

**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

**REPLY IN FURTHER SUPPORT OF DEFENDANTS’  
MOTION TO DISMISS PLAINTIFFS’ SUPPLEMENTAL CLAIMS**

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## INTRODUCTION

Plaintiffs' supplemental claims advance an essentially limitless theory of jurisdiction and fundamental rights. If Plaintiffs are correct, it means that mere disagreement with a law is good enough grounds to challenge it, no matter whether the plaintiff can point to any specific cost or harm that will befall them when the law is implemented. And it means that Plaintiffs may trigger strict scrutiny simply by alleging that a law *relates* to a fundamental right, forcing the state to assume the burden of defending the constitutionality of its laws before any showing of infringement of that right. The Court should reject Plaintiffs' unprecedented and unrestrained conception of the law.

Plaintiffs' opposition repeats the deficiencies of their supplemental claims. They fail to cite to factual allegations in their Supplemental Second Amended Petition that establish jurisdiction or the merits of their claims. Instead, they double down on unsupported legal conclusions. That is all the more difficult because Plaintiffs bring a facial challenge to H.B. 2749, which means they must show there is no circumstance in which it is constitutional. Plaintiffs lack sufficient factual allegations to show the law is unconstitutional as to them, much less that any conceivable application of the law is void.

The lack of any allegation of a present, concrete injury defeats jurisdiction over Plaintiffs' supplemental claims. Their theories of injury are little more than attempts to repackage their disagreement with the law as constitutional harm, and they plead no specific allegations of costs they will face based on a law that is still uncertain in its implementation. That shows their supplemental claims are unripe: it is impossible for this Court or any other to adequately assess any burdens imposed by H.B. 2749 when no regulations have been enacted to show how and through whom it will implement compliance.

Plaintiffs fare no better on the merits. Plaintiffs' speculation that some patients might feel

subjective distress from being asked to voluntarily fill out a form does not allege a burden on access to abortion that infringes the right to autonomy, much less a burden that might invalidate the law in every application. For their free speech claims, Plaintiffs fail to allege that H.B. 2749 regulates protected speech, let alone compels it. And their equal protection sex-discrimination claims likewise fail because Plaintiffs have not alleged that men and women are similarly situated when it comes to pregnancy and abortion, nor that those biological differences reflect sex-based stereotypes.

Plaintiffs' supplemental claims should be dismissed.

## **ARGUMENT**

### **I. The Court lacks subject-matter jurisdiction over Plaintiffs' supplemental claims.**

#### **A. Plaintiffs' supplemental claims are not ripe.**

Plaintiffs' supplemental claims are not ripe because the Secretary of Health and Environment has not yet developed or published the rules necessary to implement H.B. 2749. *See* H.B. 2749 § 1(i) (Kan. 2024). Plaintiffs say that their claims are ripe simply because H.B. 2749 went into effect in July. Opp'n to Mot. to Dismiss Pls.' Suppl. Claims 4 ("Opp'n"). Yet their asserted harms—which are already conclusory—greatly depend on how H.B. 2749 is implemented. For example, if the implementing rules allow for an electronic form that is purely voluntary to complete, then Plaintiffs' concerns about lost resources and patient stigmatization may never occur. So even if Plaintiffs' theories of injury were cognizable, until the Secretary implements rules explaining if and how Plaintiffs must follow H.B. 2749's basic directives, those injuries will not "have taken shape" and remain "hypothetical and abstract." *Shipe v. Pub. Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 170, 210 P.3d 105, 112 (2009).

Plaintiffs say the only reason their alleged harms are not yet present is because the State agreed not to enforce H.B. 2749 during this litigation. Opp'n at 6. For one, Plaintiffs asked for

that stipulation after filing in exchange for them not moving for a temporary injunction, so they cannot claim that the stipulation itself prevents their claims from ripening. And even if the stipulation were not in place, Plaintiffs would not have a ripe claim because they would still be subject to regulations that do not yet address how the questions in H.B. 2749 will be asked. *See* Kan. Admin. Regs. §§ 28-56-1 to 28-56-10. Thus, Plaintiffs’ alleged injuries remain merely hypothetical at least until those regulations are updated to implement H.B. 2749. With no further directive from the Secretary, Plaintiffs’ supplemental claims remain unripe, and the Court lacks subject matter jurisdiction over them.

All of this is why courts dismiss cases as unripe. It will be impossible to adjudicate Plaintiffs’ claims that the law imposes an undue burden before the parties have any sense of how H.B. 2749 will be implemented. Claims that hinge on such a sensitive balancing demand a clear sense of any burdens imposed by the law—not the speculation of the plaintiff about how the government might regulate if the stipulation not to enforce were lifted. And rendering a decision before any implementing regulations have been issued would leave this Court without a sufficient factual basis to conduct its analysis and an appellate court without adequate basis for review. The Court should thus dismiss those claims without prejudice until Plaintiffs can attempt to allege a ripe constitutional injury after the law is implemented.

**B. Plaintiffs lack standing for their supplemental claims.**

Even apart from lack of ripeness, Plaintiffs lack standing to assert their claims because they do not allege an injury in fact. Their brief asserts three suggested sources of purported harm from the law: it “contravene[s] their professional judgment, undermine[s] the physician-patient relationship,” and results in ““needless expenditure”” of their time and resources. Opp’n at 4. These theories are not “concrete” harms, but speculative, abstract, and conclusory allegations of

injury that cannot support standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334 (2016).<sup>1</sup> If credited, they would authorize an essentially limitless conception of standing. The Court should reject them.

*First*, Plaintiffs say they are injured by complying with H.B. 2749 because it contravenes their professional judgment—that is to say, they believe they are injured because they disagree with the law. Opp’n at 4. Of course, “mere disagreement with government action is not an injury sufficient to confer standing under Article III.” *COPE v. Kansas State Bd. of Educ.*, 71 F. Supp. 3d 1233, 1251 (D. Kan. 2014), *aff’d*, 821 F.3d 1215 (10th Cir. 2016). Such “general legal, moral, ideological, and policy concerns do not suffice on their own to confer . . . standing to sue.” *Food & Drug Admin. v. Alliance for Hippocratic Med.*, 602 U.S. 367, 386 (2024). And that is especially true in the context of professional regulation, where “the State has a significant role to play in regulating the medical profession,” even “to promote respect for life, including life of the unborn.” *Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007). The State defines the parameters for what Plaintiffs’ professional judgment may be, so it is a non sequitur for Plaintiffs to assert that professional judgment as an independent source of injury that allows them to challenge those parameters.

*Second*, Plaintiffs’ fear that H.B. 2749 will undermine the physician-patient relationship is not legally cognizable for the same reasons. The nature and duties of the physician-patient relationship is a matter of state law, *Irvin v. Smith*, 272 Kan. 112, 122, 31 P.3d 934, 942 (2001), and is properly regulated by the State, *Gonzales*, 550 U.S. at 157. This is just another way of saying that Plaintiffs disagree with how the State has defined their duties as physicians. It is not

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<sup>1</sup> “Kansas courts have looked to federal caselaw as persuasive authority and have generally interpreted our judicial power clause in a manner similar to the federal case-and-controversy requirement.” *Sierra Club v. Moser*, 298 Kan. 22, 38, 310 P.3d 360, 372 (2013).

enough to create a legally cognizable injury. *COPE*, 71 F. Supp. 3d at 1251; *All. for Hippocratic Med.*, 602 U.S. at 386.

*Third*, Plaintiffs' allegations that compliance with H.B. 2749 will result in a needless expenditure of resources likewise do not amount to a legally cognizable injury. Once again, this is just another way of saying they disagree with the law: that these unidentified expenses are "needless" because Plaintiffs do not like the Legislature's purpose. Plus, based on the pleadings now, it is "mere speculation" what expenditures could follow from compliance. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). The text of H.B. 2749 imposes no expenses, and Plaintiffs do not allege any specific costs they will incur from the law. Indeed, without implementing regulations, it is unclear what compliance will entail and of whom it will be required. For example, how an electronic form would require more expense and place a burden Plaintiffs' time and resources is a mystery. Plaintiffs' conclusory allegations provide no details and no answers.

Plaintiffs say they have standing based on the Court's prior conclusion that the expenditure of resources required to comply with the Woman's Right to Know Act amounted to a legally cognizable injury. Opp'n at 4 (citing J. Entry on Pls.' Mot. for Temp. Inj. at 31). But there, they had at least supplied a factual basis to conclude that the law imposed actual burdens on their resources. (See J. Entry on Pls.' Mot. for Temp. Inj. at 24, FOF no. 50.) That process was closer to *League of Women Voters of Kansas v. Schwab*, where, in the more flexible context of harm to free expression, the plaintiffs proffered affidavits showing their injuries were not "speculative or imaginary" and thus providing "a factual basis" that their injuries were bound to occur. 317 Kan. 805, 814, 818, 539 P.3d 1022, 1028, 1031 (2023). Plaintiffs here provide nothing of the sort—neither affidavits nor particularized allegations of any costs. That is fatal to

their alleged injury. What’s more, they make no concrete allegations showing how asking the questions required by H.B. 2749 burdens their medical practice or imposes additional costs among the many other forms they must provide to Plaintiffs.

Neither can Plaintiffs allege third-party standing, since that would require both an injury to them and to their patients. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 614, 440 P.3d 461, 466 (2019) (hereinafter “*Hodes I*”). Plaintiffs do not allege any cognizable injury to them, and they don’t allege an injury to their patients either. Instead, they offer only raw speculation about what unidentified patients “may” feel about being asked these questions, Suppl. Second Am. Petition ¶ 134, Doc. 124 (“Suppl. Pet.”), which is neither a concrete nor a cognizable injury. *See Humane Soc’y of the United States v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995) (in challenging state action, “general emotional ‘harm,’ no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes.”). The Court should therefore reject Plaintiffs’ supplemental claims for lack of a non-speculative injury.

## **II. Plaintiffs’ supplemental claims do not allege a violation of a fundamental right.**

Plaintiffs’ opposition confirms that they have not pled sufficient facts to show that H.B. 2749 infringes on any fundamental right such that it would be subject to strict scrutiny. This is problematic enough for Plaintiffs themselves, who fail to sufficiently allege any unconstitutional application as to them, but it is even more so because they assert only a facial challenge—that the law is unconstitutional in *every one* of its applications. *State v. Valdiviezo-Martinez*, 313 Kan. 614, 631, 486 P.3d 1256, 1267 (2021). Plaintiffs fall far short of that burden: they do not allege concrete harm to themselves or their patients, much less as to every possible application of the law.

Nor is there merit to Plaintiffs’ contention based on *Citizens United v. Federal Election Commission*, 558 U.S. 310, 331 (2010), that they are exempt from meeting the facial challenge

standard at the pleading stage. Opp’n at 7. *Citizens United* did not hold that the facial challenge standard is inapplicable to the pleadings, but only that it would not “always control the pleadings and disposition in every case involving a constitutional challenge.” 558 U.S. at 331. And that is why the federal courts routinely apply the facial challenge standard to reject claims at the pleading stage.<sup>2</sup> Plaintiffs have cited nothing in Kansas law—which applies those same standards—that would warrant a different result. They must but have not pled sufficient facts 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.

**A. Plaintiffs fail to allege a violation of patients’ personal autonomy.**

Plaintiffs fail to allege that H.B. 2749 “*actually impairs* a fundamental right protected under section 1” of the Kansas Constitution, *Hodes & Nauser, MDs, P.A. v. Stanek*, 551 P.3d 62, 73 (Kan. 2024) (emphasis added) (hereinafter “*Hodes IIP*”), which is a prerequisite to applying strict scrutiny. *Hodes I*, 309 Kan. at 672, 440 P.3d at 498. While the Kansas Supreme Court has recognized “slight” infringements of this right, it has also made clear that “unsupported claim[s] that [the] government action appears to impair the section 1 right” are “not enough to satisfy this burden.” *Hodes III*, 551 P.3d at 73 As Plaintiffs acknowledge, that standard matters—indeed, “there is a difference between an actual impairment and an appearance of impairment.” Opp’n at 8 (cleaned up). Even state action that “appears to contravene a protected right” does not trigger strict scrutiny unless it also creates “an actual impairment.” *Hodes I*, 309 Kan. at 672, 440 P.3d at 498 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873 (1992) (“[N]ot every

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<sup>2</sup> *74 Pinehurst LLC v. New York*, 59 F.4th 557, 563 (2d Cir. 2023) (“Pinehurst has not plausibly alleged that the [rent stabilization law] effects a taking in all of its applications and that it is thus facially unconstitutional.”); *Douglas v. United States*, 814 F.3d 1268, 1275 n.2 (11th Cir. 2016) (applying facial challenge standard to review of district court dismissal under Rule 12(b)(6)); accord *Maravelias v. Coughlin*, 2021 WL 2229817, at \*1 (1st Cir. 2021).

law which makes a right more difficult to exercise is, ipso facto, an infringement of that right.”)). Plaintiffs do not allege that H.B. 2749 causes any such impairment here.

The Kansas Supreme Court has held that the right to personal autonomy includes “a woman’s *right to decide* whether to continue a pregnancy.” *Hodes I*, 309 Kan. at 620, 623, 638–39, 648, 440 P.3d at 470, 471, 480, 485 (emphasis added). Kansas jurisprudence construes this right as concerning a woman’s *access* to abortion. But Plaintiffs do not allege that H.B. 2749 causes any impairment to any woman’s access to abortion. Instead, they merely speculate that women “*may feel shamed*” or “*may be traumatiz[ed]*” by receiving a voluntary request to fill out a form. Suppl. Pet. ¶ 134 (emphasis added). They do not plead any facts to show how their speculation about the subjective feelings of those unidentified women impede—to any degree—a *right to decide* whether to continue a pregnancy. And insisting that they have done so is not enough to state a claim.

What’s more, Plaintiffs do not even allege any facts showing that asking a woman to voluntarily respond to a question about her primary reason for choosing to have an abortion will even have the emotional effects they surmise may occur. Much less do they allege how those subjective feelings impair the right of every woman subject to the law, as required for a facial challenge. *Valdiviezo-Martinez*, 313 Kan. at 631, 486 P.3d at 1267. Instead, they distort H.B. 2749 to characterize a request to voluntarily provide information as an “interrogation” that will inflict emotional pain on their patients by “compelling” them to divulge sensitive personal information. But conclusory characterizations do not make it so. And they do not square with the plain language of H.B. 2749, which imposes no compulsion of any kind to answer these questions. Br. in Supp. of Mot. to Dismiss 12 (“MTD Br.”). Nor do Plaintiffs point to any authority stating that there is a constitutional right not to be asked a question—even one that

elicits a potential emotional response. Plaintiffs have not alleged even the “appearance of an impairment,” much less the required “actual” impairment of a fundamental right.

Plaintiffs say they have standing just as they did in *Hodes I* and *III*, but in those cases, they did not rely on mere speculation to plead an actual impairment of their right to personal autonomy. In *Hodes I*, for example, the Kansas Supreme Court found that the state prohibition at issue “ma[de] the procedures more dangerous and, for some, will delay or completely prevent the exercise of an inalienable natural right.” *Hodes I*, 309 Kan. at 672, 440 P.3d at 498. And in *Hodes III*, they alleged many reasons why the challenged laws “will make it more difficult, if not impossible,. . . to continue offering abortion care,” such as financial and material burdens and physical obstructions and delays for women seeking abortion services. *Hodes III*, 551 P.3d at 74. Plaintiffs, by contrast, allege nothing to support their conclusory assertion that the optional questions posed by H.B. 2749 “intrude[s] on patients’ medical decision-making.” Opp’n at 12.

The consequences of accepting Plaintiffs’ view are sweeping. If speculation about emotional effects on third parties about abortion triggers strict scrutiny, then Plaintiffs could trigger strict scrutiny for any abortion-related statute enacted by the Legislature simply by alleging that it might affect their patients’ feelings about having an abortion. And that extravagant construction would allow the right of autonomy to swallow whole the Legislature’s plenary authority to regulate public health and medical practice. *Ryser v. State*, 295 Kan. 452, 464, 284 P.3d 337, 346 (2012); *Sajadi v. Kansas Bd. of Healing Arts*, 61 Kan. App. 2d 114, 125, 500 P.3d 542, 551 (2021). The Court should reject that view.

**B. Plaintiffs fail to allege a violation of their right to free speech.**

Plaintiffs fail to allege the necessary elements of a free speech claim. Their brief does not show they have alleged any facts showing that H.B. 2749 regulates speech, let alone compels it. They insist 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.” Suppl. Pet. ¶ 147. But without implementing regulations, it is unclear what the law requires them to do at all. Plus, they do not even attempt to show that “collect[ing] private, nonclinical data,” *id.* ¶ 7, and reporting that data to the State—as Plaintiffs already do in many other contexts, including under prior versions of this statute in the abortion context—would infringe on protected speech.

Plaintiffs say that the State’s objections present issues for the merits, but they cannot get to the merits without first alleging an infringement of speech. They have alleged no facts showing that H.B. 2749—an information *collecting* statute—is a “content-based compelled speech regulation.” Opp’n at 13. Plaintiffs’ “bare legal conclusions” about this purported compelled speech regime “need not be credited absolutely” without factual allegations in support. *See Williams v. C-U-Out Bail Bonds, LLC*, 310 Kan. 775, 785, 450 P.3d 330, 339 (2019). Nor is it plausible to conceive of H.B. 2749 as compelling speech. If a requirement to provide a form to patients is compelled speech, then so is requiring healthcare providers to disclose their privacy policies, requiring home sellers to furnish a form disclosure about lead paint, and requiring employers to provide notices from the EEOC or OSHA. *See, e.g.*, 45 C.F.R. Parts 160, 164; 42 U.S.C. § 4852d; 29 C.F.R. §§ 516.4, 825.300. And here, there is even less an arguable basis to find a threat to speech. The government is not making a statement but asking a question and the patient’s response to that question is completely voluntary. MTD Br. at 4–5.

H.B. 2749 regulates conduct, not speech. Kansas courts distinguish between regulations implicating speech and those directed to conduct with incidental effects on speech. That is, “speech used to achieve a specific end or to induce another to act” is different from speech “intended merely as an expression of one’s thoughts.” *State v. Bland*, 321 P.3d 799 (Kan. Ct. App. 2014) (unpublished table decision). And as Plaintiffs themselves concede, Opp’n at 14–15,

“[s]tates may regulate professional conduct, even though that conduct incidentally involves speech.” *National Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 768 (2018). Concerns that prompt strict scrutiny are absent when conduct, rather than speech, is the triggering factor. Plaintiffs have pled no facts showing that collecting private, non-clinical data is speech.

Plaintiffs point to various allegations that they say support their free speech claims. Opp’n at 15. But most of the allegations they rely on in paragraphs 116–18 of their Supplemental Second Amended Petition do not concern H.B. 2749 at all but relate to the WRTK Act and its amendments. That law serves different purposes and operates by different mechanisms than H.B. 2749—allegations about one do not translate to the other. MTD Br. at 6. And the allegations they cite that do address H.B. 2749 largely concern Plaintiffs’ undeveloped assertion that the amendment’s reporting requirements raise ethical concerns about research on human subjects—a matter far afield from free speech. *See* Opp’n at 10–11. Plaintiffs do not explain how these allegations show that H.B. 2749 regulates Plaintiffs’ speech or how that speech is protected by the Kansas Constitution.

Further, even if Plaintiffs had alleged some minimal effect on their speech, “the freedom of speech is not inevitably without limitation.” *In re Comfort*, 284 Kan. 183, 202, 159 P.3d 1011, 1025 (2007). When regulating professional conduct, or non-expressive conduct not intended to convey a particular message, rather than speech, professionals may “trade certain aspects of their free speech rights for their licenses to practice,” *id.*; *contra* Opp’n at 14. Medical professionals in particular are often called by the state to collect and report non-clinical data, even for abortion. MTD Br. at 22–23. Plaintiffs’ only attempt to distinguish H.B. 2749 from these other regulations that compel Plaintiffs’ conduct is their analogy to federal research regulations and the unsupported assertion that a voluntary questionnaire forces them to “interrogate” their patients.

MTD Br. at 15–16. Nor do they allege any facts showing that asking a patient to complete a survey with form responses is expressive or intended to convey a particular message. That’s not sufficient to state a free speech claim, especially where the plain reading of H.B. 2749 reveals it is a regulation of conduct, not speech. Plaintiffs’ supplemental claims fail to meet both the standard and heightened pleading requirements for a facial challenge.

In the end, a voluntary questionnaire is not compelled speech. And Plaintiffs do not allege any facts that would show otherwise. So Plaintiffs’ bare conclusions that H.B. 2749 will “force abortion providers to inflict psychological and emotional harm on their patients” and “compel[] providers to interrogate patients using stigmatizing language that may inflict psychological or emotional distress” cannot save their free speech claims. Suppl. Pet. ¶¶ 133, 134. The Court should dismiss those claims.

**C. Plaintiffs fail to allege a violation of equal protection.**

Plaintiffs’ equal protection claims fail because they do not allege that men and women are similarly situated when it comes to pregnancy or abortion. “The party claiming an equal-protection violation has the burden to show a violation, and that includes showing that he or she is similarly situated to members of a class receiving different treatment.” *State v. Little*, 58 Kan. App. 2d 278, 280, 469 P.3d 79, 81 (2020); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). And “[w]hen men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated.” *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting). That is fatal to Plaintiffs’ claims.

Men and women are not similarly situated for abortion, since only women can become pregnant and have abortions. That is why the U.S. Supreme Court has already stated that “[a] State’s regulation of abortion is not a sex-based classification.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 216 (2022). Plaintiffs cite nothing in Kansas law that would warrant

departing from this settled rule. And this rule was not dicta, as Plaintiffs claim, but a restatement of the longstanding principle that laws that pertain to “a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny” without a showing it is a “mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.” *Id.* at 236 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496, n.20 (1974)). Plaintiffs do not allege that H.B. 2749 is a mere pretext for invidious discrimination. Nor can they.

For the same reasons, Plaintiffs have also failed to plead sufficient facts to support their allegation that H.B. 2749 “perpetuates sex-based stereotypes.” Suppl. Pet. ¶ 152. Despite what Plaintiffs say, the biological distinctiveness of sex is inscribed by nature—it is “not a stereotype.” *Adams ex rel. Kasper v. School Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022) (en banc). They allege no support for their assertion that H.B. 2749 “assumes motherhood is the appropriate role for women”—indeed, it is unclear how asking abortion patients to voluntarily identify the most important factor in their choice to have an abortion is equivalent to asking a woman to “justify” her decision. *Cf.* Opp’n at 10, 17, 25. And even if the possibility of “shame” were a cognizable injury, the Plaintiffs’ assertions that the law perpetuates that shame “do not reasonably follow from” the facts they allege and should therefore not be credited. *See Weil & Assocs. v. Urban Renewal Agency of Wichita*, 206 Kan. 405, 413–14, 479 P.2d 875, 883 (1971). They do not meet the heightened pleading standard for facial challenges.

The sweeping claims in Plaintiffs’ briefing are not borne out by the facts alleged in their Supplemental Second Amended Complaint or the provisions of the law enacted by the Legislature. They cite no support for their bald, inflammatory conclusions. For example, they say that H.B. 2749 insists “that women’s natural role and destiny is to bear children; that the ‘unnatural’ decision to end a pregnancy requires justification; and that pregnant people who seek

abortion are incompetent decision-makers.” Opp’n at 23. Or that H.B. 2749 “subjects every abortion patient to intrusive questioning based on the sex-stereotype that resisting motherhood is deviant and that women and pregnant people are incompetent decision makers in need of more policies to steer them towards choosing childbirth.” Opp’n at 25. These conclusory allegations lack any grounding in the statute itself and their pleading supplies none. Likewise, Plaintiffs’ repeated assertion that H.B. 2749 “condition[s]” a woman’s access to abortion services on her disclosure of highly personal information is defied by the plain text of the statute, which makes clear that any disclosure is voluntary. Opp’n at 24–25. Plaintiffs fail to allege facts supporting an equal protection claim based on stereotypes.

Plaintiffs thus have not alleged that H.B. 2749, by regulating the conduct of medical professionals, somehow singles out a protected class. None of their conclusory assertions show how H.B. 2749’s strictly voluntary compliance regime compels pregnant women to act in any way. The law does not “distinguish[] people capable of becoming pregnant,” Opp’n at 18, but applies a practical and factual distinction based on whether the patient *is in fact pregnant and choosing to have an abortion*. It would otherwise serve no purpose to collect information about a patient’s primary reason for choosing to have an abortion.

Ultimately, Plaintiffs would have this Court adopt a categorical rule that regulations targeting the conduct of abortion providers necessarily also implicate patients’ rights. But the Kansas Supreme Court’s prior *Hodes* decisions do not warrant that conclusion. Opp’n at 21, n. 7. In those cases, plaintiffs alleged impairments to their patients’ access to abortion services as a result of the regulations. Not so here. Patients are not required under H.B. 2749 to answer the government’s questions, and it is unclear now how those optional questions will be presented to patients. MTD Br. at 17. That is not compulsion of any kind, much less an equal protection

violation. The Court should dismiss Plaintiffs' equal protection claims.

### CONCLUSION

The Court should dismiss Plaintiffs' supplemental claims challenging H.B. 2749 without prejudice for lack of jurisdiction or with prejudice for failure to state a claim.

Respectfully submitted this 19th day of August, 2024.

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This is the certify that on this 19th day of August, 2024, I filed the above and foregoing with the Clerk of the Court, and served electronically to all counsel of record:

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