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IN THE SUPREME COURT OF 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,

Docket No. 49817-2022

RESPONDENTS' REPLY TO PETITIONERS' BRIEF IN OPPOSITION TO MOTION TO STRIKE PORTIONS OF THE DECLARATIONS OF KRISTINE SMITH AND DR. CAITLIN GUSTAFSON

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.

I. INTRODUCTION

It is beyond dispute that, just by nature of being a physician or a medical director, one does not have personal knowledge of the facts, circumstances, and opinions of every individual in the State who may possibly choose to undergo the procedure that the physician or facility offers. It is similarly beyond dispute that such an individual, without more, does not have personal knowledge of the facts, circumstances, and opinions of every other physician and facility in the State that may offer the same procedure. Yet, that is what Petitioners ask this Court to hold. They argue that because they have identified declarants Kristine Smith and Dr. Caitlin Gustafson as lay witnesses, the declarants are not subject to Idaho Rule of Evidence 702's requirement that an expert's "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," *Pet'r's Opp. to Resp'ts' Mtn. to Strike,* Dkt. 49817, at 2. Petitioners then ask this Court to conclude that, merely by the nature of their declarants' job titles, they are entitled to proffer and interpret demographic and sociological statistics; opine as to the future impact that Idaho Code § 18-622 will have on individuals of whom the declarants have no personal knowledge; and testify as to matters well outside of their personal knowledge, including the opinions and future actions of myriad unknown other individuals. *See, e.g., id.* at 3, 6-7. The

Court should decline to indulge this haphazard application of the Rules of Evidence by limiting declarant's testimony to that which is within their personal knowledge and by granting Respondents' motion to strike. Petitioners' declarations, which by their own admission are offered solely for the purpose of establishing the urgency and importance of this dispute to establish grounds for this Court's exercise of original jurisdiction, must comply with the Rules of Evidence.

II. ARGUMENT

A. Petitioners attempt to retroactively lay foundation for Kristine Smith's speculative opinions by making factual assertions not in evidence, thereby admitting to the deficiencies in the declaration.

As this Court demonstrated most recently with its rulings on the motions to strike filed in in *Reclaim Idaho v. Denney*, the rules of evidence apply to original actions. 169 Idaho 406, 417, 497 P.3d 160, 171 (2021) ("These declarants . . . provided both facts and opinion that comply with the requirements of Idaho Rules of Evidence 602, 701, and 702."). The fact that the Court admitted *admissible* lay witness testimony in *Reclaim Idaho* does not mean that *inadmissible* lay witness testimony is allowed. *Id.*, 169 Idaho at 416, 497 P.3d at 170 (noting the Court's prior grant of the respondent's motion to strike portions of certain lay witness declarations).

Just as with their first Petition, Petitioners submit the declaration of lay witness Kristine Smith whose qualifications within her declaration are set forth entirely as follows:

> I am the Area Service Director of Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky, and in my 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' Opp. Br. Ex. 1, Dkt. 49817, at ¶¶ 2-3. Nowhere in her declaration does Smith—a Seattle-based corporate employee of Planned Parenthood[1]—lay the foundation to establish to what extent and *how* her role has provided her with a basis of personal knowledge that would familiarize her with the Idahoans who seek care at Planned Parenthood clinics. Nor does she explain in her declaration how her role as a corporate employee of Planned Parenthood provides her with a basis of personal knowledge for her broad litany of complaints against Idaho—most of which are wholly irrelevant to the matters before the Court—including Idaho's healthcare infrastructure, *id.* at ¶ 12; access to contraceptives in Idaho, *id.* at ¶ 13; Idaho's sexual education in school, *id.*, Idaho's teen pregnancy rates, *id.*, how Idaho "could do so much more" to support families, *id.* at ¶ 14; and how "Native American women in Idaho are paid less than 60 cents for every dollar paid to a White non-Hispanic man." *Id.* In fact, Smith's declaration does not even assert that she has ever personally visited Idaho at all, let alone had a personal conversation with an Idaho Planned Parenthood patient. Yet Smith's declaration goes beyond even that to make assertions about Idahoans who are not even Planned Parenthood patients!

Apparently recognizing that Smith's declaration is deficient to meet the foundational and personal knowledge requirements set forth in the Idaho Rules of Evidence, Petitioners attempt to bootstrap additional, unsworn facts in their opposition:

- 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;"

[1] The State Respondents surmise that Smith is Seattle-based because that is where her declaration was executed in this case, as well as her declaration in Planned Parenthood's first case from earlier this year. *Id.* at 10; *see also Br. in Support of Pet.*, Ex. 3, Dkt. 49615, at 9.

- that she has "personal knowledge of demographic disparities" because of "the wide range of patients that come into her centers for care;"

- that she has "personal knowledge of the health risks that result from limited or delayed access" to abortion;

- 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 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. to Resp'ts' Mtn. to Strike, at 3-4. None of these unsworn assertions were included in her declaration. Thus, none of these assertions can remedy the deficiencies in her declaration. Under Idaho Rule of Evidence 602, Petitioners were required to introduce sufficient evidence to support a finding that Smith had *personal* knowledge of the facts to which she testified. Petitioners have failed to do this.

As the State Respondents noted about Smith's prior declaration in the first Planned Parenthood suit, her declaration here 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, how often? What training or exposure to medical procedures has she experienced that would allow her to opine on health risks?

These unanswered questions, which Petitioners do not even answer in their briefing, illustrate the breadth of Petitioners' total failure to establish anything beyond the bare fact that Smith has a nebulous corporate oversight role. Smith's speculative statements about the alleged burdens suffered by Idaho women seeking an abortion are not admissible, and neither are her opinions about medical terminology, medical risks to patients, and 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 unsworn facts disguised as legal argument. Further, Smith's speculative statements about possible future impacts of Idaho Code § 18-622 cannot carry any weight now that Idaho Code § 18-622 is in force.

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

Dr. Gustafson's declaration similarly 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 remedy the lack by offering in their opposition additional unsworn factual assertions that appear nowhere in Dr. Gustafson's declaration:

- Dr. Gustafson maintains personal knowledge of her clients' decision-making processes;
- Dr. Gustafson is aware of the "broader reasons for and consequences of" her patients' healthcare decisions;
- 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;[2] and
- Dr. Gustafson regularly consults with patients about reproductive decisions, including the decision whether to seek an abortion.

Pet'r's Opp. to Resp'ts' Motion to Strike, Dkt. 49817, at 6-7. 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. 2*, Dkt. 49817, at ¶ 3. It left open numerous factual questions, including 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 no foundation for that testimony. None of Dr. Gustafson's opinions about

[2] 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*, Dkt. 49817, at ¶ 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 lack the necessary foundational support to establish personal knowledge.

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 and scholarly articles, which, by definition, fall outside the scope of Dr. Gustafson's personal knowledge. *See, e.g., Pet'rs' Br. Ex. 2*, Dkt. 49817, at ¶¶ 11-13.

The memorandum filed in a now-dismissed federal district court lawsuit does not support Petitioners' position. *Pet'r's Opp. to Resp'ts' Mtn. to Strike,* Dkt. 49817, at 6 (*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)). In *Planned Parenthood v. Wasden*, the defendants sought to depose physicians to test:

> (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?)

Case No. 18-cv-00555-BLW (D. Idaho, April 10, 2020), ECF No 81 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 the plaintiffs' allegations. The defendants sought to test the allegations presented by the plaintiffs by deposing the physicians as to their own personal experience under the relevance

standard for discovery. The defendants at no point argued that all topics covered in those depositions would be admissible testimony.

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

Petitioners similarly mischaracterize this Court's decision on a motion to strike in *Reclaim Idaho v. Denney*. 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.*, at 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'r's Opp. to Resp'ts' Mtn. to Strike,* Dkt. 49817, at 2.

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'r's Opp. to Resp'ts' Mtn. to Strike,* Dkt. 49817, at 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 5 ("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, 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 risks, nor is she qualified to opine on the alleged "personal burdens" suffered by Idaho women.

Smith is a 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 any specific personal knowledge that would provide foundation for her health-related assertions; no information about any interaction she has had with specific Planned Parenthood patients; and no information as to whether she has ever even been to a Planned Parenthood center in Idaho.

It is simply not proper under the Rules for Smith, a lay witness, to proffer medical opinions. *See, e.g. Pet'r's Br.* Ex. 1, Dkt. 49817, at 12. Petitioners assert that "[u]nderstanding . . . the health risks of delaying or denying access to abortion is a necessary part of Smith's role." *Pet'r's Opp. to Resp'ts' Mtn. to Strike*, Dkt. 49817, at 4. Thus, Petitioners appear to take the position that Smith's corporate oversight role alone qualifies to proffer medical opinions. But job title alone does not establish firsthand knowledge—*especially* for a lay witness. 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 Idaho Code § 18-622. But even with the additional unsworn allegations 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.

2. Dr. Gustafson, a lay witness, did not establish that she qualified to opine on what alleged burdens Idaho women have experienced in the past or might experience in the future because of Idaho Code § 18-622.

Petitioners argue in their Opposition that Dr. Gustafson's statements within her declaration were all based upon her personal knowledge. This is a departure from her declaration, which cited not just to her personal knowledge, but to her qualifications as a physician (*Pet'rs' Br. Ex. 2*, Dkt. 49817, at ¶ 2); her board certification, *id.*; her general statement that she has attended professional conferences, *id.* at ¶ 6; review of medical literature, *id.*; and her conversations with other medical professionals. *Id*. Having now confirmed that Dr. Gustafson is offered in this case 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. Certainly, a lay witness would not be allowed to offer into evidence information gleaned from "attendance at professional conferences" or "review of relevant medical literature," or "conversations with other[s]," *id.* at ¶6, and to the extent Dr. Gustafson is relaying information gleaned from these sources, that information would be inadmissible hearsay. Idaho R. Evid. 802.

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 is 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.

III. CONCLUSION

Petitioners' declarations lack the necessary support for the speculative assertions and opinions set forth by their self-identified lay witnesses. The State Respondents' Motion to Strike portions of the declarations of Kristine Smith and Dr. Caitlin Gustafson should be granted.

DATED this 14th day of September, 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 14th day of September, 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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