

**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.; 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; the STATE OF KANSAS ex)
rel. Kansas State Board of Healing)
Arts; and JANET STANEK, in her)
official capacity as Secretary of the)
Kansas Department of Health and)
Environment,)

Defendants.)

Case No. 23CV03140

Division No. 12
K.S.A. Chapter 60

**STATE DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO NARROW OR
VACATE INJUNCTION AND TO DISMISS WITHOUT PREJUDICE**

(Filing Contains Materials Subject to the Court's 7/22/2024 Protective Order)

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INTRODUCTION

For 28 years, Kansas’s Woman’s Right to Know Act (“WRTKA”) has given women seeking abortions various statutory rights against their abortion provider. They have the right to see the ultrasound of their unborn child and the right to hear his or her heartbeat. They have a right not to be pressured into an abortion in less than 24 hours and a right to consult their physician no less than 30 minutes before the abortion. They have the right to receive certain information—including the risks and benefits of the procedure, the anatomical development of their unborn child, and the possibility that the chemical abortion process can be stopped if they change their mind. And if they suffer harm from the breach of any of these rights, they may sue their abortion provider in tort for damages.

The abortion provider Plaintiffs here seek to do away with those rights with a permanent injunction against the WRTKA in all of its applications. But they seek to do so *on behalf of the women who hold these very rights*. Plaintiffs thus invoke third-party standing to permanently prevent the women they claim to represent from suing them. That conflict of interest bars the use of third-party standing here.

Recent news and discovery make it impossible to ignore this structural conflict. As recent front-page reporting by the New York Times detailed, Planned Parenthood often provides sub-standard patient care and informed consent to women nationwide. Katie Benner, *Botched Care and Tired Staff: Planned Parenthood in Crisis*, N.Y. Times (Feb. 15, 2025), attached as Exhibit A. This stems from the organization’s desire to increase revenue by decreasing time spent per patient. *Id.* And those problems are echoed in the evidence produced in this case, including heartbreaking patient complaints Planned Parenthood received about its [REDACTED] for abortions. [REDACTED]

[REDACTED]

[REDACTED] Yet on the other hand, Plaintiffs have not offered even a single patient

who has said the WRTKA interfered with an abortion. Instead, the women who testified in this case said that they wished they would have received the information the WRTKA now requires before they consented to abortions they now regret.

This inherent conflict of interest precludes Plaintiffs from adequately representing their patients. And it poses a due process problem that prohibits the use of third-party standing, deprives the Court of jurisdiction over third-party claims, and mandates dismissal.

First, the conflict of interest between Plaintiffs and their patients deprives Plaintiffs of third-party standing to challenge the WRTKA. Even if Plaintiffs could satisfy the elements of third-party standing under Kansas law, the conflict violates federal due process protections. To recognize third-party standing here would violate due process by adjudicating the rights of Plaintiffs' women patients without joining them or giving them adequate representation. If Plaintiffs prevail, a judgment in their favor would strip away their patients' statutory rights to sue them under the WRTKA, all without any opportunity for the patients to be heard. And if affirmed on appeal, that judgment would be entitled to stare decisis, and functionally equivalent to a binding merits adjudication without their presence. Because third-party standing here is inconsistent with due process, Plaintiffs' autonomy and equal protection theories must be dismissed.

Second, this case should be dismissed because due process dictates that Plaintiffs' women patients are necessary parties to an adjudication of their own rights and yet they cannot feasibly be joined to this case. The rules for joining necessary parties sound in due process and require joinder of persons who claim an interest in the case and might be prejudiced if the case were tried in their absence. Here, the women whose rights Plaintiffs both invoke and seek to extinguish would suffer grave prejudice if this case were tried and a judgment rendered in a case in which they lacked adequate representation. A final decision barring enforcement of

the WRTKA would both remove the protections Kansas law provides to women seeking an abortion and set a precedent against them. That is true of Plaintiffs' free-speech theories just as it is true of their claims invoking their patients' rights. The women whose rights are at issue are not adequately represented and, given their vast numbers and unknown identities, they cannot feasibly be joined. This case cannot proceed without them.

The State Defendants therefore move under K.S.A. 60-212(c) and (h)(2)–(3) and K.S.A. 60-219(b) either (1) to dismiss Plaintiffs' third-party claims for lack of jurisdiction and narrow the temporary injunction accordingly or (2) to dismiss this action without prejudice for failure to join necessary parties.

BACKGROUND

Plaintiffs portray the interests of their women patients as united against the WRTKA in monolithic support of minimizing all regulations of the abortion process. That's inaccurate. Plaintiffs' single-minded advocacy for abortion does not represent the interests of all the patients whose rights they invoke.

A. The WRTKA confers rights on patients adverse to Plaintiffs.

The WRTKA is an informed consent law. It states that “[e]xcept in the case of a medical emergency, consent to an abortion is voluntary and informed only if” certain statutory conditions are met. K.S.A. 65-6709. Women may enforce the right to informed consent civilly. Under Kansas common law, a patient who experiences harm due to lack of informed consent may sue her physician in tort. *See, e.g., Kelly v. VinZant*, 287 Kan. 509, 519, 197 P.3d 803, 810 (2008). And the WRTKA gives her a separate cause of action “for actual damages, exemplary and punitive damages” if the physician fails to provide the required disclosures on the possibility of reversing a medication abortion. K.S.A. 65-6716(h)(1).

The WRTKA gives a woman seeking an abortion several statutory rights as part of informed consent:

- she must receive certain medical information about abortion in writing 24 hours before her appointment, K.S.A 65-6709(a), (d);
- she is entitled to at least 30 minutes after consulting with a physician before the abortion can be performed, K.S.A. 65-6709(c);
- she must be informed of the right to see the ultrasound of her unborn child if one is taken, K.S.A. 65-6709(h);
- she must be informed of her right to see her unborn child’s heartbeat if heart monitoring equipment is used, K.S.A. 65-6709(i); and
- if she is obtaining a medication abortion, she must be informed that, if she changes her mind after taking the first pill, it may be possible to reverse the drug’s effects if she acts quickly, K.S.A. 65-6716(c)(1).

But Plaintiffs seek to do away with their patients’ statutory rights to sue them. They contend that the WRTKA is facially unconstitutional in all of its applications and in every situation. Pls.’ Suppl. Second Am. Pet. ¶¶ 144–52. They seek a permanent injunction precluding Defendants from enforcing the law in any way or in any circumstance. *Id.* at 45–46.

They invoke the constitutional rights of their patients to obtain that relief. *Id.* ¶¶ 145, 149, 151. But if Plaintiffs obtain that ruling, it will bar any state enforcement of their patients’ statutory rights under the WRTKA. And if that ruling is affirmed on appeal, as a matter of stare decisis, it will likely bar any common-law claims under the WRTKA by their patients. *See Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 714, 89 P.3d 573, 579 (2004). Patients’ rights to sue Plaintiffs under the WRTKA hang in the balance.

B. Planned Parenthood prioritizes revenue over patient care.

Plaintiffs’ own pecuniary interests conflict with their patients’ statutory rights to informed consent. When an abortion-minded woman receives informed consent under the WRTKA, she is less likely to choose to continue with her abortion—thus denying Planned Parenthood the profits it seeks to maximize. Planned Parenthood has an economic incentive to push for less disclosure and quicker procedures. Ex. A, Benner at 1. The New York Times report, based on

interviews with *more than 50* current and former employees, describes Planned Parenthood’s intense efforts to shorten patient interactions to boost its bottom line: “Employees said there has been constant pressure to more than double the number of patients seen from the present 2.1 million, to help bring in more revenues.” *Id.* at 10. For that reason, one Planned Parenthood affiliate “expects clinics to see more than four patients an hour, and for appointments to last about 10 minutes.” *Id.* The effect has been such that a manager of another affiliate “said that patients complained they felt like they were in a factory,” *id.* at 11, while another affiliate employee characterized Planned Parenthood’s clinics as “‘a conveyor belt’ for patients.” *Id.*

Those economic pressures to shorten patient interactions have led to “scores of allegations... that accuse Planned Parenthood of poor care.” *Id.* at 2. “[C]linic employees said repeatedly in interviews that patients routinely encountered long waits, undertrained staff members and trouble even booking an appointment.” *Id.* at 9. Some of those problems led to serious medical malpractice—botched abortions, severe nerve damage from an IUD, insertion of an IUD into a woman who was already pregnant, failure to document STD test results, and an unaddressed sewage leak in an abortion recovery room such that “[p]atients vomited from the stench.” *Id.* at 1–4. And even when Planned Parenthood employees complained to supervisors about these “clinic practices,” the organization responded “with reminders that they were in a ‘mission moment’” that “overshadowed their concerns.” *Id.* at 17.

C. Kansas patients complain about lack of informed consent.

The nationwide problems highlighted by the New York Times’ reporting are mirrored in the record concerning its Kansas facilities. For one, Planned Parenthood staffs its Kansas clinic with a rotating cast of doctors, many from out of state. Ex. 36, Tr. of Emily Wales (Feb. 10, 2025) (“Wales Tr.”) at 266:3–268:1; Ex. 9,

[REDACTED]

D. All the patient testimony supports the WRTKA disclosures.

Plaintiffs have not identified a single one of their patients—former, current, or future—who alleges that the WRTKA disclosures violated her autonomy. They have not pointed to even one instance where providing those disclosures prevented a woman from obtaining an abortion she desired. And while they claim to represent those women’s interests in overturning the WRTKA, they have refused to produce any records of the patients that would support their claims, even as an anonymized sample. Instead, the only testimony by actual women in this case—including three from Kansas—shows women’s interest in receiving the information the WRTKA requires, promoting autonomy rather than hampering it.

Donna Pond had a surgical abortion in 1986 in Wichita, more than a decade before the WRTKA was enacted. It was not until the procedure had started that she was told she was expecting twins. That led to her “waffling a little bit” about the decision and asking whether the Valium she had taken would hurt the babies, but the doctor performing the abortion said “that [she] wouldn’t be able to take care of one baby, let alone two.” Ex. 66, Tr. of Donna Pond (Jan. 23, 2025) at 38:23–39:9. She testified that those performing abortions should have “to give full disclosure to the patient about what an abortion is and that it ends a life,” *id.* at 62:14–20, as the WRTKA requires. They should also have to give other information required by the WRTKA, including “alternatives to abortion, ... the picture of the sonogram, and ... not just physical consequences, but mental consequences” of having one. *Id.* at 63:7–18.

Melissa Cole, then a Kansas resident, had a surgical abortion in 1975 in Kansas City, Missouri, when she was 15 years old. Her mother forced her to get the abortion, and she “had no idea” what an abortion was. Ex. 62, Tr. of Melissa Cole (Feb. 10, 2025) at 67:16–18. She cannot say whether she knew they would take the baby out of her uterus, because “no one explained anything to [her].” *Id.* at 71:7–14. She did not consider becoming a parent because she “wasn’t given that option,” even though she “used to babysit all the time and [she] loved children.” *Id.* at 73:11–74:2. She wishes “somebody would have explained there were other options,” *id.*, or “would have seen [she] was under duress,” “scared,” as “a young child who was not participating in a way that looked like [she] wanted to be there.” *Id.* at 74:7–17, 75:9–21.

Ms. Cole had a second abortion in 1981 in Fayetteville, Arkansas. She testified that “if somebody would have talked to [her] and explained where the baby was in the process of growing,” as the WRTKA requires, it would have “given her an opportunity to think about ... keeping the pregnancy.” *Id.* at 92:11–93:2. But without

that information, she “thought it was a blob of cells” because she was not offered an ultrasound before her abortion to “actually see the beginning of a baby.” *Id.* at 93:11–96:14 (“I needed somebody to tell me what a developing fetus is and ... the stages, because I did not understand that.”).

Sheryl Hoyle had an abortion in 1972 at a hospital in Salina, Kansas. Sheryl regrets that abortion and now has to deal with “triggers” and “flashback memories,” Ex. 64, Tr. of Sheryl Hoyle (Feb. 13, 2025) at 51:17–24, such as “Mother’s Day, the time of the abortion, the date of when the baby would have born” every year. *Id.* at 53:4–54:6. “Because ... the doctor didn’t explain it well,” that made her “not trust other doctors” and not trust “people broadly.” *Id.* at 74:21–75:8; *see also id.* at 69:16–70:4. And several disclosures now required by the WRTKA would have made a difference:

- *Ultrasound and fetal heartbeat.* An ultrasound “would have revealed the true status of the baby,” *id.* at 51:17–24, “because that shows life.” *Id.* “I firmly believe that had I seen the sonogram, seen the heartbeat, that I would not have chosen” abortion. *Id.* at 52:7–12. But she was “buying into the lie that it was a blob of tissue.” *Id.* at 52:4–53:3.
- *Adoption.* Someone explaining to her the “three choices”—parenting, abortion, and adoption—“would have helped” her make the best decision for herself. *Id.* at 54:8–55:1. Although she knew adoption was available, “it was never presented in a way as an option.” *Id.*
- *Fetal pain.* She “was not told that the baby could feel pain, let alone that it was a baby at all,” but having that information would have changed her decision. *Id.* at 67:12–68:2.

Elizabeth Gillette had a chemical abortion in 2010 or 2011 at Planned Parenthood in McMinnville, Oregon. Planned Parenthood refused to give her the time that the WRTKA would have given her as a right—instead, “their responses were all very geared towards funneling me towards making the choice of an abortion,” Ex. 63, Tr. of Elizabeth Gillette (Feb. 4, 2025) at 68:21–69:3, telling her she could not “go home and think about it and come back.” *Id.* at 72:6–16. Informed

consent information “[i]n writing would have been great,” *id.* at 134:10–23, but time was what she needed most. *See id.* at 223:13–17 (“I think even 24 hours would have helped me, really.”); *id.* at 81:1–8 (“And I needed more time. I couldn’t make that choice fairly.”); *id.* at 83:16–21 (“I think what’s important is that women have enough time to think about the decision.”); *id.* at 83:24–84:18 (“But in that emotional state, I think I needed time.”). She didn’t get it, and that made all the difference. *Id.* at 139:19–140:10.

Leslie Wolbert had an abortion in 2005 at Planned Parenthood in New York. She put her “trust in the people at Planned Parenthood,” Ex. 67, Tr. of Leslie Wolbert (Feb. 7, 2025) at 67:12–22, and wished that “someone from Planned Parenthood would have looked [her] in the eye and said, ‘You can carry this baby to term and be its mama,’” *id.* at 121:7–122:18, but “[t]he only thing that [she] kept being told is that [she] needed to abort.” *Id.* at 67:12–22. She “didn’t know that a heartbeat could...be detected,” or that she “could have asked [the technician] to turn on the sound.” *Id.* at 86:16–87:6. “[N]o medical person ever said, ‘You know, you could keep this baby and, and you could actually receive help.’” *Id.* at 92:16–22. Instead, “[i]t was the exact opposite of, of that.” *Id.* She did not receive full disclosure of abortion pill side effects either—that she “would be in and out of, like, consciousness and delusional and almost fainting.” *Id.* at 102:6–17. She “had no idea,” but “literally thought [her] period is going to come quick and [she was] going to have a really heavy one.” *Id.* “100 percent” this “would have changed [her] mind.” *Id.* at 112:14–22

E. Women change their minds after receiving WRTKA disclosures.

All the Plaintiffs testified that some women change their minds about getting an abortion after they receive the WRTKA disclosures. That may be after receiving the 24-hour written disclosure, by walking out of an appointment, or by expressing uncertainty during the physician consultation.

Ex. 5, Tr. of Traci Lynn Nauser, M.D. (Jan. 7, 2025) (“Nauser Tr.”) at 315:14–318:13; Ex. 36, Wales Tr. at 146:23–148:8; Ex. 9, Alsaden Tr. at 202:12–203:18. And one woman witness, **Arianna Neely**, testified she changed her mind about getting an abortion after viewing an ultrasound of her unborn child that gave her “a thorough understanding” of the stakes. Ex. 65, Tr. of Arianna Neely (Feb. 12, 2025) at 106:19–107:11; 110:24–111:8. She “was able to see, like, characteristics of the baby,” to “see the baby wiggling,” and “know for sure that the baby had a heartbeat.” *Id.* at 106:24–107:11. Plaintiffs seek to strip away women’s right to this information in Kansas—ironically, based on their own autonomy.

LEGAL STANDARD

State Defendants raised the conflict of interest between Plaintiffs and their patients in opposing Plaintiffs’ motion for a temporary injunction, but the Court ruled in granting that motion that Plaintiffs had met the requirements of that doctrine. That interlocutory ruling is not the end of the matter—rather, “Plaintiffs must maintain their personal interest in the dispute at all stages of litigation,” and “with the manner and degree of evidence required at the successive stages of the litigation.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (quotation omitted). So now that discovery is complete, the State Defendants hereby renew their arguments concerning this conflict under K.S.A. 60-212(c). Such a motion may raise a lack of subject matter jurisdiction, which the Court has a duty to consider “at any time,” as well as failure “to join a person required by subsection (b) of K.S.A. 60-219.” K.S.A. 60-212(h)(2)–(3). Because this motion is based on discovery, it is “treated as one for summary judgment” and Plaintiffs have the opportunity to submit discovery materials in opposition. K.S.A. 60-212(d).

ARGUMENT

I. Plaintiffs lack standing to sue on behalf of their patients.

With discovery now complete, the record is clear that Plaintiffs cannot establish third-party standing consistent with Kansas law or federal due process. As a result, the Court lacks jurisdiction over third-party claims. It should dismiss them without prejudice and lift its injunction as to the WRTKA provisions challenged only under those theories.

A. Kansas does not recognize third-party standing here.

Kansas law allows third-party standing only in “special situations,” as recognized by federal precedent. *Landrith v. Jordan*, 308 P.3d 31, 2013 WL 5187269, at *8 (Kan. App. 2013). In addition to an injury in fact, the plaintiff must also “have a close relation to the third party” and “there must exist some hindrance to the third party’s ability to protect his or her own interests.” *Id.* (citing *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991)).

As this Court observed in its temporary injunction order, the Kansas Supreme Court has followed historic federal precedent allowing abortion providers “to assert their patients’ rights” to privacy from state investigation. *See Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 921, 128 P.3d 364, 377 (2006) (citing *Singleton v. Wulff*, 428 U.S. 106, 117 (1976)). But the Kansas Supreme Court has not addressed that issue since *Dobbs*, which criticized the third-party standing doctrine on this point. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 286–87 (2022) (citing *June Med. Servs. LLC v. Russo*, 591 U.S. 299 (2020) (dissents of Alito & Gorsuch, J.J.); *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582, 632 n.1 (2016) (Thomas, J., dissenting)). *Dobbs* thus cast “grave doubt” on a carte blanche approach to third-party standing in abortion cases. *EMW Women’s Surgical Ctr., P.S.C. v.*

physicians, such that by the time a patient brings in a consent form, it often bears the name of a physician no longer working there. Ex. 36, Wales Tr. at 65:20–66:9, 266:3–268:1; Ex. 9, Alsaden Tr. at 46:7–47:18. What’s more, both Plaintiffs testified that many of their patients are out-of-state visitors traveling to Kansas solely to seek an abortion. Ex. 5, Nauser Tr. at 80: 1–8; Ex. 36, Wales Tr. at 44:4–45:17; Ex. 9, Alsaden Tr. at 96:24–97:5. During their appointments, Plaintiffs’ abortion patients go through a series of cookie-cutter tasks largely managed by administrative staff, where patient education is accomplished via formulaic videos and/or stacks of paper which include, in some cases, preemptive agreements to limit the Plaintiffs’ liability. CWH-0000757, attached as Exhibit C; CWH-0000759, attached as Exhibit D; PP-0004874, attached as Exhibit E; PP-0003675, attached as Exhibit F; PP-0008189, attached as Exhibit G; PP-0008191, attached as Exhibit H. Patients are given a chance to speak with one of Plaintiffs’ physicians, who they are most likely meeting for the first time and, even then, only for a matter of minutes. Ex. 5, Nauser Tr. at 222:10–223:1; Ex. 9, Alsaden Tr. at 125:25–129:20. [REDACTED]

[REDACTED] This record undermines the notion that a meaningful doctor-physician relationship is formed in this context. Yet Plaintiffs are suing to make that relationship even *less close*—they ask the Court to strike down the 30-minute consultation window, which they say injures them by preventing them from completing more abortions. Pls.’ Suppl. Second Am. Pet. ¶¶ 138–43.

2. No insurmountable obstacles to patient suits.

Third-party standing also fails because “[t]here are no ‘insurmountable’ obstacles stopping women seeking abortions from asserting their own rights.” *Whole Woman’s Health*, 579 U.S. at 631 (Thomas, J., dissenting). To the contrary, “interested women have challenged abortion regulations on their own behalf in case

after case.” *June Med.*, 591 U.S. at 414 (Gorsuch, J., dissenting) (collecting cases). Justiciability of those cases poses no concern, for “if a woman seeking an abortion brings suit, her claim will survive the end of her pregnancy under the capable-of-repetition-yet-evading-review exception to mootness.” *Id.* at 405 (Alito, J., dissenting). Nor is the potential loss of privacy a deterrent to suit, since women “can sue under a pseudonym” and avail themselves of “[o]ther precautions [that] may be taken during the course of litigation to avoid revealing their identities.” *Id.*

The same is true here. Plaintiffs allege that their patients’ abortion rights have been infringed by the WRTKA for nearly thirty years. That encompasses a large volume of patients—

Any of these tens of thousands of women could have brought a first-party suit under the theories Plaintiffs assert here. And if any of those women had been harmed in the manner alleged by Plaintiffs, it is hard to fathom why none of them ever challenged the WRTKA, particularly because they could have been afforded privacy protection via use of a pseudonym. *See Unwitting Victim v. C.S.*, 273 Kan. 937, 942, 47 P.3d 392, 397 (2002). If the WRTKA injures autonomy, nothing stops patients from suing. That bars third-party claims.

B. Allowing third-party standing would violate due process.

Even if Plaintiffs could meet the elements of third-party standing, the theory would be precluded because of the “blatant conflict of interest between an abortion provider and its patients” concerning laws “that protect their [patients’] health.” *June Med.*, 591 U.S. at 401 (Alito, J., dissenting). Third-party standing is not appropriate where the interests of the plaintiff and the third party whose rights it invokes “are not parallel and, indeed, are potentially in conflict.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004). So “[w]hen an abortion regulation is enacted for the asserted purpose of protecting the health of women, an abortion

provider seeking to strike down that law should not be able to rely on the constitutional rights of women.” *June Med.*, 591 U.S. at 402 (Alito, J., dissenting).

That is readily apparent for Plaintiffs’ challenge of the WRTKA: they purport to invoke the rights of their patients to invalidate a law that gives those same patients the right to sue them for damages. Not only that, but the women’s interest in receiving more disclosure is directly adverse to Plaintiffs’ pecuniary interest in completing more procedures. These structural conflicts are borne out here, where the only testimony from individual women was in favor of additional disclosures about abortion, [REDACTED]

[REDACTED] Just as in *June Medical*, “it’s pretty hard to ignore the potential for conflict here.” 591 U.S. at 415 (Gorsuch, J., dissenting).

This conflict of interest poses a problem of federal due process under the Fourteenth Amendment. Plaintiffs seek to adjudicate the rights of all women in Kansas who might seek an abortion, but none of them are parties here. This violates the “due process ‘principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). “A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.” *Martin v. Wilks*, 490 U.S. 755, 762 (1989). This is part of “our deep-rooted historic tradition that everyone should have his own day in court.” *Id.* (quotation omitted). The law allows only a handful of narrow exceptions, none of which apply here. *See Taylor v. Sturgell*, 553 U.S. 880, 884 (2008).

The decision Plaintiffs seek in this case will ultimately extinguish rights provided for women by the Kansas legislature and will have the same effect as a

binding decision on the claims of the women whose rights they invoke. Plaintiffs expressly invoke the rights of those women for decision—both their rights of autonomy and their rights to equal protection. And yet at the same time, Plaintiffs seek an order to permanently bar state executive officials from any enforcement of the women’s statutory rights under the WRTKA. So this proceeding would not simply have an impact or collateral effect on the rights of Plaintiffs’ women patients under the WRTKA—it would actually decide them in their absence. It would thus violate “[t]he fundamental requirement of due process” that a party receive “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation omitted).

Plus, a decision in Plaintiffs’ favor would not be confined to the circumstances of Plaintiffs’ claims, since it is presented on a facial basis as to any and all actual and potential applications. Pls.’ Suppl. Second Am. Pet. 45–46. A final decision on that facial challenge would bar state executive officials from enforcing the WRTKA anywhere in the State, and any woman who seeks an abortion in Kansas would lose state enforcement of her rights under the WRTKA. That would sweep away the rights of any woman who might ever become subject to the law.

To be sure, as a matter of *res judicata*, Plaintiffs’ third-party standing theory would not preclude a first-party action by women patients to enforce the WRTKA. *Richards v. Jefferson Cnty.*, 517 U.S. 793, 805 (1996). But soon enough, that distinction would count for little, since it would only be a matter of time until the Kansas Court of Appeals decides the third-party claims. And once an appellate decision happens, it will likely bar any claims by the women patients. Under *stare decisis*, see *Crist*, 277 Kan. at 714, 89 P.3d at 579, a later court would apply an appellate decision “to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same.” *Stare Decisis*, Black’s

Law Dictionary Abridged (5th ed. 1983). That makes precedent just as fatal as preclusion.

That too violates the women’s rights. As then-Professor Barrett has observed, this function of stare decisis is “indistinguishable from nonparty preclusion,” since “[f]irst-in-time litigants usually receive the only opportunity to air arguments on the merits of a legal issue.” Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1013, 1017 (2003). And it “raises serious due process issues” that can veer “into unconstitutionality.” *Id.* at 1026; *see also* Emile J. Katz, *Due Process & the Standing Doctrine*, 47 Harv. J.L. & Pub. Pol’y 395, 400–01 (2024). This proposal to decide the patients’ claims without joining them is just such a case.

The few narrow exceptions to the rule against binding nonparties only underscore the due process problems with Plaintiffs’ theory. *See Taylor v. Sturgell*, 553 U.S. 880, 884 (2008). For example, a certified class action may bind absent class members, but only if the case meets procedural requirements, including that the absent class members’ interests be “adequately represented by someone with the same interests who is a party.” *Ortiz*, 527 U.S. at 846. The demand for adequate representation of absent class members is “grounded in due process” and codified in Rule 23(a)(4). *Taylor*, 553 U.S. at 901. And it affects third-party standing, since it requires “that the named plaintiff possess the same interest and suffer the same injury as class members.” *June Med.*, 591 U.S. at 402–03 (2020) (Alito, J., dissenting) (quotation omitted). The adequate representation requirement “serves to uncover conflicts of interest between named parties and the class they seek to represent.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997). And it’s why a plaintiff may not assert third-party standing where its interests “are not parallel and [are]... potentially in conflict” with those of the third party. *Elk Grove*, 542 U.S. at 15.

Applying those principles of representative litigation to the third-party standing theory here, “Plaintiffs are essentially seeking to act as a representative for a class of all their patients” affected by the WRTKA. *EMW Women’s Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 813 n.2 (6th Cir. 2020) (Bush, J., dissenting), *opinion vacated on reh’g*, No. 19-5516, 2022 WL 2866607 (6th Cir. July 21, 2022), and *abrogated by Dobbs*, 597 U.S. 215. Yet they do not allege the same injury as their patients—Plaintiffs are not even members of the class they seek to represent. Nor do they “adequately represent the interests of the absent class members.” *Id.* To the contrary, as shown above, their interests are in “blatant conflict” with their patients. *June Med.*, 591 U.S. at 401 (Alito, J., dissenting).

Where Plaintiffs seek to strip away their patients’ rights to sue them and to increase the number of abortions they can perform, they plainly cannot adequately represent those patients on the same claim. It would be “perhaps deleterious to due process rights, to allow a putative representative for a group of people to proceed with litigation in a representative capacity when those who are purportedly represented may not desire the relief that the putative representative seeks.” *EMW Surgical Ctr., P.S.C.*, 960 F.3d at 813 n.2 (Bush, J., dissenting). That is why, after *Dobbs*, the Kentucky Supreme Court held that a similar “conflict of interest between the abortion providers and their patients under the statutes at issue” precluded third-party standing. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 664 S.W.3d 633, 658–59 (Ky. 2023). “[T]he abortion providers’ interest in not being civilly or criminally prosecuted under the statutes appears to potentially conflict with a pregnant woman’s interest in receiving adequate medical care.” *Id.* And since “third-party standing is improper when the plaintiff’s interests are potentially in conflict with the third party’s interests,” the abortion providers could not rely on that theory to challenge a statute that gave their patients the right to sue them. *Id.*

This Court too, should dismiss Plaintiffs' third-party standing theories for lack of jurisdiction and vacate the temporary injunction related to those claims.

II. Plaintiffs' WRTKA challenge requires joining the affected patients.

While the Court lacks jurisdiction over Plaintiffs' third-party claims because they cannot represent their patients, the failure to join those patients also requires dismissal of Plaintiffs' WRTKA claims under the principles that govern joinder of necessary parties. Kansas law demands joinder of an absent party when disposing of the action without that party may, as a "practical matter, impair or impede the person's ability to protect the interest" or "leave an existing party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of the interest." K.S.A. 60-219(a)(1)(B). If such a person cannot feasibly be joined, the law requires dismissal if the Court determines in equity and good conscience that the action cannot proceed without the joinder of the absent party. K.S.A. 60-219(b). Here, the infeasibility of joining the women requires dismissal.

Kansas's necessary party statute is "closely modeled on Federal Rule 19," *Shawnee Hills Mobile Homes, Inc. v. Rural Water Dist. No. 6*, 217 Kan. 421, 427, 537 P.2d 210, 216 (1975), which embodies principles that are both prudential and "the fundamentals of due process." *Britton v. Green*, 325 F.2d 377, 382 (10th Cir. 1963). Indeed, joining a necessary party "preserves the principles of due process that are inherent in Rule 19 and which long antedate the Rules of Civil Procedure." *Disabled in Action of Pa. v. Se. Pa. Transp. Auth.*, 635 F.3d 87, 101 (3d Cir. 2011) (Jordan, J., concurring in part) (citing *Torrence v. Shedd*, 144 U.S. 527, 532 (1892)). And those principles compel dismissal here because the women whose rights Plaintiffs seek to decide cannot feasibly be joined.

A. Due process demands joining patients as necessary parties.

Courts employ the Rule 19 framework to promote "fair treatment of nonparties in certain circumstances where their interests, and particularly their

due process rights, are at risk from litigation between others.” *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 464 (D.C. Cir. 2017); accord *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216, 224 (5th Cir. 1946). Indeed, “[t]he failure of the court to protect those not before it may amount to a violation of due process should the judgment in the action have the effect of destroying their rights.” Wright & Miller, 7 Fed. Prac. & Proc. Civ. § 1602 (3d ed.). Even where the decision does “not bind absent persons,” if “the nonparty’s claim or defense may be impaired as a practical matter, ... this may be deemed a violation of due process.” *Id.* “[W]ithout a perfect identi[t]y of interests, a court must be very cautious in concluding that a litigant will serve as a proxy for an absent party.” *Epsilon Energy USA, Inc. v. Chesapeake Appalachia, LLC*, 80 F.4th 223, 235 (3d Cir. 2023). In accordance with these principles, the federal courts of appeals have held that due process demands joining absent parties before the court could proceed with a case.² Here too, deciding this case without the women patients would prejudice both their rights and Defendants’ rights and would therefore violate due process.

Plaintiffs’ women patients are plainly necessary parties because they “claim[] an interest relating to the subject of the action” such that disposing of it in their absence would “impair or impede” their ability to protect that interest. K.S.A. 60-219(a). In fact, they have far more than just an interest in this case—their actual rights are at stake. Pls.’ Suppl. Second Am. Pet. ¶¶ 145, 149, 151–52. That is

² See, e.g., *Britton*, 325 F.2d at 383 (where receivership would interfere with a party’s contractual rights, “due process dictates that they be heard in the proceedings for the appointment of a Receiver.”); *State of N.C. ex rel. Long v. Warren*, 37 F.3d 1495 (4th Cir. 1994) (table) (“Due process concerns compel the court to conclude that the Debtor must be a party to an action that raises the dischargeability of the Debtor’s debts.”); see also *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 123 (1968) (noting the possibility that “an injustice is being, or might be, done to the . . . constitutional, rights of an outsider by proceeding with a particular case”).

problem enough with respect to an adjudication of Plaintiffs' patients' purported right to autonomy, since, as Plaintiffs' experts concede, waiting periods like those of the WRTKA can promote autonomy. Ex. 20, Wynia Tr. at 163:15–164:10.

But the problem is even bigger for patients' various statutory rights under the WRTKA: the right to an ultrasound, to hear their child's heartbeat, to not be pushed into an abortion in less than 24 hours, to have at least 30 minutes after consultation to decide, and to receive certain medical information. Pls.' Suppl. Second Am. Pet. ¶¶ 52, 57, 61–62. Plaintiffs ask this Court to void every one of those rights as unconstitutional in each application. *Id.* at 45–46. Plaintiffs thus advocate *against* these rights of their patients rather than for them—and they do it to help their bottom line. *See* Ex. A, Benner at 10–11. And rather than let patients determine how they value each right and which of their various rights they value more, Plaintiffs insist that the statutory rights of each of their patients are void in the face of their unyielding right to an abortion. Even a decision in Plaintiffs' favor solely on their free-speech claims would substantially invalidate the WRTKA and, by barring state enforcement of the law on a facial basis, seriously impair patients' ability to protect their rights as a practical matter.

Plus, if such a decision were affirmed on appeal, it would effectively foreclose those rights without any involvement from the patients who hold them, thus violating due process. *See* Barrett, *supra*, at 1013, 1017; *Crist*, 277 Kan. at 714, 89 P.3d at 579. Even “without a direct preclusive effect, an adverse judgment could be persuasive precedent in a subsequent proceeding.” *Picciotto v. Continental Cas. Co.*, 512 F.3d 9, 16 (1st Cir. 2008) (quotation omitted). That demands that the patients be joined.

The women patients are also necessary because deciding this case without them would leave the existing parties “subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of the interest.”

K.S.A. 60-219(a). In particular, before a decision on appeal, a judgment barring the State Defendants from enforcing the WRTKA against Plaintiffs would not preclude any of the women patients from obtaining an injunction in another case forcing Defendants to enforce the WRTKA against Plaintiffs. *See Martin*, 490 U.S. at 765; *Richards*, 517 U.S. at 797. And if such a suit were filed, the State Defendants could face conflicting duties in different cases both to enforce and not enforce the WRTKA in the same situations. *W. Union Tel. Co. v. Commonwealth of Pa., by Gottlieb*, 368 U.S. 71, 75 (1961); *see also Mann v. City of Albany*, 883 F.2d 999, 1002–03 (11th Cir. 1989).

B. The infeasibility of joining the patients requires dismissal.

Though proceeding in this case requires joining the women whose rights Plaintiffs seek to adjudicate, it is not feasible to do so. Those women are an inchoate group—they represent not only Plaintiffs’ prior patients, but all future patients they or any other abortion provider in Kansas might see. They are not limited to Kansas, since Plaintiffs acknowledge the increasingly interstate nature of their practice. And they are massive in number—with roughly 30,000 abortions performed in Kansas over the last two years, Kansas Department of Health and Environment, *Annual Summary of Vital Statistics, 2023* 104 (Dec. 2024), <https://perma.cc/T2E6-LFZA>, the number of now-living women whose rights Plaintiffs seek to adjudicate likely reaches into several hundred thousand. It is impossible then to even identify all the affected women, much less determine their many different and varied interests and ensure they are joined and represented as parties here.

Since joining the women patients “is not feasible,” this Court “must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.” K.S.A. 60-219(b). All four factors of that rule—and the due process considerations that underlie them—favor dismissal.

First, “[t]he extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties” favors dismissal. K.S.A. 60-219(b)(1). “This prejudice test is essentially the same as the inquiry under Rule 19(a)(2)(i) into whether continuing the action without a person will, as a practical matter, impair that person’s ability to protect his interest relating to the subject of the lawsuit.” *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1282 (10th Cir. 2012) (quotation omitted). And here, as highlighted above, a decision without the absent women would be effectively the same thing as a binding adjudication of their rights. Judgments that “cannot, with the assurance that comes only from a full trial with all necessary parties present,” protect the defendant from duplicative or inconsistent liability, “cannot stand,” and due process requires that state courts “should have dismissed the case.” *W. Union Tel. Co.*, 368 U.S. at 80.

Second, there is no way to shape relief to avoid prejudice either to the absent women patients or to the Defendants. K.S.A. 60-219(b)(2). “[N]o such protective approach [is] possible” when the prejudice, as here, “would result from the potential outcome of the litigation itself, not the specific terms of any judgment.” *Picciotto*, 512 F.3d at 18. “[T]he all-or-nothing nature of [the] interests” here shows that joining the women patients is the only way to avoid prejudice. *N. Arapaho Tribe*, 697 F.3d at 1282.

Third, for the same reasons, a judgment rendered without the women patients would not be adequate. K.S.A. 60-219(b)(3). This factor is concerned with “the interest of the courts and the public in complete, consistent and efficient settlement of controversies.” *Provident Tradesmens*, 390 U.S. at 111. Here, proceeding without the women would not provide any opportunity for them to vindicate their interest in upholding their rights under the WRTKA, and it would not provide any adequate protection for Defendants from conflicting judgments in a separate action by patients to enforce the WRTKA. *W. Union Tel. Co.*, 368 U.S. at

75. There is “nothing complete, consistent, or efficient” about the looming prospect of relitigation. *N. Arapaho Tribe*, 697 F.3d at 1283 (cleaned up).

Fourth, Plaintiffs would still “have an adequate remedy if the action were dismissed for nonjoinder.” K.S.A. 60-219(b)(4). Of course, “[d]ismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims.” *Republic of Philippines v. Pimentel*, 553 U.S. 851, 872 (2008); *N. Arapaho Tribe*, 697 F.3d at 1283. But in any event, Plaintiffs still have a remedy for the rights that Plaintiffs assert on their own behalf—their free-speech claims. Pls.’ Suppl. Second Am. Pet. ¶¶ 146–47. Plaintiffs can litigate those rights, whether affirmatively or defensively, in the context of as-applied litigation involving specific situations with specific disclosures to specific patients.

What Plaintiffs cannot do, however, is litigate a facial challenge to the WRTKA as a whole on behalf of all women who might ever seek an abortion in Kansas when their interests in that law conflict with those women. The wide-ranging litigation Plaintiffs contemplate, untethered from any specific factual context and without any representation of the affected women, would not be a true judicial proceeding, but a legislative action. The Court should refuse the invitation to take that legislative role and should dismiss this action without prejudice and vacate the injunction because the women cannot feasibly be joined.

CONCLUSION

The Court should dismiss Plaintiffs’ third-party standing theories without prejudice and narrow the injunction accordingly or dismiss this action without prejudice and vacate the injunction. State Defendants request oral argument.

March 21, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 21, 2025, I filed the above document using Kansas e-filing and served the document to:

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**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.; 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; the STATE OF KANSAS ex)
rel. Kansas State Board of Healing)
Arts; and JANET STANEK, in her)
official capacity as Secretary of the)
Kansas Department of Health and)
Environment,)

Defendants.)

Case No. 23CV03140

Division No. 12
K.S.A. Chapter 60

**DECLARATION OF BRAD JOHNSON IN SUPPORT OF STATE
DEFENDANTS' MOTION TO NARROW OR VACATE INJUNCTION AND TO
DISMISS WITHOUT PREJUDICE**

I, Brad Johnson, declare under penalty of perjury under the laws of the State of Kansas that the following is true and correct:

1. I am a resident of the State of Kansas, am over the age of 18, and have personal knowledge of the facts set forth in this declaration.

2. I am an attorney for Defendants Kris Kobach, Stephen Howe, Marc Bennett, and Mark Dupree Sr. ("State Defendants") in this lawsuit.

3. I certify that the documents attached as Exhibits A through J are true and accurate copies of the documents that are incorporated by reference and relied on in the State Defendants' Brief in Support of Motion to Narrow or Vacate Its Injunction and Dismiss Without Prejudice.

Executed on March 21, 2025

Signature:  _____

CERTIFICATE OF SERVICE

I certify that on March 21, 2025, I filed the above document using Kansas e-filing and served the document to:

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/s/ Brad P. Johnson

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EXHIBIT A
(Submitted Separately
Due to File Size)

EXHIBIT B
(Confidential)

EXHIBIT C
(Confidential)

EXHIBIT D
(Confidential)

EXHIBIT E
(Confidential)

EXHIBIT F
(Confidential)

EXHIBIT G

**(Produced in native form to be
transmitted to the court
electronically)**

EXHIBIT H

**(Produced in native form to be
transmitted to the court
electronically)**

EXHIBIT I
(Confidential)

EXHIBIT J

**(Produced in native form to be
transmitted to the court
electronically)**