it is (a) rationally based on her perception; (b) helpful to understanding her testimony or reaching a decision on a fact in issue; and (c) not based in scientific, technical, or other specialized knowledge that falls within the scope of Rule 702. I.R.E. 701. Petitioner's testimony must be struck because it only offers speculative opinion testimony falling outside any personal knowledge.

A. In their Opposition brief, Petitioners attempt to retroactively lay foundation for impermissibly speculative statements by making factual assertions not in evidence and, in so doing, admit the deficiencies in their declarations.

1. Smith's declaration lacks any foundation for her opinions about medical procedures or terminology, or for her opinions about past and prospective burdens allegedly faced by Idaho women.

In their Opposition, Petitioners assert that the challenged statements within Kristine Smith's declaration fall within her personal knowledge from serving as Area Service Director of Planned Parthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky (hereinafter "Planned Parenthood"). But as to Smith's job duties, experiences, and qualifications, the declaration only provides the following:

> I am the Area Service Director of Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, and in that position, I am responsible for the health centers in the State of Idaho. I have worked for Planned Parenthood since 2012, and I have been the Area Service Director for eight years . . . I am responsible for management of the Planned Parenthood health centers in Idaho and therefore am familiar with our operations, including the services we provide and the communities we serve.

Pet'rs' Br. Ex. 3, ¶ 2. Having realized now that Smith's declaration is wholly inadequate to support opinions about burdens that may or may not be faced by Idaho woman in the future, Petitioners now seek to bootstrap additional facts into the record via their Opposition brief:

- that Smith's management responsibilities "dictate" that she "understands the basic medical needs of her clinics' patients and the resources that those patients require to access care;"
- that her management responsibilities include maintaining an awareness of clients' specific personal challenges;
- that her management responsibilities include maintaining an awareness of clients' specific legal challenges;
- that her management responsibilities include a requirement to "be familiar with . . . terms used to discuss [Planned Parenthood's medical] services;"
- that she maintains "*personal knowledge*" of the health risks people face when they have limited access to care;
- that she has not encountered the term "fetal heartbeat" during her tenure at Planned Parenthood;
- that she is familiar with "demographic disparities in access" to Planned Parenthood's services; and that for "over a decade," Smith has "interact[ed] with" Planned Parenthood patients that come into the health centers, and that she "*personally* interacts with" the communities served by Planned Parenthood.

Pet'rs' Opp., 3-6. None of these assertions were included in the declaration. Thus, none of them constitute facts in evidence before this Court. Under I.R.E. 602, Petitioners were required to introduce sufficient evidence to support a finding that Smith had *personal* knowledge of the facts to which she testified. But Smith's declaration had two glaring deficiencies: the absence of *any* suggestion that she interacts with Planned Parenthood patients in a manner that would qualify her to provide non-hearsay testimony as to their struggles or burdens; and the absence of any suggestion that she has received training about, or observed in clinical practice, Planned Parenthood medical procedures. A review of her declaration leaves substantial unanswered

questions. What does an Area Services Director do in their managerial role over Planned Parenthood branches? Is this position primarily an operational, financial, or marketing one? Does Smith work solely in a corporate office conducting operational and financial assessments? How often—if at all—does she visit Planned Parenthood centers and personally interact with patients? Has she ever even visited any of Idaho's Planned Parenthood centers, and, if so, when was her last visit? What training or exposure to Planned Parenthood's medical procedures—if any—has she had?

These unanswered questions, which Petitioners do not even answer in their briefing, illustrate the scope of Petitioners' total failure to establish anything beyond the bare fact that Smith has a nebulous corporate oversight role. As such, her speculative statements about the alleged personal burdens suffered by Idaho women seeking an abortion are not admissible, and neither are her opinions about medical terminology, medical risks by patients, or who may or may not perform a medically safe abortion. Try as they might, Petitioners cannot retroactively surmount this hurdle of their own making by now advancing facts disguised as legal argument.

2. Dr. Gustafson's declaration failed to establish personal knowledge that would qualify her to opine on alleged past or future burdens of Idaho women

Like Smith's declaration, Dr. Gustafson's declaration fails to establish any personal knowledge that would qualify her to discuss the financial, sociological, or other alleged personal burdens on Idaho women who have sought, or will seek, abortions. Her statements speculating about future decisions that might be made by individuals seeking abortion, demographic information and analysis, and other sociological conclusions, are inadmissible because nowhere in the declaration are these assertions supported by "evidence . . . sufficient to support a finding that [she] has personal knowledge of the matter" as required by the Rules of Evidence. I.R.E. 602.

Apparently realizing just how deficient Dr. Gustafson's declaration is on these topics, Petitioners again attempt to add additional factual assertions that appear nowhere in Dr. Gustafson's declaration:

- that Dr. Gustafson maintains personal knowledge of her clients' decision-making processes;
- that Dr. Gustafson maintains personal knowledge about abortion access in Idaho;
- that Dr. Gustafson has counseled patients working through various considerations, and specifically, that she has counseled patients on reluctance to report cases of rape or incest;[1] and
- that Dr. Gustafson regularly consults with patients about reproductive decisions.

Pet'rs' Opp., 7-8. These unsworn factual assertions are not in evidence and cannot be used to support a finding of personal knowledge, even if they could be admissible evidence as to the future thought processes and decision-making of women who might become pregnant in the future (they cannot).

Dr. Gustafson's declaration simply identified her as a Valley County family physician who, at times, provides abortions and telehealth services for Planned Parenthood. *Pet'rs' Br. Ex. 4,* ¶ 3. It left open numerous factual questions, such as, how often does Dr. Gustafson provide abortions for Planned Parenthood and for how long and how frequently does she interact with each patient? On these foundational topics, the Court and the State have been left wholly in the dark. Even if Dr. Gustafson could offer hearsay about another woman's past experiences (she cannot), she has laid

[1] In her declaration, Dr. Gustafson stated that "in my experience, women are often fearful or reluctant to report cases of rape or incest to anyone, let alone government officials." *Pet'rs' Br. Ex. 4,* ¶ 10. However, nowhere in her declaration was there a basis for this knowledge—i.e., the counseling that is now being referenced. This attempt to retroactively comply with I.R.E. 602's foundational personal knowledge requirement should be seen for what is—an admission that the declarations are factually deficient as to her opinions about the alleged burdens experienced by Idaho women.

no foundation for that testimony. None of Dr. Gustafson's opinions about what past Planned Parenthood patients experience financially, socioeconomically, emotionally, professionally, or otherwise can be considered as evidence by this Court, nor can her speculative opinions as to what future Planned Parenthood patients might experience. Furthermore, nothing in Dr. Gustafson's declaration provides support for her sociological and demographic opinions. This is emphasized by the inclusion of outside studies, which, by definition, fall outside the scope of Dr. Gustafson's personal knowledge. *See, e.g., Pet'rs' Br. Ex. 4*, ¶ 24.

Petitioners point to a memorandum filed in *Planned Parenthood v. Wasden*, claiming the defendants there argued that physicians are the "only" parties who can provide their personal knowledge of alleged burdens experienced by patients, and firsthand testimony about abortion access in Idaho. *Pet'rs' Opp.*, 4 (*citing Planned Parenthood of Great Northwest and the Hawaiian Island v. Wasden*, Case No. 18-cv-00555-BLW (D. Idaho, April 10, 2020), ECF No 81 at 3 (Mem. ISO Defendant's Motion to Compel Discovery)).[2] This mischaracterizes the defendants' position in that case. In *Planned Parenthood v. Wasden,* the defendants sought to depose physicians to test similar factual allegations made in Planned Parenthood's complaint to those made here:

> [S]ubjecting Idaho's physician-only law to a highly fact- and context-specific analysis requires a detailed overview of the physicians' capacity to perform

[2] It is notable that Planned Parenthood invokes a discovery dispute in a district court case in seeking this Court's resolution of an original action. Planned Parenthood's invocation of *Planned Parenthood v. Wasden* demonstrates how inappropriate this case is for an original action. As mentioned in the State's opposition brief, *Planned Parenthood v. Wasden* was filed in U.S. District Court, has been subject to extensive discovery on substantially similar allegations of burden as Planned Parenthood presents here, and the defendants' motion for summary judgment was denied on the grounds that there were genuine issues of material fact that required fact-finding. Opposition Brief at n. 8; Appendix 8 to Opposition Brief (Declaration of Megan A. Larrondo). That case is currently stayed pending the issuance of the U.S. Supreme Court's decision in *Dobbs, et al. v. Jackson Women's Health Organization, et al.*, Supreme Court Dkt. No. 19-1392, which is expected by the end of June. *Planned Parenthood of Great Northwest and the Hawaiian Island v. Wasden*, Case No. 18-cv-00555-BLW (D. Idaho, November 9, 2021), ECF No. 162 (Order).

> abortions for Planned Parenthood. This detailed analysis goes to causation and the "large fraction" analysis under the undue burden standard. Only the individual physicians who perform abortions for Planned Parenthood can provide (1) their personal knowledge of the alleged burdens experienced by their individual patients; and (2) first-hand testimony about abortion access in Idaho as it specifically relates to their individual circumstances (*i.e.*, what is constraining each physicians' ability to perform abortions, and how has that changed since 2015? Can any of the physicians perform additional medication or aspiration abortions, and if so, how many, when, and where? Do any of the physicians intend to perform more abortions in the future, particularly if their individual circumstances change? How has their capacity changed such that the laws at issue are now an undue burden?)

Planned Parenthood of Great Northwest and the Hawaiian Island, Case No. 18-cv-00555-BLW (D. Idaho, April 10, 2020), ECF No 81 (Mem. ISO Defendant's Motion to Compel Discovery) at 3. Thus, what the defendants actually argued was that the Court should order the doctors to be deposed so that the State could probe similar statements under the relevance standard for discovery. The defendants sought to test the allegations presented by the plaintiffs by deposing the physicians as to their own personal experience. Notably, the defendants at no point argued that all topics covered in those depositions would be admissible testimony.

B. Lay witnesses Smith and Dr. Gustafson cannot opine on any matter outside of their personal knowledge, and thus, all of the speculative statements should be stricken as inadmissible.

In addition to mischaracterizing the State's position in *Planned Parenthood v. Wasden*, Petitioners mischaracterize this Court's decision on a motion to strike in *Reclaim Idaho.* 169 Idaho 406, 497 P.3d 160 (2021). Petitioners rely on the *Reclaim Idaho* holding to argue the speculative opinions of Smith and Dr. Gustafson should be admitted as lay witness testimony, stating that in *Reclaim Idaho*, "the Court admitted the full declarations of three lay witnesses . . . [finding that] the declarants drew on their "considerable personal knowledge and experience" to provide facts and opinions, and admitted the declarations in full." *Pet'rs' Opp.*, 3.

This was not the holding in *Reclaim Idaho*. There, this Court admitted the declarations because the Court found that:

> [t]hese declarants, based on their considerable *personal knowledge and experience* with the initiative and referendum processes in Idaho, provided both facts and opinion that comply with the requirements of Idaho Rules of Evidence 602, 701, *and 702*. . . the respective *expertise* of the declarants in these topics permits them to offer such opinions, and we conclude they were not unduly speculative.

Id. at 171 (emphasis added). This Court went on to apply the expert witness test set forth in *Phillips v. E. Idaho Health Services* and determined that the declarants had "provided factual information based on the experience, observations, and personal knowledge" and as such, were entitled to offer their respective opinions. *Id*. (citing *Phillips v. E. Idaho Health Servs., Inc.,* 166 Idaho 731, 755, 463 P.3d 365, 389 (2020)). Thus, far from admitting the testimony of "lay witnesses," the *Reclaim Idaho* Court admitted the testimony *because it was expert testimony*, a standard which is "irrelevant" here because Petitioners only present lay witness testimony. *See Pet'rs' Opp.*, 3.

Recently, in *State v. Dacey*, this Court addressed the distinction between lay and expert witnesses in an appeal from a criminal case applying the Rules 701 and 702. 169 Idaho 102, 691 P.3d 1205 (Idaho 2021). In *Dacey*, this Court held that a law enforcement officer specializing in drug recognition testifying as a purported lay witness about the downstream effects of methamphetamine use was actually an expert and, therefore, should have been identified as such. This Court explained that the testimony offered by the officer relied upon specialized training and knowledge outside the scope of a lay witness. *Id.* at 1213-14. As the *Dacey* Court made clear, it simply is not within the purview of a lay witness to proffer opinions that are based on specialized training rather than personal knowledge.

The decision in *Dacey* defeats Petitioners' arguments. Petitioners offer the conclusory argument that their witnesses have personal knowledge supporting their highly speculative

opinions due merely to their years of specialized experience. *Pet'rs' Opp.,* 3 ("The challenged statements in Kristine Smith's declaration fall squarely within Smith's personal knowledge from serving for eight years as an Area Service Director of Planned Parenthood"); *id.* at 6 ("Dr. Gustafson's statements [are] based on her considerable personal knowledge and experience. . . [she] 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.") But merely reciting the declarants' job titles does not comport with Idaho Rule of Evidence 602, which requires that any witness introduce evidence sufficient to support a finding of *personal knowledge*. Thus, even if this Court were to reject Petitioners' concession and apply Rule 702 (it cannot), Smith and Gustafson's declarations as written would still be factually insufficient to establish any expertise on the personal circumstances, thought processes, and alleged burdens faced by Idaho women (even if such testimony were not hearsay and speculation as to future events).

1. Lay witness Smith, a corporate employee of Planned Parenthood, is not qualified to opine on medical matters, nor is she qualified to opine on the alleged "personal burdens" suffered by Idaho women.

Smith is corporate employee of Planned Parenthood with a directorial role encompassing multiple states who holds a managerial position, the specifics of which were left out of her declaration. As already noted, there is no information as to her interaction with any Planned Parenthood patients and there is no information as to whether she has ever even been to a Planned Parenthood center in Idaho.

When it comes to Smith's proffered medical opinions, Petitioners assert that the State "fundamentally misunderstands" Smith's role "as a director of three *health* centers that provide reproductive care." *Pet'rs' Opp.*, 4 (Emphasis in original). Apparently, Petitioner takes the position that the mere reference to Planned Parenthood as a "health" center gives declarant Smith *carte*

blanche to proffer medical testimony. It does not. Job title alone does not establish firsthand knowledge. If a job title were enough to give an individual firsthand knowledge of medical procedures, any witness could testify as a lay expert based on proximity to the medical procedure. Similarly, Petitioners seem to take the position that years of working as an employee of Planned Parenthood provides a basis of personal knowledge from which Smith can opine about how future demographic groups might be impacted by the Heartbeat Act. But even with the additional facts tucked into Petitioner's Opposition—which are not admissible evidence before this Court—*nowhere* is there even an allegation that Smith has ever spoken directly to a single Idaho woman about prospective burdens in seeking an abortion, even if her testimony as to the hearsay and speculation that would have been contained in those conversations were admissible (it is not). This alone illustrates the folly of providing a cursory overview of a corporate management position and asking the Court and the State to assume what actual personal knowledge Smith might have gleaned from that role.[3]

2. Dr. Gustafson did not establish she is a lay expert qualified to opine on what alleged burdens Idaho women have experienced in the past or might experience in the future because of the Heartbeat Act.

Petitioners argue in their Opposition that Dr. Gustafson's statements within her declaration were all based upon her personal knowledge. This is somewhat of a departure from her declaration, which cited not just to her personal knowledge, but to her qualifications as a physician (*Pet'rs' Br. Ex. 4*, ¶ 2); her board certification, *id.*; her general statement that she has attended professional

[3] Even if Petitioners *had* identified Smith as an expert—which they have explicitly disavowed—the mere description of an "Area Services Provider" "familiar" with "services" and the "community" would fall far short of setting forth the facts necessary to demonstrate specific "knowledge, skill, experience, training, or education" as to "scientific, technical, or other specialized knowledge" that would allow Smith to provide medical opinions or opine on future alleged burdens that might be experienced by Idaho women. I.R.E. 702.

conferences, *id.* at ¶ 5; review of medical literature, *id.*; and her conversations with other medical professionals, *id*. Having now identified Dr. Gustafson as a *lay* witness, Petitioners call into question whether even the medical information set forth in her declaration can appropriately be before the Court—let alone the speculative opinions challenged by the State in its motion to strike.

In any event, even assuming Dr. Gustafson's factual assertions about her years of medical experience allow lay testimony about the specifics of abortion procedures and medical risks experienced by pregnant women, those factual assertions do not establish the personal knowledge that would qualify her to opine on the alleged burdens experienced by Idaho women in the past or the future. Such testimony would be hearsay, as well as speculative, and unsupported by the necessary foundation. Notably, in any case, there is not a single assertion in Dr. Gustafson's declaration that she has ever even conversed with an Idaho Planned Parenthood patient about any burden or obstacle. Idaho Rule of Evidence 602 requires that sufficient evidence be introduced to establish a basis of personal knowledge. That requirement was not met in Dr. Gustafson's declaration.

II. CONCLUSION

By submitting declarations in support of their Petition, Petitioners admitted that their claims require fact-finding to prevail, preventing the exercise of original jurisdiction by this Court. And by urging this Court to consider factual assertions not in evidence, Petitioners admit that their declarations lack the foundational support for the speculative assertions and opinions set forth by their self-identified lay witnesses. The State's Motion to Strike should be granted.

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DATED: this 17th day of May, 2022.

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 17th day of May, 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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