

No. 19-121693-A

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IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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**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.*

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**BRIEF OF APPELLANT IN REPLY  
TO BRIEF OF APPELLEES LIPPERT & DURRETT**

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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

### TRUST WOMEN HAS STANDING TO SUE THE BOARD OF HEALING ARTS DEFENDANTS

#### A. Trust Women and its Patients Have a Cognizable Injury

The Board of Healing Arts defendants assert that Trust Women and its patients lack a cognizable injury because the Board has not “taken any adverse action against” any of Trust Women’s physicians for violating K.S.A. 65-4a10. *Lippert & Durrett Br. 14*. According to the Board defendants, Trust Women’s physicians have only “possible future injury arising from a potential administrative action being initiated against them.” *Id.*<sup>1</sup>

That this case is a pre-enforcement challenge does not mean that Trust Women lacks an injury. The U.S. “Supreme Court has often found a case or controversy between a plaintiff challenging the constitutionality of a statute and an enforcement official who has made no attempt to prosecute the plaintiff under the law at issue.” *Wilson v. Stocker*, 819 F.2d 943, 946-47 (10th Cir. 1987); *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (“an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law”). “[A] plaintiff need not ‘first expose himself to actual arrest or prosecution to be entitled to challenge [a] statute’”; fear of future enforcement is enough so long as the fear “is not imaginary or wholly speculative.” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 302 (1979) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). This standard “is quite forgiving.” *N.H. Right to Life Political Action*

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<sup>1</sup> Many of the arguments in the “cognizable injury” section of the Board of Healing Arts defendants’ brief (at 14-15) go not to the existence of an injury but rather to the causal-connection requirement. Those arguments are addressed in the next section.

*Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996); see *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2015) (where defendant’s customers’ data was stolen in a data breach, “customers should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing”); *Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir. 1978) (“One need not wait for the conflagration before concluding that a real and present threat exists.”).

Here, the risk of enforcement of K.S.A. 65-4a10 is credible, not imaginary or speculative. The Attorney General has argued that the Board of Healing Arts can enforce K.S.A. 65-4a10 against Trust Women’s physicians; the Board has refused to provide any assurance that it will not enforce K.S.A. 65-4a10; and a complaint has been filed before the Board concerning a physician’s use of telemedicine at Trust Women. Trust Women Br. 43.

Even setting aside the credible threat of future enforcement, Trust Women and its patients presently have actual injuries because Trust Women is prohibited from providing medication abortions via telemedicine, which has multiple resulting harms to its patients. Trust Women Br. 5-8, 11, 16-17, 26-27, 29-30, 34, 41-42.

**B. Trust Women’s Injury Is Causally Connected to the Board of Healing Arts**

1. The Board of Healing Arts defendants assert that there is no “causal connection between the challenged conduct and any alleged injury” because the Board has not “initiated or threatened” any action against Trust Women’s physicians. Lippert & Durrett Br. 16.

But the causal-connection requirement is met so long as the Board has the *authority* to enforce K.S.A. 65-4a10. “It is well-established that when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess *authority* to enforce the complained-of provision.” *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007) (emphasis added). The causation requirement ensures that “the plaintiff has sued the proper defendant” and has not mistakenly sued “an official who lacks authority to enforce a challenged statute.” 13A Fed. Prac. & Proc. Juris. § 3531.5 (3d ed.) (causal connection shown by “identify[ing] an official defendant with authority to enforce a challenged state statute”).

It is undisputed that the Board of Healing Arts has the authority to enforce K.S.A. 65-4a10. *See* Lippert & Durrett Br. 8-9. As officials with the authority to enforce the challenged laws, the Board defendants are proper defendants in this action.

2. The Board of Healing Arts defendants next argue that Trust Women lacks standing because the Board regulates and licenses Trust Women’s physicians, not Trust Women itself or its patients. Lippert & Durrett Br. 14.

An injury may be causally connected to the defendant even if it “flows indirectly from the challenged conduct.” *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 682, 359 P.3d 33, 51 (2015). “Designation of a proper public official as defendant does not require that the official’s acts be aimed directly at the plaintiff.” 13A Fed. Prac. & Proc. Juris. § 3531.5 (3d ed.). Standing can rest on the injuries produced by the statute’s “coercive effect upon the action of someone else.” *Bennett v. Spear*, 520 U.S. 154, 169

(1997); *see, e.g., Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 456 (5th Cir. 2017) (individual plaintiffs who were Medicaid beneficiaries and recipients of care from Planned Parenthood had standing to sue state officials who terminated Planned Parenthood’s Medicaid provider agreement, even though their injury was caused indirectly); *Wine & Spirits v. Rhode Island*, 418 F.3d 36, 45-46 (1st Cir. 2005) (franchisor of independently owned Class A liquor retailers had standing to challenge statute that prohibited Class A liquor retailers from engaging in business activities typical of a franchise relationship, even though the franchisor plaintiff did not have a Class A liquor license and was not subject to any enforcement action or penalty under the statute’s terms).

Here, Trust Women and its patients are harmed by the Board’s ability to enforce K.S.A. 65-4a10 against Trust Women’s physicians. If the Board were to revoke or suspend the license of one of Trust Women’s physicians for providing medication abortion via telemedicine, it would impair Trust Women’s ability to offer its patients abortion services. Trust Women Br. 42-43, 44.

3. The Board defendants lastly argue that there is no “causal connection between the decision to stop providing telemedicine abortions and anything the Board has done or failed to do.” Lippert & Durrett Br. 15-16. According to the Board defendants, “Ms. Burkhart testified that Trust Women Foundation stopped providing telemedicine abortions on December 31, 2018, due to a perception that the Telemedicine Act, which went into effect on that date, banned Telemedicine abortions.” *Id.* at 16 (emphasis omitted).

That mischaracterizes Ms. Burkart's testimony. She testified that she was "fearful that the clinic and our physicians could be penalized for providing telemedicine medication abortions so therefore we ceased." (R. 3:107; *see* R. 3:119). Similarly, Dr. McNicholas testified that the clinic stopped offering telemedicine because she would not "ask physicians to potentially put their medical license on the line when we were unclear about the impact of the current legal situation." (R. 3:134; *see* R. 3:160). Significantly, it is K.S.A. 65-4a10, not the Telemedicine Act, that provides for penalties against physicians, including potential revocation or suspension of their medical licenses. *Trust Women Br. 12-13*. Ms. Burkart's and Dr. McNicholas's testimony thus demonstrate that concern about the Board's enforcement of K.S.A. 65-4a10 against Trust Women's physicians was a significant part of their decision to stop offering telemedicine for abortions.

In any event, the exact reason for Trust Women's decision does not matter. As discussed, Trust Women has standing to sue the Board defendants because they are public officials with the authority to enforce K.S.A. 65-4a10. *See Bronson*, 500 F.3d at 1110.

Dated: December 17, 2019

Respectfully submitted,

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## Certificate of Service

This is to certify that on this 17th day of December, 2019, 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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