No. 19-121693-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Trust Women Foundation Inc.
d/b/a South Wind Women's Center, d/b/a Trust Women Wichita,

Plaintiff-Appellant,

v.

Marc Bennett, in his official capacity as District Attorney for Sedgwick County, Kansas; Kathleen Selzer Lippert, in her official capacity as the Executive Director of the Kansas Board of Healing Arts; Robin D. Durrett, in his official capacity as President of the Kansas Board of Healing Arts; and Derek Schmidt, in his official capacity as Attorney General of the State of Kansas,

Defendants-Appellees.

BRIEF OF APPELLANT IN REPLY TO BRIEF OF APPELLEES BENNETT AND SCHMIDT

Appeal from the District Court of Shawnee County, Hon. Teresa L. Watson
District Court Case No. 2019-CV-60

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ARGUMENTS AND AUTHORITIES

THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING A TEMPORARY INJUNCTION

A. The Standard of Review Does Not Insulate the District Court's Decision

Defendants emphasize that denial of a temporary injunction is reviewed for abuse of discretion. Bennett & Schmidt Br. 11-12. But the abuse-of-discretion standard does not insulate the district court's decision from exacting review. A district court abuses its discretion when (1) it makes an error of law or (2) it bases its decision on factual determinations not supported by the evidence or (3) its decision is arbitrary, fanciful, or unreasonable. Trust Women Br. 23. As explained in Trust Women's brief and below, the district court's decision was based on numerous legal errors, unsupported factual determinations, and unreasonable conclusions that, by definition, are abuses of discretion.

B. There is a Reasonable Probability of Irreparable Future Injury

1. Defendants and the district court rely on the wrong legal standard

A movant for a temporary injunction need show only that there is a reasonable probability of irreparable future injury. Kansas decisions place no higher burden on movants. Trust Women Br. 25, 28.

Defendants' arguments about the supposed absence of irreparable harm are premised on an incorrect legal standard. According to defendants, a party seeking a temporary injunction "must demonstrate, clearly and unequivocally, that it will suffer irreparable harm unless the court grants the injunctive relief requested." Bennett & Schmidt Br. 10. The Kansas Supreme Court has rejected that very assertion, holding that courts may not "requir[e] the moving party to make 'a showing that the movant will suffer

irreparable injury unless the injunction issues.'" *Bd. of Cnty. Comm'rs of Leavenworth Cnty. v. Whitson*, 281 Kan. 678, 683, 132 P.3d 920, 925 (2006) (citation omitted). The standard on which defendants rely incorrectly "places a higher burden on the moving party, demanding evidence that irreparable harm is a virtual certainty rather than a 'reasonable probability.'" *Id.*

Similarly mistaken is defendants' assertion that there must be a "clear showing" of irreparable injury. Bennett & Schmidt Br. 11, 12. That assertion is not supported by Kansas law. Defendants rely on decisions from federal courts, but as the Kansas Supreme Court has warned, "borrow[ing] the language" from federal decisions on irreparable harm can lead to incorrectly heightening the standard. *Whitson*, 281 Kan. at 683-84, 132 P.3d at 925. That is precisely the mistake that defendants make.

The district court's decision was also based on this wrong legal standard. Trust Women Br. 28-29. As Trust Women explained, the district court "initially quot[ed] the four elements for a temporary injunction accurately." *Id.* at 28.[1] But, despite the court's initial recitation of the law, the court went on to apply the very standard rejected by the Kansas Supreme Court. The court denied Trust Women's motion by concluding: "The bottom line is that Plaintiff has failed to demonstrate here that it or its patients will suffer irreparable injury in the absence of a temporary injunction for the period of time between now and a decision on the merits." (R. 2:156-57). That the court quoted the correct standard once in its decision does not change the court's ultimate conclusion, which was

[1] Defendants' suggestion that Trust Women "fail[ed] to point out that the district court cited and quoted the correct legal standard," Bennett & Schmidt Br. 13, is untrue.

explicitly based on an incorrect standard. That was legal error and an abuse of discretion. *Whitson*, 281 Kan. at 683, 132 P.3d at 925.

2. Unrefuted evidence showed a reasonable probability of irreparable future injury

It is no wonder why defendants resort to repeatedly invoking the wrong standard for showing irreparable harm: applying the correct standard requires reversal. In denying the existence of irreparable injury, defendants focus on the fact that under Trust Women's telemedicine protocol, patients would still travel to the Wichita clinic for a medication abortion. Bennett & Schmidt Br. 11-14.

While true, that does not show the absence of irreparable harm. Absent the in-person requirement, Trust Women could provide medication abortions without flying physicians in from outside Kansas—a fact that defendants do not dispute. Because physicians could provide medication abortions remotely, they could do it at more times, significantly expanding access for its patients. Trust Women could offer medication abortions more than two days a week and outside normal business hours; appointments would not be susceptible to being canceled or rescheduled due to a physician's flight delay or cancellation; and the amount of time patients would need to spend in the clinic would be cut by 75% or more. Trust Women Br. 16-17, 26-27. These benefits would make it easier for patients to schedule appointments and allow patients to access medication abortion earlier in their pregnancies, thus reducing health risks. *Id.* None of these facts is contested.

Absent the threat of enforcement of the in-person requirement, Trust Women would implement telemedicine and provide its patients these benefits. (R. 3:107). The in-person requirement is thus depriving Trust Women's patients of expanded access to medication abortion and access to a treatment modality (i.e., telemedicine) widely used throughout Kansas in other medical contexts. That is ongoing irreparable harm that an injunction would prevent.

Contrary to defendants' suggestion, Trust Women does not "itself impos[e] an in-person requirement under its own [telemedicine] protocols." Bennett & Schmidt Br. 14. Under Trust Women's telemedicine protocol, the physician and patient are not together in person; they are in different locations, usually in different states. Trust Women Br. 15-16.

Defendants also note that Trust Women has not yet found medical office space to be able to provide medication abortions via telemedicine in other parts of Kansas. Bennett & Schmidt Br. at 3-4, 14. Using telemedicine to provide medication abortions in other parts of Kansas would *further* expand access. But even without that step, implementing telemedicine at the Wichita clinic would expand access for Trust Women's patients. Trust Women Br. 16-17, 26-27.

Defendants claim that there was not "a shred of evidence to show that a single patient was unable to obtain a medication abortion because of the prohibition on telemedicine abortion." Bennett & Schmidt Br. 12; *see id.* at 3. That is untrue. The absence of telemedicine means that Trust Women can offer medication abortion only during business hours on two weekdays. (R. 3:96-97, 108-09, 150). Unrefuted testimony at the hearing established that because of this limited appointment availability, there have

been patients who have been unable to schedule an appointment quickly enough to have a medication abortion before the gestational cutoff and have instead had to have a surgical abortion. (R. 3:112-13, 154-56). This is consistent with the findings of an in-depth study on the use of telemedicine for medication abortions, which demonstrated that for some patients telemedicine "made the difference of being able to obtain a medication abortion at all" before "they would have been past the window of eligibility." (R. 3:63-64).

In short, the only defense of the district court's conclusion that defendants can muster is one that not only relies on the wrong legal standard but also depends on ignoring unrefuted facts that show the multiple ways in which the telemedicine requirement harms patients by restricting access to medication abortion. Trust Women Br. 16-17, 26-27.

3. A constitutional injury is irreparable injury per se

Even setting aside all these facts, defendants do not appear to deny that a constitutional violation is per se irreparable harm. *See* Trust Women Br. at 25-26; Bennett & Schmidt Br. at 13-14; *see Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 805 (10th Cir. 2019) ("Most courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury."). Nor could they: such a violation is not compensable with money damages. Because the in-person requirement for medication abortions is likely unconstitutional, *see* Trust Women Br. 32-39, there is by definition a reasonable probability of irreparable future injury.

4. Trust Women did not delay in filing suit

Contrary to defendants' assertion and the district court's conclusion (Bennett & Schmidt Br. 14-15; R. 2:155), Trust Women did not delay in filing suit. Trust Women

Br. 30-32. Defendants' arguments on this point make little sense. Defendants note that K.S.A. 65-4a10 was enacted in 2011, Trust Women opened its clinic in 2013, and Trust Women did not file suit until 2019. While defendants argue that this demonstrates a significant delay, that conclusion does not follow. Trust Women could not have sued in 2011; it did not exist. There was no reason for Trust Women to challenge the in-person requirement in 2013 because (1) it did not offer medication abortions via telemedicine until October 2018 (R. 3:96) and (2) the *Hodes 2011* agreed order enjoined enforcement of K.S.A. 65-4a10 (R. 1:66). Trust Women Br. 12-13, 31-32. In December 2018, the Attorney General for the first time threatened that, despite the *Hodes 2011* order, the in-person requirement could still be enforced. Trust Women brought this suit *the next month.* (R. 1:19); Trust Women Br. 18-19, 21, 31. Far from delay, the timeline demonstrates Trust Women's diligence in protecting the rights of itself and its patients.

Finally, although defendants criticize Trust Women for obtaining an unopposed stay of proceedings in the district court after filing the notice of appeal (Bennett & Schmidt Br. 15), Trust Women took that step to try to speed meaningful injunctive relief. Had the case proceeded in the district court to final judgment, the court never would have granted a permanent injunction against the Board of Healing Arts defendants because the court had dismissed the claims against them. Securing reversal of that dismissal in this appeal is

integral to obtaining relief that will ensure Trust Women can implement telemedicine again without risk.[2]

C. Trust Women Has a Substantial Likelihood of Prevailing on the Merits

1. This Court should decide whether there is a substantial likelihood that the in-person requirement is unconstitutional

Defendants suggest that the merits questions should be left for the district court—whether in further temporary-injunction proceedings on remand or in proceedings leading to final judgment. Bennett & Schmidt Br. 16. But this Court should decide likelihood of success now. Postponing consideration of the merits questions would be pointless: it is undisputed that likelihood of success on the merits is a legal question that this Court decides on its own, without deference to the district court. Trust Women Br. 33. Because likelihood of success here "presents solely a question of law on established facts," awaiting

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[2] The "procedural backwater" mentioned by the district court (R. 2:156) and defendants has no bearing on whether the court should have issued a temporary injunction.

In any event, defendants bear responsibility for any "procedural backwater." There have been three cases involving the in-person requirement: *Hodes 2011*, *Trust Women I*, and this case. Trust Women sought to reduce the number of cases by moving to consolidate this case with the *Hodes 2011* case. Yet defendants opposed consolidation, and the district court denied it, inexplicably concluding that the two cases "do not present common issues of law or fact sufficient for consolidation." (R. 2:8); *see* Trust Women Br. 21.

Further, the three cases are the result of newly enacted legislation and the Attorney General's shifting position. The *Hodes 2011* suit was filed by a different Kansas abortion provider to challenge the abortion-specific regulatory scheme enacted that year by the Kansas legislature, one part of which was the in-person requirement, K.S.A. 65-4a10. Trust Women Br. 12-13. The *Trust Women I* suit was brought to challenge newly enacted Sections 6 and 7 of the Telemedicine Act to the extent that those provisions could be read to prohibit the use of telemedicine for medication abortions. *Id.* at 18. This suit was brought in response to the Attorney General's assertion that the in-person requirement can be enforced notwithstanding the *Hodes 2011* agreed order, as well as the defendants' refusal to provide non-enforcement assurances. *Id.* at 18-19, 21.

a decision by the district court "would be futile." *Rhodenbaugh v. Kan. Emp't Sec. Bd. of Review*, 52 Kan. App. 2d 621, 629, 372 P.3d 1252, 1258-59 (2016).

Indeed, the applicable legal standard makes the likelihood-of-success-on-the-merits inquiry here relatively straightforward. It is undisputed that the in-person requirement is subject to strict scrutiny, that it infringes on the fundamental right to abortion, and that it is therefore presumptively unconstitutional. Trust Women Br. at 33-34, 37; Bennett & Schmidt Br. 16-17; *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 669, 440 P.3d 461, 496 (2019). As the Kansas Supreme Court has recognized, "the level of scrutiny to be applied often determines the constitutionality of the statute." *Farley v. Engelken*, 241 Kan. 663, 670, 740 P.2d 1058, 1063 (1987). That is certainly true on this temporary-injunction record, where defendants failed to present any evidence.

Defendants now say they "anticipate that they will make a strong showing on remand." Bennett & Schmidt Br. 16. But when they had their chance, they made no showing at all. At the evidentiary hearing in the trial court, defendants had an opportunity to present expert witnesses, fact witnesses, and other evidence to try to meet their burden to overcome the presumption that the in-person requirement is unconstitutional. *See id.* at 16-17 (acknowledging that the burden is on the government to overcome presumption of unconstitutionality). But defendants presented nothing. Indeed, by insisting that they will make a stronger showing in later proceedings, defendants implicitly concede that they failed to meet their burden at the hearing.

Postponing a decision on likelihood of success on the merits would be not only pointless but also harmful to Trust Women and its patients. It would prolong by many

months the ongoing harms being imposed by an unconstitutional statute. This Court should reach the question of likelihood of success on the merits in this appeal.

2. The in-person requirement fails under strict scrutiny

Defendants mention three interests that they claim justify the in-person requirement for medication abortions: (1) patient health and safety, (2) promoting fetal life, and (3) helping patients make informed choices. Bennett & Schmidt Br. 17-18. Defendants have not established that these interests are compelling or that the in-person requirement is narrowly tailored to serve them.

While the government's interest in health and safety may be compelling in other contexts, it is not here because the in-person requirement is woefully underinclusive to advance that interest. Where the government restricts constitutionally protected conduct "and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993) (Where ordinance prohibited animal sacrifice, and the government asserted an interest in protecting public health from disposal of animal carcasses and consumption of uninspected meat, interest in public health was not compelling because regulations were underinclusive, as they did not apply to hunters or other animal slaughters.); *see Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (underinclusiveness of regulation diminishes the credibility of the government's asserted interest). Here, the in-person requirement applies only to medication abortion, even though it is undisputed that the requirement fails to target other medical treatments and medications that have significantly

greater health and safety risks. Trust Women Br. 36. The statute's underinclusiveness is fatal under strict scrutiny.

The in-person requirement is also not narrowly tailored to advance the state's interest in health and safety; indeed, it does not advance that interest at all. Trust Women Br. 35-36; *see United States v. Marzzarella*, 614 F.3d 85, 100 (3d Cir. 2010) ("Narrow tailoring requires that the regulation actually advance the compelling interest it is designed to serve."). Unrebutted testimony by both Trust Women's expert and its medical director established that using telemedicine for medication abortion is just as safe and effective as providing medication abortion in person. There is no health or safety benefit associated with requiring a patient to be physically in the same room with the physician while she takes the first pill in the two-drug protocol. Trust Women Br. 9-10, 14-15, 35. Scientific studies and leading medical organizations confirm the absence of any health and safety benefit. *Id.* at 10-11, 35. Indeed, the in-person requirement *harms* patient health and safety because it delays access to abortion care, subjecting patients to increased health risks. *Id.* at 11, 17, 36. Additionally, as discussed above, the statute is underinclusive; it is therefore "not drawn in narrow terms to accomplish" its interest in health and safety. *Church of the Lukumi Babalu Aye*, 508 U.S. at 546. Nor have defendants shown that an outright ban on telemedicine is the least intrusive means necessary to advance an interest in health and safety. *See Planned Parenthood of the Heartland v. Reynolds ex rel. Iowa*, 915 N.W. 2d 206, 240 (Iowa 2018) ("Narrow tailoring . . . ensures all state forays into constitutionally protected spheres are judiciously fashioned and commit no greater intrusion than necessary.").

While defendants make a passing reference in their brief to an interest in promoting fetal life, Bennett & Schmidt Br. 17, they make no effort to explain how the in-person requirement could possibly serve that interest. Nor do defendants even attempt to demonstrate that requiring the physical presence of a physician when the patient takes the first pill for a medication abortion is the least restrictive means necessary to advance the state's interest in fetal life. Defendants have wholly failed to meet their burden with respect to this interest. *See Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 226 (1989) (challenged law fails strict scrutiny where the state "never adequately explains" how the law advances the asserted interest).

Defendants have also failed to meet their burden with respect to an interest in helping patients make informed choices. Defendants suggest, without evidence, that in-person consultation between patients and physicians is superior to telemedicine consultation. But for every other area of medicine, the Kansas legislature has made the opposite determination. The Telemedicine Act, which defines "telemedicine" as including physician-patient "consultations," places telemedicine consultations generally on par with in-person consultations. (R. 1:110-11, §§ 2(a)(5), 3(b)-(c), 4(b)-(d)). Because the in-person requirement at issue here is vastly underinclusive in that it does not prohibit telemedicine consultations for other medical treatments and medications that impact a patient's life, it fails under strict scrutiny. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 546-47.

Moreover, defendants' assertion that in-person consultation for medication abortions is superior to telemedicine consultation is contrary to the record. Trust Women's

expert conducted an in-depth, peer-reviewed study of medication abortions performed via telemedicine, which revealed that patients generally felt very comfortable communicating with their physicians via telemedicine. (R. 3:63-64).[3] Nothing in the record refutes this. What is more, K.S.A. 65-4a10 does not actually require that the physician-patient *consultation* be done in person; what it requires is that the patient be in the physician's physical presence while the patient takes mifepristone. K.S.A. 65-4a10 is thus not narrowly drawn to accomplish either in-person consultation or informed decision-making.

Finally, the fact that K.S.A. 65-4a10 has exceptions for medical emergencies and for induction abortions performed in hospitals does not save the in-person requirement. *Contra* Bennett & Schmidt Br. 18. Those exceptions do not solve any of the problems just discussed.

[3] Kate Grindlay, Kathleen Lane, and Daniel Grossman, *Women's and Providers' Experiences with Medical Abortion Provided Through Telemedicine: A Qualitative Study*, 23(2) Women's Health Issues 117-22 (Mar.-Apr. 2013).

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Respectfully submitted,

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Certificate of Service

This is to certify that on this 4th day of May, 2020, I electronically filed the above and foregoing with the Clerk of the Court using the Court's electronic Filing System, which will send a notice of electronic filing to all counsel of record and provided copies of the above via email.

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