

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN
Chief of Civil Litigation

MEGAN A. LARRONDO, ISB #10597
DAYTON P. REED, ISB #10775
Deputy Attorneys General
954 W. Jefferson Street, 2nd Floor
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8073
megan.larrondo@ag.idaho.gov
dayton.reed@ag.idaho.gov

Attorneys for Respondents

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,

and

SCOTT BEDKE, in his official capacity as
Speaker of the House of Representatives of the

Docket No. 49899-2022

**MEMORANDUM IN SUPPORT
OF STATE RESPONDENTS'
MOTION TO STRIKE PORTIONS
OF THE DECLARATION OF DR.
CAITLIN GUSTAFSON**

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

Yet again, Petitioners have chosen to rely on factual allegations that are inadmissible under Idaho Rules of Evidence 602, 701, and 702. *See* Respondents' Motions to Strike in Docket No. 49615-2022 and Docket No. 49817-2022. This Court should strike as inadmissible much of the testimony in the declaration of Dr. Caitlin Gustafson, which Petitioners offer as Exhibit 1 to their Brief in Support of Verified Petition for Writ of Prohibition and Application for Declaratory Judgment (No. 49899-2022). Under the Idaho Rules of Evidence, the inadmissible claims in paragraphs 6, 9, 10, 11, 13, 14, 15, and 16 of Dr. Gustafson's declaration should be stricken as they contain speculative statements that are inadmissible under Rules 602, 701, and 702.

II. ARGUMENT

Petitioners rely upon factual allegations in Dr. Gustafson's declaration to support the claims and arguments made in their Verified Petition for Writ of Prohibition and Application for Declaratory Judgment and supporting brief.¹ Dr. Caitlin Gustafson is a medical doctor who performs abortions for Planned Parenthood (Ex. 1). Just as with Planned Parenthood's declarations in Dockets No. 49615-2022 and 49817-2022, it is unclear whether her testimony is offered as expert testimony. However, since Petitioners did not offer Dr. Gustafson as an expert in their initial Petition (Docket. No. 49615-2022), it stands to reason she is offered here as lay witnesses, as well.

¹ Petitioners now expressly limit the claims and arguments that their factual allegations support to only their argument that original jurisdiction is appropriate. Pet'rs' Br. in Response to this Court's June 30, 2022, Order Setting Hr'g 13-15.

See Pet'rs' Opposition to Motion to Strike, Docket No. 49615-2022, p. 3 (“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”). Regardless of whether Dr. Gustafson’s testimony is that of a lay witness or an expert, however, many of the assertions made in her declaration are speculative in nature and/or fall outside the scope of the declarant’s personal knowledge. As such, most of the content in the declaration should be stricken as inadmissible under the Idaho Rules of Evidence and well-settled legal precedent.

As set forth in the State of Idaho’s and the State Respondents’ prior motions to strike in Dockets 49615-2022 and 49817-2022, respectively, 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. As this 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. Large parts of the declaration of Dr. Caitlin Gustafson should 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. 1, ¶ 2. 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 offered in this matter 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, these inadmissible statements should be stricken.

1. Paragraph 6

In paragraph 6, 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. *Id.* at ¶ 6. The Act criminalizes knowing or reckless performance of an abortion in violation of Chapter 88, Title 18, Idaho Code. Moreover, Dr. Gustafson speculates that the Heartbeat Act going into effect would “jeopardize other care that I provide to women who are experiencing a miscarriage or complications related to pregnancy,” *id.*, but provides no foundation for this statement. Paragraph 6 should be stricken in its entirety.

2. Paragraphs 9-11, 13-14

Paragraphs 9-11 and 13-14 are rife with speculation from Dr. Gustafson regarding the impacts of the Heartbeat Act and are filled with arguments and legal conclusions that have no place in a declaration under penalty of perjury. Conclusory statements about the Heartbeat Act or its exceptions, such as “vague” and “devastating” simply underscore this point.

In the second and third sentence of paragraph 9, Dr. Gustafson misstates the Heartbeat Act by advancing that it bans abortions unless an “extremely vague and narrow affirmative defense[]” applies. *Id.* at ¶ 9. But the Heartbeat Act does not use affirmative defenses; it instead provides exceptions in the case of a medical emergency, or in the case of rape or incest. *See* Idaho Code § 18-8804. The fourth sentence speculates about unspecified “devastating effects,” Pet’rs’ Br. at ¶ 9, that the law might have in the future. The entirety of paragraph 14 should be stricken as it is inaccurate, contains improper legal conclusions, and is speculative.

In paragraph 10, Dr. Gustafson contradicts her statements in paragraph 9 by (this time correctly) referring to exceptions in the Heartbeat Act. Pet’rs’ Br. at ¶ 10. Yet she alleges the exceptions are “narrow,” and contends in the last sentence the medical emergency language “is too vague.” *Id.* These are conclusory legal arguments unsuited to a factual declaration. The first and last sentence of paragraph 10 should be stricken.

In paragraph 11, Dr. Gustafson complains about the objective standard used in the Heartbeat Act. *Id.* at ¶ 11. But she alleges in a conclusory statement that “the language here is even worse.” *Id.* She misunderstands that the objective standard would require evidence that her action was not of reasonable medical judgment—she would not simply be “second guessed if someone later decides that determination was not ‘reasonable.’” The last sentence of paragraph 11 should be stricken.

In the second sentence of paragraph 13, Dr. Gustafson again incorrectly asserts that the Heartbeat Act employs an affirmative defense. *Id.* at ¶ 13. The second-to-last sentence of paragraph 13 asserts a legal conclusion that the Heartbeat Act does not provide notice to physicians. The second and second-to-last sentences of paragraph 13 should be stricken.

The last sentence of paragraph 14 should be stricken. Dr. Gustafson comments that “women are often fearful or reluctant to report cases of rape and incest to anyone, let alone government officials.” *Id.* at ¶14. Dr. Gustafson who asserts her qualifications as a medical doctor, however, lacks the foundation to make this statement.

3. Paragraph 15

In paragraph 15, Dr. Gustafson speculates that women, following the effective date of the Heartbeat Act, will have two weeks “at most” to decide whether to have an abortion “and resolve every financial and logistical hurdle.” *Id.* at ¶ 15. This speculation, especially about financial or logistical challenges, is outside the scope of Dr. Gustafson’s expertise or personal knowledge. Moreover, while it may be proper for Dr. Gustafson to explain the medical aspects of early pregnancy, it is simply too speculative for her to assert that women faced with unplanned pregnancy will only have two weeks to determine whether to get an abortion. There are myriad circumstances that could leave women with greater or lesser time frames to decide to obtain an abortion. Dr. Gustafson simply has not established the proper foundation to proffer such generalized speculation.

Dr. Gustafson also asserts “abortion will become unavailable after approximately six weeks LMP.” *Id.* 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 in Idaho. Further, Dr.

Gustafson’s assertion in the last sentence that there would be “myriad consequences” that would “be severe for many people, especially those who are lower income, are victims of domestic violence, and /or are members of racial minority groups” is speculative. *Id.* Further, Dr. Gustafson has not established any sociological qualifications that would allow her to offer these statements, nor has she established any foundation within her personal knowledge for such statements. This entire paragraph should be stricken.

4. Paragraph 16

In paragraph 16, Dr. Gustafson asserts that the Heartbeat Act will “greatly harm many Idahoans.” *Id.* at ¶ 16. This statement is based purely on Dr. Gustafson’s speculation as to the future consequences of the Heartbeat Act. Furthermore, this statement is argumentative and lacks factual support. The last clause of paragraph 16 should be stricken.

DATED this 2nd 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 2nd 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:

Michael J. Bartlett,
BARTLETT & FRENCH LLP
michael@bartlettfrench.com

Alan E. Schoenfeld
Rachel E. Craft
WILMER CUTLER PICKERING
HALE AND DORR LLP (New York, NY Office)
alan.schoenfeld@wilmerhale.com
rachel.craft@wilmerhale.com

Sofie C. Brooks
WILMER CUTLER PICKERING
HALE AND DORR LLP (Boston, MA Office)
sofie.brooks@wilmerhale.com

Daniel W. Bower
MORRIS BOWER & HAWS PLLC
dbower@morrisbowerhaws.com

Monte Neil Stewart
Attorney at Law
monteneilstewart@gmail.com

/s/ Megan A Larrondo

MEGAN A. LARRONDO
Deputy Attorney General