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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,

and

Docket No. 49899-2022

RESPONDENTS' REPLY TO PETITIONERS' BRIEF IN OPPOSITION TO MOTION TO STRIKE PORTIONS OF THE DECLARATION OF DR. CAITLIN GUSTAFSON

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.

The Rules of Evidence apply to original actions. Because of this inescapable fact, Dr. Caitlin Gustafson's declaration must be limited to only admissible testimony. Her speculative and conclusory allegations must be stricken. This Court should grant the State Respondents' motion to strike the statements made in paragraphs 9, 10, 11, 13, 14, 15 and 16 of the declaration of Dr. Caitlin Gustafson.

I. ARGUMENT

The State Respondents do not dispute that a provider may testify to the treatment that they may have rendered to a patient, but that is not the situation here. 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. The simple fact that Dr. Gustafson has a medical degree does not entitle her to opine on all subjects tangential to her medical practice as a lay witness absent some personal knowledge gained from her participation in the care and treatment of the patient. As such, her testimony must be struck when it offers speculative opinion testimony falling outside of her established personal knowledge.

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A. The Rules of Evidence apply to all original actions, including this challenge, and foreclose the admission of the challenged portions of Dr. Gustafson's declaration.

As this Court demonstrated most recently with its rulings on the motions to strike filed 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 the inadmissible portions of certain lay witness declarations).

These rules have not been met here as to Dr. Gustafson's challenged statements, which are offered only in her capacity as a lay witness. As previously argued, in *State v. Dacey*, this Court addressed the distinction between lay and expert witnesses in an appeal from a criminal case applying Rules 701 and 702. 169 Idaho 102, 691 P.3d 1205 (Idaho 2021). 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, but that is what Dr. Gustafson is purporting to now do. And even if this Court were to reject Petitioners' concession and apply Rule 702 (it cannot), Dr. Gustafson's declaration as written is still 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) since her opinions are general in nature and not specific to any particular patient.

Notably, there is not a single assertion in Dr. Gustafson's declaration that she has ever even conversed with any patient about a burden or obstacle caused by the Heartbeat Act's criminal and licensing enforcement provisions (nor could there be because her declaration was filed before the challenged statutes took effect). 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, as again, she is expressing expert opinions, since her statements are "reached through a special mode of reasoning, i.e., the application of scientific, technical, or specialized knowledge (or tools) not generally known, or available to, the general public." *State v. Smith*, 2022 WL 40041014, * 15 (Idaho S. Ct. Sept. 2, 2022). The current situation is unlike that in *Reclaim Idaho* where the declarants were able to provide their opinions as *expert witnesses* "based on their considerable personal knowledge and experience with the initiative and referendum processes in Idaho" such that "the respective expertise of the declarants in these topics permit[ted] them to offer such opinions." *Reclaim Idaho*, 169 Idaho at 417, 497 P.3d at 171 (finding that the challenged portions of the declarations complied "with the requirements of Idaho Rules of Evidence 602, 701, and 702"). Dr. Gustafson's declaration is, at best, speculation that is not based upon personal knowledge and personal observations. She does not limit her testimony to her patients and instead speaks to all women in the state of Idaho who may want abortions.

Moreover, Petitioners mischaracterize the defendants' prior arguments from *Planned Parenthood v. Wasden* where the defendants actually argued that the court should order the doctors to be deposed so that the defendants could probe statements under the relevance standard for discovery. As discussed in greater detail in the Respondents' Reply to Petitioners' Brief in Opposition to State of Idaho's Motion to Strike the Declarations of Kristine Smith and Dr. Caitlin Gustafson filed in Docket 49817, there, the defendants sought to test the allegations presented by the plaintiffs under the relevance standard for discovery by deposing the physicians as to their own personal experience. *See* Reply to Pet's Br. in Opp. to Mtn. to Strike, Dkt. 49817, at 8. The defendants at no point argued that all topics covered in those depositions would be admissible testimony. *Id.*

B. Paragraph 6 contains inadmissible hypothetical statements.

Paragraph 6 is phrased as a hypothetical statement due to its repeated use of "would". It does not actually state what Dr. Gustafson has done or is doing presently since the law is currently in effect. As such, these statements are simply speculatory and cannot be taken as fact. The omission of how the law actually impacts Dr. Gustafson's practice is telling and again shows that this is not lay testimony based on personal knowledge.

C. Paragraphs 9-11, 13-14 are not based upon personal observation.

Most of the statements in paragraphs 9-11 and 13-14 may be characterized as legal conclusions, which the Court should disregard "as a matter of course." *Reclaim Idaho*, 169 Idaho at 417, 497 P.3d at 171. Paragraphs 9-11 reflect Dr. Gustafson's understanding of the Heartbeat Act and provides conclusory statements as to its exceptions and effects. Again, her statements are not tied to any particular experience with a patient, but speaks to the entire state of Idaho and are therefore not appropriate lay witness testimony. Similarly, in paragraphs 13 and 14, Dr. Gustafson is speaking about the impact of the legislation on other medical providers and other women in general. Further, she provides no foundation regarding her opinions about rape and incest counseling. In short, these are not lay statements, but are expert opinions, which is inappropriate. There is no exception for a lay witness to provide essentially expert testimony disguised as "logic."

D. Paragraph 15 is not based upon personal observation.

Paragraph 15 seeks to add additional unsworn comments to provide the foundation lacking from the declaration. The statements are general statements that speculate when a woman may decide to have an abortion. But one can envision other circumstances where a woman would have more time to decide to have an abortion. Dr. Gustafson's generalizations are not personal knowledge. Further, no foundation has been provided for Dr. Gustafson to conclude how other medical providers may react to the Heartbeat Act, and Dr. Gustafson does not speak to its effect

on the community that she serves. These are blanket generalizations that could have been supported by actual evidence from declarations of multiple physicians, but Petitioners elected not to provide that evidence.

E. Paragraph 16 extends far beyond Dr. Gustafson's personal knowledge.

At no point did Dr. Gustafson's declaration establish that she has treated all women across all of Idaho. Her private practice is limited to Valley County and she performs abortions for Planned Parenthood at its Meridian clinic and via telemedicine. There is no statement in Dr. Gustafson's declaration to establish that she has personal knowledge from treating patients from across all of Idaho. But even so, it would still be inadmissible speculation for Dr. Gustafson to speculate as to the impact that the Heartbeat Act's criminal and licensing enforcement mechanisms on a Idaho women.

II. CONCLUSION

Dr. Gustafson's declaration lacks the necessary support for her speculative assertions and opinions. The challenged paragraphs far exceed Dr. Gustafson's established personal knowledge. The State Respondents' Motion to Strike portions of the declaration of 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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