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CLERK OF THE JOHNSON COUNTY DISTRICT COURT
CASE NUMBER: 23CV03140
PII COMPLIANT

**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; 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

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**STATE DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

**Dated: April 25, 2025**

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## INTRODUCTION

Plaintiffs' response brief helpfully narrows the issues the Court needs to decide. Plaintiffs admit they have suffered no harm from, and indeed voluntarily comply with, many of the Statutes' provisions, albeit in a deficient manner. Plaintiffs continue to screen their patients for coercion. They offer women the opportunity to view the ultrasound of their child. Plaintiffs have doctors meet with women before an abortion to ask questions. Their clinic procedures exceed the Act's 30-minute waiting period. Women schedule their appointments more than 24 hours before an abortion. And Plaintiffs advise women about the risks, benefits, and alternatives to abortion. While Plaintiffs boldly claim the Statutes' requirements "stigmatize" abortion, Plaintiffs' actions tell the opposite story: the Statutes' requirements are necessary for Kansas women to make an informed decision.

Plaintiffs claim they've created a genuine dispute of material fact in their challenge to the WRTKA and H.B. 2749 for three reasons. None succeeds.

First, they claim that every law that regulates abortion is a *per se* infringement of Kansas women's rights to self-determination and bodily autonomy. In Plaintiffs' simple logic, the Statutes impose costs on abortion providers and therefore violate the third-party rights of Kansas women. But that extreme de-regulatory position would invalidate every law applicable to abortion providers. The *Hodes* trilogy of cases require evidence of actual harm to women. And the *only* voices of post-abortion women in this case support the Statutes.

Second, Plaintiffs claim that because a narrow subset of the Statutes' requirements allegedly have harmed women's rights, *all* of the WRTKA's multi-faceted provisions are unconstitutional. But that scattershot approach to constitutional analysis entirely ignores Plaintiffs' burden to show actual infringement from every distinct provision of the WRTKA and H.B. 2749.

Third, Plaintiffs' alleged evidence of actual harm focuses on the 24-hour disclosure period, the informed consent disclosures, the 30-minute waiting period, and the legibility requirements of the WRTKA, as well as the questions in H.B. 2749. But Plaintiffs have not identified a single woman over a nearly thirty-year period of alleged compliance who has suffered any harm from these requirements. Plaintiffs cannot do so because the Statutes enhance, rather than infringe, women's rights to make informed choices about abortion, childbirth, parenting, and adoption.

Nothing in the *Hodes* cases prevent the Kansas Legislature from protecting women from coercive or abusive family members, boyfriends, husbands, and healthcare providers, to ensure the choice is voluntary, informed, and made after adequate deliberation. Because Plaintiffs have not and cannot show constitutional harm from the Statutes, summary judgment is proper in favor of State Defendants.

**REPLY IN SUPPORT OF STATE DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. **Uncontroverted facts**. The following facts are uncontroverted: 1-44, 46-48, 50-53, 58, 60-62, 64, 76, 78-80, 83-85, 87-89, 91-92, 94-95, 99-101, 103-04, 106.[1]

2. **Controversions regarding Plaintiffs' relationship with their patients**. Plaintiffs attempt to controvert Fact Nos. 49, 54-57, 59, 65 which document their shallow relationship with their patients. But Plaintiffs' responses do not controvert these material facts as much as they try to obscure them. Fact No. 55 is emblematic of this. There, Plaintiffs attempt to controvert that Plaintiffs' physicians typically meet their patients for the first time at the pre-abortion meeting by pointing to evidence suggesting some of Dr. Nauser's patients have a pre-existing relationship,

[1] Plaintiffs attempt to add erroneous clarifications and non-evidentiary objections to some facts they don't controvert, but those additions fail to controvert the facts. "It is well settled that uncontroverted statements of fact in a party's motion for summary judgment are deemed admitted by a party who fails to controvert those facts." *Gietzen v. Feleciano*, 25 Kan. App. 2d 487, 488, 964 P.2d 699, 700 (1998).

and Planned Parenthood's patients meet with staff during intake. These facts do not change that the majority of Plaintiffs' patients are from out-of-state and meet the physician for the first time at their abortion appointments for only a few minutes. Ex. 35, Sandoval 230(b)(6) Tr. 128:8- 129:3, 230:24-234:3; Ex. 5, Nauser 230(b)(6) Tr. 80:1-81:18, 186:22-187:3. Plaintiffs' patients could challenge the Statutes but have not done so. Plaintiffs do not dispute they have a financial incentive in the de-regulation of abortion or that the only former abortion patients who have testified in this case said women want more information, not less, before an abortion, including of the content mandated by the WRTKA. Ex. 36, Wales 230(b)(6) Tr. 155:10-20; Ex. 5, Nauser 230(b)(6) 351:9-352:16; Defs. Opp'n Fact Nos. 4-19, 91-106; Cole Tr. at 93:11–96:14. Similarly, Plaintiffs' hearsay objection of Fact No. 65 does not deprive the Court of the ability to consider that article as a matter of "legislative fact" in evaluating the existence of a conflict of interest between abortion providers and their patients.

3. **Controversions regarding patient harm**. Plaintiffs attempt to controvert Fact Nos. 63, 66-75, 77, 81-82, 86, 90, 93, 96-98, 102, and 105 primarily through inadmissible evidence of purported infringement of the right to self-determination and bodily autonomy. Pursuant to Supreme Court Rule 141(d), State Defendants object to Plaintiffs' reliance on such inadmissible evidence. As described in Section III below, Plaintiffs' attempt to create a dispute of material fact relies on (1) irrelevant speculation, (2) inadmissible hearsay, and (3) evidence of purported harm arising from Plaintiffs' conduct, not the Act. Plaintiffs' disputes of Fact Nos. 102 and 105 regarding testimony of compelled speech are also moot. *See* Section V, below.

4. **Controversions regarding legislative animus**. Plaintiffs attempt to controvert Fact No. 45, which states that Plaintiffs have failed to produce evidence showing the Kansas legislature "enacted the Statutes to perpetuate sex-based stereotypes or out of animus for women." Plaintiffs' response does not actually

dispute this statement but instead argues a separate point that the Statutes allegedly "reflect antiquated stereotypes." Plaintiffs have failed to controvert the substance of Fact No. 45 with citations to the record, and Fact No. 45 should be deemed admitted. *Gietzen*, 25 Kan. App. 2d at 488, 964 P.2d at 700.

## ARGUMENT

### I. Plaintiffs cannot establish third-party standing.

As explained in State Defendants' motion to dismiss and vacate briefing, which is incorporated herein by reference, Plaintiffs failed to establish third-party standing and therefore cannot challenge the Statutes on behalf of their patients.

### II. The Court's temporary injunction findings are not binding.

Despite months of discovery, Plaintiffs' response merely regurgitates the secondhand evidence they presented at the temporary injunction stage. They claim State Defendants "relitigate" factual findings made at that stage. Pls. Resp. at 32, 34, 39, 42-44, 46, 48, 55-57. But a temporary injunction is not a final ruling—it simply preserves rights pending a merits decision. *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 461, 726 P.2d 287, 289–90 (1986). Accordingly, findings in a temporary injunction ruling are not binding because, as here, a developed record often dictates a different result. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Bonner Springs Unified Sch. Dist. No. 204 v. Blue Valley Unified Sch. Dist. No. 229*, 32 Kan. App. 2d 1104, 1119, 95 P.3d 655, 665 (2004). And the rules of evidence don't apply at the temporary injunction stage, which is why Plaintiffs could rely on hearsay and speculation. *Midwest Vascular Access, LLC v. Santini*, 2013 WL 448933, at *4 (Kan. Dist. Ct. 2013).

Here, the Court's temporary injunction ruling relied on Plaintiffs' undeveloped and inadmissible assertions that the WRTKA and H.B. 2264 impaired autonomy through delays, denials, or reduced abortion appointments. Temp. Inj. Order at 41-42. No admissible evidence supports Plaintiffs' assertions. *See* Section

III, below. The Court also found that Plaintiffs' self-serving affidavits submitted in support of their temporary injunction suggested the Act's and H.B. 2264's consent materials might be inaccurate or irrelevant. Temp. Inj. Order at 42, 74. But the developed record shows that is not the case. Defs. Opp'n Fact Nos. 2-107. This "full development of the record" requires reaching a "final determination … at variance with the views expressed in its opinion [granting] temporary injunctive relief." *Bonner Springs*, 32 Kan. App. 2d at 1119, 95 P.3d at 665.

## III. There is no admissible evidence the WRTKA infringes autonomy.

Plaintiffs admit that many of the WRTKA's provisions have not infringed their patients' right to self-determination and bodily autonomy. For example, Plaintiffs comply with the pre-payment prohibition. Pls. Resp. Defs. Fact Nos. 84-85. They continue to screen their patients for coercion. Pls. Resp. Defs. Fact No. 86. Plaintiffs offer to show a patient the ultrasound image of her unborn child. Pls. Resp. Defs. Fact No. 87. And Plaintiffs have their physicians meet with patients before an abortion. Pls. Resp. Defs. Fact No. 91.

Plaintiffs also admit they have no injury from several of the Act's provisions. They admit they have no heart-monitor equipment and thus cannot suffer harm from this part of the Act. Pls. Resp. Defs. Fact No. 88. They admit that their own internal patient-processing systems take longer than the Act's 30-minute waiting period. Pls. Resp. Defs. Fact No. 93. No patient was denied emergency care due to medical emergency rules. Pls. Resp. Defs. Fact No. 98; *see also* Sandoval Tr. 244:15-19. Plaintiffs do not dispute that there is scientific evidence to support the Act's disclosures. Pls. Resp. Defs. Fact. No. 74. They admit they voluntarily provide their patients with a description of the abortion method, and the risks, benefits, and alternatives to abortion. Pls. Resp. Defs. Fact No. 75. And none of Plaintiffs' physicians have ever faced unprofessional conduct charges. Pls. Resp. Defs. Fact No. 99.

Plaintiffs, by their actions, agree that the vast majority of the Act's requirements are necessary and good. And, after almost thirty years and tens of thousands of abortions, they have not identified a *single* patient to support their claim that the WRTKA causes distress, delays, excessive costs, or denied abortions. Pls. Resp. Defs. Fact Nos. 75, 85-86, 92, 94-95.

Plaintiffs argue they don't have to prove actual infringement for each of the Act's provisions. Pls. Resp. at 33. They argue that the harm they have allegedly suffered from a narrow subset of the Act's provisions brings *all* of the Legislature's handiwork down in one fell swoop. *Id.* But Plaintiffs' burden is to prove that each individual requirement and disclosure of the Act is unconstitutional. "The general doctrine" in Kansas "is that only the invalid parts of a statute are without legal efficacy." *State ex rel. Marshall v. Consumers Warehouse Mkt., Inc.*, 185 Kan. 363, 372, 343 P.2d 234, 242 (1959).

The Act's requirements are plainly severable from one another. The Act contains a severability clause, K.S.A. § 65-6714, and individual requirements are not dependent on each other for viability. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 624 (2020). For example, K.S.A. § 65-6709(c) has two distinct requirements: (1) that a physician meet with a woman before an abortion "to ensure that she has an adequate opportunity to ask questions of and obtain information from the physician concerning the abortion"; and (2) that this meeting occur "[a]t least 30 minutes prior to the abortion procedure." While State Defendants dispute Plaintiffs have suffered any harm from these provisions, plainly the physician-meeting requirement can be severed from the 30-minute waiting period, which was added via a 2009 amendment. Defs. Fact No. 22. Plaintiffs' litigation history proves the point. In 2013, Plaintiffs challenged a portion of an amendment to the Act, not the entire Amendment, let alone the Act itself. And the courts in those cases treated the Act as severable. Ex. A, *Hodes & Nauser v. Schmidt,* slip opinion, 13–C705

(Shawnee Cnty. Kan. Dist. Ct., June 28, 2013) ("[D]ue to the severability clause … th[e] Court must review each individual provision of the Act challenged and determine individually if any of the challenges substantiate injunctive relief."); *Comprehensive Health of Planned Parenthood of Kansas & Mid-Missouri, Inc. v. Templeton*, 954 F. Supp. 2d 1205, 1217 (D. Kan. 2013) (same). The Court should too.

**A. Mere regulation of abortion does not violate autonomy rights.**

Unable to prove the Statutes cause actual harm, Plaintiffs ask the Court to find that all "laws that regulate the provision of abortion care infringe patients' right to personal autonomy." Pls. Resp. at 32 (capitalization reformatted). Taken to its logical conclusion, Plaintiffs' theory of the constitutional right to self-determination and bodily autonomy would invalidate every law and regulation applied to abortion providers because all laws impose a cost and thus an "obstacle" to abortion in some sense. The requirement that physicians (and not nurses or pharmacists or abortion "navigators") prescribe prescription drugs, including mifepristone and misoprostol, imposes costs, albeit minimal. K.S.A. §§ 65-1626, 65-1643, 65-2837; Ex. 35, Sandoval 230(b)(6) Tr. 30:10-32:19. The requirement that abortion occur in a clinic and not, say, at the pharmacy, presumably also imposes some cost. K.S.A. §§ 65-1626, 65-1643, 65-2837. Like the Woman's Right to Know Act, these laws are safeguards to ensure abortions are properly prescribed, not infringements of the right to autonomy. And Plaintiffs don't challenge those laws, let alone argue they infringe a fundamental right.

Such an all-encompassing rule conflicts with the *Hodes* trilogy, where the Court held that Plaintiffs must "prove a challenged law actually infringes on a constitutionally protected fundamental right." *Hodes III*, 318 Kan. 995, 1005, 551 P.3d 62, 71 (2024). Indeed, the Court would not have had to assess whether the laws at issue actually infringed patients' rights if mere regulation of abortion was sufficient to prove actual infringement. Under the actual infringement test, a

court's analysis begins with a consideration of "the nature of the right at stake." *Id.*, 318 Kan. at 1009, 551 P.3d at 73. Here, the right at stake (self-determination) includes three distinct components: it entails (1) the right to continue a pregnancy and have a child, (2) the right to have an abortion, and (3) the right to "decide" between the two. *Hodes I*, 309 Kan. 610, 620, 440 P.3d 461, 471 (2019). The Court then considers whether Plaintiffs have proven some infringement of this right.

Proving actual infringement is uniquely difficult in the context of an informed consent law like the WRTKA. This is because the Act reinforces the right to self-determination and enhances a woman's decision-making process by providing her with relevant information, ensuring she has sufficient time to make the decision, and shielding her from coercion by abortion providers, family members, boyfriends, and others. Plaintiffs' ethicist, Dr. Wynia, agrees that "a waiting period can prevent coercion and promote autonomy if it's imposed for a medical procedure," and that waiting periods "are most likely to be appropriate for irreversible procedures that affect life and fertility." Ex. 20, Wynia Tr. 163:15–164:10, 164:24–165:19. It is of no moment that the law provides information about fetal development or building time for a woman to make her decision. The safeguards, which Plaintiffs crow are "stigmatizing" of abortion, give women adequate information, as the only post-abortive witnesses in the case attest.

Plaintiffs argue that the Act "singles" out abortion for unique treatment. But that argument is incorrect and cannot invalidate the Act as a matter of law without some evidence of infringement of the right to self-determination. Plaintiffs' experts acknowledge that federal law imposes a waiting period of not just 24 hours but *30 days* for coverage of sterilization. *See* Ex. 20, Wynia Tr. 159:9-161:9. And Kansas law imposes informed consent requirements on a wide swath of medical procedures as different from abortion as the administration of "psychotropic medication," K.A.R. 28-39-231; dry needling, K.A.R. 100-29-19; weight-loss medication, K.A.R.

100-22-8a; and many others.[2] Indeed, courts regularly uphold waiting periods, background checks, and mandatory reporting laws in the context of constitutional rights like abortion and the Second Amendment.[3]

Plaintiffs' overbroad challenge of the entire WRTKA fails as a matter of law. All that remains are claims arising from the 24-hour notice period, the informed consent disclosures, the 30-minute waiting period, and the readability requirement in the Act. Plaintiffs' evidentiary showing for those claims is insufficient.

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[2] *See, e.g.*, K.S.A. § 65-4974 (research on human subjects); K.S.A. § 65-67a07 (fetal tissue donation); K.S.A. § 65-1,157a (newborn infant hearing loss screening); K.S.A. § 39-7,121g (requiring "informed consent indicating the risks and benefits of using banked donor human breast milk"); K.S.A. § 65-1,249 (collection of an umbilical cord, umbilical cord blood, amniotic fluid and placenta tissue for medical research); K.A.R. 30-60-76 (human research subjects); K.A.R. 129-5-88(b)(5) (family planning services and materials); K.A.R. 102-1-10a (declaring it unprofessional conduct for psychologists to provide clinical psychological services without informed consent); K.A.R. 100-72-3 (declaring it professional misconduct for a naturopathy practitioner to provide certain forms of treatment without first receiving the informed consent of the patient); K.A.R. 102-3-12a (electronic counseling sessions); K.A.R. 30-63-23 (providers of community services and mental illness).

[3] *See, e.g., Antonyuk v. James*, 120 F.4th 941, 998 (2d Cir. 2024), *cert. denied*, No. 24-795, 2025 WL 1020368 (U.S. Apr. 7, 2025) (rejecting challenge to New York statute that requires gun dealers to be of "good moral character"); *Rocky Mountain Gun Owners v. Polis*, 701 F. Supp. 3d 1121 (D. Colo. 2023) (upholding 3-day waiting period before gun purchase); *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016) (upholding 10-day waiting period to purchase firearms); *Ortega v. Lujan Grisham*, 741 F. Supp. 3d 1027 (D.N.M. 2024) (upholding 7-day waiting period to purchase firearms); *Vermont Fed'n of Sportsmen's Clubs v. Birmingham*, 741 F. Supp. 3d 172 (D. Vt. 2024) (upholding 3-day waiting period to purchase firearms); *see Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992) (upholding 24-hour waiting period for abortion following provision of certain information); *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 7 F.4th 478 (6th Cir. 2021) (upholding 48-hour waiting period for abortion and noting "[b]efore making life's big decisions, it is often wise to take time to reflect."); *Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999) (upholding 24-hour waiting period for abortion); *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994) (upholding 24-hour waiting period for abortion); *see also, e.g.*, Cal. Penal Code § 26835 California (requiring gun dealers to "conspicuously" post nine difference state-mandated warnings "in block letters not less than one inch in height.").

### B. *Speculative* infringement is not *actual* infringement.

Plaintiffs' effort to avoid summary judgment rests largely on speculative harm—hypothetical injuries their experts suggest the Statutes could cause—unsupported by testimony from any patient in over 30 years of practice and tens of thousands of abortions. *See* Pls. Expert Reports.

For it to have any meaning, "actual" infringement must require proof of a real, concrete infringement of women's autonomy rights. *Actual*, Black's Law Dictionary, 12th ed. 2024 ("Existing in fact; real"); *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993); *Rosemond v. Markham*, 135 F. Supp. 3d 574, 587-88 (E.D. Ky. 2015) ("The Board's argument that no proof of actual harm is necessary, and that speculative harm is enough is unpersuasive."). Courts have rejected showings of speculative harm in similar contexts. *Shopoff & Cavallo LLP v. Hyon*, 167 Cal. App. 4th 1489, 1509 (2008) ("Unless a party suffers damage, i.e., appreciable and actual harm, as a consequence of his attorney's negligence, he cannot establish a cause of action for malpractice. Breach of duty causing only speculative harm is insufficient to create such a cause of action."); *Hayes v. Chao*, 541 F. Supp. 2d 387, 394 (D.D.C. 2008) (dismissing claim resting on "only speculative harms"). In short, Plaintiffs' showings of speculative infringement cannot create a dispute of material fact.

### C. Plaintiffs' self-inflicted harms were not caused by the Act.

Plaintiffs argue their claims are not speculative because they have purportedly adduced evidence that the WRTKA caused delays and care denials, resulting in emotional distress. Pls. Resp. at 35-36, 38. But all delays or cancellations (and resultant emotional distress) cited by Plaintiffs arise from their requirement that patients print, sign, date, and timestamp consent forms 24 hours in advance—a step the WRTKA does not mandate. Pls. Resp. at 35-36, 38; *see* Ex. 35, Sandoval Tr. 295:15-25 ("all [the] reasons that a patient would be turned away" related to having an incorrect or improperly filled out form). Plaintiffs claim they

have "no other means" to confirm receipt of the disclosures in printed form 24 hours prior to an abortion. Pls. Resp. at 36. But the Act explicitly provides "other means": it requires that providers supply patients with printed consent materials and that patients certify timely receipt *at the appointment*. K.S.A. § 65-6709(a), (e). KDHE's template certification form provides a simpler way to verify compliance. *See* Ex. B.

Plaintiffs say they have no duty to mitigate harm imposed by the WRTKA. Pls. Resp. at 35-36. But the problem is not that Plaintiffs failed to mitigate harm; it is that they created these alleged harms by taking on burdens not imposed by the Act. Plaintiffs suggest proper compliance could have resulted in different harm, delays. Pls. Resp. at 36. But this speculation is contradicted by Plaintiffs' scheduling of appointments days to weeks in advance. Defs. Fact No. 77. It also fails legally. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (A plaintiff "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").

**D. Plaintiffs' hearsay evidence of emotional harm is inadmissible.**

Plaintiffs say the Act's provisions caused emotional harm. To support this alleged harm, Plaintiffs rely on inadmissible hearsay. Consider Plaintiffs' Fact No. 43 in their affirmative motion for summary judgment, which they cite in their response brief as evidence they've shown actual infringement. Pls. Resp. at 34. That fact says that the Act's disclosures "wedge the State's stigmatizing message that childbirth is preferrable to abortion into the informed consent process." As support for this characterization, however, Plaintiffs rely on testimony of Dr. Sandoval about what her patients told her: "I've personally had multiple patients who would describe the [disclosures] to be distressing and condescending to them." That's classic hearsay. A third party (alleged patients) told Dr. Sandoval something, and Dr. Sandoval is now testifying to those statements to prove the truth of the matter asserted (that the Act is allegedly stigmatizing). Similarly, in Plaintiffs' Fact Nos.

23 and 39, they again cite Dr. Sandoval's testimony, 241:18-242:8, to support the notion that patients are impacted by the supposed "unique" nature of the WRTKA:

> My patients reported to me and I observed patients specifically saying that the language felt shameful, additionally condescending in that they were being told, . . . "You have to sit here and wait 30 more minutes while you think about your decision."

This is hearsay. Likewise, in their Fact No. 57, Plaintiffs rely on Dr. Sandoval's testimony that patients "directly t[old] [her]" they found the 30-minute consent form "condescending" and that they felt "harmed" by it because they "already made [their] decision." Ex. 35, Sandoval Tr. 234:9-24. Plaintiffs rely on this hearsay testimony as the primary evidence that the 24-hour notice and 30-minute waiting period infringed women's autonomy rights "when they have sufficiently deliberated their decision." Pls. Summ. J. Br. at 44. None of this evidence is admissible. Even Plaintiffs' broader claims of patient harm rest on hearsay, as they admit only learning of the harm "because patients would tell [them]." Ex. 35, Sandoval Tr. 296:10-13. Almost all of Plaintiffs' evidence of harm relies on inadmissible hearsay.

Plaintiffs have the burden of proving the admissibility of their hearsay evidence. *State v. Morris*, 551 P.3d 802 (Kan. Ct. App. 2024), *review denied* (Oct. 29, 2024). Yet they have made no effort to persuade the Court regarding the admissibility of these statements beyond bare conclusory statements that they fall within either the "contemporaneous statements and/or statements of physical or mental condition" exceptions. Pls. Resp. at 37. Not only is this unsupported proposition insufficient to carry their burden, but it is also incorrect.

First, the hearsay exception for statements of mental or physical conditions under K.S.A. § 60-460(l) is narrowly construed, applying only to declarations of a "presently existing subjective condition" stated with specificity. *Thompson v. Norman*, 198 Kan. 436, 444, 424 P.2d 593 (1967); *Eggeson v. DeLuca*, 45 Kan. App. 2d 435, 448, 252 P.3d 128 (2011). Plaintiffs' testimony fails this standard, as it

consists of vague summations of conversations with multiple unnamed patients. *See* Ex. 35, Sandoval Tr. 151:21-152:9, 234:9-24, 241:18-242:8, 242:17-19, 267:15-18. Plaintiffs ask the Court to "craft[] a new hearsay exception … for paraphrases of state of mind declarations by unknown declarants. Without hesitation [the Court should] refrain from adopting such a recommendation." *Smith Fiberglass Prods., Inc. v. Ameron, Inc.*, 7 F.3d 1327, 1331 (7th Cir. 1993). But even if the testimony had the requisite specificity, it remains inadmissible. The statements are offered not merely to show patients' mental state but to prove that the WRTKA caused that state, which exceeds the scope of the exception. *United States v. Fontenot*, 14 F.3d 1364, 1371 (9th Cir. 1994) ("The state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind.")

Second, Plaintiffs' reliance on the contemporaneous statement hearsay exception under K.S.A. § 60-460(d) fails. This exception applies only to statements made "while the declarant was perceiving the event or condition" described, requiring strict contemporaneity. *State v. Rowe*, 252 Kan. 243, 249, 843 P.2d 714, 719 (1992). Plaintiffs' testimony relies on patient statements made *after* receiving and reviewing informed consent materials, not during the event itself. *See* Ex. 35, Sandoval Tr. 151:21-152:9, 234:9-24, 241:18-242:8, 242:17-19, 267:15-18. Nor could Plaintiffs ever prove these statements were made contemporaneously because the hearsay statements on which they rely are, again, "paraphrases of state of mind declarations by unknown declarants." *Ameron, Inc.*, 7 F.3d at 1331.

## IV. H.B. 2749 does not violate patients' rights.

Plaintiffs facially attack H.B. 2749,[4] meaning they have to prove there is no way for State Defendants to implement the bill in a constitutional manner. They

[4] Plaintiffs claim State Defendants have waived the argument that H.B. 2749 survives rational basis scrutiny. Pls. Resp. at 50. But State Defendants specifically

have not carried that burden, and their response makes no attempt to do so. Because H.B. 2749 can be implemented with *no* involvement of Plaintiffs—for example, through an entirely voluntary and online process, *see* Defs. Summ. J. Br. at 31-32—their facial challenge fails as a matter of law. Furthermore, Plaintiffs admit they voluntarily ask the questions contemplated by H.B. 2749, *see* Defs. Summ. J. Br. at 31, undercutting any claim of harm. They have identified no patient who has experienced "trauma" by Plaintiffs conducting "research" on them.

Plaintiffs also claim H.B. 2749 would infringe women's autonomy by causing distress or reactivating trauma through questions about sensitive information. Pls. Resp. 38-40. But they offer no legal authority for this assertion. To the contrary, collecting and providing private medical information to "representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy." *Whalen v. Roe*, 429 U.S. 589, 602 n.29 (1977) (recognizing collection of similar sensitive information in the context of "venereal disease, child abuse, injuries caused by deadly weapons, and certifications of fetal death" was also constitutional). The collection of medical information in the abortion context is permissible where it is "reasonably directed to the preservation of maternal health" and the process "respect a patient's confidentiality and privacy." *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 80 (1976). H.B. 2749 meets these standards. It seeks to collect information relevant to women's decisions about abortion and childbirth, Defs. Opp'n Fact Nos. 82-86, while protecting patients' confidentiality and privacy. Defs. Resp. Pls. Fact No. 84.

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argued H.B. 2749 is rationally related to a legitimate state interest. *See* Defs. Summ. J. Br. at 31. In any event, parties are not required to file summary judgment motions and do not waive their claims or arguments simply by failing to brief them on summary judgment. So, Plaintiffs' reliance on *State v. Logsdon*, 304 Kan. 3, 28, 371 P.3d 836, 854 (2016), has no merit. Furthermore, Plaintiffs bear the burdens of production and proof in this case. This means that State Defendants are entitled to judgment if Plaintiffs fail to satisfy their burden on any number of issues.

## V. The Statutes regulate conduct, not speech.

Plaintiffs' free speech claim relies on a misreading of *National Institutes of Family & Life v. Becerra* (*NIFLA*), 585 U.S. 755 (2018). *NIFLA* considered a California law that required pregnancy resource centers to inform women about abortion services. *Id.* at 761. The Court distinguished regulations of professional conduct incidentally involving speech from content-based restrictions. *Id.* at 767-68. It cited two examples: (1) laws prohibiting conduct carried out through speech, as in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and (2) informed consent laws, like those upheld in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). *Id.* at 768. The Court reaffirmed that *Casey*'s informed consent law did not violate free speech rights. *Id.* at 770; Pls. Resp. at 43-44. Such laws "regulate[] speech only 'as part of the practice of medicine, subject to reasonable licensing and regulation by the State.'" *Id.* The Statutes mirror *Casey* by tying disclosures to abortion procedures. *Id.*

Plaintiffs argue that *Casey*'s "truthful, non-misleading, and relevant information" standard does not apply to their free speech challenge. Pls. Resp. at 44. But this standard has been widely adopted by courts in First Amendment challenges to abortion procedures. *See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 432 (6th Cir. 2019); *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734 (8th Cir. 2008).

The WRTKA satisfies this standard. Like the informed consent law in *Casey*, it mandates the disclosure of "truthful, non-misleading, and relevant information." Defs. Resp. Fact Nos. 2-107. Crucially, Plaintiffs do not dispute that scientific evidence supports the Act's required disclosures. Pls. Resp. Defs. Fact No. 74. And Plaintiffs provided their own "corrective" disclosures when they disagreed with the state's speech under the Act, confirming the law is the State's speech and does not

infringe Plaintiffs' right free speech. Pls. Resp. Defs. Fact No. 71; Ex. 5, Nauser 230(b)(6) Tr. 128:17-129:16; Ex. 6, Nauser 230(b)(6) Tr. 307:23-308:12, 308:21-309:6, 382:12-19, 383:12-17, 388:5-12; Ex. 36, Wales 230(b)(6) Tr. 164:3-165:5, 249:10-17.

**VI. The Statutes do not implicate equal protection.**

Kansas courts follow precedent from the Supreme Court of the United States when evaluating equal protection claims. *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168, 180 (2022). Because the U.S. Supreme Court has already addressed and rejected equal protection claims like Plaintiffs', this Court should do the same.

First, Plaintiffs again ask the Court to find that any law regulating abortion violates equal protection. This position lacks any basis in law, as courts have refused to apply strict scrutiny simply because a law regulates abortion. *See* Defs. Summ. J. Br. at 32-33.

Second, Plaintiffs insist that abortion regulation is, by definition, sex discrimination. It is not. Dispositive federal precedents "establish conclusively" that abortion regulation "is not *ipso facto* sex discrimination." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271–73 (1993) ("'While it is true,' … 'that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.'"). Indeed, the Court in *Bray* specifically rejected the notion that abortion regulation by itself amounts to the class-based animus necessary to trigger heightened scrutiny. Instead, evidence of an actual intent to "discriminate invidiously against women as a class" is necessary. *Id.* "[T]he goal of preventing abortion … does not remotely qualify for such [a] harsh description." *Id.* at 271. Plaintiffs have failed to put forth any evidence that the Kansas legislature acted with such discriminatory intent when enacting the Statutes. *See* Defs. Resp. Pls. Fact Nos. 58-60, 77. The Supreme Court reaffirmed *Bray*'s holding in *Dobbs*:

> [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. … The regulation of a medical procedure that only one sex can undergo does 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." … Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny.

*Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022). Plaintiffs say this was dicta, but, to the contrary, the Court specifically ruled on the issue because it had been raised as "yet another potential home for the abortion right." *Id.*

Plaintiffs resort to inapposite case law and irrelevant Kansas history to support their equal protection claims. For example, *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 729 (2003), and *United States v. Virginia*, 518 U.S. 515, 530 (1996), have nothing to do with abortion. *Hibbs* analyzed whether state employees can recover damages for a state's failure to comply with FMLA, and *VMI* considered whether single-sex military colleges violated equal protection. And both *Allegheny Reprod. Health Ctr. v. Pennsylvania Department of Human Services*, 309 A.3d 808, 924 (Pa. 2024), *and New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, 126 N.M. 788, reached decisions diametrically opposed to the Court in *Bray* pursuant to "notably different" and more expansive protections found in those states' constitutions and equal rights amendments. Likewise, *Hanson v. Hutt*, 517 P.2d 599, 602-03 (Wash. 1973), predated *Bray* and is inapposite.

## VII. Plaintiffs misconstrue the plain language of H.B. 2264.

Plaintiffs misconstrue the standards for a vagueness challenge. A statute avoids vagueness if it clearly outlines the prohibited conduct and penalties for non-compliance. *United States v. Batchelder*, 442 U.S. 114, Syl. ¶ (c) (1979).[5] Plaintiffs

[5] Plaintiffs urge the Court to deny State Defendants' summary judgment motion on the vagueness issue and grant their own request, despite omitting such a claim in their summary judgment brief. Their relied-upon authority, however, only supports

argue H.B. 2264 lacks clear requirements because K.S.A. § 65-6716(c)(1)(B) doesn't explicitly link the "other relevant telephone and internet resources" providers must share with patients to the materials KDHE must publish. Pls. Resp. at 53. But a statute is not unconstitutionally vague simply because it employs undefined terms—even if those terms are "susceptible to multiple interpretations." *State v. McCune*, 299 Kan. 1216, 1235, 330 P.3d 1107, 1120 (2014); *United States v. Graham*, 305 F.3d 1094, 1105 (10th Cir. 2002). In determining whether a statute is vague, courts can ascertain a term's meaning by reading it in context and considering "the interpretation of the statute given by those charged with enforcing it." *Harmon v. City of Norman, Oklahoma*, 981 F.3d 1141, 1152 (10th Cir. 2020); *Boos v. Barry*, 485 U.S. 312, 332 (1988). Using identical wording in nearby clauses, H.B. 2264 connects the "relevant telephone and internet resources" providers must give to the same materials KDHE must issue. *Compare* K.S.A. § 65-6716(c)(1)(B) *with* K.S.A. § 65-6716(e). This context, and the State's repeated representation that this is the intended meaning of the statute, give abortion providers fair warning of the conduct H.B. 2264 requires and explicit standards for its enforcement.

Plaintiffs' claim that H.B. 2264 invites subjective enforcement hinges on the Court finding that "other relevant telephone and internet resources" is unconstitutionally vague. If the language carries the meaning proffered by the State, then Plaintiffs' objection regarding the standards for enforcement is moot.[6] *See* Pls. Resp. at 53-54. Plaintiffs also mischaracterize the holding in *State v. Black*

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such relief when the responding party hasn't also sought summary judgment. *Wilcox v. Wyandotte World-Wide, Inc.*, 208 Kan. 563, 572, 493 P.2d 251, 258 (1972). Since Plaintiffs moved for summary judgment without raising a vagueness claim, the Court should decline their belated request.

[6] Plaintiffs' claim that the State Defendants' position is contradicted by its own authority requires a blatant misreading of State Defendants' summary judgment brief and the cases on which it relies.

*1999 Lexus ES300*, 45 Kan. App. 2d 168, 176, 244 P.3d 1274, 1280 (2011), to imply that a law must "'provide[] several objective factors' to guide application" to satisfy the "explicit standards" requirement. *See* Pls. Resp. at 53-54. But this is simply untrue: this cherry-picked language was used to describe the statute challenged in *Lexus ES300*, not to establish a new standard. *See also McCune*, 299 Kan. at 1235, 330 P.3d at 1120 (rejecting vagueness claim based on lack of explicit sentencing procedures). "[B]ecause [H.B.2264] unambiguously specif[ies] the activity proscribed and the penalties available upon conviction," it is not void for vagueness. *Batchelder*, 442 U.S. at Syl. ¶ (c).

## VIII. Plaintiffs' facial challenge fails as a matter of law.

Plaintiffs ignore the evidentiary burden for their facial challenge, which requires they prove "that no set of circumstances exists under which the Act would be valid." *Watson*, 273 Kan. at 435, 44 P.3d at 364; *see also* Pls. Resp. at 54-55 (failing to address facial challenge standard). Plaintiffs' decision to ignore their burden makes sense because the only abortion patients who have offered testimony in this case were harmed by inadequate disclosure and time to make their decisions. Defs. Resp. Pls. Fact Nos. 43, 61. Plaintiffs' requested relief would violate the constitutional rights of these and similarly situated women who desire to exercise their right to self-determination in the deliberative and informed manner that the Act allows. Indeed, Plaintiffs' attempt to rush women through their clinics without adequate disclosures is itself harmful to Kansans' right to self-determination.

Plaintiffs argue that it is mere "happenstance" that other Kansas "abortion provider[s]" did not join "this litigation." Pls. Resp. at 55. But no obstacle prevented their participation in this highly publicized suit. The absence of other providers demonstrates the Act does not cause irreparable injury to most, if not all, Kansas women. The Act is thus constitutional in at least some applications, and Plaintiffs cannot succeed on the only relief they seek, facial invalidation of the Statutes.

## IX. Plaintiffs' extreme delay is inexcusable.

Plaintiffs urge the Court to overlook their nearly 30-year delay in challenging the WRTKA, arguing it's irrelevant to "substantive constitutional challenges." Pls. Resp. 55-58. Yet their own authority and actions betray this stance. Kansas courts hold that an unreasonable delay in contesting a statute's constitutionality can bar a claim. *Tr. Women Found. Inc. v. Bennett*, 509 P.3d 599 (Kan. Ct. App. 2022). Indeed, it is inexcusable where, as here, Plaintiffs "s[a]t on their rights" with no explanation of their reason for doing so. *Fish v. Kobach*, 840 F.3d 710, 753 (10th Cir. 2016).

Plaintiffs have complied with the WRTKA for decades without challenging its core provisions. They even dismissed challenges to the 2013 amendment after minor revisions preserved the Act's "status quo." Defs. Fact No. 33; Defs. Opp'n Fact No. 21. Since the 2013 amendment, there have only been two other amendments to the WRTKA, one in 2017 (which Plaintiffs did not challenge) and H.B. 2264. This contradicts Plaintiffs' argument that the Act has somehow gotten more onerous over time. The chief provisions they now challenge, 24-hour notice and informed consent materials, and the 30-minute waiting period, date to 1997 and 2009, respectively. Rather than suffering harm from these provisions, Plaintiffs asked to preserve this framework in 2013. Defs. Fact No. 33. And Plaintiffs waited *four years* to challenge the Act after *Hodes I*. Courts have barred claims for far shorter delays, and the Court should do so here. *Perry v. Judd*, 471 F. App'x 219, 224 (4th Cir. 2012) (applying laches to four-month delay); *Roberts v. Caskey*, No. 22-2366-DDC-ADM, 2022 WL 11089308, at *6 (D. Kan. Oct. 19, 2022) (irreparable harm undercut by no reason for delay); *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984) (delay negates presumption of irreparable harm).

## CONCLUSION

The Court should grant State Defendants' motion for summary judgment.

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**CERTIFICATE OF SERVICE**

I certify that on this 25th day of April, 2025, the above and foregoing were electronically filed with the Clerk of the Court using the Court's Electronic Filing System, which will send notice of electronic filing to all counsel of record.


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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; 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 P. JOHNSON**

I, Brad P. Johnson, declare under penalty of perjury that the following is true and correct:

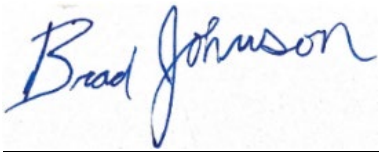
1. I am a resident of the State of Kansas, am over the age of 18, and have personal knowledge of the facts set forth in this declaration.

2. I am an attorney for Defendants Kris Kobach, Stepen Howe, Marc Bennett, and Mark Dupree Sr. ("State Defendants") in the above-captioned lawsuit.

3. I certify that the documents attached to the State Defendants Reply in Support of their Omnibus Motion for Summary Judgment as Exhibits A-B are true and accurate copies of such documents which are incorporated by reference.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 25th day of April, 2025.

Signature: 

# EXHIBIT A

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS**
**DIVISION ONE**

HODES & NAUSER, MDS, P.A.; HERBERT C. HODES, M.D.; and TRACI LYNN NAUSER M.D.,
Plaintiffs,

v.

Case No. 13C705

DEREK SCHMIDT, in his official capacity as Attorney General of the State of Kansas; ROBERT MOSER, M.D., in his official capacity as Kansas Secretary of Health and Environment; and NICK JORDAN, in his official capacity as Kansas Secretary of Revenue
Defendants.

## MEMORANDUM DECISION AND ORDER

The above matter comes before the Court on Plaintiffs' Motion for Temporary Restraining Order and Temporary Injunction to enjoin the Defendants, their agents, and their successors in office from enforcing Kansas House Bill 2253 (2013). After careful consideration of the evidence, the relevant law, and the arguments of the parties, the Court finds and concludes as follows.

## NATURE OF THE CASE

This case arises out of Plaintiffs' petition seeking declaratory and injunctive relief from Kansas House Bill 2253 (2013) ("the Act"), which was signed into law on April 19, 2013. The Act is scheduled to take effect July 1, 2013. Plaintiffs assert that the Act imposes punitive and discriminatory requirements on women seeking abortions and abortion providers, which Plaintiffs allege to be in violation of the Kansas Constitution.

## STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy that is not awarded as a matter of right. *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Granting temporary injunctive relief is appropriate when four prerequisites are met: (1) substantial likelihood exists that the movant will eventually prevail on the merits; (2) the Court is satisfied the movant will suffer irreparable injury unless the injunction issues; (3) the movant proves the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; and (4) the movant makes a showing that the injunction, if issued, would not be adverse to the public interest. *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 462, 726 P.2d 287 (1986). The main purpose of a temporary injunction is to maintain the status quo until such time that the court can render a meaningful decision. *Waste Connections of Kansas, Inc. v. City of Bel Aire, Kan.*, 191 F. Supp. 2d 1238, 1241 (D. Kan. 2002). It is not to determine any controverted right, but merely to prevent injury to a claimed right pending final determination of the controversy on its merits. *Steffes v. City of Lawrence*, 284 Kan. 380, 394, 160 P.3d 843 (2007).

## DISCUSSION AND CONCLUSION OF LAW

Plaintiffs have not met their burden to establish the four required elements for granting a temporary injunction in respect to the Act in its entirety. Rather, due to the severability clause contained in section 23 of the Act, this Court must review each individual provision of the Act challenged and determine individually if any of the challenges substantiate injunctive relief.

Defendants admit, and this Court agrees, that the State has a vested interest in preserving human life. The U.S. Supreme Court has reviewed the States' power to regulate abortion and has held the States possess certain power to regulate abortions so long as the law contains

exceptions for pregnancies that endanger the woman's life or health. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Without an adequate medical emergency provision, the health and lives of pregnant women are endangered. Plaintiffs are board-certified physicians in the field of Obstetrics and Gynecology. They have asserted and supported that provisions of the Act effectively eliminate any meaningful exception for medical emergencies from the requirement that women seeking abortions observe a 24-hour waiting period. The Kansas Supreme Court has not taken the occasion to recognize the Due Process considerations of *Casey* as applied to the Kansas Constitution. However, it indicated, "we customarily interpret its provisions to echo federal standards." *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364, 377 (2006). Further, Defendants have failed to cite any instance of a state refusing to recognize the *Casey* standard.

In *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. ____, 133 S. Ct. 2321 (2013), the U.S. Supreme Court recently addressed compelled speech. In analyzing a policy statement that was required for obtaining federal funding, the Supreme Court held that compelling speech as a condition for receiving funds was unacceptable. In authoring the majority opinion, Chief Justice Roberts remarked, "Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment." *Agcy. for Int'l. Dev.* 570 U.S. ____, 133 S. Ct. 2321 (2013). Here, the State attempts to mandate that the Plaintiffs certify the material found on a state-maintained website as "objective, nonjudgmental, [and] scientifically accurate." The Plaintiffs have established a substantial likelihood that this certification is a direct regulation of speech, in violation of the First Amendment of the U.S. Constitution. The Kansas Constitution protects freedom of speech in a

manner coextensive with the U.S. Constitution through Section 11 of the Kansas Bill of Rights. *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122, 1126 (1980).

Absent injunctive relief, the Act will take effect on July 1, 2013. The Court finds that the threatened harm to Plaintiffs and their patients outweighs any potential harm to Defendants because the injunction imposes no affirmative obligation, administrative burden, or cost upon Defendants and will merely maintain the status quo pending further hearings on the merits of the case. The Court further finds that absent injunctive relief, irreparable harm to Plaintiffs and their patients will occur and monetary damages would be inadequate to compensate them. Further, granting injunctive relief is not adverse to the public interest in that: it will protect the Plaintiffs' current practice, it will protect patients' access to the health services provided in that practice, and in that Plaintiffs' practice is already subject to government regulation and oversight by the Kansas state agencies referenced above.

The Court does not grant injunctive relief only as an adjudication on the merits; rather, it is only necessary that plaintiffs establish a reasonable probability of success, and not an overwhelming likelihood of success, in order for a preliminary injunction to issue. *Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d 255, 261 (10th Cir. 1981). Therefore, the Court determines, for the issues involving the medical emergency exception and compelled speech, there is a substantial likelihood of success and enjoins section 12(g), and any other relevant provisions pertaining to medical emergencies, and section 14(l) of the Act.

In respect to the remaining challenges to the Act, the Plaintiffs have not met the burden of proving the four elements to establish that injunctive relief is appropriate at this time. The Court, therefore, denies temporary injunction in respect to the remaining portions not specifically

addressed herein. The Court, however, grants a temporary injunction to the sections and provisions as described above.

## CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Temporary Injunction is GRANTED in part and DENIED in part. This Memorandum Decision and Order shall serve as the journal entry of judgment. No further journal entry is required.

IT IS SO ORDERED.

Dated this 28 day of June, 2013.

Hon. Rebecca W. Crotty
District Judge

## CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in the pick-up bin this 15th day of July, 2013, to the following:

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# EXHIBIT B

# Certification of Voluntary and Informed Consent

# Abortion Instructions and Informed Consent Form

Available online: www.womansrighttoknow.org

# INSTRUCTIONS
# FOR CERTIFICATION OF VOLUNTARY AND INFORMED CONSENT FORM

This form is in compliance with the Woman's Right to Know Act (K.S.A. 65-6708 *et seq*.) and is an important legal document. Properly prepared, it is proof that the physician or qualified agent of the physician complied with the statutory requirement that the pregnant woman received complete information about her alternatives and voluntarily consented to an abortion at least 24 hours prior to having the abortion. Complete the form in accordance with the following instructions:

- All entries must be in ink. Type, print or stamp all entries other than the pregnant woman's confirmation initials, signatures, dates and times.
- In the upper left hand corner, enter the name and address of the facility. A stamped name and address is acceptable.
- In Sections I and II, type, print or stamp the name of the individual who presented the information and indicate whether that person is the physician who will perform the abortion, referring physician, or other qualified person by entering check marks in the appropriate spaces. Have the pregnant woman read the sections and initial in the spaces provided to acknowledge receipt of information.
- In Section III, type, print or stamp the name of the physician who will perform the abortion. Have the pregnant woman read the section and initial in the space provided to acknowledge receipt of information.

The CERTIFICATION OF VOLUNTARY AND INFORMED CONSENT - ABORTION form is composed of instructions and a consent form. If information or materials are provided by a referring physician, that person retains the original. It is recommended that the referring physician retain the original as part of the patient's medical records. Give a copy to the patient with verbal instructions to take it to the physician who is to perform the abortion. It is recommended that this physician also retain a photocopy of this consent form and make it a part of the patient's medical record. The CERTIFICATION OF VOLUNTARY AND INFORMED CONSENT - ABORTION (on the reverse side) should not be sent to Kansas Department of Health and Environment (KDHE).

The INDUCED TERMINATION OF PREGNANCY, PHYSICIAN'S REPORT ON NUMBER OF CERTIFICATIONS RECEIVED form must be submitted monthly by the physician accepting referral and who performs the abortion to the:

Kansas Department of Health and Environment
Bureau of Epidemiology and Public Health Informatics
1000 SW Jackson, Ste. 100
Topeka, Kansas 66612

To be completed by the Provider.
Name and address of facility:
_____
_____
_____

Send completed forms to:
Bureau of Epidemiology and Public Health Informatics
1000 SW Jackson, Ste. 100
Topeka, Kansas 66612

Legislative Session, amended K.S.A. 65-6709 and K.S.A. 65-6710

# VOLUNTARY AND INFORMED CONSENT FORM

**Please initial each section to indicate the information was provided.**

**Initials: _____** **SECTION I. The following information was presented to me in writing at least 24 hours before the abortion by_____, who is (check one): ☐ the physician who is to perform the abortion; ☐ a referring physician.**

1. The following information concerning the physician who will perform the abortion;
   A. The name of such physician;
   B. the year in which such physician received a medical doctor's degree;
   C. the date on which such physician's employment commenced at the facility where the abortion is to be performed;
   D. whether any disciplinary action has been taken against such physician by the state board of healing arts by marking either a box indicating ''yes'' or a box indicating ''no'' and if the box indicating ''yes'' is marked, then provide the website addresses to the board documentation for each disciplinary action;
   E. whether such physician has malpractice insurance by marking either a box indicating ''yes'' or a box indicating ''no'';
   F. whether such physician has clinical privileges at any hospital located within 30 miles of the facility where the abortion is to be performed by marking either a box indicating ''yes'' or a box indicating ''no'' and if the box indicating ''yes'' is marked, then provide the name of each such hospital and the date such privileges were issued;
   G. the name of any hospital where such physician has lost clinical privileges; and
   H. whether such physician is a resident of this state by marking either a box indicating ''yes'' or a box indicating ''no'';

2. a description of the proposed abortion method;

3. a handbook titled, If You Are Pregnant (available in print form and on-line);

4. description of the risks related to the proposed abortion method, including risk of premature birth in future pregnancies, risk of breast cancer and risks to my reproductive health and alternatives to the abortion that a reasonable patient would consider material to the decision of whether or not to undergo the abortion;

5. the probable gestational age of the unborn child at the time the abortion is to be performed and that Kansas law requires the following: "No person shall perform or induce an abortion when the unborn child is viable unless such person is a physician and has a documented referral from another physician not financially associated with the physician performing or inducing the abortion and both physicians determine that: (1) the abortion is necessary to preserve the life of the pregnant woman; or (2) a continuation of the pregnancy will cause a substantial and irreversible *physical* impairment of a major bodily function of the pregnant woman." If the child is born alive, the attending physician has the legal obligation to take all reasonable steps necessary to maintain the life and health of the child.

6. no person shall perform or induce a partial birth abortion on an unborn child unless such person is a physician and has a documented referral from another physician who is licensed to practice in this state and who is not legally or financially associated with the physician performing or inducing the abortion and both physicians provide a written determination that: the partial abortion is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness or physical injury, including a life endangering physical condition caused by or arising from the pregnancy itself;

7. the probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed;

8. the contact information for counseling assistance for medically challenging pregnancies, the contact information for perinatal hospice services and a listing of websites for national perinatal assistance, including information regarding which entities provide such services free of charge;

9. the medical risks associated with carrying an unborn child to term; and

10. any need for anti-Rh immune globulin therapy, if I am Rh negative, the likely consequences of refusing such therapy and the cost of the therapy.

**Initials:** **SECTION II. The following information was presented to me in writing at least 24 hours before the abortion by_____, who is (check one):**

_____

☐ **the physician who is to perform the abortion;** ☐ **a referring physician;**

☐ **a qualified person (an agent of the physician who is a psychologist, licensed social worker, registered professional counselor, registered nurse or physician). I have been informed in writing that:**

1. A handbook titled, If You Are Pregnant is available in printed form and on-line that describes the unborn child, and a Directory of Available Services that lists agencies which offer alternatives to abortion with a special section listing adoption services and a list of providers who offer free ultrasound services.

2. medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and more detailed information on the availability of such assistance is contained in the printed materials given to me and described in K.S.A. 65-6710, and amendments thereto;

3. the father of the unborn child is liable to assist in the support of my child, even in instances where he has offered to pay for the abortion (in the case of rape this information may be omitted);

4. I am free to withhold or withdraw my consent to the abortion at any time prior to invasion of the uterus without affecting my right to future care or treatment and without the loss of any state or federally-funded benefits to which I might otherwise be entitled;

5. the abortion terminates the life of a whole, separately unique, human living being; and

6. by no later than 20 weeks from fertilization, the unborn child has the physical structures necessary to experience pain. There is evidence that by 20 weeks from fertilization unborn children seek to evade certain stimuli in a manner that in an infant or an adult would be interpreted to be a response to pain. Anesthesia is routinely administered to unborn children who are 20 weeks from fertilization or older who undergo prenatal surgery.

**Initials:** _____ **SECTION III.** At least 30 minutes prior to the abortion procedure, prior to physical preparation for the abortion and prior to the administration of medication for the abortion, I met privately with the physician who is to perform the abortion and such person's staff and I had an adequate opportunity in my own language to ask questions and obtain information from the physician concerning the abortion.

**Initials:** _____ **SECTION IV.** At least 30 minutes prior to the abortion procedure, the physician informed me that ultrasound equipment is used preparatory to the performance of an abortion, of my right to view the ultrasound image at no additional expense, and of my right to receive a picture of the image at no additional expense.
Ultrasound used: yes ___,
I requested to view image: yes ___, no ___
I requested a physical picture: yes ___, no ___

Patient Signature: _____ Date: _____ Time: _____ A.M. or P.M. (circle one)

**Initials:** _____ At least 30 minutes prior to the abortion procedure, the physician informed me: that heart monitor equipment is used preparatory to the performance of an abortion, and of my right to listen to the heartbeat at no additional expense.
Heart monitor equipment used: yes ____,
I requested to listen: yes ____, no ____

Patient Signature: _____ Date: _____ Time: _____ A.M. or P.M. (circle one)

This certification required by K.S.A. 65-6709 shall be placed in the woman's medical file in the physician's office and kept for 10 years or in the case of a minor 5 years past the minor's majority, but in no event less than 10 years.