

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION 7

2013 JUN 21 A 9 44

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

Case No. 13 C 705

v. )  
 )  
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. )

Petition

(Pursuant to K.S.A. Chapter 60)

Plaintiffs, Hodes & Nauser, MDs, P.A.; Herbert C. Hodes, M.D.; and Traci Lynn Nauser, M.D. (collectively "Plaintiffs"), by and through their undersigned attorneys, bring this petition against above-named Defendants, their employees, agents, and successors in office ("Defendants") and in support thereof state the following:

**I. PRELIMINARY STATEMENT**

1. This lawsuit seeking declaratory and injunctive relief challenges Kansas House Bill 2253 (2013) (the "Act"), which was signed into law on April 19, 2013, and is scheduled to take effect on July 1, 2013. A copy of the Act is annexed hereto as Exhibit A.

2. The Act imposes a host of punitive and discriminatory requirements on women seeking abortion services in Kansas and the conscientious physicians who provide those services. Among other things, the Act requires pregnant women in life-threatening situations—e.g., those

who are hemorrhaging, suffering from an infection, or have an ectopic pregnancy that is about to rupture—to wait a minimum of 24 hours before obtaining emergency medical care. That delay could well be the difference between life and death for some women. It also requires healthcare providers to give inaccurate medical information to patients seeking abortion services and imposes a multitude of tax penalties on abortion providers and their patients.

3. The Act's 40-plus pages of discriminatory provisions violate rights guaranteed by the Kansas Constitution.

4. Plaintiffs are a private medical practice specializing in obstetrics and gynecology and the father-daughter team of physicians who own and operate that practice (collectively, "Drs. Hodes and Nauser"). Motivated in part by their religious faith, Drs. Hodes and Nauser have provided high-quality obstetrical and gynecological services, including previability abortion services, in their Kansas office for decades. They bring this action on behalf of themselves and their patients.

## **II. JURISDICTION AND VENUE**

5. This Court has jurisdiction under K.S.A. § 20-301.

6. Plaintiffs' requests for declaratory and injunctive relief are authorized by K.S.A. §§ 60-1701, 60-1703 (declaratory relief) and K.S.A. §§ 60-901, 60-902 (injunctive relief).

7. Venue in this Court is proper under K.S.A. § 60-602(2) because Defendants maintain their offices in this district.

## **III. PARTIES**

### **A. Plaintiffs**

8. Plaintiff Herbert C. Hodes, M.D., is a Board-certified Obstetrician-Gynecologist ("OB-GYN") licensed to practice medicine in Kansas. He is a Fellow of the American College

of Obstetricians and Gynecologists (“ACOG”), the leading medical society of OB-GYNs in the United States, and a member of the National Abortion Federation (“NAF”), the leading medical society of abortion providers in North America. Dr. Hodes has been providing a full range of obstetrical and gynecological services, including previability abortion services, in Kansas for 35 years. He holds admitting and clinical privileges at several hospitals in the Kansas City area.

9. Plaintiff Traci Lynn Nauser, M.D., is a Board-certified OB-GYN licensed to practice medicine in Kansas. She is a Fellow of ACOG and a member of NAF. She joined the medical practice of her father, Dr. Hodes, 14 years ago, and she has been providing a full range of obstetrical and gynecological services, including previability abortion services, in that practice ever since. She holds admitting and clinical privileges at several hospitals in the Kansas City area.

10. Plaintiff Hodes & Nauser, MDs, P.A., is the private medical practice owned and operated by Drs. Hodes and Nauser. The practice is located in Overland Park, Kansas, and advertises under the name “Center for Women’s Health.” It maintains a website at this URL: <http://www.hodesnauser.com/>.

11. Plaintiffs provide a full range of obstetrical and gynecological services to their patients, including family planning services, pap smears, prenatal care, delivery of babies, gynecological procedures and surgeries, screening for and treatment of sexually transmitted infections, treatment of menopausal symptoms, infertility treatments, and previability abortion services.

12. Plaintiffs accept all major forms of health insurance in the area, including private insurance plans and KanCare.

13. Plaintiffs bring this action on their own behalf and on the behalf of their patients.

## **B. Defendants**

14. Defendant Derek Schmidt is the Attorney General of Kansas. He is responsible for defending Kansas laws against constitutional challenge. K.S.A. § 75-702. Defendant Schmidt is sued in his official capacity, as are his agents and successors.

15. Defendant Robert Moser, M.D., is the Kansas Secretary of Health and Environment. He is the head of the Kansas Department of Health and Environment (“KDHE”), K.S.A. § 75-5601(a), and is responsible for the adoption of “all general policies and rules and regulations relating to all forms of health and environment which are administered or supervised by or under the department of health and environment,” K.S.A. § 75-5625. KDHE is responsible for enforcing the provisions of the Act that amend the Woman’s Right to Know Act, K.S.A. §§ 65-6708 to 65-6715, as well as those that limit the scope of State medical assistance programs. Secretary Moser is sued in his official capacity, as are his agents and successors.

16. Defendant Nick Jordan is the Kansas Secretary of Revenue. He is the head of the Kansas Department of Revenue, K.S.A. § 75-5101(a), which is responsible for enforcing the provisions of the Act concerning taxation. Secretary Jordan is sued in his official capacity, as are his agents and successors.

## **IV. STATUTORY FRAMEWORK AND RELEVANT FACTS**

### **A. Overview of the Act**

17. The Act is a 47-page omnibus measure that addresses a variety of different subjects—from medical practice to tax liability to supportive services for parents of children with disabilities—in 25 distinct sections. Sections 1-10 create new provisions of law. Sections 11-22 amend existing provisions of law. Sections 23-25 address housekeeping matters like severability and effective date.

18. Photos taken by the Associated Press of the Kansas Governor signing the Act into law showed that the Governor's notes concerning the measure contained religious references, including the phrase "Jesus & Mary." A copy of two such photos are annexed hereto as Exhibit B.

19. Twenty of the Act's 22 substantive sections impose a host of punitive, stigmatizing, and unconstitutional burdens on abortion, including, among many others: prohibiting immediate access to abortion in medical emergencies, compelling abortion providers to make medically inaccurate statements to their patients, creating new taxes on abortions and those who provide them, and banning abortion providers from volunteering in their children's schools.

20. Section 9 of the Act is one of two outliers. It authorizes the provision of supportive services to parents and prospective parents of children with disabilities. Act, § 9. It does not single out abortion patients and providers for special requirements or disfavored treatment. Indeed, it would have no effect at all on access to abortion services in Kansas. Plaintiffs do not object to this provision except to the extent that its inclusion in the Act contributes to a violation of the constitutional prohibition against laws containing more than one subject. *See* Kan. Const. art. 2, § 16.

21. Section 2 of the Act, setting forth a legislative policy statement about the legal status of fertilized eggs, would not affect access to abortion services in Kansas, either. It provides in relevant part:

- (a) The legislature hereby finds and declares the following:
  - (1) The life of each human being begins at fertilization;
  - (2) unborn children have interests in life, health and well-being that should be protected; and
  - (3) the parents of unborn children have protectable interests in the life,

health and well-being of the unborn children of such parents.

- (b) On and after July 1, 2013, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of the development, all the rights, privileges and immunities available to other persons, citizens and residents of this state, subject only to the constitution of the United States, and decisional interpretations thereof by the United States supreme court and specific provisions to the contrary in the Kansas constitution and the Kansas Statutes Annotated.

\* \* \*

- (d) Nothing in this section shall be construed as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

Act, § 2.

22. This provision would not serve to limit access to abortion services because “the constitution of the United States, and decisional interpretations thereof by the United States supreme court” protect the right to terminate a pregnancy as a fundamental right. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

23. If it is interpreted to be self-executing, it could, however, affect other kinds of medical care provided to pregnant women by, *inter alia*, creating a duty of care by physicians to the embryo or fetus that conflicts with the duty of care owed to the pregnant woman. It could also create legal obligations by the pregnant woman to the embryo or fetus—*e.g.*, an obligation not to engage in behavior that would recklessly endanger the life of the embryo or fetus.

24. Plaintiffs assert that the better interpretation of Section 2 is that it is not self-executing. Rather, Section 2 should be interpreted as a policy statement that is precatory rather than compulsory.

25. Accordingly, Plaintiffs seek a declaratory judgment that: Section 2 of the Act is not self-executing, and its provisions are not enforceable; as a result, Section 2 cannot be used as

the basis for any civil or criminal action against a pregnant woman or a healthcare professional who provides services to a pregnant woman.

26. The remaining provisions of the Act address a multitude of subjects but share a common purpose: to burden, punish, and stigmatize women seeking abortions services in Kansas and the physicians who provide those services. If permitted to take effect, these provisions would do all of the following:

- eliminate any meaningful exception for medical emergencies from the requirement that women seeking abortions observe a 24-hour waiting period, Act, § 12(g);
- compel physicians to provide abortion patients with false and misleading information and vouch for its accuracy, Act, §§ 14(a)(3), 14(b)(6), 14(l);
- compel abortion providers to hang gigantic signs in their offices, effectively turning their office walls into a billboard for the State's message, Act, § 14(k);
- impose special tax liability on abortion patients, abortion providers, and others who facilitate access to abortion services, Act, §§ 3(b), 3(c), 11(a), 17(b)(xxiv), 17(b)(xxv), 18(b)(iv), 19(c), 21(d)(2), 22(p), 22(ll), 22(rr), 22(ccc);
- deny abortion providers protection against discrimination by State agencies that is afforded to other healthcare providers, Act, § 7;
- ban abortion providers from working or volunteering in public schools, Act, § 4;
- ban University of Kansas Medical School faculty members from teaching medical students and residents how to perform abortions, even when on property not owned by the medical school, Act, § 16(i);
- impose a criminal ban on sex-selective abortions, Act, § 10; and
- ban the expenditure of State funds for an abortion procedure, Act, § 3(a).

27. These provisions, which Plaintiffs seek to enjoin in their entirety, are discussed in greater detail in the following sections.

**B. Definition of Abortion under Kansas Law**

28. Kansas law defines "abortion" as "the use or prescription of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the

result of natural causes in utero, accidental trauma or a criminal assault on the pregnant woman or her unborn child, and which causes the premature termination of the pregnancy.” K.S.A. § 65-6701(a). This definition encompasses the termination of both intrauterine pregnancies and ectopic pregnancies. The Act retains this definition with respect to existing provisions of law, Act, § 12(a), and incorporates it by reference with respect to the new provisions it creates, Act, § 1(a).

29. In a normal pregnancy, the fertilized egg implants in the lining of a woman’s uterus. This is known as an intrauterine pregnancy.

30. An ectopic pregnancy occurs when the fertilized egg implants outside a woman’s uterus, typically in one of her fallopian tubes. This is an extremely dangerous condition that can be deadly without prompt treatment.

**C. *De Facto* Elimination of Medical Emergency Exception**

31. The deceptively-titled Woman’s Right to Know Act, K.S.A. §§ 65-6708 to 65-6715, imposes a mandatory, 24-hour waiting period on women who intend to have an abortion. K.S.A. § 65-6709(a), (b), (d). This requirement is not applicable in the case of a “medical emergency,” K.S.A. § 65-6705(a), currently defined as “that condition which, on the basis of the physician’s good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function,” K.S.A. § 65-6701(e).

32. The Act changes the definition of medical emergency to: “a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy *without first determining gestational age* to



avert the death of the woman or for which a delay necessary to determine gestational age will create serious risk of substantial and irreversible *physical* impairment of a major bodily function. *No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.*” Act, § 12(g) (emphasis added). The Act also provides that: “‘Bodily function’ means physical functions only. The term ‘bodily function’ does not include mental or emotional functions.” Act, § 12(b).

33. Physicians routinely determine the gestational age of a pregnancy before performing an abortion. The method of abortion that is appropriate for a given patient depends, in part, on the gestational age of the pregnancy. Therefore, even when an abortion is performed for reasons of medical emergency, gestational dating is usually a necessary part of the procedure.

34. It takes only minutes to determine the gestational age of a pregnancy.

35. As a result, a medical emergency as defined by the Act can never exist.

36. There are situations in which the immediate termination of a pregnancy is medically indicated, such as when a patient is hemorrhaging, has an infection, has an ectopic pregnancy, requires treatment with a medication that is incompatible with pregnancy, or is experiencing suicidal ideation.

37. In such circumstances, delaying termination of the pregnancy by 24 hours or more would put the pregnant woman’s life and health in serious jeopardy.

38. The change in the definition of “medical emergency” prescribed by the Act also impacts other restrictions on access to abortion, including those that apply to minors. Kansas law provides that, “[e]xcept in the case of a medical emergency or [when a minor commences a legal proceedings and obtains court authorization for an abortion], no person shall perform an

abortion upon an unemancipated minor, unless the person first obtains the notarized written consent of the minor and both parents or the legal guardian of the minor.” K.S.A. § 65-6705(a).

**D. Compelled Statements of False and Misleading Information**

39. The Woman’s Right to Know Act requires abortion providers to make certain statements to abortion patients in writing prior to the commencement of the 24-hour waiting period. K.S.A. § 65-6709. These written statements fall into three categories: (1) those that must be provided by “the physician who is to perform the abortion or the referring physician;” K.S.A. § 65-6709(a); (2) those that may be provided by any “qualified person,” K.S.A. § 65-6709(b); and (3) those that must be included in a booklet published by KDHE, K.S.A. § 65-6709(d); 65-6710.

*i. Statements about Preterm Birth and Breast Cancer*

40. To the first category of statements, those that must be provided by a physician, the Act adds: a description of risks related to the proposed abortion method, “including risk of premature birth in future pregnancies, [and] risk of breast cancer.” Act, § 14(a)(3).

41. Having an abortion does not increase a woman’s risk of premature birth in future pregnancies. Studies concluding otherwise have been debunked as methodologically flawed.

42. Having an abortion does not increase a woman’s risk of developing breast cancer.

43. In 2009, ACOG’s Committee on Gynecologic Practice published a formal statement on the relationship between abortion and breast cancer. It concluded: “Early studies of the relationship between prior induced abortion and breast cancer risk were methodologically flawed. More rigorous recent studies demonstrate no causal relationship between induced abortion and a subsequent increase in breast cancer risk.” ACOG Committee on Gynecologic Practice. ACOG Committee Opinion No. 434: Induced Abortion and Breast Cancer Risk.

44. Drs. Hodes and Nauser object to making the statements required by Section 14(a)(3) of the Act.

*ii. Statements about Fetal Pain*

45. To the second category of statements, those that may be provided by any qualified person, the Act adds: “[B]y 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.” Act, § 14(b)(6).

46. These statements are medically inaccurate and misleading.

47. In 2010, the Royal College of Obstetricians and Gynaecologists (“RCOG”), the leading medical association of OB-GYNs in the United Kingdom, published a report about fetal pain after completing a comprehensive review of the relevant research. It concluded: “In reviewing the neuroanatomical and physiological evidence in the fetus, it was apparent that connections from the periphery to the cortex are not intact before 24 weeks of gestation and, as most neuroscientists believe that the cortex is necessary for pain perception, it can be concluded that the fetus cannot experience pain in any sense prior to this gestation. After 24 weeks there is continuing development and elaboration of intracortical networks such that noxious stimuli in newborn preterm infants produce cortical responses. Such connections to the cortex are necessary for pain experience but not sufficient, as experience of external stimuli requires consciousness. Furthermore, there is increasing evidence that the fetus never experiences a state

of true wakefulness *in utero* and is kept, by the presence of its chemical environment, in a continuous sleep-like unconsciousness or sedation.” RCOG. *Fetal Awareness: Review of Research and Recommendations for Practice*. London: RCOG Press; 2010; viii.

48. Anesthesia is not routinely administered to fetuses undergoing surgery *in utero*.

49. Drs. Hodes and Nauser object to making the statements required by Section 14(b)(6) of the Act.

*iii. Statements Published by KDHE*

50. To the third category of statements, those that must be published in a booklet by KDHE (“KDHE Booklet”), the Act adds numerous additional requirements. Act, § 15.

51. In addition, the Act requires “[a]ny private office, freestanding surgical outpatient clinic or other facility or clinic in which abortions are performed that has a website” to “publish an easily identifiable link on the homepage of such website that directly links to” the KDHE Booklet via KDHE’s website. Act, § 14(1). The link must state: “The Kansas Department of Health and Environment maintains a website containing objective, nonjudgmental, scientifically accurate information about the development of the unborn child, as well as video of sonogram images of the unborn child at various stages of development. The Kansas Department of Health and Environment’s website can be reached by clicking here.” *Id.*

52. A copy of the KDHE Booklet is annexed hereto as Exhibit C and is available at [http://www.womansrighttoknow.org/download/Handbook\\_English.pdf](http://www.womansrighttoknow.org/download/Handbook_English.pdf).

53. The current version of the KDHE Booklet contains statements that are not objective, nonjudgmental and scientifically accurate.

54. The additional text required by Section 15 of the Act contains statements that are not objective, nonjudgmental and scientifically accurate.

55. Such statements include, but are not limited to, the following:

- “[A]bortion terminates the life of a whole, separate, unique, living human being;”
- “Pregnancy begins at fertilization with the union of a man’s sperm and a woman’s egg to form a single-cell embryo;”
- “Eight weeks after fertilization, except for the small size, the developing human’s overall appearance and many internal structures closely resemble the newborn;”
- “Starting more than 30 weeks before birth, many common daily activities seen in children and adults begin in the womb;”
- “A 2009 analysis of international studies concluded prior induced abortions are associated with a significantly increased risk of low birth weight and preterm births;”
- “There are also studies that have found an increased risk of breast cancer after induced abortion . . . .”
- “After having an abortion, some women suffer from a variety of psychological effects . . . even posttraumatic stress disorder.”

56. Plaintiffs object to publishing the link required by Section 14(l) of the Act on their website.

#### **E. Gigantic Signage Requirement**

57. The Woman’s Right to Know Act requires “[a]ny private office, freestanding surgical outpatient clinic or other facility or clinic in which abortions are performed” to “conspicuously post a sign . . . with lettering that is legible and shall be at least three quarters of an inch boldfaced type” that states the following:

Notice: It is against the law for anyone, regardless of their relationship to you, to force you to have an abortion. By law, we cannot perform an abortion on you unless we have your freely given and voluntary consent. It is against the law to perform an abortion on you against your will. You have the right to contact any local or state law enforcement agency to receive protection from any actual or threatened physical abuse or violence. You have the right to change your mind at any time prior to the actual abortion and request that the abortion procedure cease.

K.S.A. § 65-6709(k).

58. The Act requires that the following additional text be added to the required sign:

It is unlawful for anyone to make you have an abortion against your will, even if

you are a minor. The father of your child must provide support for the child, even if he has offered to pay for an abortion. If you decide not to have an abortion, you may qualify for financial help for pregnancy, childbirth and newborn care. If you qualify, Medicaid will pay or help pay the cost of doctor, clinic, hospital and other related medical expenses, included childbirth delivery services and care for your newborn baby. Many agencies are willing to provide assistance so that you may carry your child to term, and to assist you after your child's birth.

Act, § 14(k).

59. The addition of this text more than doubles the length of the required sign. The resulting sign, when printed with 3/4-inch letters, would occupy a minimum of 6 square feet on the wall where it is hung.

60. Much of the information that is required to appear on the sign is duplicative of information contained in the KDHE Booklet, which must be provided to the patient at least 24 hours before a scheduled abortion procedure.

61. Plaintiffs object to posting the sign required by the Act in their medical office. They do not want to turn their office walls into a billboard for the State's message.

**F. Imposition of Tax Liability**

***i. Income Tax Liability***

62. The Act imposes a multitude of income tax penalties on abortion patients and their families; employers who provide health insurance coverage for abortion to their employees; individuals and institutions that provide abortion services; and philanthropists that contribute to educational institutions, such as medical schools, where abortions are performed. For example, pursuant to the Act:

- Abortion patients and their families are denied generally-applicable income tax deductions and credits for medical expenses to the extent those expenses are related to abortion services. Act, §§ 3(b), 3(c), 17(b)(xxiv), 17(b)(xxv), 18(b)(iv). They are likewise denied generally-applicable income tax deductions and credits for the purchase of a health insurance policy to the extent it provides coverage for abortion. Act, §§ 3(b), 17(b)(xxiv), 17(b)(xxv), 18(b)(iv).

- Employers are denied generally-applicable income tax deductions and credits for employee benefits to the extent employees are provided with health insurance coverage or health savings account contributions that are used to pay for abortion services. Act, §§ 11(a), 17(b)(xxv), 18(b)(iv).
- Abortion providers are denied a generally-applicable income tax credit for “research and development activities” for expenditures related to the performance of an abortion. Act, §§ 19(c).
- Taxpayers are denied a generally-applicable tax credit for charitable contributions to educational institutions for deferred maintenance of facilities to the extent abortions services are provided at the facilities. Act, § 21(d)(2).

63. These tax penalties are discriminatory. Further, they unduly burden women seeking abortion services, discourage physicians, hospitals, and universities from providing—and training others to provide—abortion services, and discourage employers from providing health insurance coverage for abortion services.

*ii. Sales and Compensating Use Tax Liability*

64. The Act also targets abortion patients and providers for the imposition of special sales and compensating use tax liability. For example, pursuant to the Act:

- Medications “used in the performance or induction of an abortion” are subject to a special sales tax. Act, § 22(p).
- Non-profit organizations that provide abortion services must pay a special sales tax when purchasing educational materials for distribution to the public, even if the materials are unrelated to abortion. Act, § 22(ll).
- Individuals who attend an annual event held by a non-profit organization that provides abortion services must pay a special sales tax when purchasing tickets. Act, § 22(rr).
- Non-profit clinics and health centers that provide services, including abortion services, to “medically underserved individuals and families” must pay a special sales tax on the purchase of all “tangible personal property or services purchased by a contractor for the purpose of constructing, equipping, reconstructing, maintaining, repairing, enlarging, furnishing, or remodeling facilities for any such clinic or center.” Act, § 22(ccc).
- All otherwise-applicable exemptions from sales or compensating use taxes are repealed for “that portion of such amounts paid or incurred for an abortion.” Act, § 3(b).

65. This special tax liability is discriminatory. Further, it unduly burdens abortion patients and makes it more difficult for nonprofit organizations as well as private practitioners like Plaintiffs to provide abortion services.

66. Drs. Hodes and Nauser prescribe or dispense a variety of drugs that are used in connection with the performance of an abortion. These drugs include analgesics for pain control, antibiotics to prevent infection, and cervical ripening agents. In addition, they use the drug methotrexate to treat ectopic pregnancies in appropriate cases.

**G. Failure to Protect Abortion Providers from Discriminatory Treatment**

67. Section 7 of the Act provides that: “No state agency shall discriminate against any individual or institutional healthcare entity on the basis that such healthcare entity does not provide, pay for or refer for abortions.” Act, § 7.

68. The Act fails to provide any comparable protections for individual or institutional healthcare entities that do provide, pay for or refer for abortions.

69. Many people are motivated to provide, pay for or refer for abortions by their religious beliefs and/or conscience.

70. Drs. Hodes and Nauser are motivated to provide abortion services by their Jewish faith.

71. Drs. Hodes and Nauser sometimes refer their patients to practitioners in other states when those patients require abortion care that is not permitted under Kansas law.

**H. Ban on Abortion Providers Working or Volunteering in Public Schools**

72. Section 4 of the Act provides that: “No school district, employee or agent thereof, or educational service provider contracting with such school district shall provide abortion services. No school district shall permit any person or entity to offer, sponsor, or otherwise



furnish in any manner any course materials or instruction relating to human sexuality or sexually transmitted diseases if such person or entity is an abortion services provider, or an employee, agent or volunteer of an abortion services provider.” Act, § 4.

73. Among other things, this provision would bar abortion providers from serving as chaperones on their schoolchildren’s fieldtrips.

74. This provision serves no conceivable purpose other than to express hostility toward abortion providers.

**I. Ban on Performance of Abortions by State Medical School Faculty**

75. Section 16 of the Act would ban “any member of the physician faculty of the university of Kansas school of medicine” from performing an abortion when acting in the scope of his or her employment, even if the abortion is performed on property not owned by the medical school. Act, § 16(i).

76. This provision, *inter alia*, bars State medical school faculty members from teaching medical students and residents how to perform abortion procedures. As a result, the next generation of Kansas physicians will have difficulty in obtaining the training needed to provide abortion services.

**J. Criminal Ban on Sex-Selective Abortions**

77. Section 10 of the Act would create a ban on sex-selective abortions. Act, § 10. The ban is enforced through criminal penalties. Act, § 10(e).

78. There is absolutely no evidence that any sex-selective abortion has ever been performed in Kansas or is likely to be performed in Kansas.

79. The sole purpose of this provision is to chill the performance of abortions in Kansas.

**K. Ban on Expenditure of Public Funds for Abortion Services**

80. Many Kansans participate in state-funded healthcare or health insurance programs. Among these are the beneficiaries of various medical assistance plans the State offers to different groups of low-income Kansans. Two of these plans, Medicaid and the Children's Health Insurance Program ("CHIP") are offered to the public under the name KanCare. *See generally* Acting Adm'r, Ctrs. for Medicare and Medicaid Servs., to Kan. Medicaid Dir. (Dec. 27, 2012) (approving creation of KanCare).<sup>1</sup>

81. Medicaid is a joint federal-state program that provides medical assistance to the poor. 42 U.S.C. §§ 1396b(a)(1), 1396d(a), 1396d(b). Consistent with the federal Medicaid statute, Kansas' Medicaid program offers medical assistance to needy men and women in the State. K.S.A. § 75-7409(b); Kan. Med. Assistance Program, General Introduction Provider Manual, Introduction (May 26, 2010) at ii.<sup>2</sup> KanCare permits beneficiaries to enroll in one of several managed care plans. Acting Adm'r, Ctrs. for Medicare and Medicaid Servs., to Kansas Medicaid Dir. (Dec. 27, 2012) at 1. The benefits offered in these plans include physician, hospital, laboratory, hospice, reproductive health, dental, and nursing services, among others. *See generally* Kan. Med. Assistance Program, Prof'l Servs. Provider Manual (May 20, 2013).<sup>3</sup>

82. CHIP is a joint federal-state program that provides medical care or insurance to low-income minors above the income threshold for Medicaid qualification. 42 U.S.C. § 1397aa. Consistent with the federal CHIP statute, Kansas has chosen to implement CHIP by providing a

---

<sup>1</sup>Available at <http://www.medicare.gov/Medicare-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ks/ks-kancare-ca.pdf>.

<sup>2</sup>Available at [https://www.kmap-state-ks.us/Documents/Content/Provider%20Manuals/Gen%20Intro%2005262010\\_10029.pdf](https://www.kmap-state-ks.us/Documents/Content/Provider%20Manuals/Gen%20Intro%2005262010_10029.pdf)

<sup>3</sup>Available at [https://www.kmap-state-ks.us/Documents/Content/Provider%20Manuals/Professional\\_05202013\\_13060.pdf](https://www.kmap-state-ks.us/Documents/Content/Provider%20Manuals/Professional_05202013_13060.pdf).

managed care plan for minors up to 19 years of age. K.S.A. § 38-2001(b). CHIP permits qualifying minors to enroll in the same managed care plans that are offered to Medicaid beneficiaries. K.S.A. § 38-2001(b); Acting Adm'r, Ctrs. for Medicare and Medicaid Servs., to Kansas Medicaid Dir. (Dec. 27, 2012) at 3.

83. KanCare covers abortion services for girls and women in a variety of contexts. Medicaid covers abortions for participants “[i]n the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself.” Kan. Med. Assistance Prof'l Servs. Provider Manual, § 8400, 8-3. CHIP covers abortions “necessary to save a woman’s life or in cases of rape, incest, or aggravated indecent liberties with a child.” K.S.A. § 38-2003.

84. Section 3(a) of the Act would prohibit the expenditure of any public funds for an abortion, “[e]xcept to the extent required by federal law,” and in cases where an abortion “is necessary to preserve the life of the pregnant woman.” Act, §§ 3(a), 8. Thus, the Act would further restrict the already limited coverage that KanCare provides for abortion services.

85. Under federal law, federal Medicaid funds must be made available to cover those abortions necessary to save a woman’s life or where the pregnancy results from rape or incest, but may not be used to cover other abortions. *See* Dir., CMS Operations, Health Care Fin. Admin., to State Medicaid Dirs. (Feb. 12, 1998) at 1.<sup>4</sup> Likewise, CHIP funds must be made available for abortions for the same reasons, to the same extent that a state’s CHIP benchmark insurance plan does. 42 U.S.C. §§ 1397aa(a); 1397cc; 1397ee(c)(1). States are free, however, to provide more comprehensive coverage for abortion services using state funds.

---

<sup>4</sup>Available at <http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/smd021298.pdf>.

86. Courts in fifteen states have held that their state's constitution requires more comprehensive coverage of abortion by state medical assistance programs than is required by federal law.

87. KanCare provides full coverage for medical services related to prenatal care and childbirth. Kan. Med. Assistance Prof'l Servs. Provider Manual, § 8400, 8-32.

88. Section 3(a) of the Act discriminates against KanCare-eligible women seeking abortion services. It would delay some women in accessing abortion services, including those that are needed for health reasons, and prevent some women from accessing abortion services at all.

## V. CLAIMS FOR RELIEF

### **FIRST CLAIM FOR RELIEF** **(Single-Subject Rule)**

89. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 88 above.

90. The Act violates the single-subject rule embodied in Kansas Constitution Article 2, Section 16.

### **SECOND CLAIM FOR RELIEF** **(Fundamental Right to Terminate a Pregnancy)**

91. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 88 above.

92. Except for Sections 2 and 9, the provisions of the Act individually and collectively violate Sections 1 and 2 of the Kansas Constitution Bill of Rights by infringing on the fundamental right to terminate a pregnancy.

**THIRD CLAIM FOR RELIEF**  
**(Compelled Speech)**

93. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 88 above.

94. The following provisions of the Act violate Section 11 of the Kansas Constitution Bill of Rights by compelling Plaintiffs to engage in State-mandated speech: Sections 14(a)(3); 14(b)(6), 14(k), and 14(l).

**FOURTH CLAIM FOR RELIEF**  
**(Denial of Equal Protection to Abortion Patients)**

95. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 88 above.

96. Except for Sections 2 and 9, the provisions of the Act individually and collectively violate Section 1 the Kansas Constitution Bill of Rights by denying equal protection of the laws to abortion patients.

**FIFTH CLAIM FOR RELIEF**  
**(Denial of Equal Protection to Abortion Providers)**

97. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 88 above.

98. Except for Sections 2 and 9, the provisions of the Act individually and collectively violate Section 1 the Kansas Constitution Bill of Rights by denying equal protection of the laws to abortion providers.

**SIXTH CLAIM FOR RELIEF**  
**(Declaratory Judgment)**

99. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 88 above.

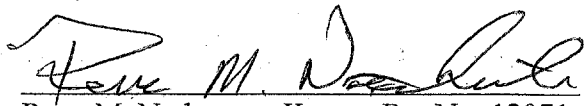
100. Pursuant to K.S.A. § 60-1704, Plaintiffs are entitled to a determination of how the provisions of the Act, and in particular Section 2, affect their rights, status, or other legal relations and how they affect the rights, status, or other legal relations of their patients.

## VI. REQUEST FOR RELIEF

WHEREFORE Plaintiffs request that the Court:

1. Issue a Declaratory Judgment that:
  - a. Section 2 of the Act is not self-executing, and its provisions are not enforceable; as a result, Section 2 cannot be used as the basis for any civil or criminal action against a pregnant woman or a healthcare professional who provides services to a pregnant woman; and/or
  - b. The Act as a whole is unconstitutional and therefore unenforceable; and/or
  - c. Each section of the Act that violates the Kansas Constitution is unconstitutional and therefore unenforceable; and/or
2. Grant a Permanent Injunction restraining Defendants, their agents, and their successors in office from:
  - a. Enforcing the Act in its entirety; and/or
  - b. Enforcing each provision of the Act that violates the Kansas Constitution; and/or
3. Grant such other and further relief as this Court deems just, proper, and equitable; including an award of costs and attorney's fees to Plaintiffs.

Respectfully submitted, this 21st day of June, 2013.

  
Rene M. Netherton, Kansas Bar No. 12071  
1508 S.W. Topeka Blvd., Ste. 101  
Topeka, KS 66612

Phone: (785) 267-6767  
Fax: (785) 234-6768  
Email: nethertonlaw@yahoo.com

Teresa A. Woody, Kansas Bar No. 16949  
The Woody Law Firm, P.C.  
1621 Baltimore Avenue  
Kansas City, MO 64108  
Phone: (816) 421-4246  
Fax: (816) 471-4883 Fax  
Email: teresa@woodylawfirm.com

Stephanie Toti, N.Y. Bar No. 4270807\*  
David Brown, N.Y. Bar No. 48635\*  
Natasha Lycia Ora Bannan, N.Y. Bar No. 5021167\*  
Center for Reproductive Rights  
120 Wall Street, 14th Floor  
New York, NY 10005  
Phone: (917) 637-3600  
Fax: (202) 568-6510  
Email: stoti@reporights.org  
dbrown@reporights.org  
nbannan@reporights.org

Kent A. Yalowitz, N.Y. Bar No. 2188944\*  
Laura W. Tejada, N.Y. Bar No. 4431789\*  
Meredith B. Esser, N.Y. Bar No. 4944278\*  
Arnold & Porter LLP  
399 Park Avenue  
New York, NY 10022  
Phone: (212) 715-1000  
Fax: (212) 715-1399  
Email: kent.yalowitz@aporter.com  
laura.tejada@aporter.com  
meredith.esser@aporter.com

\*Motion for Admission *Pro Hac Vice*  
Pending

COUNSEL FOR PLAINTIFFS