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

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

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Oral Argument: 25 minutes

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NATURE OF THE CASE

This case is a challenge under the Kansas constitution to a statutory constraint applicable only to medication abortion, which, despite the absence of any medical justification, bans a method of providing health-care services that is safe, effective, and widely used in other areas of medicine.

Medication abortion involves using drugs, rather than instruments, to terminate early pregnancy. The statutory requirement at issue here mandates that medication-abortion pills be given to the patient while the physician who prescribed them is physically present in the same room as the patient. Medication abortion is the only health-care service to which this in-person requirement applies. The requirement effectively bans the use of telemedicine to provide medication abortion. Telemedicine is the use of technology to provide health care remotely, and it is used in Kansas to provide care in a wide variety of areas, including for medical services that carry far greater risk than medication abortion.

Unrefuted evidence established that there is no medical basis for the in-person requirement. In fact, the requirement undermines public health by making medication abortion less accessible and delaying access to abortion until later in pregnancy when the risk of complications increases. The requirement also pushes what would otherwise be first-trimester abortions into the second trimester.

Plaintiff-appellant Trust Women Foundation Inc. operates a health-care clinic in Wichita that provides abortion care, including medication abortion. Trust Women used telemedicine to provide medication abortion for approximately three months, and it would do so again if the defendants were enjoined from enforcing the in-person requirement.

Defendants-appellees are the Kansas Attorney General, the District Attorney for Sedgwick County, the Executive Director of the Board of Healing Arts, and the President of the Board of Healing Arts. The Attorney General asserts that the defendants may enforce Kansas's in-person requirement. The Board of Healing Arts can suspend or revoke the medical licenses of physicians who violate the requirement.

Trust Women sued and sought a temporary injunction to bar the defendants from enforcing the prohibition on the use of telemedicine for medication abortions. The district court denied Trust Women's motion, holding that Trust Women had not proved that it or its patients "will suffer" irreparable injury. The court so ruled even though (1) the Kansas Supreme Court has held that plaintiffs need not prove that they "will suffer" irreparable injury; (2) a constitutional violation is irreparable injury per se; and (3) undisputed evidence established that the in-person requirement reduces the availability of medication abortion, forces patients to spend more time at the clinic to obtain a medication abortion, makes it harder for patients to schedule appointments, deprives some patients of the ability to choose medication abortion over surgical abortion, increases financial costs to patients, increases health risks by delaying abortions, and more.

In the same order, the district court also dismissed Trust Women's claims against the Board of Healing Arts defendants, holding that Trust Women lacks standing to sue them—even though the Board has the authority to revoke or suspend the licenses of Trust Women's physicians for violating the in-person requirement.

STATEMENT OF THE ISSUES

I. Whether the district court abused its discretion by denying Trust Women's motion for a temporary injunction to preclude the Attorney General and the District Attorney from enforcing Kansas's in-person requirement for medication abortions.

II. Whether the district court erred by dismissing Trust Women's claims against the Board of Healing Arts defendants and denying Trust Women's motion for a temporary injunction against them on the basis that Trust Women purportedly lacks standing to sue the Board defendants.

STATEMENT OF FACTS

A. Trust Women

Trust Women operates clinics in Wichita, Oklahoma City, and Seattle, providing reproductive health care, including abortion, as well as HIV/AIDS testing and transgender care to underserved communities. (R. 1:244-45; 2:137; 3:80-83). The Wichita clinic opened in April 2013, and 84% of the abortions provided there are during the first trimester. (R. 3:81, 92-93). The clinic provides both surgical and medication abortions. (R. 3:91).

B. Trust Women's Unrefuted Evidence

The facts set forth in this Statement are uncontroverted. They were elicited through the testimony of three witnesses called by Trust Women at a one-day hearing on Trust Women's motion for a temporary injunction. (R. 2:136). Defendants presented *no* witnesses or exhibits at the hearing. (R. 2:136, 3:161-62).

Trust Women's Witnesses

Dr. Daniel Grossman is an expert in obstetrics and gynecology, including abortion care. (R. 3:29). He is a Professor in the Department of Obstetrics, Gynecology, and Reproductive Sciences at the University of California, San Francisco, and a Fellow of the American College of Obstetricians and Gynecologists. (R. 1:226-27).

Julie Burkhart is the founder and CEO of Trust Women. (R. 3:79). She has been involved with providing abortion care for over twenty years. (R. 3:84).

Dr. Colleen McNicholas is an expert in obstetrics and gynecology, including abortion care. (R. 3:129). She is Trust Women's Medical Director and one of the physicians who provides care there. (R. 3:129, 157-58). At the time of the hearing, she was also an Associate Professor at the Washington University School of Medicine in the Department of Obstetrics and Gynecology's Division of Family Planning. (R. 1:258-59).

C. Medication Abortion

Medication abortion involves using drugs, rather than instruments, to terminate early pregnancies. (R. 3:30). The U.S. Food and Drug Administration has approved a two-drug protocol for terminating pregnancies up to 10 weeks' gestation (measured from the first day of the last menstrual period). (R. 1:261; 3:30). The patient first takes a 200-milligram tablet of mifepristone, which blocks the hormone progesterone, causing the pregnancy to begin to separate from the uterus. (R. 3:30-31, 55-56). Then 24 to 48 hours later, the patient takes four 200-microgram tablets of misoprostol at the patient's home or another location of her choosing. (R. 3:30, 56). Misoprostol causes the cervix to open and

the uterus to contract, resulting in expulsion of the pregnancy—a process similar to a miscarriage. (R. 3:31, 148-49).

Medication abortion is approximately 95% effective at ending pregnancy. (R. 3:33). It is also extremely safe. Minor complications—e.g., nausea, mild infection, or an incomplete abortion requiring vacuum aspiration—occur in about 4% to 5% of cases. (R. 3:32, 56). Major complications—e.g., heavy bleeding or serious infection—occur in fewer than 0.3% of patients. (R. 3:32, 56). Medication abortion is safer than taking Tylenol, penicillin, or Viagra. (R. 3:57-58).

Among Trust Women's patients who are within the 10-week limit for medication abortion, about 60% to 70% choose medication over surgical abortion. (R. 3:147-48). There are many reasons for this choice. For example, some women who have experienced sexual abuse prefer taking pills over the insertion of instruments. (R. 3:148). Some women who have experienced miscarriage choose medication to experience their abortion in a way that is familiar to them. (R. 3:148-49). And for some patients, such as those with a uterine anomaly, medication abortion is medically preferable over surgical abortion. (R. 3:149).

D. Obstacles to Accessing Abortion in Kansas

Kansas women face multiple barriers to accessing abortion. (R. 3:149-51). For one, although the majority of patients seeking abortion are low income, the cost of the service is generally not covered by insurance or Medicaid in Kansas. (R. 1:230; 3:43-44, 151).

In addition, abortion access is severely limited geographically. Kansas has only three providers: Trust Women in Wichita, the Center for Women's Health in Overland Park, and Planned Parenthood in Overland Park and Wichita. (R. 1:236). Ninety-seven

percent of Kansas counties have no provider. (R. 3:43-44). About 56% of Kansas women of reproductive age live in a county without an abortion provider—higher than the national average of 39%. (R. 3:43-44). Women in western Kansas must travel up to 180 miles for an abortion. (R. 3:95).

Relatedly, many women have transportation issues. About half of Trust Women's abortion patients live outside the Wichita area. (R. 3:95). Some patients from rural areas must travel using buses or taxis. (R. 3:94). Trust Women has had patients arrive at the bus station in downtown Wichita only then to have difficulty getting to the clinic in eastern Wichita. (R. 3:94). Taxi drivers have refused to drive patients to the clinic after realizing where the patients were going. (R. 3:94).

Patients who manage to navigate the financial and transportation obstacles face yet another hurdle: limited appointment availability. Trust Women currently provides abortions only two days a week, typically Thursdays and Fridays from 8:00 am to 5:00 pm. (R. 3:89). That is because Trust Women has been unable to find an in-state physician to work with the clinic and is forced to fly in physicians from outside Kansas. (R. 1:249; 3:87, 89-91). The limited availability of those out-of-state physicians—all of whom have competing schedules and responsibilities—restricts when Trust Women can offer abortion. (R. 3:89-90, 132-33). Flight delays and cancellations have forced the clinic to cancel or delay patient appointments. (R. 3:90).

Trust Women's inability to find in-state physicians willing to provide abortion care is unsurprising given the history of violence and harassment against abortion providers. Before starting Trust Women, Ms. Burkhart worked with Dr. George Tiller, a Wichita

abortion provider who was murdered in his church in 2009 by an anti-abortion extremist. (R. 3:83-84). During its operation, Trust Women has been subjected to vandalism, trespassing, hate mail, and harassing phone calls. (R. 3:85). Protestors are regularly outside the clinic during business hours, and they have yelled at staff members by name, followed staff when they leave the clinic, tracked information about cars entering and exiting the property, and picketed physicians at their homes and other places of business. (R. 3:85-87).

Because Trust Women can provide abortions only two days a week, its schedule on those days is packed, leading to long wait times. (R. 3:111, 150). As a result, patients have to spend six to eight hours at the clinic for a medication or surgical abortion. (R. 3:91-92, 111, 150). It can be extremely difficult for patients to fit a six-to-eight-hour appointment into their schedules on a Thursday or Friday, due to competing demands on their time and attention, including work, school, and childcare. (R. 3:149-51). Women regularly call the clinic seeking appointments on days other than Thursdays and Fridays. (R. 3:98).

These obstacles delay abortion access and harm women seeking abortions. (R. 3:42-45, 149-53). Health risks associated with pregnancy increase with gestation; delaying abortion access increases exposure to those pregnancy-related risks. (R. 3:152-53). Although abortion is extremely safe at all stages, the complication rate is higher in the second trimester. (R. 3:44). The financial cost of abortion is also much lower earlier in pregnancy. (R. 3:91, 153).

Because Trust Women can provide abortions only on certain days and at limited times, some patients who wanted medication abortions were unable to get an appointment

at the clinic before the 10-week gestational cutoff for medication abortion. These patients have instead had to have surgical abortions. (R. 3:112-13, 154-56).

E. Telemedicine as a Means of Alleviating Obstacles to Abortion Access

One way to alleviate these obstacles is to use telemedicine to provide abortion. As defined by Kansas law, telemedicine is "the delivery of healthcare services or consultations while the patient is at an originating site and the healthcare provider is at a distant site." K.S.A. 40-2,211(a)(5). Telemedicine is used to "facilitate the assessment, diagnosis, consultation, treatment, education and care management of a patient's healthcare." *Id.*

Telemedicine is used throughout the United States in practically every area of medicine—including obstetrics and gynecology—to facilitate consultations, diagnose conditions, prescribe medications, and monitor and treat chronic illnesses. (R. 1:239; 3:33-34, 142-45). Kansas health-care practitioners have used telemedicine to provide consultations, follow-up care, and medication management in more than thirty specialties, including cardiology and oncology. (R. 1:239; 3:34-35). Neurologists use telemedicine to review imaging scans and diagnose and treat strokes in patients at Kansas hospitals that do not have a neurologist available. (R. 1:239; 3:34-35).

In 2018, the Kansas legislature enacted the Telemedicine Act (reprinted in full at R. 1:110-13), which facilitates the use of telemedicine. Among other things, the Telemedicine Act (1) provides that telemedicine may be used to establish a valid provider-patient relationship, (2) prohibits insurance plans from excluding coverage for services provided through telemedicine, and (3) provides for the prescribing of drugs, including controlled substances, via telemedicine. (R. 1:110-13, §§ 1(a), 3(b), 4(b), 5(a)).

Telemedicine is a safe and effective means of providing medication abortion. Because a physician need not ever physically touch the patient to provide a medication abortion, physicians can provide the same level of abortion care remotely via telemedicine as they can provide in person. (R. 3:58, 133, 140). Telemedicine has been used to provide medication abortion in the United States since at least 2008 and is currently being provided in Iowa, Alaska, Washington, Idaho, Nevada, Illinois, Maine, New York, Hawaii, and Oregon. (R. 3:51, 59).

Providing medication abortion with telemedicine is nearly identical to providing it in person. (R. 3:61, 99-106, 134-39). In either setting, the patient must be in a health-care facility, where the patient receives an ultrasound, which can be performed by an ultrasound technician. (R. 3:99-102, 138). The patient's medical history and ultrasound images are stored in the patient's electronic medical record; the physician reviews the same electronic medical record regardless of whether the physician is in person or remote. (R. 3:100-02, 135-36, 139). The patient consults with the physician either in person or, in a telemedicine setting, via secure video. (R. 3:100-05, 133-35, 139). In the in-person setting, typically the physician hands the patient the medication for the abortion; in the telemedicine setting, a nurse or medical assistant hands the patient the medication under the physician's direction, with the physician watching over secure video to ensure that the correct medication and dosage are provided. (R. 3:75-77, 105-06, 138).

In rare cases in which complications occur from medication abortion, it does not matter to the patient's health whether the physician saw the patient in person or remotely. (R. 3:54). The complications that arise from medication abortion occur after the patient

leaves the clinic. (R. 3:54-55). The patient takes the first medication, mifepristone, at the clinic and the second medication, misoprostol, at home. (R. 3:54-56). Complications and effects—e.g., cramps, bleeding, and infection—do not occur in the clinic; they occur only after the patient takes misoprostol at home. (R. 3:54-55).

Studies have borne out the safety of telemedicine for medication abortion. Dr. Grossman testified about a study he published looking at patients receiving medication abortion at an Iowa clinic in the first seven years of that clinic's use of telemedicine. (R. 3:50-53). The study was published in *Obstetrics and Gynecology*, which is the journal of the American College of Obstetricians and Gynecologists. (R. 3:47, 51). Of the more than 19,000 patients in the study, about half received medication abortion via telemedicine and about half were in person. (R. 3:51-52). The study found that the prevalence of clinically significant adverse events overall was only 0.26%, and there was no statistically significant difference in the prevalence of these events between telemedicine and in-person treatment. (R. 3:52).

Dr. Grossman published another study in *Obstetrics and Gynecology* about the effectiveness of medication abortion provided through telemedicine. (R. 3:47-49). The study found a success rate of 99% for telemedicine patients and 97% for in-person patients—no statistically significant difference. (R. 3:48). And telemedicine patients in the study were much more satisfied with their overall experience than in-person patients were. (R. 3:48-49).

Leading medical organizations support the use of telemedicine for medication abortion. The National Academies of Sciences, Engineering, and Medicine recently

reviewed the evidence on the safety of abortion and concluded that there is no evidence of any need for a physician to be physically present when medication abortion is provided to the patient. (R. 3:38, 53). The American College of Obstetricians and Gynecologists, the largest professional organization of women's health physicians, issued a practice bulletin setting the standard of care for providing medication abortion and stating unequivocally that telemedicine is an appropriate way to provide medication abortion. (R. 3:24, 72-73).

Telemedicine expands abortion access earlier in pregnancy when it is safer, thereby furthering public health and reducing second-trimester abortions. (R. 3:61-62). Telemedicine can be used to reduce geographic barriers and help patients access abortion care closer to home. (R. 3:62). It also reduces wait times for clinic appointments, allowing more patients to access medication abortion before the 10-week gestational cutoff, which would otherwise require the patient to have a surgical abortion. (R. 3:62). A study published in the *American Journal of Public Health* reported that after telemedicine was introduced in Iowa, the proportion of patients who received medication abortion, rather than surgical abortion, increased from 46% to 54%—a much larger increase than the national increase over the same period. (R. 3:65-66). Patients were also about 50% likelier to obtain a first-trimester, rather than second-trimester, abortion. (R. 3:66).

Patients and providers in other states also report satisfaction with their telemedicine experiences. Patients appreciate that telemedicine decreases their travel time, allows them to obtain an abortion closer to home, and increases flexibility in scheduling appointments, allowing them to schedule the treatment at a convenient time to minimize time off work. (R. 3:63-64). Physicians appreciate that telemedicine allows them to provide care earlier

in pregnancy, expands access to medication abortion, and alleviates the need for them to travel to remote locations to provide abortion care. (R. 3:59-61). Both physicians and clinic staff report that it has been easy to integrate telemedicine into their practices. (R. 3:60-61, 64-65).

F. Kansas's Prohibition on Using Telemedicine for Medication Abortions

Although Kansas law facilitates the use of telemedicine in other areas of medicine, *supra* p. 8, the Kansas legislature has singled out one service for which telemedicine is prohibited: medication abortion.

1. K.S.A. 65-4a10's in-person requirement

Under K.S.A. 65-4a10 (reprinted in full at R. 1:93-94), which was enacted in 2011, a patient receiving a medication abortion must take the first drug, mifepristone, "in the same room and in the physical presence of the physician who prescribed" it. K.S.A. 65-4a10(b)(1). Although the patient can take the second drug, misoprostol, at home, misoprostol must be given to the patient "by or in the same room and in the physical presence of the physician who prescribed" it. *Id.*

The Board of Healing Arts can suspend or revoke the medical license of a physician who violates this in-person requirement. *See* K.S.A. 65-4a10(d) ("A violation of this section shall constitute unprofessional conduct . . . ."); K.S.A. 65-2836(b) (providing for license revocation, suspension, or limitation, or public censure, for "an act of unprofessional or dishonorable conduct").

K.S.A. 65-4a10 has been enjoined since December 2011. A different Kansas abortion provider sued in 2011, challenging the burdensome, abortion-specific regulatory

scheme enacted that year by the Kansas legislature, one part of which was the in-person requirement of K.S.A. 65-4a10. *Hodes & Nauser, MDs, P.A. v. Moser* ("*Hodes 2011*"), No. 11-CV-1298 (Shawnee Cty. Dist. Ct.).[1] The defendants in *Hodes 2011* are the Attorney General, the Secretary of the Kansas Department of Health and Environment, and the Johnson County District Attorney. (R. 2:134). After the court entered a temporary restraining order, the parties to that case jointly stipulated to entry of an agreed order that the injunction "shall remain in effect pending the Court's issuance of a final judgment." (R. 1:66). The court entered the agreed order enjoining enforcement of K.S.A. 65-4a10. (R. 1:66; 2:134).

2. Sections 6 and 7 of the Telemedicine Act

The Kansas Telemedicine Act, which took effect January 1, 2019, also speaks to the use of telemedicine for abortions. Section 6 provides: "Nothing in the Kansas telemedicine act shall be construed to authorize the delivery of any abortion procedure via telemedicine." (R. 1:111, § 6). Further, although Section 7 of the Telemedicine Act provides that the law's provisions are generally severable, it contains one exception: Section 6 is expressly "nonseverable" from the rest of the act. (R. 1:111, § 7).

The district court here interpreted Sections 6 and 7 of the Telemedicine Act as not containing an independent prohibition on using telemedicine for abortions. (R. 2:146). Trust Women does not challenge that interpretation in this appeal.

[1] The district court in this case used the shorthand "*Hodes 2011*" to distinguish the 2011 case from a 2015 case also brought by Hodes & Nauser MDs, P.A.

3. Absence of medical benefit for Kansas's prohibition

Regardless of the statutory source of Kansas's prohibition on the use of telemedicine for medication abortions, there is no medical justification for it. Dr. Grossman testified that "there is no medical basis for these laws" and that "a requirement for physicians to be in the same room is outside the standard of care." (R. 3:37, 73). Dr. McNicholas also testified that there is no medical benefit associated with requiring a physician to be in person for a medication abortion. (R. 3:131-32). Their testimony was unrefuted.

Defense counsel tried, but failed, to elicit testimony from Dr. Grossman that the in-person requirement has a medical benefit. Defense counsel asked whether there are circumstances in which the physician should perform a physical examination of the patient. (R. 3:73-74). Dr. Grossman explained that sometimes further evaluation—such as an additional ultrasound, radiology, or bloodwork—may be needed to determine eligibility for medication abortion, but a physician can tell via telemedicine whether such evaluation is needed. (R. 3:73-75). And the need for further evaluation can happen regardless of whether the physician is remote or in person. (R. 3:74-75).

Defense counsel also asked Dr. Grossman whether having the medication be administered in the physician's physical presence might ensure that the patient receives the correct medication and dosage. Dr. Grossman explained that it would not. (R. 3:75-77). Mifepristone comes as a single 200-milligram pill in a blister pack that is clearly labeled in a bright orange box. (R. 3:75-76). It is very easy to see that the correct medication is being provided, and because mifepristone comes only in a single pill, it is impossible to

make a dosing error. (R. 3:75-76). The physician is therefore able to supervise the dispensing of the medication over video. (R. 3:76-77).

G. Trust Women's Use of Telemedicine to Provide Medication Abortion

Trust Women began using telemedicine to provide medication abortions at its Seattle clinic in mid-2018. (R. 3:119). The Seattle program has been successful; there have been no issues with safety or efficacy, and patients have been satisfied with their experiences. (R. 3:142).

In October 2018—with K.S.A. 65-4a10 enjoined by the *Hodes 2011* agreed order—Trust Women began using telemedicine to provide medication abortions at its Wichita clinic. (R. 3:96, 134, 155). Trust Women implemented the same telemedicine protocol for its Wichita clinic as the one it used for its Seattle clinic. (R. 3:98-99, 136-37, 142). As in Seattle, Trust Women's Wichita patients who have received medication abortion via telemedicine have not experienced any significant complications. (R. 3:106-07).

Trust Women's telemedicine protocol is nearly identical to its protocol for in-person medication abortion. (R. 3:99-106, 136-41). For telemedicine, patients come to the Wichita clinic, and physicians provide care remotely using secure videoconferencing. (R. 3:100, 145). The clinic uses the same equipment for telemedicine abortion that it uses for in-person abortion, with the addition of a laptop. (R. 3:134-35). The patient receives the same ultrasound in the same exam room, and the patient's medical record is stored in the same electronic location. (R. 3:100-01, 134-37). The physician reviews the patient's medical record and ultrasound images, consults with the patient, and determines whether the patient is eligible for medication abortion in the same way with telemedicine as with

in-person treatment, except that the physician appears by video. (R. 3:100-05, 135-41). For both types of treatment, the patient returns to the clinic for a follow-up appointment two to three weeks later to ensure that the medication abortion has been effective. (R. 3:104-05).

There are only two significant differences between Trust Women's telemedicine and in-person protocols. (R. 3:106, 138). First, whereas the physician generally performs the ultrasound for an in-person abortion, in the telemedicine setting an ultrasound technician performs the ultrasound while the physician watches over video so that the physician can direct the technician as needed. (R 3:100-02, 106, 135-36, 138). Second, if the physician is in person, he or she typically hands the patient the medications, whereas, for a telemedicine abortion, a nurse or medical assistant hands the patient the medicine while the physician supervises over video. (R. 3:105-06, 138).

Trust Women's use of telemedicine enabled it to greatly increase access to medication abortion. (R. 3:96-98, 119-20, 150-52). Because physicians could provide medication abortion care from a remote location without flying to Wichita, physicians and the clinic had much greater flexibility in the days and times that services could be provided. (R. 3:96-97, 150). The clinic was able to offer medication abortions more than two days a week and outside normal business hours. (R. 3:96-97, 108-09, 150). Trust Women's CEO estimated that the clinic made medication abortions available an additional eight to twelve hours per week. (R. 3:119-20). These telemedicine appointments were not susceptible to being canceled or rescheduled due to a physician's flight delay or cancellation. (*See* R. 3:90). Telemedicine also significantly reduced the amount of wait time at the clinic:

patients needed to spend only one to two hours at the clinic for a telemedicine medication abortion rather than six to eight hours for an in-person medication abortion. (R. 3:91-92, 97, 150-51).

Trust Women found that, by expanding appointment availability and reducing the time spent at the clinic, telemedicine made it much easier for patients to access medication abortion, even though patients still needed to come to the Wichita clinic. (R. 3:97-98, 150-52). Telemedicine makes it easier for patients to fit the appointment into their schedules, reduces the amount of time needed to be away from work or school, and alleviates childcare burdens. (R. 3:97-98, 150-52). Telemedicine also allows patients to access medication abortion earlier in their pregnancies, thus reducing the risk of complications and lowering the financial cost to patients. (R. 3:152-53).

Trust Women has considered and researched expanding its use of telemedicine to further increase access to medication abortion in rural areas of Kansas. (R. 3:107-08). Such an expansion would involve opening new clinics or partnering with existing health-care providers in other parts of Kansas so that patients do not need to travel to the Wichita clinic. (R. 3:107-08, 145-47).

Although the Wichita clinic's use of telemedicine has been referred to as a "pilot program" (R. 3:98, 107, 155), that term was not intended to suggest that the telemedicine program was intended to be temporary. (R. 3:118-19). Rather, "pilot program" described the fact that telemedicine was a new way of providing service at the Wichita clinic and that Trust Women was implementing telemedicine incrementally, first through a pilot program

in Wichita and then potentially later in other parts of the state so that patients do not need to travel to Wichita. (R. 2:138; 3:107-08, 118-19, 146).

H. *Trust Women I*

With the Telemedicine Act poised to take effect on January 1, 2019, Trust Women sued the Attorney General on November 8, 2018, challenging Sections 6 and 7 of the Telemedicine Act to the extent that those provisions can be read to prohibit the use of telemedicine for medication abortions and seeking injunctive relief. (R. 2:135); *Trust Women Found. Inc. v. Schmidt* ("*Trust Women I*"), No. 2018-CV-844 (Shawnee Cty. Dist. Ct.). *Trust Women I* was assigned to the same district court judge assigned to *Hodes 2011*.

On December 3, 2018, the Attorney General filed a brief in *Trust Women I* in which he argued for the first time that the *Hodes 2011* agreed order "did not prohibit others—for example the Board of Healing Arts or the Sedgwick County District Attorney—from enforcing K.S.A. 65-4a10." Def.'s Resp. Opposing Pl.'s Mot. for Temp. Inj. & TRO at 4 n.1, *Trust Women I* (Dec. 3, 2018). The Attorney General also argued for the first time that because K.S.A. 65-4a10 was amended in 2015, the *Hodes 2011* agreed order was no longer in force. *Id.*[2]

Trust Women responded that the *Hodes 2011* agreed order remained in effect pending issuance of a final judgment in that case. Pl.'s Reply to Def.'s Opp. To Pl.'s Mot. for Temp. Inj. & TRO at 4, *Trust Women I* (Dec. 12, 2018). Trust Women also explained that because the Attorney General, the chief law officer of the state, stipulated to entry of

[2] The district court in this case took judicial notice of the court files in *Hodes 2011* and *Trust Women I*. (R. 2:152 n.2).

the *Hodes 2011* agreed order, that order also bound the Sedgwick County District Attorney and the Board of Healing Arts. *Id.* at 4-5.

On December 31, 2018, the district court in *Trust Women I* issued an order dismissing the case, holding that the Telemedicine Act does not "contain[] an independent prohibition on the provision of abortion through the use of medications nor by telemedicine." (R. 1:49-50).

The *Trust Women I* court also explained that the agreed order in *Hodes 2011* is still in effect and that K.S.A. 65-4a10 thus remains "enjoined from enforcement." (R. 1:52). Further, the court explained that "there is no basis to argue that enforcement against others with like interests somehow were excepted." (R. 1:57). Trust Women is therefore "entitled to enjoy that umbrella of protection and safe harbor provided by the *Agreed Order* and, therefore, not be exposed to any threat of selective enforcement." (R. 1:57).

The *Trust Women I* order, however, did not clarify a different, but related question: whether the *Hodes 2011* agreed order precludes enforcement by the Sedgwick County District Attorney or the Board of Healing Arts. (R. 2:135).[3]

[3] The Attorney General has appealed the *Trust Women I* order, asserting that it modified and extended the *Hodes 2011* agreed order. *Trust Women Found. Inc. v. Schmidt*, No. 19-120755-A (Kan App.). The Attorney General also asked the *Hodes 2011* district court to allow enforcement of K.S.A. 65-4a10. Defs.' Mot. to Clarify and/or Dissolve Inj. Relating to K.S.A. 65-4a10 at 1, *Hodes 2011* (Jan. 30, 2019). After the court denied that request, the Attorney General appealed the denial, and that appeal is pending. *Hodes & Nauser, MDs, P.A. v. Norman*, No. 19-121046-A (Kan. App.). The *Trust Women I* appeal is stayed pending resolution of the *Hodes 2011* appeal and the instant appeal.

I. Trust Women's Decision to Cease Providing Medication Abortion Using Telemedicine

Accordingly, as of December 31, 2018, Trust Women had no assurance that the District Attorney and the Board of Healing Arts could not enforce K.S.A. 65-4a10. So on December 31, 2018, Trust Women stopped using telemedicine to provide medication abortions. (R. 3:107). Ms. Burkhart, Trust Women's CEO, 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). Dr. McNicholas, Trust Women's Medical Director and one of its physician providers, testified that the Wichita 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). In fact, by that point a complaint had been filed and remained pending before the Board of Healing Arts concerning a physician's use of telemedicine at Trust Women. (R. 3:88, 117, 122, 125).

Ms. Burkhart also testified that absent the concern about enforcement, Trust Women would have continued providing medication abortion using telemedicine. (R. 3:107). And if the in-person requirement were enjoined, Trust Women would reinstate its use of telemedicine at the Wichita clinic. (R. 3:107). Additionally, Trust Women has been researching how to expand the use of telemedicine into more rural areas of Kansas, and it would seek to implement such an expansion. (R. 3:107-08, 116).

J. This Litigation

In light of the Attorney General's position that the Sedgwick County District Attorney and Board of Healing Arts could enforce K.S.A. 65-4a10, as well as the lack of clarity on this issue in the *Trust Women I* order, Trust Women sought assurances from the District Attorney and the Board that they would not enforce the in-person requirement. Neither the District Attorney nor the Board provided any assurance. (R. 1:353; 2:136).

So on January 29, 2019, Trust Women filed this lawsuit on behalf of itself and its patients, seeking declaratory and injunctive relief against enforcement of K.S.A. 65-4a10 and, out of an abundance of caution, Sections 6 and 7 of the Telemedicine Act. (R. 1:19-20, 34-39, 67-68, 83-89). Trust Women moved to consolidate the case with the *Hodes 2011* case, but the district court denied that motion. (R. 1:116-221, 338-45; 2:6-10).

After a one-day hearing, the district court issued a single order denying Trust Women's motion for a temporary injunction and dismissing Trust Women's claims against the Board of Healing Arts defendants. (R. 2:132-58).

The court first construed Sections 6 and 7 of the Telemedicine Act as neither authorizing nor prohibiting the use of telemedicine for abortions. (R. 2:146 ("the Telemedicine Act does not limit or prohibit abortion in this state")). As noted, Trust Women does not challenge that interpretation in this appeal.

The court then concluded that Trust Women lacks standing to assert its claims against the Board of Healing Arts defendants. (R. 2:146-51). The court was not convinced that Trust Women and its patients have an injury that is causally connected to the Board (R. 2:149)—even though Trust Women is unable to provide telemedicine abortion because

the Board could suspend or revoke its physicians' licenses for doing so. The court focused on the fact that "it is the physicians who face discipline from the Board of Healing Arts, not Plaintiff." (R. 2:148-49). The court found it significant that "[t]here was no testimony that a physician performing telemedicine abortions made a decision to stop doing so because of the challenged laws, or for any other reason." (R. 2:149). Further, the court concluded that the timing "undermines the existence of a causal connection between the challenged laws and any alleged injury to Plaintiff." (R. 2:149). According to the court, "K.S.A. 65-4a10 was not a barrier to Plaintiff performing telemedicine abortions"; rather, Trust Women purportedly "stop[ped] performing telemedicine abortions because of the passage of the Telemedicine Act." (R. 2:150).

The court also denied Trust Women's motion for a temporary injunction, ruling that Trust Women did not "prove" that it or its patients "will suffer" irreparable injury. (R. 2:154, 156). The court "assume[d] the existence of some constitutional violation which would provide Plaintiff a substantial likelihood of prevailing on the merits," but nevertheless concluded that the constitutional violation was not irreparable harm. (R. 2:154). The court agreed with the defendants' argument that the in-person requirement does not decrease abortion access because, under Trust Women's telemedicine protocol, "patients must still travel to the Wichita clinic." (R. 2:154-55). The court's legal analysis never addressed Trust Women's unrebutted evidence that telemedicine expands abortion access by increasing appointment availability, reducing patient time at the clinic, creating scheduling flexibility for patients, and allowing patients to access abortion earlier in pregnancy. The court also ruled that Trust Women supposedly delayed in filing suit (R.

2:155-56)—even though Trust Women sued within one month after the *Trust Women I* order.

ARGUMENTS AND AUTHORITIES

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING A TEMPORARY INJUNCTION AGAINST THE ATTORNEY GENERAL AND THE DISTRICT ATTORNEY

This Court should reverse the district court's denial of Trust Women's motion for a temporary injunction to preclude the Attorney General and the Sedgwick County District Attorney from enforcing Kansas's prohibition on the use of telemedicine for medication abortions.

The denial of a motion for a temporary injunction is reviewed for abuse of discretion. *Bonner Springs Unified Sch. Dist. No. 204 v. Blue Valley Unified Sch. Dist. No. 229*, 32 Kan. App. 2d 1104, 1113, 95 P.3d 655, 661 (2004). A district court abuses its discretion if its decision (1) is arbitrary, fanciful, or unreasonable, (2) is based on an error of law, or (3) is based on an error of fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801, 810 (2011). "[A]n appellate court has unlimited review of legal conclusions upon which a district court judge's discretionary decision is based." *State v. Gonzalez*, 290 Kan. 747, 755, 234 P.3d 1, 4 (2010). "'A district court by definition abuses its discretion when it makes an error of law." *Kuhn v. Sandoz Pharm. Corp.*, 270 Kan. 443, 456, 14 P.3d 1170, 1179 (2000) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)). Further, "a district court abuses its discretion when the decision is based on factual determinations not supported by the evidence." *Gonzalez*, 290 Kan. at 757, 234 P.3d at 10.

Trust Women established each of the elements necessary for a temporary injunction. (R. 1:222-24) (motion for temporary injunction); (R. 1:225-72) (evidence supporting motion); (R. 1:273-309) (memorandum of law in support of motion); (R. 2:13-39) (replies in support of motion); (R. 2:67-108) (proposed findings of fact and conclusions of law).

A movant is entitled to a temporary injunction when the following elements are met: "a substantial likelihood of eventually prevailing on the merits; a reasonable probability of suffering irreparable future injury; the lack of obtaining an adequate remedy at law; the threat of suffering injury outweighs whatever damage the proposed injunction may cause the opposing party; and the impact of issuing the injunction will not be adverse to the public interest." *Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 491, 173 P.3d 642, 647 (2007).

The district court gave one reason for denying Trust Women's motion against the Attorney General and District Attorney: that Trust Women purportedly did not establish that it or its patients will suffer irreparable injury without an injunction. (R. 2:154-57). That ruling must be set aside because it was based on the wrong legal standard and also ignored Trust Women's uncontroverted evidence of irreparable injury. Not only did Trust Women show irreparable injury, it also established a substantial likelihood that it will succeed in showing that Kansas's in-person requirement unconstitutionally interferes with a woman's fundamental right to abortion and with Trust Women's and its patients' equal-protection rights. And it is undisputed that all the remaining elements for injunctive relief are met. Accordingly, this Court should reverse the denial of Trust Women's motion and instruct the district court to enter a temporary injunction on remand.

A. There is a Reasonable Probability That Trust Women and its Patients Will Suffer Irreparable Injury Without an Injunction

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

Trust Women introduced uncontroverted evidence and testimony that easily meets the standard for showing irreparable injury for a temporary injunction. A party seeking a temporary injunction need only show that "there is a reasonable probability of irreparable future injury." *Bd. of Cty. Comm'rs of Leavenworth Cty. v. Whitson,* 281 Kan. 678, 683, 132 P.3d 920, 925 (2006) (quoting *Empire Mfg. Co. v. Empire Candle, Inc.*, 273 Kan. 72, 86, 41 P.3d 798 (2002)). An injury is irreparable where the injured party cannot "achieve a full, complete, and adequate remedy . . . through recovery of calculable money damages." *Persimmon Hill First Homes Ass'n v. Lonsdale*, 31 Kan. App. 2d 889, 894, 75 P.3d 278, 283 (2003) (discussing why violations of restrictive covenants are inherently irreparable).

Here, the district court assumed that Kansas's in-person requirement for medication abortion deprives Trust Women and its patients of their constitutional rights. (R. 2:154 ("[T]he Court will assume the existence of some constitutional violation which would provide Plaintiff a substantial likelihood of prevailing on the merits.")). The deprivations of the constitutional rights of Trust Women and its patients are irreparable injuries as a matter of law. Violations of constitutional rights are inherently irreparable because such violations are incapable of being remedied through money damages. Where there is a deprivation of constitutional rights, "no further showing of irreparable harm is required. A deprivation of a constitutional right is, itself, irreparable harm." *Adams ex rel. Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996); *see also Elrod v. Burns*, 427 U.S. 347,

373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (citation omitted)); *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977) ("Planned Parenthood's showing that the ordinance interfered with the exercise of its constitutional rights and the rights of its patients supports a finding of irreparable injury.").

Having assumed the existence of constitutional violations, the district court should have concluded that those violations constitute irreparable future injury as a matter of law. Although the district court acknowledged that "federal courts within the Tenth Circuit have usually presumed irreparable harm when dealing with the alleged violation of a constitutional right," the court stated that "this is not the only consideration." (R. 2:154). But none of the decisions cited by the district court (*see* R. 2:154) support that proposition. When a constitutional right is involved, "no further showing of irreparable injury is necessary." *Kikimura*, 242 F.3d at 963; *see Adams*, 919 F. Supp. at 1505 ("no further showing of irreparable harm is required").

In any event, Trust Women showed a reasonable probability of irreparable injury. Absent Kansas's in-person requirement, Trust Women would not have to fly physicians in from out of state to provide medication abortions at its Wichita clinic. (R. 3:96-97). That would enable Trust Women to offer medication abortion more than two days a week and outside normal business hours. (R. 3:96-97, 108-09, 150). It would also mean that appointments for telemedicine medication abortion would not be susceptible to

cancellation or rescheduling if the physician's flight is canceled or delayed. (R. 3:90). Patients would only need to spend one to two hours at the clinic rather than six to eight hours. (R. 3:91-92, 97, 150-51). The expanded appointment availability and the reduced amount of patient time spent at the clinic would make it much easier for patients to schedule an appointment, reduce the amount of time needed to be away from work or school, and alleviate burdens such as childcare. (R. 3:97-98, 150-52). We know that allowing the use of telemedicine for medication abortion would alleviate all these burdens because that is exactly what happened when Trust Women provided medication abortions via telemedicine.

The in-person requirement thus harms Trust Women and its patients by precluding Trust Women from offering this extremely safe and effective treatment option despite the absence of even a shred of evidence that the requirement serves a valid health or safety interest. The in-person requirement makes medication abortion less accessible, makes it more difficult for patients to schedule an appointment, and subjects patients to the risk their appointment will be canceled or rescheduled. The prohibition forces some women to wait so long that they are ineligible for medication abortion and shifts first-trimester abortions into the second trimester. (R. 3:62, 66, 112-13, 154-56). And patients who are not delayed beyond the point of eligibility are still forced to wait until later in their pregnancies to have a medication abortion, increasing both health risks and financial costs to patients, and they are also forced to spend many more hours at the clinic to obtain a medication abortion. (R. 3:42-45, 61-62, 91-92, 97, 149-53).

The existence of these harms was undisputed; the state introduced no evidence refuting them. And these harms cannot be compensated through money damages; they are therefore irreparable. *Persimmon Hill*, 31 Kan. App. 2d at 894, 75 P.3d at 283.

2. The district court's no-irreparable-injury determination was based on legal and factual errors

a. The court applied the wrong legal standard

The Kansas Supreme Court has made clear that a party seeking a temporary injunction need only show that "there is a reasonable probability of irreparable future injury." *Whitson*, 281 Kan. at 683, 132 P.3d at 925. The Court has expressly rejected any standard that is more exacting than "reasonable probability." As the Court has explained, trial courts may not "requir[e] the moving party to make 'a showing that the movant *will suffer* irreparable injury unless the injunction issues.'" *Id.* (emphasis added) (quoting *Gen. Bldg. Contractors, L.L.C. v. Bd. of Shawnee Cty. Comm'rs*, 275 Kan. 525, 542, 66 P.3d 873, 884 (2003)). The "will suffer" standard "places a higher burden on the moving party, demanding evidence that irreparable harm is a virtual certainty rather than a 'reasonable probability.'" *Id.* This is "too high a standard for parties seeking injunctions." *Id.*, 281 Kan. at 684, 132 P.3d at 925.

Yet this "will suffer" standard is exactly what the district court erroneously imposed. After initially quoting the four elements for a temporary injunction accurately (R. 2:152), the court ultimately denied Trust Women's motion on the ground that Trust Women did not "prove" that its patients "will suffer" irreparable harm. (R. 2:154, 156). According to the court, "Plaintiff has, at this stage, failed to *prove* the necessary element of irreparable

injury." (R. 2:154 (emphasis added)). Explicitly applying the exact standard that the Kansas Supreme Court rejected, the district court concluded: "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 (emphasis added)).

By applying the incorrect legal standard, the district court necessarily abused its discretion. *Kuhn*, 270 Kan. at 456, 14 P.3d at 1179 ("A district court by definition abuses its discretion when it makes an error of law."). Because the court's determination of no irreparable harm was the sole reason it denied a temporary injunction against the Attorney General and the District Attorney (R. 2:156-57), its application of the wrong legal standard necessitates that that decision be set aside.

b. The court's determination that "there is no evidence the challenged laws decrease access to abortion" is unsupported

The court appears to have credited defendants' argument that "there is no evidence the challenged laws decrease access to abortion." (R. 2:154). The court observed that under Trust Women's existing telemedicine protocol, "patients still must travel to the Wichita clinic," and added that "Plaintiff would like to open more clinics in remote parts of the state but has not taken even preliminary steps to do so." (R. 2:154-55).

But the district court ignored the fact that under Trust Women's telemedicine protocol, although patients still must travel to the Wichita clinic, physicians do not. (R. 3:100, 145). Physicians can provide medication abortion care from remote locations rather than flying to Wichita. (R. 3:96-97). As discussed, it is unrefuted that allowing physicians

to provide care remotely via telemedicine greatly increases the availability of medication abortion. It allows Trust Women to offer medication abortion more days each week and on more hours during those days, reduces the time patients must spend at the clinic, makes it easier for patients to schedule appointments, and allows patients to access medication abortion earlier in their pregnancies. *Supra* at pp. 16-17, 26-27. The district court's determination cannot be reconciled with the evidence presented at the hearing—including evidence that the district court discussed in its Statement of Facts (R. 2:140).

c. Trust Women did not delay in filing suit

Contrary to the district court's conclusion, Trust Women did not "delay in bringing this lawsuit." (R. 2:155). At all points, Trust Women acted reasonably and diligently to protect the constitutional rights of itself and its patients.

Trust Women began using telemedicine to provide medication abortions in October 2018. (R. 3:96, 134, 155). At that point, the Telemedicine Act had not yet taken effect but would become effective on January 1, 2019. On November 8, 2018, Trust Women brought the *Trust Women I* suit, seeking pre-enforcement relief against the Telemedicine Act to the extent it prohibits the use of telemedicine for medication abortions. (R. 2:135). Trust Women thus acted diligently to protect its rights vis-à-vis the Telemedicine Act.

Trust Women also acted promptly vis-à-vis K.S.A. 65-4a10. The *Hodes 2011* agreed order has enjoined enforcement of K.S.A. 65-4a10 since December 2011. (R. 1:66). During the *Trust Women I* case, Trust Women learned of a threat that K.S.A. 65-4a10 could nevertheless be enforced. Specifically, in a brief filed in *Trust Women I* on December 3, 2018, the Attorney General for the first time made the extraordinary argument that K.S.A.

65-4a10 could be enforced by himself as well as the Sedgwick County District Attorney and the Board of Healing Arts, despite the *Hodes 2011* agreed order. Def.'s Resp. Opposing Pl.'s Mot. for Temp. Inj. & TRO at 4 n.1, *Trust Women I* (Dec. 3, 2018). On December 31, 2018, the *Trust Women I* court clarified that the Attorney General was wrong and that the *Hodes 2011* agreed order prevented him from enforcing K.S.A. 65-4a10. (R. 1:57). But the court provided no clarity about whether the District Attorney and the Board could do so. (R. 1:57; 2:135).

In response to the enforcement threat, Trust Women worked diligently to protect its rights. Trust Women tried to reach a non-litigious solution by seeking non-enforcement assurances from the District Attorney and the Board. (R. 2:136). After receiving no such assurances, Trust Women was forced to bring this suit. (R. 1:353-54). It did so on January 29, 2019, less than a month after the order in *Trust Women I*. (R. 1:19).

The district court did not grapple with this timeline when it ruled that Trust Women delayed in filing suit. (R. 2:155). Instead, the court provided the following explanation:

> K.S.A. 65-4a10 prohibited telemedicine abortions effective July 1, 2011. Enforcement of the law, at least by the parties to the *Hodes 2011* case, has been enjoined by agreement of the parties since late 2011, but Bennett and the Board Defendants were not parties. Plaintiff opened its doors in April 2013. K.S.A. 65-4a10 was amended in 2015. Plaintiff did not challenge the law until January 2019. This is a significant delay.

(R. 2:155).

While those dates are accurate, they do not show delay. As the court observed, K.S.A. 65-4a10 was enacted in 2011. But Trust Women could not have sued in 2011: it

did not even open until 2013. By that point, enforcement of K.S.A. 65-4a10 had already been long enjoined by the *Hodes 2011* agreed order. As the court also observed, K.S.A. 65-4a10 was amended in 2015. But as the *Trust Women I* court confirmed, the amendment to K.S.A. 65-4a10 did not change the fact that the *Hodes 2011* agreed order precluded its enforcement. (R. 1:52-53). In any event, Trust Women did not offer medication abortions via telemedicine until October 2018 (R. 3:96), so it did not need to challenge Kansas's in-person requirement years earlier—in 2011, 2013, or 2015—as the district court suggested.

B. Plaintiffs Established Each of the Remaining Elements for Injunctive Relief

For all the reasons given above, this Court should reverse the district court's denial of Trust Women's temporary-injunction motion because the court's no-irreparable-injury ruling was erroneous. Because Trust Women also established each of the remaining elements for injunctive relief, this Court should not only reverse but also instruct the district court to issue a temporary injunction on remand.

1. Trust Women has a substantial likelihood of prevailing on the merits

A movant for a temporary injunction must show "a substantial likelihood of eventually prevailing on the merits." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 619, 440 P.3d 461, 469 (2019). To satisfy this prong, "plaintiffs need show only that they are substantially likely to win, not that they absolutely will." *Id.*, 309 Kan. at 674, 440 P.3d at 499 (citing *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709, 713 (2012)). Here, there is a substantial likelihood that Trust Women will ultimately prevail in showing that Kansas's in-person requirement for medication abortion

impermissibly interferes with two rights guaranteed by the Kansas constitution: (1) a woman's fundamental right to decide whether to continue her pregnancy and (2) Trust Women's and its patients' rights to equal protection.

Because these are legal questions, this Court's review is de novo. *Hodes & Nauser*, 309 Kan. at 673, 440 P.3d at 498; *Downtown Bar & Grill*, 294 Kan. at 191-92, 273 P.3d at 713. Thus, although the district court did not reach this issue, this Court is well positioned to decide whether Trust Women has shown a substantial likelihood of success—particularly given that the underlying facts here are uncontroverted.

a. The in-person requirement impermissibly interferes with a woman's fundamental right to decide whether to continue her pregnancy

"[S]ection 1 of the Kansas Constitution Bill of Rights protects all Kansans' natural right of personal autonomy, which includes the right to control one's own body, to assert bodily integrity, and to exercise self-determination." *Hodes & Nauser*, 309 Kan. at 680, 440 P.3d at 502. "This right allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy." *Id.* "Although not absolute, this right is fundamental." *Id.*, 309 Kan. at 614, 440 P.3d at 466.

Because this is a fundamental right, the "most searching" standard applies—strict scrutiny. *Id.*, 309 Kan. at 663, 440 P.3d at 493. Under the strict-scrutiny standard, "once a plaintiff proves an infringement—regardless of degree—the government's action is presumed unconstitutional." *Id.*, 309 Kan. at 669, 440 P.3d at 496. "[T]he State is prohibited from restricting that right unless it can show it is doing so to further a compelling

government interest and in a way that is narrowly tailored to that interest." *Id.*, 309 Kan. at 680, 440 P.3d at 502.

Kansas's prohibition on the use of telemedicine for medication abortion undoubtedly impairs a woman's fundamental right to abortion. Unrefuted evidence established that the prohibition makes abortion less accessible and ultimately forces women to delay having a medication abortion until later in their pregnancies, which increases both health risks and financial costs. (R. 3:42-45, 60-62, 91, 149-53). Women who are delayed must continue carrying their unwanted pregnancies until they are able to access an abortion, which is itself an impairment of the woman's right. *Hodes & Nauser*, 309 Kan. at 672, 440 P.3d at 498. And for some women, the delay makes them ineligible for medication abortion, forcing them instead to have a surgical abortion, even if medication abortion is medically preferable. (R. 3:62, 112-13, 148-49, 154-56). For women who are able to have a medication abortion despite the telemedicine ban, the ban has the effect of making women spend many more hours at the clinic than they otherwise would need to, increases the difficulty women experience scheduling an appointment, and subjects women to the risk their appointment will be canceled or rescheduled. (R. 3:90-92, 149-52). Each of these is an impairment, to some degree, of a woman's fundamental right to terminate her pregnancy. *See Hodes & Nauser*, 309 Kan. at 669, 440 P.3d at 496 (plaintiff need only show some infringement, "regardless of degree"); *id.*, 309 Kan. at 672, 440 P.3d at 498 (right to abortion impaired where law results in delayed abortion or increased health risks).

Defendants cannot show that the state has a compelling interest in banning the use of telemedicine for medication abortions. "[W]hen the State has to show a compelling

interest under strict scrutiny, it must show something that is 'not only extremely weighty, possibly urgent, but also rare.'" *Id.*, 309 Kan. at 670, 440 P.3d at 497 (citation omitted). Telemedicine is used widely in Kansas, including in cardiology, oncology, and diagnosing and treating strokes. (R. 1:239; 3:34-35). Kansas law facilitates the use of telemedicine for other treatments and other medications, including controlled substances, and places telemedicine generally on par with in-person medical care. (R. 1:110-13, §§ 1(a), 3(b), 4(b), 5(a)). There is only one treatment for which telemedicine is outright banned: medication abortion. K.S.A. 65-4a10(b)(1).

The state cannot show an extremely weighty, urgent, rare reason why medication abortion must be treated differently from the thirty-plus specialties in which telemedicine is used in Kansas. As Dr. Grossman testified, "telemedicine provision [of] medication abortion is just as safe and effective . . . as providing that service with an in-person visit." (R. 3:69). "[T]here is no medical basis for these laws," and "a requirement for physicians to be in the same room is outside the standard of care." (R. 3:37, 73). That testimony was unrebutted. (*Accord* R. 3:131-32 (Dr. McNicholas testifying that there is no medical benefit associated with requiring a physician to be in person for a medication abortion)).

Studies comparing in-person medication abortion against telemedicine have shown there is no clinically significant difference in effectiveness or in the prevalence of adverse events. (R. 3:48-52). And leading medical organizations have concluded that telemedicine is appropriate for providing medication abortion. (R. 3:24, 38, 53, 72-73). In short, there is no weighty, urgent, rare medical or health concern over the use of telemedicine for medication abortions that could support its complete ban.

Defendants argued below that the state has a compelling interest in protecting a woman's health and safety. But defendants cannot show that an in-person requirement for medication abortion is narrowly tailored to serve an interest in health and safety. Banning the use of telemedicine only for medication abortions is both underinclusive and overinclusive. The telemedicine ban does not apply to medical treatments that have greater health and safety risks than medication abortion does. (R. 3:34-35, 57-58, 142-44). For example, it is undisputed that medication abortion is safer than taking Tylenol, penicillin, or Viagra (R. 3:57-58), yet Kansas has no physician in-person requirement for those medications. Banning telemedicine for medication abortions also undermines, rather than serves, the state's asserted interest in health and safety. The ban is detrimental to women's health, as it delays access to abortion care, subjecting women to increased health risks both from continued pregnancy and from abortion complications. (R. 3:42-45, 149-53).

In short, a blanket ban on the use of telemedicine for medication abortions is not carefully drawn to ensure that it addresses some compelling health and safety concern *and* that it goes no farther than necessary to do so.

b. The in-person requirement impermissibly interferes with Trust Women's and its patients' rights to equal protection

Kansas's prohibition on providing medication abortion via telemedicine also denies both Trust Women's and its patients' rights to equal protection under the Kansas Constitution.

i. Patients' equal-protection rights are violated. The "guiding principle" of the equal-protection guarantee "is that similarly situated individuals should be treated

alike." *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22, 28 (2005). But Kansas singles out women seeking medication abortion and treats them differently from all other persons who seek comparable or riskier care through telemedicine.

Strict scrutiny applies to this classification because it involves a woman's "fundamental" right to decide "whether to continue a pregnancy." *Hodes & Nauser*, 309 Kan. at 614, 440 P.3d at 466. "The most critical level of examination under current equal protection analysis is 'strict scrutiny,' which applies in cases involving suspect classifications such as race, ancestry, and alienage, and fundamental rights implicitly guaranteed by the Constitution." *Farley v. Engelken*, 241 Kan. 663, 669, 740 P.2d 1058, 1063 (1987); *see Jurado v. Popejoy Constr. Co.*, 253 Kan. 116, 124, 853 P.2d 669, 676 (1993) ("strict level of scrutiny applies when fundamental rights are affected").

"Although statutes generally come before this court clothed with the presumption of constitutionality, when a suspect classification or fundamental right is involved, the burden of proof to justify the classification shifts to the proponent of the statute." *Jurado*, 253 Kan. at 124, 853 P.2d at 676 (citation omitted); *see Farley*, 241 Kan. at 670, 740 P.2d at 1063 ("the burden of proof is shifted from plaintiff to defendant and the ordinary presumption of validity of the statute is reversed"). "Under the 'strict scrutiny' test, it must be demonstrated that the classification is necessary to serve a compelling state interest, otherwise it is unconstitutional." *Farley*, 241 Kan. at 670, 740 P.2d at 1063.

Defendants cannot show that the state's classification between medication-abortion patients and similarly situated patients is necessary to serve any compelling state interest. As discussed, Kansas law facilitates the use of telemedicine for patients receiving far

riskier procedures than medication abortion, and it contains no in-person requirement for patients taking riskier medications. *Supra*, pp. 8, 12. Scientific studies show there is no significant difference between patients who receive medication abortion in person versus with telemedicine, and leading medical organizations confirm that telemedicine is appropriate for medication abortion. *Supra*, pp. 10-11. Accordingly, Trust Women is substantially likely to succeed on its claim that its patients' equal-protection rights are violated.

ii. Trust Women's equal-protection rights are violated. Trust Women is also substantially likely to succeed in showing that its own equal-protection rights are violated. The in-person requirement for medication abortion impermissibly discriminates against abortion providers by treating them differently from similarly situated providers who offer other forms of medical care via telemedicine.

The different treatment of similarly situated health-care providers is subject to rational-basis review. *See Downtown Bar & Grill*, 294 Kan. at 195, 273 P.3d at 715. Under the rational-basis test, "proffered rational basis must both explain the distinction drawn by the statute between two classes of individuals and be a legitimate legislative objective." *State v. Cheeks*, 298 Kan. 1, 8, 310 P.3d 346, 353 (2013). "Although the rational basis standard is a 'very lenient standard,' it is not a 'toothless' one." *Id.*, 298 Kan. at 8, 310 P.3d at 353 (quoting *Downtown Bar & Grill,* 294 Kan. at 193-95, 273 P.3d at 714-15).

Here, there is no evidence that Kansas's in-person requirement for medication abortion bears a rational relationship to any legitimate goal. The State has no legitimate reason for discriminating between qualified health-care providers in this way. It certainly

has no legitimate reason why physicians who use telemedicine to provide medication abortions should be subject to having their medical licenses suspended or revoked, while physicians who use telemedicine to provide other medications with much higher rates of complications are not. Given the demonstrated safety record of telemedicine abortions and Kansas's facilitation of telemedicine for far riskier procedures, there is no conceivable purpose for banning the provision of abortion services via telemedicine other than for the improper purpose of restricting the right to access abortion.

2. It is undisputed that the remaining elements for injunctive relief are met

It is undisputed that Trust Women and its patients lack any adequate legal remedy for their constitutional violations. (R. 2:62; *see* R. 2:119-29). And after the hearing on Trust Women's motion, the Attorney General and District Attorney no longer dispute (1) that the threat of injury to Trust Women and its patients outweighs any harm to the other side and (2) that a temporary injunction would not be adverse to the public interest. (R. 2:119-29).

Nor could they. Trust Women and its patients are experiencing constitutional harms and delays in accessing health care. The defendants, by contrast, face no injury from issuance of an injunction. The temporary injunction will impose no affirmative obligation, administrative burden, or cost on the defendants. The state is not harmed by temporary injunctive relief that prohibits government officials from enforcing unconstitutional laws. To the contrary, temporary injunctive relief benefits both government officials and the public's interest by preventing the state from inflicting constitutional violations on its

citizens. *See Adams*, 919 F. Supp. at 1505 ("The public interest would best be served by enjoining the defendants from infringing on the plaintiff's right to equal protection."). Additionally, because the injunction will allow access to medication abortion earlier in pregnancy when it is safer, it will further public health and reduce second-trimester abortions. (R. 3:60-62, 65-67).

* * *

Trust Women and its patients are suffering ongoing constitutional harms because of Kansas's prohibition on telemedicine for medication abortion. The district court's denial of temporary injunctive relief to prevent those ongoing harms was a clear abuse of discretion. That denial should be reversed, and the case should be remanded with instructions for the district court to enjoin the Attorney General and the District Attorney.

II. THE DISTRICT COURT COMMITTED LEGAL ERROR BY DENYING A TEMPORARY INJUNCTION AND DISMISSING THE CLAIMS AGAINST THE BOARD OF HEALING ARTS DEFENDANTS ON THE BASIS OF NO STANDING

The temporary injunction should also extend to the Executive Director and President of the Board of Healing Arts. The district court did not enjoin the Board defendants because it held that Trust Women lacks standing to sue them and dismissed the claims against them. (R. 2:147-51). That was legally erroneous. As Trust Women explained to the district court, it has standing to sue the Board defendants on behalf of itself and its patients. (R. 1:351-62) (response to motion to dismiss); (R. 2:108-10) (proposed findings of fact and conclusions of law). The dismissal of the claims against the Board defendants

should be reversed, and the district court should be instructed on remand to temporarily enjoin them.[4]

A. Trust Women Has Standing to Sue the Board of Healing Arts Defendants

Standing is a "question[] of law over which an appellate court's scope of review is unlimited." *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 676, 359 P.3d 33, 48 (2015). To show standing, (1) the plaintiff must have "suffered a cognizable injury," and (2) there must be "a causal connection between the injury and the challenged conduct." *Id.*, 302 Kan. at 678, 359 P.3d at 49.

There is no question that Trust Women and its patients have suffered and continue to suffer a cognizable injury. The cognizable-injury requirement ensures that the plaintiff has a personal stake in the outcome by having suffered some actual or threatened injury—as opposed to having only a generalized grievance or a general interest common to all members of the public. *See Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196, 1210 (2014). Trust Women and its patients do not have merely a generalized disagreement with the in-person requirement for medication abortion; they are personally impacted by it. The requirement prohibits Trust Women from providing its patients an important medical

[4] "An order that . . . refuses . . . an injunction" is appealable. K.S.A. 60-2102(a)(2). Thus, the district court's refusal to enjoin the Board of Healing Arts defendants is appealable. The dismissal of Trust Women's claims against the Board defendants is also appealable, as it is part of the "order that . . . refuses . . . an injunction." *Id.*; *see Home Builders Ass'n of Greater Kansas City v. City of Overland Park*, 22 Kan. App. 2d 649, 654-55, 921 P.2d 234, 239-40 (1996) (grant of partial summary judgment was appealable under K.S.A. 60-2102(a)(2) where it was part of an order that granted a request for injunctive relief).

service—medication abortion via telemedicine—that it would otherwise provide. As explained below, Trust Women faces the very real threat that it could lose a physician if that physician violates K.S.A. 65-4a10 and has his or her license suspended or revoked. And as discussed at many points in this brief, the telemedicine prohibition harms Trust Women's patients in multiple ways, including by reducing access to and delaying medication abortion. *Supra*, pp. 5-8, 11, 16-17, 26-27, 29-30, 34.

The "causal connection" element is also readily met. For this element, the "injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Kan. Bldg. Indus. Workers Comp. Fund*, 302 Kan. at 681, 359 P.3d at 51 (internal quotation marks, brackets, and ellipses omitted).

Trust Women's harm is fairly traceable to the Board of Healing Arts. The Board licenses and regulates all Kansas physicians, including the physicians who practice at Trust Women. (R. 2:141; 3:88). The Board can investigate physicians and discipline them for "unprofessional" conduct. K.S.A. 65-2836(b). If the Board finds unprofessional conduct, the physician's "license may be revoked, suspended or limited, or the licensee may be publicly censured or placed under probationary conditions." K.S.A. 65-2836. Significantly, K.S.A. 65-4a10 provides that violating the in-person requirement for medication abortion "shall constitute unprofessional conduct." K.S.A. 65-4a10(d). So if one of Trust Women's physicians violates K.S.A. 65-4a10 (assuming it is not enjoined), the Board of Healing Arts could discipline that physician, including by revoking that physician's license to practice medicine in Kansas. Were a physician's license to be

revoked, that physician could no longer provide *any* abortions or offer other medical services at Trust Women—an extremely serious consequence given the great difficulty Trust Women has had finding physicians. (R. 3:87).

Although K.S.A. 65-4a10 is enjoined by the *Hodes 2011* agreed order, there is still a real and serious risk that the Board will investigate and discipline physicians who provide telemedicine abortions. In *Trust Women I*, the Attorney General argued that the *Hodes 2011* agreed order "did not prohibit others—for example the Board of Healing Arts or the Sedgwick County District Attorney—from enforcing K.S.A. 65-4a10." Def.'s Resp. Opposing Pl.'s Mot. for Temp. Inj. & TRO at 4 n.1, *Trust Women I* (Dec. 3, 2018). The *Trust Women I* order did not address that argument. (R. 2:135). Trust Women sought assurance from the Board that it would not enforce K.S.A. 65-4a10, but the Board provided no such assurance. (R. 2:136; 3:125-26). And in fact, the Board is investigating a complaint concerning a physician's use of telemedicine at Trust Women. (R. 1:354; 3:122, 125).

Given this uncertainty and the grave potential consequences, Trust Women stopped providing telemedicine medication abortions on December 31, 2018, the same day that the *Trust Women I* order issued. (R. 2:135; 3:107). The decision to stop providing via telemedicine was a direct result of the threat that the Board would enforce K.S.A. 65-4a10 against Trust Women's physicians. Ms. Burkhart, Trust Women's CEO, 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). Dr. McNicholas, Trust Women's Medical Director and one of its physicians, 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). Ms. Burkhart also testified that absent the concern about enforcement, Trust Women would have continued providing medication abortions using telemedicine, and if the in-person requirement were enjoined Trust Women would reinstate its use of telemedicine. (R. 3:107).

Trust Women thus has an injury that is causally connected to the threat of the Board of Healing Arts' enforcement of K.S.A. 65-4a10. Trust Women plainly has standing to sue the Board defendants and seek injunctive relief against them.

B. The District Court's Rationale for its No-Standing Ruling Is Misplaced

In ruling that Trust Women lacks standing, the district court focused on the fact that "it is the physicians who face discipline from the Board of Healing Arts, not Plaintiff, but no physician is a party to this lawsuit." (R. 2:149). But that does not deprive Trust Women of standing to sue the Board. Trust Women's harm need only be fairly traceable to the Board. *Kan. Bldg. Indus. Workers Comp. Fund*, 302 Kan. at 681, 359 P.3d at 51. "[T]he fairly traceable standard does not set a high bar for plaintiffs." *Id.* The standard "is lower than that of proximate cause." *Id.*, 302 Kan. at 681-82, 359 P.3d at 51 (quoting *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013)). An injury may be fairly traceable to the defendant even if it "flows indirectly from the challenged conduct." *Id.*, 302 Kan. at 682, 359 P.3d at 51.

While Trust Women's physicians would obviously be harmed by disciplinary action taken by the Board, Trust Women itself would also be harmed. Trust Women needs Board-

licensed physicians to provide its patients medical care. (R. 3:87-88). If the Board suspends or revokes the medical license of one of Trust Women's physicians for violating K.S.A. 65-4a10, that physician would be unable to provide *any* medical services. That would be a significant loss for Trust Women and its patients, especially because physicians are extremely difficult to replace. (R. 3:87).

The district court also thought it significant that there "was no testimony that a physician performing telemedicine abortions made a decision to stop doing so because of the challenged laws, or for any other reason." (R. 2:149). That is beside the point. Trust Women's CEO and its Medical Director made the decision that they could not put their physicians' "medical license on the line." (R. 3:134; *see* R. 3:107, 119, 160). Regardless of who made the decision, Trust Women stopped using telemedicine due to the very real concern about enforcement by the Board of Healing Arts and the other defendants. Trust Women's own harm is directly traceable to the Board.

Finally, the district court suggested that the reason Trust Women stopped using telemedicine was not because of K.S.A. 65-4a10 but because the Telemedicine Act—which the court held does not prohibit telemedicine abortions—was taking effect the next day. (R. 2:149-50). As an initial matter, that is wrong or at least incomplete. Trust Women stopped providing telemedicine abortions on December 31, 2018—the day the *Trust Women I* order issued, which failed to address the Attorney General's assertion that the Board of Healing Arts could enforce K.S.A. 65-4a10. That was also the day before the Telemedicine Act took effect. There was therefore considerable legal uncertainty. As Dr. McNicholas testified, Trust Women was "unclear about the impact of the current legal

situation," R. 3:134, including both the effect of the Telemedicine Act and the potential for enforcement of K.S.A. 65-4a10.

In any event, regardless of whether Trust Women stopped providing telemedicine abortions because of K.S.A. 65-4a10, the Telemedicine Act, or both, Trust Women still has current, ongoing harms to itself and its patients from the threat that the defendants may enforce K.S.A. 65-4a10. As Trust Women told the district court, it would "readily dismiss [the Board] Defendants from this lawsuit if they would . . . stipulat[e] that the Board will not seek to enforce the medication in-person requirement, K.S.A. § 65-4a10." (R. 1:351-52). Because of the Board's refusal, Trust Women has had to seek injunctive relief against the Board defendants from the district court and now this Court. Trust Women has standing to sue and seek that relief.[5]

CONCLUSION

The district court's July 8, 2019, order denying Trust Women's motion for a temporary injunction and dismissing Trust Women's claims against the Board of Healing Arts defendants should be reversed. This Court should remand with instructions for the district court to enjoin the Attorney General, the Sedgwick County District Attorney, and the Executive Director and President of the Board of Healing Arts from enforcing Kansas's

[5] The district court also stated that "Trust Women seems to assert third party standing on behalf of independent contractor physicians," and the court went on to reject such standing. (R. 2:150-51). To be clear, Trust Women asserts third-party standing on behalf of its patients only, not its physicians. Trust Women has sued the defendants because of the actual and threatened harm *to itself and its patients* from the defendants' potential enforcement of the in-person requirement for medication abortions.

prohibition on the use of telemedicine for medication abortions pending the full resolution of this suit.

Dated: October 30, 2019

Respectfully submitted,

/s/ Robert V. Eye

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APPENDIX

ELECTRONICALLY FILED
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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2019-CV-000060

Court: Shawnee County District Court

Case Number: 2019-CV-000060

Case Title: Trust Women Foundation Inc vs. Marc Bennett - District Attorney Sedgwick Co KS, et al.

Type: MDO

SO ORDERED.

/s/ Honorable Teresa L Watson, District Court Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE

TRUST WOMEN FOUNDATION, INC.,

Plaintiff

vs. Case No. 19-CV-60

MARC BENNETT, ET AL.,

Defendants

MEMORANDUM DECISION AND ORDER

This lawsuit involves a constitutional challenge to three state statutes. It comes before the Court at this time on Plaintiff Trust Women Foundation, Inc.'s, motion for a temporary restraining order and temporary injunction. Defendants are Marc Bennett, the Sedgwick County District Attorney; Kathleen Selzer Lippert, executive director of the Kansas Board of Healing Arts; Robin D. Durrett, president of the Kansas Board of Healing Arts; and Derek Schmidt, Attorney General of the State of Kansas. Defendants Lippert and Durrett filed a motion to dismiss, and it is also before the Court. The motions have been fully briefed and argued to the Court. The Court is ready to rule.

STATEMENT OF FACTS

Background.

In 2011, the legislature enacted K.S.A. 65-4a10, which in its original form prohibited drug-induced abortions unless the medications were administered in the physical presence of the physician who prescribed the drug. The statute effectively prohibited the performance of

medication abortions by means of telemedicine. It also said that violation of the statute constitutes unprofessional conduct under K.S.A. 65-2837, part of the Kansas Healing Arts Act.

This law was challenged in a 2011 lawsuit filed in Shawnee County District Court, *Hodes v. Moser, et al.,* case no. 2011-CV-1298 (Division 7) (hereinafter "*Hodes 2011*").[1] Plaintiffs, two physicians who performed abortions, claimed the statute was unconstitutional and asked the court to enjoin defendants Secretary of the Kansas Department of Health and Environment ("KDHE"), the Attorney General, and the Johnson County District Attorney from enforcing K.S.A. 65-4a10. On December 2, 2011, the court approved an Agreed Order ("2011 Agreed Order") in which the parties agreed that "[d]uring the pendency of these proceedings, defendants shall not seek to enforce either the statutory Act [K.S.A. 65-4a10] or the permanent regulations promulgated by the Kansas Department of Health and Environment."

In 2015, with the lawsuit still pending in Shawnee County District Court, the Kansas Legislature amended aspects of K.S.A. 65-4a10, purportedly in an effort to address the potential constitutional issues identified in the lawsuit. The amended statute took effect on June 11, 2015. Plaintiffs in *Hodes 2011* then amended their petition, alleging that the regulations promulgated by KDHE pursuant to the amended statute were unconstitutional. The *Hodes 2011* lawsuit remains pending in Shawnee County District Court.

The Kansas Legislature passed the Telemedicine Act in 2018. It became law on July 1, 2018, but took effect on January 1, 2019. See K.S.A. 40-2,210. The Telemedicine Act addresses health insurance coverage and information privacy standards for care provided by telemedicine. It does not identify what services may or may not be provided by means of telemedicine. The Telemedicine Act contains one reference to abortion. Section 6, now codified at K.S.A. 40-

[1] This is to distinguish the case from a 2015 lawsuit filed in Shawnee County District Court, *Hodes v. Schmidt, et al.,* case no. 2015-CV-490 (now Division 2), which was ultimately decided by the Kansas Supreme Court at 440 P.3d 461 (Kan. 2019), also cited below.

2,215, states that "[n]othing in the Kansas telemedicine act shall be construed to authorize the delivery of any abortion procedure via telemedicine." Section 7, now codified at K.S.A. 40-2,216, states that K.S.A. 40-2,215 is non-severable; in other words, if K.S.A. 40-2,215 is declared unconstitutional and void, the entire Telemedicine Act is void.

More than three months later, in mid-October 2018, Plaintiff began a brief "pilot program" in its Wichita clinic offering telemedicine abortions. The pilot program is described in more detail below.

On November 8, 2018, a new lawsuit was filed in Shawnee County District Court, *Trust Women Foundation v. Schmidt ("Trust Women I"),* case no. 2018-CV-844 (Division 7), alleging that Sections 6 and 7 of the Telemedicine Act were an unconstitutional infringement on access to abortion. The suit was brought on behalf of Trust Women Foundation, Inc., Plaintiff here, and its patients. Attorney General Derek Schmidt was the lone Defendant.

The district court in *Trust Women I* concluded that Sections 6 and 7 of the Telemedicine Act do not contain an independent ban on telemedicine abortions. The court also stated that the 2011 Agreed Order in *Hodes 2011* remained in effect despite the Kansas Legislature's 2015 revisions to K.S.A. 65-4a10. The court said that "all provisions of [K.S.A. 65-4a10] are enjoined from enforcement" by the 2011 Agreed Order. The case was dismissed on December 31, 2018. It is currently pending on appeal.

The court in *Trust Women I* observed that the 2011 Agreed Order prevented the Attorney General from enforcing K.S.A. 65-4a10 not only against Plaintiff but against others similarly situated. The court did not state whether non-parties, including the Kansas Board of Healing Arts and other county or district attorneys, were enjoined by the 2011 Agreed Order from investigating and prosecuting cases based on violations of K.S.A. 65-4a10.

After *Trust Women I* was dismissed, Trust Women sought written assurances from the Kansas Board of Healing Arts ("the Board") and Bennett that they would not seek to enforce the medication in-person requirement in K.S.A. 65-4a10 and Section 6 of the Telemedicine Act pending appeal of *Trust Women I.* The Board was not a party to *Trust Women I* or the 2011 Agreed Order. The Board did not provide the requested agreement not to enforce the statutes. Similarly, Bennett was not a party to *Trust Women I* or the 2011 Agreed Order. Bennett did not provide the requested agreement not to enforce the statutes.

Trust Women filed the instant petition, on behalf of itself and its patients, against the Sedgwick County District Attorney, the Attorney General, and Board Defendants Lippert and Durrett in their official capacities, challenging K.S.A. 65-4a10 and Sections 6 and 7 of the Telemedicine Act. Trust Women moved the court to: 1) issue a temporary restraining order prohibiting Defendants from enforcing the challenged laws until the court rules on the merits; and 2) grant a temporary injunction prohibiting Defendants from enforcing the challenged laws.

Board Defendants Lippert and Durrett filed a motion to dismiss, or in the alternative judgment on the pleadings, or for a more definite statement. The Board Defendants also filed a response in opposition to the temporary restraining order and temporary injunction. Bennett and Schmidt filed a response in opposition to the temporary restraining order and temporary injunction. This Court held a hearing on May 22, 2019, on the pending motions. No temporary restraining order was issued prior to the hearing. Thus, the motion for temporary restraining order is moot and the matter before the Court is Plaintiff's request for temporary injunction.

Plaintiff presented the testimony of three witnesses: Julie Burkhart, Dr. Colleen McNicholas, and Dr. Daniel Grossman. Defendants presented no witnesses. The matter was

taken under advisement. After review of the file and the testimony presented at the hearing, the Court is ready to rule.

The Wichita clinic.

Plaintiff Trust Women Foundation, Inc. (d/b/a Southwind Women's Center, d/b/a Trust Women Wichita) performs abortions at a clinic in Wichita, Kansas. Plaintiff operates two other clinics in Oklahoma City, Oklahoma, and Seattle, Washington. The Wichita clinic opened in April 2013; the Oklahoma City clinic opened in September 2016; the Seattle clinic opened in June 2017. Three other clinics perform abortions in Kansas. Two are located in the Kansas City metropolitan area, and the third is Planned Parenthood in Wichita.

Burkhart is the founder and CEO of Trust Women. Dr. Colleen McNicholas, D.O., is the medical director of the Wichita clinic. Dr. McNicholas' role as medical director is performed pursuant to an independent contract with Trust Women. Her clinical work at the Wichita clinic is performed and managed through a contract with her employer, Washington University. Dr. McNicholas has never performed a telemedicine abortion.

Trust Women is not licensed by the Board. The Board has no enforcement authority over Trust Women. Trust Women is licensed as an ambulatory surgical center by KDHE and has been since July 2014.

The Wichita clinic is open Monday through Friday, 8 a.m. to 5 p.m. Plaintiff has contracts with two physicians to perform abortions at the Wichita clinic. Both physicians live out of state. Both physicians are licensed by the Board. Plaintiff flies a physician into Wichita to perform abortions on Thursdays and Fridays and "[a]s a result the clinic is only able to provide abortion services on those two days." The limited number of days abortions are performed at the clinic is due to issues related to physician availability. Burkhart testified that "we are limited on a

number of days that we would be able to offer reproductive healthcare," and "it's dependent upon the physicians' schedule that they have elsewhere. And so we schedule around the availability of those doctors."

Currently, the clinic provides medication and surgical first trimester abortions, and second trimester surgical abortions up until 21 weeks, 6 days of pregnancy, as measured from the first day of the woman's last menstrual period ("LMP"). Plaintiff offers medication abortions up to 10 weeks LMP. Plaintiff charges $650 to $700 for a first trimester medication or surgical abortion. Plaintiff charges $600 to $650 for a telemedicine medication abortion. Plaintiff charges $750 to $2,350 for a second trimester surgical abortion.

Medication abortion involves the use of medications to terminate a pregnancy. In a medication abortion, the patient takes the first tablet of mifepristone, and then 24-48 hours later the patient takes four tablets of misoprostol. Both are usually administered buccally; that is, placed in the cheek pouch, between the gums and the cheek, and allowed to dissolve for 30 minutes before swallowing. Generally speaking, patients take the first medication, mifepristone, in the clinic. According to Dr. Grossman's testimony at the hearing, this medication "starts the process" but the abortion "does not happen at that moment." The patient then takes the second medication, misoprostol, at home. The testimony at the hearing was that the "abortion happens generally after the patient takes the second medication at home, and that's when the cramping and bleeding begin."

Plaintiff complied with the physician-in-person requirement of K.S.A. 65-4a10 until October 2018. On October 13, 2018, the Wichita clinic began offering telemedicine abortions as a pilot program. Burkhart said telemedicine abortions at the Wichita clinic were deemed a "pilot program" because they were a new service.

Plaintiff adopted a protocol for the provision of medication abortions via telemedicine. When a woman calls Plaintiff seeking a medication abortion, an appointment is scheduled. The patient arrives at the clinic for the appointment and completes the intake process. She is then taken to a room for recording of vital signs. A staff member performs an ultrasound. The doctor accesses a videoconference platform to review the patient's chart and evaluate the ultrasound results. The doctor speaks to the patient via videoconference. The patient then leaves to meet with a staff person to talk about the procedure and other options. If the patient decides to proceed with the abortion, she schedules a follow up appointment at the clinic 14-21 days later. The patient then returns to videoconference with the doctor. The doctor confirms the patient's eligibility for a medication abortion. At the doctor's direction, the staff person gives the patient one tablet of mifepristone, and the patient takes the tablet within sight of the doctor through the videoconference platform. The patient receives instruction on the second set of pills to take at home.

The patient returns to Plaintiff's clinic for the scheduled follow up visit 14-21 days later. The patient takes a pregnancy test and sees a doctor in person. Burkhart testified that this occurs because if the patient is still pregnant at the second appointment "we want to give an opportunity for the physician to evaluate that patient at that time."

Under the pilot program, patients still had to travel to the Wichita clinic for both the first and second appointments. Under Plaintiff's protocols for in-person and telemedicine abortions, the patient must return to the clinic for a follow up appointment 14-21 days later to see a doctor in person. Thus, all medication abortion follow up appointments are scheduled for days when a physician is physically present in the clinic. The only difference in Plaintiff's protocol for in-

person medication abortions and telemedicine medication abortions is that the doctor is not present in person for the first visit.

Burkhart testified that, for the two and a half months Plaintiff provided telemedicine medication abortions, Plaintiff was able to offer an additional 8 to 12 hour per week of abortions through one of the out-of-state doctors who already contracted with Plaintiff. She testified that in-clinic wait times were reduced for telemedicine abortion patients.

Plaintiff stopped providing telemedicine abortions on December 31, 2018. Burkhart testified that Plaintiff stopped providing telemedicine abortions at that point due to her perception that the Telemedicine Act, which went into effect on January 1, 2019, banned telemedicine abortions.

Burkhart testified that because of the gestational limit for medication abortions, some of Plaintiff's patients obtained a surgical abortion rather than a medication abortion. Burkhart testified that there are any number of reasons—unrelated to the State's ban on telemedicine abortions in K.S.A. 65-4a10—that can result in Plaintiff's patients falling outside the 10-week window for a medication abortion, including that the patient did not realize she was pregnant right away or that she failed to call to make an appointment in time. At the hearing, Plaintiff did not offer evidence of any patient that was not able to obtain a medication abortion because of the ban on telemedicine abortion.

Burkhart testified that Plaintiff is exploring options to rent medical office space to expand into remote areas of Kansas in order to improve access to telemedicine abortions. However, Plaintiff has not reviewed any real estate listings or visited any potential sites for possible medical office space. Plaintiff has not hired a commercial real estate agent to look for possible medical office space in western Kansas. Burkhart testified that such an undertaking requires a

significant amount of time and financial resources, and Plaintiff has made a strategic decision to expand its reach in Kansas only incrementally.

Plaintiff's expert, Dr. Grossman, testified that providing medication abortions by telemedicine can increase access to medication abortions. He based this testimony primarily on a study he helped conduct of Planned Parenthood's network of 17 clinics in Iowa. But he admitted that because the Iowa study involved "many more clinics," the "improvements in access" in Kansas "would be of a smaller magnitude given that telemedicine is being used at a single site."

Plaintiff provided no evidence that providing medication abortions by telemedicine from a single clinic in Wichita, using protocols that require women to travel to the clinic even when the medication abortion is performed by telemedicine, and require women to travel back to the clinic for a follow-up appointment with a physician in person, expands access to abortion for women in remote rural areas of Kansas.

Kansas Board of Healing Arts.

The Board's general duties and responsibilities are set forth in K.S.A. 65-2801 *et seq.* and regulations contained in K.A.R. 100-1-1 *et seq.,* known generally as the Kansas Healing Arts Act. The Board was created by statute and is required to fulfill its statutory mission of protecting the public. The Board fulfills its statutory mission by investigating complaints related to a medical professional's compliance with the applicable practice act.

When the Board receives a complaint with allegations of a violation of the Kansas Healing Arts Act, it triggers a process of evaluation, investigation, internal review, and hearings. See K.S.A. 65-2836; K.S.A. 65-2838; K.S.A. 65-2838a; K.S.A. 65-2839a; K.S.A. 65-2840a; K.S.A. 65-2840c; K.S.A. 65-2851a. An investigation is opened only if the complaint alleges facts that, if true, may indicate a potentially actionable violation.

Investigations involve collecting records, interviewing patients or witnesses, and other standard investigative processes. The licensee is directly notified that an investigation has been opened. After the investigation is complete, the matter is subject to an internal review process. The results of the investigation are reviewed by a staff attorney. Then the investigation may go to a peer review committee.

If not closed after the peer review committee, the investigation goes to the disciplinary panel to determine what action, if any, to take. If the disciplinary panel believes there is admissible evidence of a violation, and action is necessary, there are multiple resolutions available, including non-public and public measures. Or, in the alternative, the case may be closed.

Public disciplinary action can include one, or a combination, of the following: fine, public censure, probationary conditions, or limiting, suspending or revoking a license. See K.S.A. 65-2836. Such adverse action is initiated by a disciplinary panel of the Board filing a petition for discipline with the Board. See K.S.A. 65-2836; K.S.A. 65-2838; K.S.A. 65-2839a; K.S.A. 65-2840a; K.S.A. 65-2851a.

If an action seeking an adverse order is initiated, the proceedings are governed by the Kansas Administrative Procedures Act ("KAPA") and the Kansas Judicial Review Act ("KJRA"). K.S.A. 65-2851a. KAPA provides due process to those against whom the Board seeks to take adverse action, including notice, formal hearing(s), and the right to immediately appeal to the district court. See K.S.A. 77-501 *et. seq.* and K.S.A. 77-601 *et. seq.* The KJRA provides a broad range of authority for the reviewing district court to provide relief to a licensee facing an adverse administrative order from the Board, including an immediate stay of the Board order,

vacating the Board order, and/or issuing a remand order to the Board with further directions. *See, e.g.,* K.S.A. 77-622(b).

Board complaint.

Burkhart testified that a complaint has been filed with the Board concerning the provision of telemedicine abortions at Plaintiff's Wichita clinic. She testified that the complaint was filed against an independent contractor and not against an employee of Plaintiff. She testified that to her knowledge the complaint is "pending." There was no allegation or evidence that the Board has ever taken adverse action against any Board licensee for violation of K.S.A. 65-4a10.

Plaintiff filed this lawsuit "on behalf of itself and its patients" challenging K.S.A. 65-4a10 and Sections 6 and 7 of the Telemedicine Act. Plaintiff did not sue on behalf of its contracted physicians.

CONCLUSIONS OF LAW

Plaintiff seeks a temporary injunction preventing enforcement of K.S.A. 65-4a10 and Sections 6 and 7 of the Telemedicine Act. Plaintiff asserts that these statutes are facially unconstitutional because they impair Plaintiff's ability to perform medication abortions by telemedicine, thus infringing upon a woman's right to an abortion.

The statutes at issue.

K.S.A. 65-4a10 was adopted by the Kansas Legislature in 2011 and amended in 2015. In its current form, it says:

> "(a) No abortion shall be performed or induced by any person other than a physician licensed to practice medicine in the state of Kansas.
>
> (b)(1) Except in the case of an abortion performed in a hospital through inducing labor: (A) When RU-486 (mifepristone) is used for the purpose of inducing an abortion, the drug shall initially be administered by or in the same room and in the physical presence of the physician who prescribed, dispensed or otherwise provided the drug to the patient; and (B) when any other drug is used

for the purpose of inducing an abortion, the drug or the prescription for such drug shall be given to the patient by or in the same room and in the physical presence of the physician who prescribed, dispensed or otherwise provided the drug or prescription to the patient.

(2) The provisions of this subsection shall not apply in the case of a medical emergency.

(c) The physician inducing the abortion, or a person acting on behalf of the physician inducing the abortion, shall make all reasonable efforts to ensure that the patient returns 12 to 18 days after the administration or use of such drug for a subsequent examination so that the physician can confirm that the pregnancy has been terminated and assess the patient's medical condition. A brief description of the efforts made to comply with this subsection, including the date, time and identification by name of the person making such efforts, shall be included in the patient's medical record.

(d) A violation of this section shall constitute unprofessional conduct under K.S.A. 65-2837, and amendments thereto."

The 2015 amendments added an exception for abortions performed in a hospital through inducing labor. The 2015 amendments also added the language in subsection (b)(1)(B) and (b)(2).

Section 6 of the Telemedicine Act says: "Nothing in the Kansas telemedicine act shall be construed to authorize the delivery of any abortion procedure via telemedicine." Section 7 of the Telemedicine Act says:

"If any provision of the Kansas telemedicine act, or the application thereof to any person or circumstance, is held invalid or unconstitutional by court order, then the remainder of the Kansas telemedicine act and the application of such provision to other persons or circumstances shall not be affected thereby and it shall be conclusively presumed that the legislature would have enacted the remainder of the Kansas telemedicine act without such invalid or unconstitutional provision, except that the provisions of K.S.A. 40-2,215, and amendments thereto, are expressly declared to be nonseverable."

Plaintiff claims that K.S.A. 65-4a10 and Sections 6 and 7 of the Telemedicine Act violate Sections 1 and 2 of the Kansas Constitution's Bill of Rights because they impose an impermissible restriction on the right to an abortion. Section 1 says: "All men are possessed of

equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Section 2 says:

> "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency."

The Kansas Supreme Court recently decided that Section 1 of the Kansas Constitution's Bill of Rights "acknowledges rights that are distinct from and broader than the United States Constitution," and that it ensures "the inalienable natural right of personal autonomy," which includes a woman's right to abortion. The court decided that only the application of strict scrutiny would properly protect this fundamental right in the face of a law that might impair it. *Hodes & Nauser, MDs, P.A. v. Schmidt,* 440 P.3d 461, 471, 497-98 (Kan. 2019).

Sections 6 and 7 of the Telemedicine Act.

Plaintiff argues that Sections 6 and 7 of the Telemedicine Act infringe upon a woman's right to an abortion by prohibiting telemedicine abortions. This Court disagrees. While K.S.A. 65-4a10 purports to regulate the provision of telemedicine abortions in Kansas, Sections 6 and 7 of the Telemedicine Act clearly do not. Statutory interpretation is a question of law for the court. The fundamental rule of statutory interpretation is that the intent of the legislature governs. "And the best avenue for discerning that intent is to read the language of the statute, giving common words their ordinary meaning. If the statute contains plain and unambiguous language, we do not look to extrinsic aids for guidance on legislative intent because the statutory language is 'the best and only safe rule for determining the intent of the creators of written law.'" *Matter of Bowman,* 441 P.3d 451, 458 (Kan. 2019).

The Telemedicine Act does not authorize or prohibit any specific medical procedure. Rather, it clarifies that the same federal privacy protections afforded patients apply equally to care provided in person and via telemedicine, K.S.A. 40-2,2212(a); it applies the same professional standards of practice and conduct equally to care provided in person and via telemedicine, K.S.A. 40-2,2212(c); and it prohibits exclusion of telemedicine care from insurance coverage simply because it is provided via telemedicine, K.S.A. 40-2,2213(b).

Section 6 says nothing in the Telemedicine Act authorizes telemedicine abortion. But nothing in the Telemedicine Act prohibits it, either, or limits it in any possible way. The fact that Section 7 denotes Section 6 as non-severable does not transform the Telemedicine Act into an indirect restriction on abortion. Because the Telemedicine Act does not limit or prohibit abortion in this state, Plaintiff's constitutional challenge to Sections 6 and 7 of the Telemedicine Act in this context fails as a matter of law. Plaintiff's only surviving challenge is to the constitutionality of K.S.A. 65-4a10.

Justiciability of the claims against Lippert and Durrett.

Plaintiff's constitutional claims against Defendants Lippert and Durrett are grounded in the notion that violations of K.S.A. 65-4a10 constitute unprofessional conduct under the Kansas Healing Arts Act, the Board is charged with investigating and punishing such violations, and the Board should be enjoined from doing so because the statute is unconstitutional. The Board Defendants argue that Plaintiff does not have standing to make constitutional claims against them, and the claims against them are not ripe for review. These arguments raise the issue of justiciability of the claims against Lippert and Durrett.

> "Kansas courts do not render advisory opinions. The federal courts' prohibition against advisory opinions is imposed by Article III, Section 2 of the United States Constitution, which expressly limits the judicial power to 'Cases' or 'Controversies.'

> But because Article 3 of the Kansas Constitution does not include any 'case' or 'controversy' language, our case-or-controversy requirement stems from the separation of powers doctrine embodied in the Kansas constitutional framework. That doctrine recognizes that of the three departments or branches of government, '[g]enerally speaking, the legislative power is the power to make, amend, or repeal laws; the executive power is the power to enforce the laws, and the judicial power is the power to interpret and apply the laws in actual controversies.' And Kansas, not federal, law determines the existence of a case or controversy, i.e., justiciability. But this court is not prohibited from considering federal law when analyzing justiciability.
>
> Under the Kansas case-or-controversy requirement, courts require that (a) parties have standing; (b) issues not be moot; (c) issues be ripe, having taken fixed and final shape rather than remaining nebulous and contingent; and (d) issues not present a political question." *Gannon v. State,* 298 Kan. 1107, 1119, 319 P.3d 1196 (2014) (internal citations omitted).

Challenges to standing or ripeness call into question this Court's subject matter jurisdiction, which may be raised at any time by a party or by this Court on its own motion. *Stechschulte v. Jennings,* 297 Kan. 2, 29, 298 P.3d 1083 (2013). Ripeness was raised by Lippert and Durrett in their motion to dismiss the amended petition. Standing was raised by Lippert and Durrett at the May 22, 2019, hearing. Plaintiff addressed the issues of ripeness and standing in its response to Lippert and Durrett's motion to dismiss, and at the May 22, 2019, hearing.

A. Standing.

"Standing is a jurisdictional question in which courts determine whether a party has alleged a sufficient stake in the controversy to warrant invocation of jurisdiction and to justify the exercise of the court's remedial powers on that party's behalf." *Board of Johnson County Comm'rs v. Jordan,* 303 Kan. 844, 854, 370 P.3d 1170 (2016). To establish standing, a plaintiff must show that it has suffered a cognizable injury and that there is a causal connection between the injury and the challenged laws. *Peterson v. Ferrell,* 302 Kan. 99, 103, 349 P.3d 1269 (2015).

A cognizable injury must be particularlized; it must affect the plaintiff in a personal and individual way. This is also known as "injury in fact." Indeed, "'a party must present an injury that is concrete, particularized, and actual or imminent.'" *Gannon,* 298 Kan. at 1123. The causal connection requirement means the injury must be "'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" *Id.* at 1130–31, citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992).

The burden is on Plaintiff to establish standing. *Gannon,* 298 Kan. at 1123. Because this Court opted to decide the issue after rather than before the hearing, it will be considered not on the face of the pleadings alone, but on the evidence adduced at the temporary injunction hearing. As such, Plaintiff must establish standing by a preponderance of the evidence. *Id.* at 1123-24.

Trust Women states in its amended petition that it sues "on behalf of itself and its patients," and does name or include any of its contracted physicians as parties to the lawsuit. It does not state that it sues on behalf of any physicians. Trust Women at this juncture seeks a temporary injunction preventing the Board Defendants from enforcing K.S.A. 65-4a10 through its subsection (d), which says a violation of the statute shall constitute unprofessional conduct under K.S.A. 65-2837, part of the Kansas Healing Arts Act. In other words, Trust Women seeks a temporary injunction preventing the Board of Healing Arts from taking any action against the license of a physician for violation of K.S.A. 65-4a10.

Trust Women is licensed as an ambulatory surgical center by KDHE and has been since July 2014. Trust Women is not licensed by the Board of Healing Arts. The Board has no enforcement authority over Trust Women. Likewise, there was no allegation or evidence presented at the hearing that Trust Women's patients are licensed by the Board of Healing Arts or that the Board has enforcement authority over patients. Trust Women argues that, in regard to

its claims against Defendants Lippert and Durrett, it suffers injury in fact under K.S.A. 65-4a10 because its contracting physicians face discipline from the Board of Healing Arts for providing telemedicine abortions. By Plaintiff's own admission, it is the physicians who face discipline from the Board of Healing Arts, not Plaintiff, but no physician is a party to this lawsuit.

Nonetheless, Trust Women argues that it and its patients suffer injury in fact because Trust Women's contracting physicians "are unwilling to provide telemedicine abortion" at the clinic because the challenged laws threaten their licenses. Trust Women argues that these unnamed physicians made a "decision to cease providing this care" because of the challenged laws. There is no such evidence in the record.

The evidence cited by Trust Women includes Burkhart's testimony that after the passage of the Telemedicine Act in 2018 she "was just fearful that the clinic and our physicians could be penalized for providing telemedicine medication abortions so therefore we ceased." Plaintiff cited a similar sentiment from Dr. McNicholas. Dr. McNicholas said that she would not continue to provide telemedicine abortions if she thought her license was in jeopardy, but Dr. McNicholas also testified that she has never performed a telemedicine abortion. There was no testimony that a physician performing telemedicine abortions made a decision to stop doing so because of the challenged laws, or for any other reason.

The timing of the pilot project undermines the existence of a causal connection between the challenged laws and any alleged injury to Plaintiff. K.S.A. 65-4a10 prohibited telemedicine abortions effective July 1, 2011. Enforcement of the law, at least by the parties to the *Hodes 2011* case, was and has been enjoined since 2011 subject to the terms of the 2011 Agreed Order. Plaintiff opened its doors in April 2013, but did not offer telemedicine abortion until October

2018. Thus, it appears that K.S.A. 65-4a10 was not a barrier to Plaintiff performing telemedicine abortions.

Instead, Plaintiff posits that unnamed physicians made a decision to stop performing telemedicine abortions because of the passage of the Telemedicine Act. First, the Telemedicine Act does not prohibit telemedicine abortions. Second, there was no evidence that physicians performing telemedicine abortions decided to stop. Third, Plaintiff's pilot program began months *after* the passage of the Telemedicine Act. The pilot program ceased immediately prior to the effective date of the Telemedicine Act based, according to Burkhart and Dr. McNicholas, on "advice of counsel."

These unique circumstances lead the Court to conclude that, in terms of its claims against the Board Defendants, Plaintiff has not proven an injury in fact to itself or its patients and it cannot satisfy the causal connection requirement. Thus, its claim to individual standing fails.

Though it did not say so explicitly in its first amended petition, Trust Women seems to assert third party standing on behalf of independent contractor physicians. "A party generally must assert its own legal rights and interests and may not base its claim to relief on the legal rights or interests of third parties." *Ternes v. Galichia,* 297 Kan. 918, 922, 305 P.3d 617 (2013). One exception to this rule is associational standing, which has not been asserted and does not apply here. *See, e.g., NEA–Coffeyville v. U.S.D. No. 445,* 268 Kan. 384, 387, 996 P.2d 821 (2000) (stating elements of associational standing). Another exception is third party standing, which requires that a plaintiff show that it: "(1) 'must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute'; (2) 'must have a close relation to the third party'; and (3) 'there must exist some hindrance to the

third party's ability to protect his or her own interests.'" *Landrith v. Jordan,* 2014 WL 1302623, *4 (Kan.App. 2014), citing *Powers v. Ohio,* 499 U.S. 400, 411 (1991).

Again, even assuming Plaintiff could prove injury in fact and close relation to its independent contractor physicians, Plaintiff has offered no proof at this stage of any hindrance to the physicians' ability to protect their own interests. Plaintiff correctly asserts that abortion clinics and physicians have been allowed to assert third party standing on behalf of their patients. See, e.g., *Comprehensive Health of Planned Parenthood of Kansas & Mid-Missouri, Inc. v. Kline,* 287 Kan. 372, 406, 197 P.3d 370 (2008) (abortion providers can assert third-party standing to champion patients' rights to informational privacy); *Alpha Med. Clinic v. Anderson,* 280 Kan. 903, 921, 128 P.3d 364 (2006); *Singleton v. Wulff,* 428 U.S. 106, 117, (1976) (physician had standing to assert rights of patients seeking abortions; patient "may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit"). But Plaintiff offers no legal authority for the proposition that clinics may assert third-party standing on behalf of physicians, nor does Plaintiff explain how independent contractor physicians (or any other physicians) are hindered from joining this lawsuit as plaintiffs or bringing suit in their own right. For these reasons, any third party standing claim fails.

The Court concludes that Plaintiff does not have standing to assert its claims against Board Defendants Lippert and Durrett. As such, this Court lacks subject matter jurisdiction over these particular claims, and they are dismissed.

B. Ripeness.

Because the Court concludes that Plaintiff lacks standing to sue Lippert and Durrett, it need not address the additional issue of ripeness.

Temporary injunction standard.

Plaintiff's remaining claims are against Bennett and Schmidt.[2] Plaintiff seeks a temporary injunction prohibiting the remaining Defendants' enforcement of K.S.A. 65-4a10 pending this Court's final decision on the constitutional challenge. A temporary injunction is an "extraordinary remedy." *Idbeis v. Wichita Surgical Specialists, P.A.,* 285 Kan. 485, 499, 173 P.3d 642 (2007); see also *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) (describing a preliminary injunction as "an extraordinary and drastic remedy"). A temporary injunction merely preserves the relative positions of the parties until a full decision on the merits can be made. *Steffes v. City of Lawrence,* 284 Kan. 380, 394, 160 P.3d 843 (2007). It should never be awarded as a matter of right. See *Winter v. National Resources Defense Council, Inc.,* 555 U.S. 7, 24 (2008).

"An injunction is an equitable remedy and its grant or denial in each case is governed by principles of equity." *Wichita Wire, Inc. v. Lenox,* 11 Kan. App. 2d 459, 461–62, 726 P.2d 287, 289–90 (1986). The grant or denial of a temporary injunction is entrusted to the sound discretion of the district court. *Id.*

Plaintiff, as the party requesting the temporary injunction, bears the burden of proving that:

> "(1) The plaintiff has a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability exists that the plaintiff will suffer irreparable injury without an injunction; (3) the plaintiff lacks an adequate legal remedy, such as damages; (4) the threat of injury to the plaintiff outweighs whatever harm the injunction may cause the opposing party; and (5) the injunction will not be against the public interest." *Hodes,* 440 P.3d at 469.

[2] This Court takes judicial notice of the court files in *Hodes 2011* and *Trust Women I.* This Court is cognizant of the 2011 Agreed Order and the orders of Division 7 in those cases. However, this Court expresses no opinion at this time regarding the enforceability of the 2011 Agreed Order as against any of the named Defendants here.

The first element of the temporary injunction analysis requires that Plaintiff show a substantial likelihood of eventually prevailing on the merits. This requirement exists not to determine the controverted right, but to "prevent injury to a claimed right pending a final determination of the controversy on its merits." *Idbeis,* 285 Kan. at 491 (internal quotation marks omitted).

The Kansas Supreme Court has resolved that Section 1 of the Kansas Constitution provides a fundamental right to abortion that is to be guarded with the application of strict scrutiny to any law that might impair it. This Court is duty bound to apply the precedent of this state's highest court. *State v. Meyer,* 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015).

The strict scrutiny test begins with "determining how governmental action burdens or infringes on a right." *Hodes,* 440 P.3d at 496.

> "[B]efore a court considers whether a governmental action survives this test, it must be sure the action actually impairs the right. In some cases, it will be obvious that an action has such effect. Imprisonment, for example, obviously impairs the right to liberty. In other cases, the court may need to assess preliminarily whether the action only appears to contravene a protected right without creating any actual impairment. See *Casey,* 505 U.S. at 873, 112 S.Ct. 2791 (plurality opinion) (noting that "not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right")." *Hodes,* 440 P.3d at 498.

The second step of the strict scrutiny analysis is described as follows: "once a plaintiff proves an infringement—regardless of degree—the government's action is presumed unconstitutional. Then, the burden shifts to the government to establish the requisite compelling interest and narrow tailoring of the law to serve it." *Id.* at 496.

Defendants assert that the State has several compelling interests at stake, including protecting the health and safety of the woman seeking an abortion and ensuring that abortions are performed under safe circumstances. Defendants also argue that the State has a compelling

interest in "promoting potential life" and in "helping people make informed choices in life." See *Planned Parenthood of the Heartland v. Reynolds,* 915 N.W.2d 206, 241 (Iowa 2018). Defendants raise arguments in regard to narrow tailoring of the law, notably in light of the 2015 amendments to K.S.A. 65-4a10.

These issues will not be analyzed in great detail here because Plaintiff's motion for temporary injunction fails on the second issue – irreparable injury. Suffice it to say that application of strict scrutiny analysis is not necessarily "fatal in fact" to all legislative efforts. *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 202 (1995). But for purposes of this motion only, the Court will assume the existence of some constitutional violation which would provide Plaintiff a substantial likelihood of prevailing on the merits. This assumption is made only because Plaintiff has, at this stage, failed to prove the necessary element of irreparable injury.

As Plaintiff points out, federal courts within the Tenth Circuit have usually presumed irreparable harm when dealing with the alleged violation of a constitutional right. This is so because irreparable injury is defined in part by whether any alleged harm may be adequately compensated after the fact with money damages. *Schrier v. University of Co.,* 427 F.3d 1253, 1267 (10th Cir. 2005). But this is not the only consideration. If the alleged harm is speculative in nature it does not equate to irreparable injury. *Id.* Conclusory statements are not sufficient to demonstrate irreparable harm. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.,* 356 F.3d 1256, 1261 (10th Cir. 2004). Further, lack of diligence in seeking an injunction undermines the notion that an injury is irreparable. *Benisek v. Lamone,* 138 S. Ct. 1942, 1944 (2018).

Defendants argue that Plaintiff's claims of irreparable harm are speculative and conclusory because there is no evidence the challenged laws decrease access to abortion. Regardless of K.S.A. 65-4a10's requirements for telemedicine abortion, under Plaintiff's own

protocol the Plaintiff's patients must still travel to the Wichita clinic for both the first and second appointments in a telemedicine abortion. Plaintiff would like to open more clinics in remote parts of the state but has not taken even preliminary steps to do so. Burkhart's testimony indicated that the availability of telemedicine abortions has as much to do with securing resources to open new clinics and finding physicians to staff them, whether in person or remotely.

Defendants also highlight Plaintiff's delay in bringing this lawsuit. Indeed, "a party requesting a preliminary injunction must generally show reasonable diligence." *Benisek,* 138 S. Ct. at 1944. A plaintiff's "delay in seeking an injunction undermines their argument that they will suffer irreparable harm if an injunction does not issue." *Utah Gospel Mission v. Salt Lake City Corp.,* 316 F. Supp. 2d 1201, 1221 (D. Utah 2004), *aff'd* 425 F.3d 1249 (10th Cir. 2005). "A delay in seeking an injunction has been viewed as a concession or an indication that the alleged harm does not rise to a level that merits an injunction." *Texas v. United States,* 328 F. Supp. 3d 662, 738 (S.D. Tex. 2018), citing 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.1 ("A long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction.").

K.S.A. 65-4a10 prohibited telemedicine abortions effective July 1, 2011. Enforcement of the law, at least by the parties to the *Hodes 2011* case, has been enjoined by agreement of the parties since late 2011, but Bennett and the Board Defendants were not parties. Plaintiff opened its doors in April 2013. K.S.A. 65-4a10 was amended in 2015. Plaintiff did not challenge the law until January 2019. This is a significant delay.

Plaintiff claims that there was no need for a challenge until the Telemedicine Act went into effect on January 1, 2019. But as set forth above, the Telemedicine Act does not restrict abortion. Even so, it is odd that Plaintiff did not offer telemedicine abortion until several months

after the passage of the Telemedicine Act, which Plaintiff believed to be a new ban on telemedicine abortions, albeit not effective until January 1, 2019.

"In determining whether a preliminary injunction is warranted, a court must be guided by normal equitable principles and must weigh the practicalities of the situation." *GTE Corp. v. Williams,* 731 F.2d 676, 678 (10th Cir. 1984). "As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek,* 138 S. Ct. at 1943–44.

The circumstances of this particular case are somewhat unusual and require consideration of equitable principles. There was a challenge to K.S.A. 65-4a10 in 2011. The parties to that lawsuit agreed not to enforce the law or resultant regulations. The Attorney General is the only party to both that lawsuit and the instant one. There are questions about whether the 2011 Agreed Order somehow binds others who were not parties to it. There are questions about whether and how the 2011 Agreed Order applies in light of 2015 amendments to the statute. Further, Plaintiff challenged Sections 6 and 7 of the Telemedicine Act in a suit filed November 8, 2018 (*Trust Women I*), but the Attorney General was the only defendant. That suit was dismissed, only to be reincarnated here a few weeks later with additional claims and additional defendants.

The instant suit is the latest addition to a growing procedural backwater. The shift in parties and the framing of the issues from case to case has hindered the court's ability to resolve the underlying merits of the telemedicine abortion issue. If this Court is to reach the merits in the instant case, it requires the parties to present additional evidence and more probing legal analysis than has occurred at this early stage. 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. Because Plaintiff's motion for temporary injunction fails on this element, the Court need not explore the others at this time.

CONCLUSION

For the reasons set forth above, Plaintiff's claims against Board Defendants Lippert and Durrett are dismissed for lack of standing. Plaintiff's motion for temporary injunction against the remaining Defendants is denied. The amended case management order filed April 30, 2019, remains in effect until further order of the Court.

This order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON
DISTRICT COURT JUDGE

Certificate of Service

This is to certify that on this 30th day of October, 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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