

Background

1. On August 2, 2023, Plaintiffs filed an Expert Witness Designation (Designation). The Designation includes retained experts and non-retained experts. The State Defendants move to strike each of Plaintiffs' experts and seek to exclude all of their proposed affidavit testimony in this matter.
2. Plaintiffs' four retained experts are: (1) Dr. Ghazaleh Moayedi; (2) Professor Rebecca Peters; (3) Rabbi Danya Ruttenberg; and (4) Michael A. Blonigen.
3. Dr. Moayedi offers expert medical testimony regarding the medical meaning (or lack thereof) of the medical terms utilized in the Life as a Human Right Act (Act) and the medicated abortion statute. Dr. Moayedi also offers expert medical opinions on fetal pain, the medical risks associated with pregnancy and abortion, as well as the impact the statutes have on access to healthcare. Professor Peters offers expert testimony on theology, ethics, and morality. She opines on the origins of the sectarian Christian theological view that personhood begins at conception and states it is a minority religious view that is not shared by all Christians, nor by many non-Christians. Rabbi Danya Ruttenberg offers expert testimony on Jewish doctrine as it relates to abortion care and the practice of conservative Judaism. Michael A. Blonigen offers expert opinions on the standards governing prosecution of crimes under the Act and medicated abortion statute stating they are vague, incomplete, and inconsistent.
4. Plaintiffs' four non-retained experts are: (1) Dr. Giovannina Anthony; (2) Julie Burkhart; (3) Dr. Rene Hinkle; and (4) Christine Lichtenfels. Dr. Anthony and Dr. Hinkle offer expert testimony related to the lack of medical meaning to many of the terms incorporated into the Act and medicated

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abortion statute as well as opinions regarding the harm that the challenged statutes will cause to women and physicians. Julie Burkhart and Christine Lichtenfels offer testimony opining that the impact of the statutes undermines, rather than furthers, the State’s asserted legislative purposes.

5. The State Defendants assert that all of the expert testimony in the Designation is inadmissible. The State Defendants argue that the expert testimony is irrelevant, reflects opinions on ultimate issues of law, and does not “fit” this case because it will not help the Court understand evidence in this case or determine a fact at issue. The State Defendants also contend that the testimony exceeds the reasonable confines of the subject matter of the expert’s stated area of expertise.
6. The Plaintiffs argue that each of the affiants provides relevant testimony to the claims asserted in this matter. Plaintiffs also contend that the State Defendants’ positions are incorrect as a matter of law. Finally, the Plaintiffs highlight that most of the State Defendants’ arguments are conclusory and unsupported by caselaw.

Standard of Review

7. “The district court’s decision on the admissibility of evidence is reviewed under the abuse of discretion standard.” *In re Paternity of HLG*, 2016 WY 35, ¶ 7, 368 P.3d 902, 904 (Wyo. 2016) (citations omitted).

A trial court’s rulings on admissibility of evidence are entitled to considerable deference, and, as long as there exists a legitimate basis for the trial court’s ruling, that ruling will not be disturbed on appeal. The appellant bears the burden of showing an abuse of discretion.

In re Paternity of HLG, 2016 WY at ¶ 7, 368 P.3d at 904 (citations omitted). “A district court does not abuse its discretion if it could reasonably conclude as it did.” *Dutka v. Dutka*, 2023 WY 64, ¶ 11,

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531 P.3d 310, 314 (Wyo. 2023) (citing *Hehn v. Johnson*, 2022 WY 71, ¶ 18, 511 P.3d 459, 462-63 (Wyo. 2022) (quoting *Sears v. Sears*, 2021 WY 20, ¶ 13, 479 P.3d 767, 772 (Wyo. 2021), and *Johnson v. Clifford*, 2018 WY 59, ¶ 8, 418 P.3d 819, 822 (Wyo. 2018)). The issue before this Court involves the admissibility of expert opinions. Expert testimony is controlled by Wyoming Rule of Evidence 702 which provides:

A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if:

- (a) the 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;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

8. To determine whether the expert’s testimony is admissible under W.R.E. 702, Wyoming has adopted the two-part analysis from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The two-part test determines: (1) whether the expert’s methodology or technique is reliable, and (2) whether the proposed testimony fits the facts of the case. *Bunting v. Jamieson*, 984 P.2d 467, 471 (Wyo. 1999) (citations omitted). *Daubert* establishes the trial judge’s general gatekeeping obligation, and it applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge. *Id.* at 471. W.R.E. 702 and *Daubert* require an expert’s testimony to have a valid “connection to the pertinent inquiry as a precondition to admissibility.” *Williams v. State*, 60 P.3d 151, 161 (Wyo. 2002).
9. Expert testimony may be admissible even if shaky. It may provide only a “scintilla” of support for a

claim or defense. *Bunting*, 984 P.2d at 471. The testimony “need not be so persuasive as to meet a party’s burden of proof or even necessarily its burden of production.” *Williams*, 60 P.3d at 159. The burden of proof is on the party offering the testimony to show the proposed testimony is admissible. *Bunting*, 984 P.2d at 471.

10. Daubert’s First Prong. In the first prong of the *Daubert* analysis, the district court must determine whether the reasoning or methodology underlying the testimony is scientifically valid. The *Daubert* decision provided a non-exclusive list of four criteria to guide the trial court’s determination:

- (1) whether the theory or technique in question can be and has been tested;
- (2) whether it has been subjected to peer review and publication;
- (3) its known or potential rate of error along with the existence and maintenance of standards controlling the technique’s operation; and
- (4) the degree of acceptance within the relevant scientific community.

Later courts identified additional factors to assess reliability. These include:

- (5) the extensive experience and specialized expertise of the expert;
- (6) whether the expert is proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation; and
- (7) the non-judicial uses to which the method has been put.

Bunting v. Jamieson, 984 P.2d at 471 (citations omitted).

11. Daubert’s Second Prong. The second part of the *Daubert* approach requires the trial court to determine whether the testimony “fits” the disputed issues of fact.

[W]hether the expert testimony will assist the trier of fact in understanding or determining a fact in issue-essentially asks whether the expert's testimony “fits” the facts of the case. This is a relevance standard. Moreover, “the ‘helpfulness’ standard incorporated in FRE 702 means that the expert’s opinion must relate to an issue that is actually in dispute and must provide “a valid scientific connection to the pertinent

inquiry.

Bunting v. Jamieson, 984 P.2d at 472 (citations omitted).

Legal Analysis

12. The parties do not contest whether the reasoning or methodology underlying the proposed experts' testimony is scientifically valid. Each of the proposed experts offers testimony based on their extensive experience and specialized expertise in their respective fields as represented in their detailed reports and attached *curricula vitae*. The Court finds that the expert testimony of each of the proposed experts satisfies the first prong of the *Daubert* analysis.
13. **Relevance.** Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wyo. R. Evid. 401. The State Defendants assert that the affidavits are not relevant to Plaintiffs' as-applied claims and that the Court is not permitted to consider any evidence when resolving facial claims. Plaintiffs argue that the affidavit testimony is relevant to establishing how, according to Plaintiffs, the challenged statutes: (1) do not further a particular governmental interest; (2) are vague and ambiguous because many of the terms used in the statutes have no medical meaning; and (3) violate the free exercise of religion for Ms. Dow who practices conservative Judaism, as well as violate the Establishment Clause; all of which are at issue in this matter.
14. A Court is prohibited from conducting its own investigation. Courts must rely on the universe of facts and information supplied by the parties to reach its conclusions of law. Each of the affidavits

offers facts and information regarding medicine, obstetrics, women's health, Judaism, and Christianity. This Court is not learned in medicine, obstetrics, women's health, or various religious views.

15. The Court finds that the affidavits presented by medical experts are relevant. The challenged statutes are aimed at persons with specialized knowledge, namely medical providers. The common understanding of medical providers regarding particular terms not otherwise defined by the challenged statutes is relevant to the Plaintiffs' vagueness claims. *See United States v. Richter*, 796 F.3d 1173, 1189 (10th Cir. 2015). Additionally, "[w]hether a [statutory] term has . . . a technical meaning is a question of fact to be proved." *See Powder River Coal Co. v. Wyo. Dep't of Revenue*, 2006 WY 137, ¶ 16, 145 P.3d 442, 448 (Wyo. 2006). Because this matter involves the application of terms in the challenged statutes by medical providers, the Court finds that the affidavits are relevant to identifying whether the terms have a technical meaning within the medical profession.
16. The Court finds that the affidavits presented by Professor Rebecca Peters and Rabbi Danya Ruttenberg are also relevant to the claim that the challenged statutes violate both Plaintiff Kathleen Dow's right to free exercise of religion and the constitutional prohibition on establishment of religion. The affidavit testimony presents evidence related to Ms. Dow's sincerely held religious beliefs and their connection with long standing conservative Judaism practices. Both are relevant to the Plaintiff Dow's free exercise of religion claim. Additionally, the affidavit of Professor Peters presents evidence on the "historical context" and sectarian religious meaning underlying the challenged statutes. In addressing establishment of religion claims, a court assesses the official

objective of the challenged statute and its secular purpose. *McCreary Cnty. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 862 (2005).

17. Finally, the Court finds that the Plaintiffs assert a mix of as-applied and facial challenges in this matter. The State Defendants assert, without citation to case law, that the expert testimony is not relevant to “as-applied” claims. The Court finds that the expert affidavits are also relevant to the Plaintiffs’ as-applied claims. Plaintiffs assert that the statutes are unconstitutional as-applied to each of the individual Plaintiffs. The expert testimony presents opinions on how the statutes impact Plaintiffs Dow and Johnson’s ability to make their own health care decisions, how the terms of the statutes will be impossible for the physician Plaintiffs to apply, subjecting them to criminal sanctions, and how the statutes prevent Plaintiff Dow from conducting her life in accordance with her sincerely held religious beliefs.
18. Proffered Testimony Reflects Opinions on Ultimate Issues of Law. The State Defendants argue that Dr. Moayed, Rabbi Ruttenberg, Mr. Blonigen, Dr. Anthony and Dr. Hinkle provide opinions on ultimate issues of law. Plaintiffs argue that the medical experts will testify based on their medical training and experience regarding terms used in the statute that have no medical meaning. “Whether a term has such a technical meaning is a question of fact to be proved.” *Powder River Coal Co. v Wyo. Dep’t of Revenue*, 2006 WY 137, ¶ 16, 145 P.3d 442, 448 (Wyo. 2006). This testimony is necessary for the trier of fact to understand whether the terms in the statutes have a technical or special meaning. The testimony is not an opinion on the ultimate issues of law.
19. Mr. Blonigen’s proffered testimony does not offer an interpretation of the Abortion Ban as the State

Defendants suggest. Instead, Mr. Blonigen’s testimony, based on his experience as a prosecuting attorney, seeks to explain the terms in the statute and the difficulties the terms provide for prosecutors to decide whether to prosecute a case. “Rules 702 and 703 grant all expert witnesses, not just ‘scientific’ ones, testimonial latitude unavailable to other witnesses on the assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 137 (1999). According to the Plaintiffs’ Designation, Mr. Blonigen has tried more than two-hundred jury trials including crimes involving child abuse, child sexual abuse, and sexual assault. Within that experience, Mr. Blonigen has had to make charging decisions which include whether the facts surrounding the alleged crimes fit the elements of the crime. His expertise regarding the analysis of the statutory language in order to make charging decisions are fact-based decisions. Therefore, the Court finds that Mr. Blonigen’s proffered testimony is based on applying facts to statutory language and is not an opinion on the ultimate issue of law.

20. Proffered Testimony Does Not Fit the Case. The Plaintiffs have set forth claims based on the interpretation of medical terms related to obstetrics, women’s healthcare, and the inability of prosecutors to make determinations of when to prosecute doctors performing abortions. The Plaintiffs’ claims also require information related to religion and the historical context of various theological views. In order for the trier of fact to make determinations on the ultimate issues of law, the Court finds the testimony necessary to understand the facts surrounding the Plaintiffs’ claims. The trier of fact in this case has no medical training, no theological training, nor is the trier of fact

permitted to rely on her knowledge as a former prosecutor. If a juror in a personal injury case had medical training they would not be permitted, based on a jury instruction, to rely on their independent medical training, but rather would be required to rely on the evidence presented at trial.

21. Further Wyo. R. Evid. 702 and *Daubert* require an expert's testimony to have a valid "connection to the pertinent inquiry as a precondition to admissibility." *Williams v. State*, 60 P.3d 151, 161 (Wyo. 2002). Where an expert's testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must, as a gatekeeper, determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." *Id.* The proffered affidavit testimony relates to issues that are actually in dispute and provide a valid connection to the pertinent inquiries within the Plaintiffs' claims in which the trier of fact must rely upon to make determinations regarding the ultimate issues of law.

22. Exceeds the Reasonable Confines of the Subject Matter of the Expert's Stated Area of Expertise.

The experts in this case each have a distinct area of expertise on which they rely upon to offer testimony to address various issues in this case. "[A] court should consider a proposed expert's full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given area." *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000). The Court finds that Dr. Moayedhi has a broad range of practical and academic training allowing her to opine regarding medical ethics. The Court further finds that the various experts' testimony regarding key statutory terms is necessary for the trier of fact to make determinations within each separate and distinct claim (eg: religion, healthcare, obstetrics, and

ability to prosecute). Therefore, the Court finds that the proffered expert testimony does not appear to exceed the confines of the subject matter of the expert's stated area of expertise.

IT IS THEREFORE ORDERED that the State Defendants' *Motion to Strike Plaintiffs' Expert Witnesses and to Exclude Their Testimony in this Case* is respectfully **DENIED**.

DATED the 7th day of December, 2023.

1210
Melissa M. Owens
District Judge

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by mail/fax upon the following persons at their last known address this 7 day of Dec, 2023

- J. Robinson / M. Bramlet - Fax
 - P. Modlin / M. Cooney c/o Robinson Bramlet - Fax
 - J. Jende - Fax E. Weisman - Email
 - L. Colasivonno - Fax
 - F. Harrison - Fax
 - D. Harle / T. Garrison - c/o F. Harrison - Fax
 - T. Szott - email
- By Dep Jelle Smith