IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

HODES & NAUSER, MDs, P.A., on behalf of itself, its patients, physicians, and staff; TRACI LYNN NAUSER, M.D.; TRISTAN FOWLER, D.O.; and COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, on behalf of itself, its patients, physicians, and staff, Plaintiffs, v. KRIS KOBACH, in his official capacity as Attorney General of the State of Kansas; STEPHEN M. HOWE, in his official Capacity as District Attorney for Johnson County; MARC BENNETT, in his official Capacity as District Attorney for Sedgwick County; MARK A. DUPREE, SR., in his official capacity as District Attorney for Wyandotte County; SUSAN GILE, in her official Capacity as Executive Director of the Kansas Board of Healing Arts; JERRY DEGRADO, D.C., in his official capacity as President of the Kansas Board of Healing Arts, and JANET STANEK, in her official capacity as Secretary of the Kansas Board of Health and the Environment, Defendants.	Case No. 23CV03140 Division No. 12 K.S.A. Chapter 60

BRIEF IN SUPPORT OF DEFENDANTS ATTORNEY GENERAL KRIS W. KOBACH AND DISTRICT ATTORNEYS STEPHEN M. HOWE, MARC BENNET, AND MARK A. DUPREE SR.'S MOTION TO DISMISS PLAINTIFFS' SUPPLEMENTAL CLAIMS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Other Authorities

Defendants, Kansas Attorney General Kris W. Kobach and District Attorneys Stephen M. Howe, Marc Bennett, and Mark A. Dupree, Sr. ("Defendants"), submit this brief in support of their motion to dismiss Plaintiffs' claims regarding H.B. 2749 from their Supplemental Second Amended Petition (Doc. 124) because Plaintiffs lack standing to challenge H.B. 2749, their supplemental claims are not ripe, and because the claims related to H.B. 2749 fail to state a claim upon which relief can be granted. *See* K.S.A. 60–212(b)(1) and (6)..

INTRODUCTION

The Kansas Department of Health and Environment ("KDHE") tracks and publishes data related to health and environment in the state, including over ninety categories of information related solely to vital statistics. This consists of detailed information about mortality (including unborn human mortality caused by induced abortion), population ages, births, etc. Its annual report includes details such as whether a new mother used cigarettes, her total prenatal weight gain, marital status, and age, among many other categories.[1]

According to Plaintiffs, "demand for abortion care" has "increased exponentially" in the last two years. Doc. 124 at ¶ 26. But although the state has an interest in protecting unborn life, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 301 (2022), and reducing whatever causes compel a woman to seek an abortion, Plaintiffs claim the state cannot even ask why a patient is seeking an abortion. Asking a question when there is no obligation to answer does not infringe a fundamental right and Plaintiffs have failed to allege any facts to demonstrate otherwise.

Plaintiffs' Supplemental Second Amended Petition asks this Court to strike down H.B. 2749—an amendment to an existing information reporting statute that has stood unchallenged by Plaintiffs for decades. H.B. 2749 simply adds to existing reporting requirements

[1] Kansas Department of Health and Environment, *Annual Summary of Vital Statistics, 2022*, available at https://www.kdhe.ks.gov/DocumentCenter/View/31759/2022-Annual-Summary-Full-Report-PDF.

a provision requiring women to receive the opportunity to provide the reason why they sought an abortion. They need not answer, and the form of the question is not prescribed by statute (e.g., it could simply be handing a patient an additional piece of paper with the question along with other intake papers).

Plaintiffs allege that this voluntary reporting option violates several provisions of the Kansas Constitution by attempting to lump it in with the Woman's Right to Know Act (the "WRTK Act"). But the two statutes are separate and serve different purposes. Plaintiffs cannot rely on facts specific to the WRTK Act to support their allegations as to H.B. 2749. Nor can Plaintiffs rely on conclusory or speculative factual scenarios to support their claims. But even if their bare allegations are taken as true, Plaintiffs do not allege how any of them give rise to a constitutional violation. Plaintiffs fail to carry their burden to establish standing, allege claims that are not ripe, and fail to plead facts sufficient to support their claims as to H.B. 2749.

First, Plaintiffs tack on their challenge to H.B. 2749 to their original petition but fail to allege H.B. 2749 has led to any injury in fact. H.B. 2749 has never been implemented, and the KDHE has yet to develop rules and regulations prescribing what compliance would entail. Thus, Plaintiffs' lack standing and their claims are unripe.

Second, Plaintiffs fail to show that H.B. 2749 infringes a constitutional right, much less meet the burden of a facial challenge by pleading facts that would demonstrate that there are no set of circumstances under which the statute would be valid. Rather, they rely on conclusory assertions and legally implausible characterizations of the amendment that fail to address whether and how the reporting requirements of H.B. 2749 delay or impede a woman's access to abortion. They similarly fail to allege any facts supporting their legal conclusion that H.B. 2749—a data collection statute—regulates speech, let alone compels it. Plaintiffs also assert that

H.B. 2749, like the WRTK Act, constitutes sex discrimination in violation of equal protection. But such a claim has never been accepted by any Kansas court, and the federal courts to consider a sex-discrimination claim based on equal protection have rejected it out of hand—even under *Roe v. Wade*. Plaintiffs also fail to allege any facts suggesting that H.B. 2749 is sex-based rather than procedure-based, or that women and men are similarly situated when it comes to pregnancy, as is required to state an equal protection claim.

Third, Plaintiffs incorrectly suggest that H.B. 2749 is subject to strict scrutiny. H.B. 2749 is merely a standard information reporting statute—well within the traditional and broad purview of the State to regulate the healing arts. Because it neither infringes a fundamental right nor falls outside the traditional bounds of state regulation, the amendment need only bear a rational relation to some legitimate end to survive. That is easily shown here.

The Court should dismiss Plaintiffs' supplemental claims related to H.B. 2749.

STATEMENT OF FACTS

H.B. 2749 amends a reporting statute found in an entirely separate portion of the Kansas Statutes from the WRTK Act. *See* K.S.A. 65-445. Its purpose, like the reporting statute it modifies, is to collect confidential, statistical data of all pregnancies lawfully terminated within the State. Section 65-445 already requires "[e]very person licensed to practice medicine and surgery" to record and report to the secretary of health and environment the number of pregnancies terminated, the type of medical facility in which the pregnancy was terminated, and other information specified by existing and applicable statutes or specified by the secretary of health and environment. *Id.* Reports must in certain instances "specify the medical diagnosis and condition constituting a substantial and irreversible impairment of a major bodily function or the medical diagnosis and condition that necessitated performance of an abortion to preserve the life of the pregnant mother." *Id.* Plaintiffs have not challenged these preexisting reporting

requirements.

H.B. 2749 was introduced to the Kansas House on February 7, 2024, to inform better support programs for mothers and their children, advance medical research, and protect the health of women by ensuring that the reasons why a woman chooses abortion are accurately reported. It passed both chambers of the State legislature before being vetoed by the Governor on April 25, 2024. The legislature overrode the Governor's veto on April 29, 2024, and the amendment became effective on July 1, 2024. The amendment as passed introduces new informational reporting requirements that include asking women who have *already decided* to have an abortion—except in a medical emergency—which out of a number of pre-written reasons was the most important factor in her decision to seek an abortion. These pre-written reasons include the following:

(1) Having a baby would interfere with the patient's education, employment, or career;

(2) the patient cannot provide for the child;

(3) the patient already has enough, or too many, children;

(4) the patient's husband or partner is abusive to such patient or such patient's children;

(5) the patient's husband or partner wants such patient to have an abortion;

(6) the patient does not have enough support from family or others to raise a child;

(7) the pregnancy is the result of rape;

(8) the pregnancy is the result of incest;

(9) the pregnancy threatens the patient's physical health;

(10) the pregnancy threatens the patient's mental or emotional health; or

(11) the child would have a disability.

H.B. 2749. A woman may decline to answer, in which case her provider need only record that

she declined. The amendment does not specify the form in which the questions are presented to women seeking an abortion, leaving that up to the discretion of her provider. Presumably, her provider may hand her a physical questionnaire with the rest of her intake papers and give her the option to either circle the applicable answer or to disregard the paper completely.

H.B. 2749 requires Plaintiffs to make a numerical report of whether and the number of times each of these responses was chosen, as well as de-identified demographical information such as age, race, marital status, and reports of abuse or domestic violence. The report must also include the method by which the abortion was performed. Organizations like the pro-abortion Guttmacher Institute regularly report similar information gathered voluntarily by facilities that perform abortions in the state. *See, e.g.*, Maddow-Zimet I, Philbin J, DoCampo I, and Jones RK, *Monthly Abortion Provision Study*, updated Mar. 19, 2024, https://osf.io/k4x7t/; Finer, L. et al, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, Perspectives on Sexual and Reproductive Health, 2005, 37(3):110–118.

H.B. 2749 requires the secretary of health and environment to "adopt rules and regulations to implement this section. Such rules and regulations shall prescribe, in detail, the information required to be kept by the physicians and hospitals and the information required in the reports that must be submitted to the secretary." H.B. 2749 § 1(i). No such rules and regulations have been developed or published implementing H.B. 2749, and Plaintiffs do not allege they are subject to any such rules and regulations. The current rules and regulations published by the KDHE on the reporting requirements do not include H.B. 2749's additional question. *See* K.A.R. § 28-56-1 et seq.

Plaintiffs commenced their original action challenging the constitutionality of certain provisions of the WRTK Act in June 2023, for which the Court granted a temporary injunction

based on Plaintiffs' claims regarding free speech and personal autonomy. Approximately one year later, Plaintiffs moved to supplement their petition to add these new claims related to H.B. 2749—an amendment to a separate abortion-related statute—claiming substantial overlap in the facts. The Court granted Plaintiffs' motion to supplement and Plaintiffs filed their Supplemental Second Amended Petition on July 1, 2024. Despite the disparate goals, subjects, and mechanisms of the two statutes, Plaintiffs' supplement adds very few additional facts to support their constitutional claims as to H.B. 2749, relying heavily on the existing and statute-specific facts about the WRTK to plead their new challenges.

LEGAL STANDARD

This Court should dismiss claims in Plaintiffs' Supplemental Second Amended Petition if it has "fail[ed] to state a claim upon which relief can be granted," K.S.A. 60-212(b)(6), or if the court lacks jurisdiction K.S.A. 60-212(b)(1). In doing so, it must "assume as true" "the well-pled facts and allegations" in "the petition." *Steckline Commc'ns v. J. Broad. Grp. of Kan.*, 305 Kan. 761, 767-68, 388 P.3d 84, 90 (2017). But courts are not "required to accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what happened, or if these allegations are contradicted by the description itself." *Weil & Assocs. v. Urb. Renewal Agency of Wichita*, 206 Kan. 405, 413–14, 479 P.2d 875, 883 (1971); *see also Kurcharski-Berger v. Hill's Pet Nutrition, Inc.*, 60 Kan. App. 2d 510, 515–16, 494 P.3d 283, 289 (2021).

Further, plaintiffs bringing a facial challenge to the constitutionality of a statute face a heavy burden "because such challenges rest on speculation, conflict with the principle of judicial restraint, and threaten to undermine the democratic process." *State v. Valdiviezo-Martinez*, 313 Kan. 614, 631, 486 P.3d 1256, 1267 (2021). Such challenges in Kansas are therefore "disfavored." *State v. Bollinger*, 302 Kan. 309, 318–19, 352 P.3d 1003, 1010–11 (2015). To

succeed on such a facial challenge, the plaintiff "has the burden to show that there is no set of circumstances under which the statute would be valid." *Valdiviezo-Martinez*, 313 Kan. at 631, 486 P.3d at 1267.

ARGUMENT

I. The Court lacks subject-matter jurisdiction to consider Plaintiffs' supplemental claims.

"[S]tanding and ripeness are components of subject matter jurisdiction," *Kansas Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 743, 387 P.3d 795, 799 (2017), and "[t]he burden to establish these elements of standing rests with the party asserting it." *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196, 1211 (2014). To meet that burden, Plaintiffs must "show that [they] suffered a cognizable injury and show a causal connection between the injury and the challenged conduct." *State v. Bodine*, 313 Kan. 378, 385, 486 P.3d 551, 560–61 (2021). Plaintiffs have failed to allege any facts that demonstrate a cognizable injury from H.B. 2749, nor is a challenge to H.B. 2749 ripe because no implementing regulations have yet to be developed.

A. Plaintiffs lack standing because they have not suffered an injury in fact from H.B. 2749.

The new reporting provisions of H.B. 2749 have not been implemented. Regulations or guidance on implementation have not been published. H.B. 2749 has injured no one. And Plaintiffs have not alleged in their supplemental petition that it has injured anyone.

Plaintiffs offer a few scant speculative statements about potential future alleged injuries, but they do not even attempt to meet their burden to demonstrate that H.B. 2749 has caused any injury in fact to anyone. For example, Plaintiffs speculate that a patient who is asked why she is seeking an abortion "may feel shame[]," or "may be traumatiz[ed]," (Doc. 124 ¶ 134), even though the amendment makes clear she does not have to answer. H.B. 2749 § 1(c). None of these allegations give rise to a cognizable injury, *see infra* section II, but even if they did, Plaintiffs

offer nothing but mere "speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). When a claim is based on "guesswork as to how independent decisionmakers will exercise their judgment," standing is lacking. *Id.* at 413. Plaintiffs' alleged injury is based on guesswork about how a hypothetical patient might respond. Plaintiffs have thus failed to allege a key element of standing: injury in fact.

Plaintiffs also fail to meet their burden under a pre-enforcement theory where "[a] high threshold is required to demonstrate standing." *League of Women Voters of Kan. v. Schwab*, 317 Kan. 805, 813–14, 539 P.3d 1022, 1028 (2023). Under such a theory a plaintiff *may* have standing to challenge a law that hasn't been enforced only if the plaintiff alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* (cleaned up). Plaintiffs "must show an imminent threat of prosecution that is not speculative or imaginary." *Id.* Where, as here, the facts alleged do not demonstrate an actual injury in fact to the Plaintiffs, they lack standing. *Bodine*, 313 Kan. at 385, 486 P.3d at 560–61.

Plaintiffs do not even attempt to make the necessary allegations. They do not allege an intent to violate H.B. 2749 or any threat of prosecution. In *League of Women Voters of Kansas*, the court found standing, but only because the plaintiffs submitted affidavits asserting factual scenarios that had already occurred that could plausibly give rise to an injury. 317 Kan. at 818, 539 P.3d at 1031. Plaintiffs make no such allegations here about H.B. 2749.

Thus, whether under the traditional concrete injury-in-fact analysis, or under the high threshold necessary for a pre-enforcement challenge, Plaintiffs have failed to allege facts demonstrating a concrete injury caused by H.B. 2749.

B. Plaintiffs' claims are not ripe because the implementing rules and regulations for H.B. 2749 have not even been developed, much less

implemented.

For similar reasons that Plaintiffs lack standing, their claims are not ripe. "Ripeness, like standing, is an element of subject matter jurisdiction." *Kansas Nat'l Educ. Ass'n*, 305 Kan. at 748, 387 P.3d at 802 (2017). "To be ripe, issues must have taken shape and be concrete rather than hypothetical and abstract." *Shipe v. Pub. Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 170, 210 P.3d 105, 112 (2009). When "the State has not yet sought application of the amended ... statute" there is no ripe claim and the court must "decline the parties' invitation to issue an advisory opinion on these issues." *State v. Soto*, 299 Kan. 102, 128–29, 322 P.3d 334, 351–52 (2014).

Here, H.B. 2749 requires the secretary of health and environment to "adopt rules and regulations to implement this section." H.B. 2749 § 1(i). No such rules and regulations have been developed or published implementing H.B. 2749, and Plaintiffs do not allege they are subject to any such rules and regulations. The current rules and regulations published by the KDHE on the reporting requirements do not include H.B. 2749's additional questions. *See* K.A.R. § 28-56-1 et seq. Neither the parties nor the court knows what those rules and regulations will entail once developed and implemented and this court should decline Plaintiffs' "invitation to issue an advisory opinion on these issues." *Soto*, 299 Kan. at 128–29, 322 P.3d at 351–52.

The lack of ripeness is also shown on the face of H.B. 2749. The amendment states that except in emergencies, "each patient shall be asked prior to the termination of such patient's pregnancy, which of the following reasons was the most important factor in such patient's decision to seek an abortion." H.B. 2749 § 1(c). If a patient declines to answer all plaintiffs must do is note that the patient declined to answer. That's all. The bill does not specify what form the questions should be asked in. It does not require Plaintiffs or their patients to say anything or respond to the questions. Based on its text, without knowing more, the providers could include

one sheet of paper with the question on it in the intake materials with a note saying that the patient need not respond. Plaintiffs have not tried that. They don't know how any patient would respond (if at all) if they did. And no patient has actually suffered any injury from being asked a question in that way. Thus, Plaintiffs' claims are not ripe for adjudication.

II. Plaintiffs do not allege facts that demonstrate H.B. 2749 infringes a fundamental right.

Plaintiffs have not pleaded sufficient facts to support their conclusory allegation that H.B. 2749 infringes their patients' right to abortion, Plaintiffs' right to free speech, or their right to equal protection of the laws. Plaintiffs bear the burden to show that H.B. 2749 on its face infringes a fundamental right. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 619–20, 440 P.3d 461, 469 (2019) (*Hodes I*) ("First, having alleged a violation of the Kansas Constitution Bill of Rights, they must establish this right exists and that our Constitution protects it. Second, the Doctors must establish S.B. 95 unconstitutionally infringes on this right."); *State v. Genson*, 59 Kan. App. 2d 190, 210, 481 P.3d 137, 152 (2020), *aff'd*, 316 Kan. 130, 513 P.3d 1192 (2022) ("Only if a legislative enactment burdens a fundamental right must the infringement be narrowly tailored to serve a compelling government interest.").

Plaintiffs have failed to meet their burden with respect to each of their claims on H.B. 2749. Instead, Plaintiffs argue, as they do for the WRTK Act, that strict scrutiny of their supplemental claims is appropriate because H.B. 2749 targets abortion care, patients, and providers for additional regulation. But Plaintiffs have failed to allege how the standard healthcare reporting requirements of H.B. 2749 "interfere with the right[s]" protected by the Kansas Constitution. And the burden rests with Plaintiffs to "prove[] an infringement" of the right to personal autonomy, free speech, or equal protection before strict scrutiny attaches. *Hodes I*, 309 Kan. at 668. And this burden is heightened where the constitutional challenge is a facial

one. *Bollinger*, 302 Kan. at 318–19, 352 P.3d at 1010–11 ("It is difficult for a challenger to succeed in persuading a court that a statute is facially unconstitutional. Such challenges are disfavored, because they may rest on speculation, may be contrary to the fundamental principle of judicial restraint, and may threaten to undermine the democratic process."). "To establish that a statute is unconstitutional on its face, [Plaintiff[has the burden to show that there is no set of circumstances under which the statute would be valid." *Valdiviezo-Martinez*, 313 Kan. at 631, 486 P.3d at 1267. Plaintiffs have failed to meet even a lesser burden. They cannot extrapolate unrelated allegations about the legal effects of the WRTK Act, an informed consent statute, to H.B. 2749, an amendment to a separate and distinct reporting statute, without alleging specifically how H.B. 2749 infringes a constitutional right.

A. Plaintiffs fail to state a claim that H.B. 2749 impedes a Kansas woman's right to an abortion.

At the pleading stage, to show infringement of a Kansas woman's right to an abortion, Plaintiffs must allege facts that support at least that H.B. 2749 would "deny[] a pregnant woman the ability to determine whether to continue a pregnancy" by, for instance, "delay[ing] or completely prevent[ing]" a woman from accessing an abortion. *Hodes I*, 309 Kan. at 646, 440 P.3d at 484; *Hodes & Nauser, MDs, P.A. v. Stanek*, No. 125,051, 2024 WL 3308163, at *10 (Kan. July 5, 2024)(*Hodes II*).

i. Plaintiffs' speculative allegations do not raise a legal injury.

Plaintiffs have not alleged that H.B. 2749 delays or prevents Plaintiffs' patients from accessing an abortion. That should end the inquiry.

Instead, Plaintiffs assert that H.B. 2749 may harm a patient by "forc[ing] abortion providers to inflict psychological and emotional harm on their patients" by allegedly "compel[ling] providers to interrogate patients using stigmatizing language that may inflict

psychological or emotional distress." (Doc. 124 at ¶¶ 133, 134.) Plaintiffs' legal characterization of the amendment is wrong on its face, and their speculative claims about independent actors' potential subjective responses are not cognizable injuries.

Plaintiffs' legal characterization of the amendment as "compelling providers to interrogate patients using stigmatizing language" is simply wrong. The amendment merely requires women to be given the opportunity to provide their reason for seeking an abortion if they so choose. The format is not dictated and could be as unobtrusive as a piece of paper with the question and answers written—Plaintiffs may even notify the patient she need not answer. H.B. 2749 § I(c). The amendment does not require an "interrogation" and the court should not credit Plaintiffs' characterization of the law. *Weil & Assocs.*, 206 Kan. at 413–14, 479 P.2d at 883. Indeed, rather than twist the language to the worst possible light, courts have an obligation "to interpret a statute in a manner that renders it constitutional if there is any reasonable construction that will maintain the legislature's apparent intent." *Soto*, 299 Kan. at 121, 322 P.3d at 347.

As to Plaintiffs' factual claims of alleged potential distress, these allegations do not give rise to a legal injury and are speculative. They do not give rise to a legal injury because there is no constitutional right not to be asked a question. Defendants are unaware of any authority holding that a subjective feeling constitutes a constitutional injury. Rather, "in the context of psychological injuries, alleging 'anxiety' alone appears to fall short of cognizable injury as a matter of general tort law." *Buchholz v. Meyer Njus Tanick*, PA, 946 F.3d 855, 864 (6th Cir. 2020).

Further, speculative, subjective, and unsupported claims of offense are simply not enough to plead infringement of a fundamental right. *See, e.g.*, *Planned Parenthood of Southeastern*

Pennsylvania v. Casey, 505 U.S. 833, 878 (1992) (noting that a state may constitutionally "persuade" a woman "to choose childbirth over abortion"); *see also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982) (declining to find Article III standing where respondents' only alleged injury was "the psychological consequence presumably produced by observation of conduct with which one disagrees"). Plaintiffs have not alleged more than speculative potential subjective distress about the implementation of H.B. 2749. Thus, they failed to state a claim.

Defendants also fail to state a claim because their allegations are based on speculation about third parties' potential responses. Defendants allege that a hypothetical patient may feel distressed by being given the opportunity to express her driving motivation for seeking an abortion *or* by declining to answer. This allegation is speculative, and even if it were concrete does not state a claim. *Supra.* Plaintiffs assert, with no factual basis, that a patient "*may* feel shamed by H.B. 2749" or that she "*may* be traumatiz[ed]." (Doc. 124 at ¶ 134.)(Emphasis added) These statements fail to allege a violation of a constitutional right for the same reasons as they fail to give Plaintiffs standing—they are based on mere speculation about the independent acts of third parties.

ii. Even taking Plaintiffs' hypothetical injuries as true, Plaintiffs do not even attempt to allege how they delay or impede access to abortion.

More importantly, Plaintiffs do not even allege that these highly speculative, subjective, and unsupported allegations of offense—however conceivable in imaginary circumstances—delay or impede their patients' *access* to abortion. Nor can they. As Plaintiffs themselves acknowledge, H.B. 2749 neither mandates the form in which the questions are presented to the patient nor requires the patient to answer the questions. *See* H.B. 2749 § 1(c). Plaintiffs are wrong, then, that H.B. 2749 requires them to "*interrogate*" their patients (Doc. 124 at ¶ 117) and

that the amendment "*compels* people seeking abortion to disclose" the information sought (*Id.* at ¶ 135 (emphasis added).). Plaintiffs' claims contradict the text of the amendment.

Plaintiffs also acknowledge that H.B. 2749 merely adds "new informational requirements" (*Id.* at ¶ 112) to an existing and unchallenged reporting statute that has for decades required Plaintiffs to submit written records on the number of abortions performed, the type of medical facility in which the abortion was performed, and other de-identified individual abortion information consistent with Department of Health and Environment regulations. (*Id.* at ¶¶ 110–11.) It is difficult to imagine, and Plaintiffs do not allege, how these additional optional "informational requirements" impede or delay a woman's access to abortion. Plaintiffs' allegations thus "do not reasonably follow" and "are contradicted by" their own account of H.B. 2749. *Weil & Assocs.*, 206 Kan. at 413–14. The Court need not and indeed should not accept Plaintiffs' unsupported and conclusory assertions as true. But even if they are true, Plaintiffs have not even attempted to allege how they give rise to a constitutional violation.

Also missing from Plaintiffs' supplement is a factual basis for their assertion that introducing these entirely optional informational requests to a woman may cause her to "fear exposing [herself] to scrutiny and [her] loved ones or other supports to liability" or to "fear collateral consequences" if she is a survivor of domestic violence. Plaintiffs point only to ambiguous and groundless notions of "extremist attempts by anti-abortion politicians and other actors" (whether in Kansas we do not know), "to prohibit, investigate, and take enforcement action" (of an unspecified nature) "against assistance provided to help people travel from states where abortion is illegal." (Doc. 124 at ¶ 135.) These allegations of potential future injury are also speculative. Even if Plaintiffs did raise sufficient facts to show women may in some circumstances fear said exposure or collateral consequences from a de-identified and optional

informational request, Plaintiffs have once again failed to allege how these highly speculative feelings would delay or impede that woman from accessing an abortion. They also fail to establish that "no set of circumstances exist under which [H.B. 2749] would be valid, as required for their facial challenge. *State v. Jones*, 492 P.3d 433, 445 (Kan. 2021). Their claims related H.B. 2749 should therefore be dismissed.

B. Plaintiffs fail to state a claim that H.B. 2749 violates Plaintiffs' right to free speech.

H.B. 2749 does not implicate the First Amendment, and Plaintiffs have failed to plead otherwise. Plaintiffs' free speech claims mischaracterize the regulation of medical conduct as "speech" in contravention of U.S. Supreme Court and Kansas precedent. *See* Infra Sec. III. The informational requirements of H.B. 2749 fall under Kansas's broad authority to regulate licensed healthcare providers and the practice of medicine within its borders. *Id.*

Plaintiffs repeatedly insist that abortion services are "health care." If so, then abortion is even more clearly within the State's purview to regulate. If a law requiring Plaintiffs to report what happens at their services, without interfering with the furnishing of that service, violates the First Amendment, then it is difficult to see how the State may ever legitimately regulate doctors and the practice of medicine.

Nevertheless, Plaintiffs argue that H.B. 2749 "compel[s Plaintiffs] to communicate government-mandated messages that alter the content of their speech and are contrary to their views," (Doc. 124 at ¶ 147), but Plaintiffs do not plead any facts in support of this claim as to H.B. 2749. Besides the conclusory allegation that H.B. 2749 "co-opts providers to serve as the State's agents to *collect* private, nonclinical data on its behalf," (*Id.* at ¶ 7 (emphasis added)), Plaintiffs fail to allege anywhere that the provisions of H.B. 2749 regulate speech, even incidentally. It is Plaintiffs' burden to raise these facts, not Defendants' burden to anticipate and

refute them.

Plaintiffs' claims of compelled speech similarly fail. "The compelled speech doctrine relies on the general proposition that the government may not compel a citizen to speak its message." *State v. Masterson*, 515 P.3d 753, *2 (Kan. Ct. App. 2022), *review denied* (Dec. 16, 2022). Plaintiffs have omitted any facts supporting their conclusory allegation that the information-collecting provisions of H.B. 2749 alter the content of their speech or compel them to communicate the government's message. Plaintiffs also assert that H.B. 2749 "compels providers to interrogate patients using stigmatizing language that may inflict psychological or emotional distress," (Doc. 124 at ¶ 134) but, as discussed above, these assertions are likewise unsupported and contradicted by the plain language of the amendment. Plaintiffs' conclusory allegations are insufficient to plead a free speech violation, and further fail to meet the heightened standards for pleading a facial challenge to H.B. 2749. These supplemental claims should also be dismissed.

C. Plaintiffs have not shown that H.B. 2749 impedes Plaintiffs' patients' right to equal protection.

Plaintiffs also fail as a matter of law to allege a cognizable equal-protection claim and once again fail to establish that "no set of circumstances exist under which [H.B. 2749] would be valid, as required for their facial challenge. *Jones*, 492 P.3d at 445. First, "a threshold requirement for stating an equal protection claim is to demonstrate that the challenged statutory enactment treats 'arguably indistinguishable' classes of people differently." *In re Weisgerber*, 285 Kan. 98, 106, 169 P.3d 321, 328 (2007). But Plaintiffs do not allege that men and women are similarly situated when it comes to pregnancy or abortion—nor could they credibly do so. "[M]en and women are not similarly situated when it comes [to] pregnancy and abortion." *Planned Parenthood Great Nw., v. State*, 522 P.3d 1132, 1198 (Idaho 2023). "Only women are

capable of pregnancy; thus, only women can have an abortion." *Id.* It would be nonsensical to require the State to request the same information from a man or a woman who is not pregnant, as neither could be making the decision to have an abortion.

Nor have Plaintiffs shown that H.B. 2749 singles out "people capable of becoming pregnant," or "discriminates against pregnant people seeking abortion care." (Doc. 124 at ¶¶ 151, 118.) Such a status is not a protected class, nor have Plaintiffs pled that it is. Further, Plaintiffs do not plead any facts to state a claim that H.B. 2749 has the effect of singling any protected class out. H.B. 2749's requirements attach only to abortion providers, not to their patients. And Plaintiffs' allegation that H.B. 2749 "discriminates against people seeking abortion by compelling providers to interrogate their reasons for seeking abortion care using language that is stigmatizing" is not only conclusory, but legally implausible. (*Id.* ¶ 117.) Patients are not required to answer the government's questions, and Plaintiffs need only note in those instances that the patient declined to answer. Further, distinguishing "people capable of becoming pregnant" (*id*. at ¶ 151) makes sense because "the goal" of gathering information about the reasons women choose to have an abortion "necessarily requires a regulation that affects the only sex who can become pregnant, i.e., women," and only that subset of women who are currently pregnant and seeking an abortion. *Planned Parenthood Great Nw.*, 522 P.3d at 1199.

Neither any Kansas case (including *Hodes I*, 309 Kan. 610, 440 P.3d 461 (2019)) nor any federal case suggests that abortion regulations present a sex-discrimination issue. In fact, the opposite is true. "A State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." *Dobbs*, 597 U.S. at 216. But even before *Dobbs*, the Court had long held that "legislative classification[s] concerning pregnancy" were not discriminatory sex-based classifications and that regulations of medical

procedures touching on pregnancy do not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other," *Geduldig v. Aiello*, 417 U.S. 484, 496 n. 20 (1974). Or, more directly, disfavoring abortion or encouraging women to carry a pregnancy to term does not constitute "invidiously discriminatory animus" against women. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273–74 (1993).

Similarly, two state supreme courts recently rejected sex-discrimination challenges to abortion laws for the same reasons. *See Planned Parenthood Great Nw.*, 522 P.3d at 1198 ("[N]one of these statutes classifies on the basis of sex alone or sexual stereotypes because men and women are not similarly situated when it comes [to] pregnancy and abortion."); *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 743 (Iowa 2022) *reh'g denied* (July 5, 2022) (upholding informed consent law against state constitutional challenge because "[w]omen undeniably are not" similarly situated to men as it relates to pregnancy).

The Kansas Supreme Court in *Hodes I* did not reject these holdings. Instead, it distinguished section 1 of the Kansas Constitution Bill of Rights from the federal Fourteenth Amendment based on its language concerning natural rights, a term which "no provision of the United States Constitution uses." *Hodes I*, 309 Kan. at 625. The court's statements about gender bias cited by Plaintiffs, (Doc. 124 at ¶ 141), support the conclusion that Kansas's constitutionally protected "natural rights" apply to women as well as men. The case does not imply some unique sex-discrimination cause of action against state abortion laws. *See Hodes I*, 309 Kan. at 660. And the court specifically rejected the view that "section 1 should be applied in two different ways—one way for equal protection analysis and another for violation of a substantive right." *Id.* at 667.

Second, Plaintiffs have not pleaded sufficient facts to support their conclusory allegation that H.B. 2749 "perpetuates sex-based stereotypes." (Doc. 124 at ¶ 151.) For example, Plaintiffs' claim that H.B. 2749 assumes "motherhood is the appropriate role for women," (*id.*), lacks any factual basis. Plaintiffs baselessly assert that H.B. 2749 "discriminates against people seeking abortion by compelling providers to interrogate their reasons for seeking abortion care using language that is stigmatizing." (*Id.* at ¶ 117.) As explained ad nauseam, Plaintiffs' characterization of H.B. 2749 as an "interrogation" is implausible because patients can decline to answer, and the amendment leaves at Plaintiffs' discretion the form in which the State's information-gathering questions are asked.

Plaintiffs also fail to allege how the language used in the State's optional questions about why a woman has chosen to have an abortion stigmatizes women into feeling that "motherhood is the appropriate role for women." (*Id.*at ¶ 151.) Plaintiffs' baldly assert that the State "perpetuates such stereotypes by asking abortion patients to justify their decision to terminate their pregnancy by way of a government-prescribed menu of 'reasons' that use shaming language." (*Id.* at ¶ 138.) Plaintiffs fail to allege how optionally identifying "the most important factor" in a woman's choice to have an abortion using neutral language is "shaming," but rather ask the Court to accept its conclusory and speculative allegations about the legal effects of the language. But even taking these speculations as true, Plaintiffs fail to connect the dots about how such subjective feelings of "shame" constitute an equal protection violation.

Nor does H.B. 2749 assume that "women need to justify their decision to terminate a pregnancy." (Doc. 124 at ¶ 139.) Instead, it gives women an option to anonymously share why they have chosen to have an abortion. Plaintiffs' failure to allege any facts supporting a "stereotype" in H.B. 2749 dooms their equal-protection claim. Thus, the Court should dismiss it.

D. Plaintiffs fail to allege that the State's data collection, which they characterize as research, violates any fundamental right.

Plaintiffs dedicate three new paragraphs of their supplemental petition to manufactured claims about the legal and ethical research implications of H.B. 2749, but nowhere do Plaintiffs allege that their concerns violate any provision of the Kansas Constitution. First, Plaintiffs fail to allege that H.B. 2749 is even subject to heightened ethical standards for research on human subjects. Plaintiffs cite *federal* HHS policies for protecting human research subjects, but do not state whether or how these policies governing federal departments or agencies apply to H.B. 2749—an amendment to a standard state healthcare reporting statute. Nor do Plaintiffs allege what state principles of medical ethics the reporting amendment will cause Plaintiffs to violate. Second, Plaintiffs baselessly assert that H.B. 2749 "compels" providers to ask patients questions "that have not undergone institutional review board vetting," and "conscripts pregnant people seeking abortion to serve as unwitting participants in the State's human subjects research without any of the safeguards required by federal regulations and the principles of medical ethics." (Doc. 124 at ¶¶ 128-30.) Plaintiffs cannot show that the amendment "conscripts" their patients into serving as "unwitting participants" in research for the simple reason that the questions are optional. If Plaintiffs' theory is correct—that every data collection is an unauthorized "study"—then every state and the federal government have been engaged in unethical research for decades. Plaintiffs allege no facts or legal theories to support such a proposition. And Plaintiffs allege no facts supporting their theory that data collection statutes are all subject to university research review standards. But, even taking Plaintiffs' unsupported and conclusory claims about human research and medical ethics as true, Plaintiffs do not allege what if any constitutional violation these allegations give rise to. The Court and Defendants are simply left guessing. These claims should likewise be dismissed.

III. Rational basis applies to Plaintiffs' supplemental claims.

Because Plaintiffs have failed to allege facts that demonstrate H.B. 2749 infringes a fundamental right, the rational basis test applies. *State v. Limon*, 280 Kan. 275, 283–84, 122 P.3d 22, 28 (2005) (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)) ("The general rule is that a law will be subject to the rational basis test unless the legislative classification targets a suspect class or burdens a fundamental right."). This shifts the burden of proof onto the Plaintiffs. "When this test is appropriate, constitutionality is presumed, and the burden is on the party challenging the statute to prove that no rational basis exists." *Jurado v. Popejoy Const. Co.*, 253 Kan. 116, 123, 853 P.2d 669, 675 (1993); *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058, 1061 (1987) (describing the presumptive burden on the party attacking the statute to prove that the statute is unconstitutional). The Kansas Supreme Court adopts the rational basis test described by the United States Supreme Court in *McGowan v. State of Md.*, 366 U.S. 420, 425–26 (1961), and *Romer v. Evans*, 517 U.S. 620, 631 (1996). *See Farley*, 241 Kan. at 669; *Hodes I*, 309 Kan. at 663, 440 P.3d at 493. Under rational basis review, "[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective," *Farley*, 241 Kan. at 669 (quoting *McGowan*, 366 U.S. at 425–26 (1961)). Because H.B. 2749 "bears a rational relation to some legitimate end," it survives rational basis review. *Romer*, 517 U.S. at 631.

"The State has broad authority to regulate the practice of medicine." *Ryser v. State*, 295 Kan. 452, 464, 284 P.3d 337, 346 (2012); *see also Sajadi v. Kansas Bd. of Healing Arts*, 61 Kan. App. 2d 114, 125, 500 P.3d 542, 551 (2021) ("The State has the right to regulate, through its agencies, the practice of medicine and this authority is broad in scope."). Under that broad authority, the State has a rational basis for collecting anonymous abortion data pursuant to H.B. 2749. As an initial matter, H.B. 2749 amends a statute that has for decades already required

Plaintiffs to keep some of the same records of lawful abortions and submit annual reports to the secretary of health and environment. (Doc. 124 at ¶¶ 112–13.) The additional data collected under H.B. 2749 helps policymakers obtain a better understanding of the reasons why women seek abortions, enabling them to better serve women in unplanned pregnancies by pursuing policies that could alleviate the pressures they face and broaden their conceivable choices—including preserving the lives of their children. *See Dobbs*, 597 U.S. at 301 (holding that the State has a legitimate interest in, *inter alia*, "respect for and preservation of prenatal life at all stages of development"). The data also serves the legitimate purpose of "protect[ing] maternal health and safety" by revealing to practitioners through the State's form responses that a woman is being abused or coerced into having an abortion and illuminating to the State whether there is a need for new policies to protect women from sexual abuse or coercion. *Id.*

The State also has an interest in preserving the integrity of the medical profession. *Id.* H.B. 2749 is a standard reporting regulation based on the traditional authority states have over the healthcare profession, as "the practice of the healing arts is a privilege granted by legislative authority and is not a natural right of individuals[.]"*Vakas v. Kan. Bd. of Healing Arts*, 248 Kan. 589, 592, 808 P.2d 1355, 1359 (1991) (quoting K.S.A. 65-2801). Kansas, like every other state, has both the authority and the responsibility to regulate the healing arts. Every state has enacted certain laws and regulations that govern the practice of medicine and outline the responsibility of state medical boards to regulate professional practice within their borders. *See, e.g.*, *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.").

Furthermore, the type of reporting required by H.B. 2749 is not unique, nor does it single out abortion for disparate treatment. Rather, informational reporting is an incidence of the medical profession. In Kansas, for example, licensed physicians must report to local health authorities the status of patients with infectious diseases. *See* K.S.A. 65-118. Kansas regulations also articulate a variety of state-mandated reporting and disclosure requirements for any dispensation of opioid antagonists absent a prescription. *See* K.A.R. 68-7-23. And medical professionals advancing an opioid antagonist protocol must similarly ensure accurate recordkeeping and education of persons to whom the emergency opioid antagonist is given. *See* K.A.R 65-16-127. There are similar reporting requirements in the medical field for births and deaths, communicable diseases, use of controlled substances, and other things like insurance coverage, various forms of suspected or actual abuse, and adverse events. *See, e.g.*, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 81, 96 (1976). The Kansas Department of Health and Environment, for example, already tracks and publishes an annual summary of vital statistics.[2] These statistics include detailed numerical reports on live births and fertility, fetal and infant mortality, and marriages and marriage dissolutions.

Because Kansas has a rational basis to require the reporting set forth in H.B. 2749, and because these reporting requirements do not delay or impede women's access to abortion, "the State may use its regulatory power" to impose informational reporting requirements "all in furtherance of its legitimate interest in regulating the medical profession in order to promote respect for life, including the life of the unborn," and to regulate within its normal sphere. *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007).

CONCLUSION

[2] *See supra* n.1.

Plaintiffs fail to plead any constitutional violation relating to H.B. 2749, relying on layers of speculation, conclusory allegations, and unrelated facts pled as to a separate and distinct abortion statute. Plaintiffs are required to plead facts that not only demonstrate that *H.B. 2749* violates the Kansas Constitution, but that "there is no set of circumstances under which the statute would be valid." *Valdiviezo-Martinez*, 313 Kan. at 631, 486 P.3d at 1267. Plaintiffs have fallen far short of that burden. They cannot rely on the fact that both H.B. 2749 and the WRTK Act are both abortion regulations to plead their new supplemental claims. Because Plaintiffs' lack standing to assert their claims as to H.B. 2749, and because their supplemental claims lack any factual support under both the normal and heightened pleading standards for facial challenges and are unripe, they should be dismissed.

Respectfully submitted this 22nd day of July, 2024.

/s/ Anthony J. Powell
Anthony J. Powell, #14981
Solicitor General
120 SW 10th Ave., Room 200
Topeka, KS 66612-1597
Phone (785) 296-2215
Fax: (785) 296-3131
Email: Anthony.powell@ag.ks.gov

/s/ Robert C. Hutchison
Robert C. Hutchison, #27351
Deputy Attorney General
120 SW 10th Ave., Room 200
Topeka, KS 66612-1597
Phone (785) 296-2215
Fax: (785) 296-3131
Email: Robert.hutchison@ag.ks.gov

/s/ Lincoln Davis Wilson
Lincoln Davis Wilson, ID Bar #11860*
J. Caleb Dalton, VA Bar #83790*
Gabriella M. McIntyre, DC Bar #1672424
Alliance Defending Freedom
44180 Riverside Parkway
Lansdowne, VA 20176
Phone: (571) 707-4655
Fax: (571) 707-4790
Email: lwilson@adf.egal.org
Email: cdalton@adflegal.org
Email: gmcintyre@adflegal.org

/s/ Julia C. Payne
Julia C. Payne, IN Bar No. 34728-53*
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
Phone (480) 444-0020
Fax: (480) 444-0028
Email: jpayne@adflegal.org

Attorneys for Defendants Kris W. Kobach, Stephen M. Howe, Marc Bennett, and Mark Dupree
*Admitted *pro hac vice*

CERTIFICATE OF SERVICE

This is the certify that on this 22nd day of July, 2024, I filed the above and foregoing with the Clerk of the Court, and served electronically to all counsel of record:

Teresa A. Woody
The Woody Law Firm PC
1621 Baltimore Avenue
Kansas City, MO 64108
Phone: (816) 931-5919
Fax: (816) 471-4883
teresa@woodylawfirm.com

Jiaman Wang
Cici Coquillette
Megan Jones
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Phone: (917) 637-3600
Fax: (917) 637-3666
awang@reprorights.org
ccoquillette@reprorights.org
mjones@reprorights.org

David J. Weiner
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, NW Washington, DC 20001
Phone: (202) 942-5000
david.weiner@arnoldporter.com

Paul W. Rodney
Arnold & Porter Kaye Scholer LLP
1144 Fifteenth Street, Suite 3100
Denver, CO 80202
Phone: (303) 863-1000
paul.rodney@arnoldporter.com

Attorney for Plaintiffs Hodes & Nauser, MDs, P.A.; Traci Lynn Nauser, M.D. and Tristan Fowler, D.O.

Mandi R. Hunter
Stephanie L. Hammann
Hunter Law Group, P.A.
1900 W. 75th Street, Suite 120
Prairie Village, KS 66208
Phone: (913) 320-3830
mrh@hunterlawgrouppa.com
sh@hunterlawgrouppa.com

Erin Thompson
4401 W. 109th St., Suite 200
Overland Park, KS 66211
Phone: (913) 345-4617
erin.thompson@ppgreatplains.org

Diana O. Salgado
Planned Parenthood Federation of America
1110 Vermont Avenue NW, Suite 300
Washington, DC 20005
Phone: (212) 261-4399
diana.salgado@ppfa.org

Emma Noftz Stern
Planned Parenthood Federation of America
123 William Street, 9th Floor
New York, NY 10038
Phone: (212) 965-7000
emma.stern@ppfa.org

Attorneys for Plaintiff Comprehensive Health of Planned Parenthood Great Plains

Derenda J. Mitchell
Kansas State Board of Healing Arts
800 SW Jackson, Lower Level – Suite A
Topeka, KS 66612
Phone: (785) 296-3288
warran.wiebe@ks.gov

Attorney for Defendants Gile and DeGrado

By: *Robert C. Hutchison*

Robert C. Hutchison