

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; BRAD LITTLE, in his official
capacity as Governor of the State of Idaho;
LAWRENCE WASDEN, in his official capacity as
Attorney General of the State of Idaho; **JAN M.
BENNETTS**, in her official capacity as Ada County
Prosecuting Attorney; **GRANT P. LOEBS**, in his
official capacity as Twin Falls County Prosecuting
Attorney; **IDAHO STATE BOARD OF MEDICINE;**
IDAHO STATE BOARD OF NURSING; and
IDAHO STATE BOARD OF PHARMACY,

Respondents,

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. 49817-2022

**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

INTRODUCTION

The State’s revived attempt to strike portions of Petitioners’ Declarations fails. The challenged portions of the Declarations of Kristine Smith and Dr. Caitlin Gustafson are plainly admissible under the Idaho Rules of Evidence and are properly before this Court on Petitioners’ application for a Writ of Prohibition and Application for Declaratory Judgment. Both Declarations are grounded in the declarants’ extensive personal knowledge of the state of reproductive health care in Idaho and the challenges facing the patients and communities who seek to receive such care, as well as their combined decades’ worth of experience serving Planned Parenthood health centers in the state. As such, the Declarations properly assist this Court in understanding the real-world effects of Idaho Code § 18-622 (the “Total Abortion Ban”) on both patients and health care providers in Idaho.

ARGUMENT

I. Both Declarations Are Fully Admissible Under the Idaho Rules of Evidence

Where, as here, the Court is hearing “an original action without the benefit of a trial record ... [i]t is essential that the Court have access to *all* the relevant facts necessary to reach an appropriate decision.” *Reclaim Idaho v. Denney*, 169 Idaho 406, 417, 497 P.3d 160, 171 (Idaho 2021) (emphasis added). The portions of the Declarations of Smith and Dr. Gustafson the State seeks to strike present facts relevant to the implications of the Total Abortion Ban in the manner required by the Idaho Rules of Evidence, as all statements in the Declarations are based on Smith and Gustafson’s personal knowledge and experience.

Idaho Rule of Evidence 602 provides 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 for opinion or inference testimony from lay witnesses, 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.” I.R.E. 701. 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, 864 P.2d 596, 605 (1993). As the State recognizes in its renewed Motion to Strike, *see* Mem. ISO Respondents’ Motion to Strike at 3, No. 49817-2022, Petitioners offer Smith and Dr. Gustafson as lay witnesses, not expert witnesses, so the requirements of Idaho Rule of Evidence 702, which governs expert testimony, are irrelevant to the State’s challenge.

As lay witnesses, Smith and Dr. Gustafson 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, describing the effects of a redistricting law on an organizing campaign, certain historical statistics, and relevant comparable policies. *Id.*; *see also* Verified Petition for Writ of Prohibition and Application for Declaratory Judgment, Ex. 1 (Decl. of Ben Yursa 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), *Reclaim Idaho v. Denney*, No. 48784-2021 (May 7, 2021). 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.

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. As Area Service Director, Smith is “responsible for management of the Planned Parenthood health centers in Idaho[,]” which, as she explains in her Declaration, means she is “familiar with [the centers’] operations, including the services [they] provide and the communities [they] serve.” Smith Decl. ¶ 3. The State contends that Smith’s qualifications limit her to “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[.]” Motion to Strike 4. But Smith’s position has necessarily exposed her to far more than just general client data; her near-decade of managing Planned Parenthood health centers dictates that she understands the basic medical needs of her health centers’ patients, the resources that those patients require to access care, and the barriers that prevent access to such care.

From her role with the largest provider of reproductive health services in Idaho, Smith Decl. ¶ 2, Smith has personal knowledge of demographic disparities in access to health services,

given the wide range of patients that come to her centers for care. It is precisely within Smith's responsibilities managing health centers to be aware of the challenges facing the centers' patients, and which communities are underserved. She therefore has personal knowledge of the barriers people in the communities Planned Parenthood serves face in accessing medical care, including abortion care. *See* Motion to Strike, Smith, 5-9 (¶¶ 3, 5, 6, 7, 9) (requesting the Court strike Smith Decl. ¶¶ 9, 12, 13, 14, 16). Further, Smith also has personal knowledge of the health risks that result from limited or delayed access to such care.¹ *See* Motion to Strike, Smith, 10-12 (¶¶ 13-15) (requesting the Court strike Smith Decl. ¶¶ 20-26). Understanding the general barriers to abortion care in Idaho, *see* Smith Decl. ¶¶ 20-22, and the health risks of delaying or denying access to abortion, *see id.* ¶¶ 23-26, is a necessary part 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 because of the Total Abortion Ban, *see* I.R.E. 701(a).

¹ The State asserts that Petitioners' statements concerning the "possible burdens and obstacles" faced by persons seeking abortions "have no relevance" in the post-*Roe* era, given that the Court is no longer required to undertake an undue burden analysis. Motion to Strike, Smith, 11 (¶ 14 n.2). This argument ignores the patent relevance of such statements to the Court's consideration of whether the Total Abortion Ban violates Idahoan's state constitutional and statutory rights, as well as to Petitioners' showing that the Court's exercise of original jurisdiction is warranted here.

The State argues that Smith cannot know the effects that the Total Abortion Ban will have on physicians and patients in Idaho.² *See* Motion to Strike, Smith, 4-6 (¶¶ 8, 10, 11-12) (requesting the Court to strike Smith Decl. ¶¶ 5-6, 10-11, 15, 17-19). The exact opposite is true. Smith is in the best position to know what impacts the threat of criminal liability for performing an abortion will have on the availability of abortion in the centers she manages. She understands, through her personal knowledge, that the Total Abortion Ban will effectively force Planned Parenthood to stop providing abortion services in the state of Idaho. Moreover, it is not speculative for Smith to assess the effects the Total Abortion Ban will have on the 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.

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

² The State also repeatedly asserts that statements made by Smith and Dr. Gustafson concerning the possible effects of the Total Abortion Ban are “out of date” now that the Ban has gone into effect. *See, e.g.*, Motion to Strike, Smith, 11-2 (¶ 15); Gustafson, at 12 (¶ 1). But statements concerning the Ban’s long-term effects on health care providers and patients in Idaho are hardly “out of date” considering that the Ban has only been in effect since August 25, 2022.

Planned Parenthood.” *Id.* ¶ 3. As in its first Motion to Strike, the State’s renewed objections to Dr. Gustafson’s Declaration ignore this wealth of personal and professional experience.

Doctors to assess and understand patients’ decision-making, and from her many years of treating patients making these consequential decisions, Dr. Gustafson has knowledge of her patients’ personal circumstances and the obstacles they 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 Nw. & 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.” Mem. ISO Defs.’ Motion to Compel Discovery at 3, *Planned Parenthood of Great Northwest and the Hawaiian Islands v. Wasden*, No. 18-cv-555 (D. Idaho, Apr. 10, 2020), ECF No. 81 (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 “non-medical and personal considerations a person might have for seeking an abortion[.]” Motion to Strike, Gustafson, 12 (¶ 2) (requesting the Court strike Gustafson Decl. ¶ 10); *see also id.* at 13 (¶ 3), 15 (¶ 5) (requesting

the Court strike Gustafson Decl. ¶¶ 21, 23). As a doctor practicing in Idaho for fifteen years, Dr. Gustafson has helped patients work through those considerations, including, for example, 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 reasons for and consequences of the healthcare decisions her patients make. *See* Motion to Strike, Gustafson, 15 (¶ 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. I.R.E. 701(a).

Dr. Gustafson's statements about the effects that the Total Abortion Ban will have on medical providers, and, hence, access to abortion, are also grounded in her personal knowledge. *See* Motion to Strike, Gustafson, 12-15 (¶¶ 1, 3-4) (requesting the Court strike Gustafson Decl. ¶¶

5, 14-22). The States’ repeated objections that these statements contain “inaccurate” and “conclusory” legal arguments are insufficient to support its motion to strike. Motion to Strike, Gustafson, 13-14 (¶ 3) (requesting the Court strike Gustafson Decl. ¶¶ 14-18, 20-21). The Court is free to disregard “statements which could arguably be read as legal conclusions” while nevertheless accepting these portions of Dr. Gustafson’s Declaration as highly relevant evidence of the practical chilling effects of the Total Abortion Ban on medical providers. *Reclaim Idaho*, 169 P.3d at 171 (rejecting the argument that certain declarations should be stricken for allegedly stating legal conclusions and incorrect legal standards and explaining that “[t]o the extent that any of the declarations contained statements which could arguably be read as legal conclusions, this Court has disregarded such statements as a matter of course. ... [T]he balance of the declarations ... [are] relevant inasmuch as they contain evidence that has a tendency to make a fact of consequence more or less probable”). Based on her personal experience, medical knowledge, and personal understanding of the operation of the Total Abortion Ban, it is not speculative or conclusory for Dr. Gustafson to testify that the Ban will prevent her and other similarly situated physicians from providing abortions. See Motion to Strike, Gustafson, 7 (¶ 7) (requesting the Court strike Gustafson Decl. ¶ 27).

Dr. Gustafson is in an ideal 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 the Total Abortion Ban’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 the Total Abortion Ban on the people of Idaho. That information is firmly grounded in the declarants' personal knowledge. No portions of either Declaration should be stricken.

Dated: September 9, 2022

Respectfully submitted,

/s/ Michael J. Bartlett

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 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:

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